

# NUDGES: AN ALARM FOR CONSUMERS AGAINST UNFAIR TERMS IN ONLINE BOOKING FLIGHT TICKETS

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## Abstract

Unfair terms are the terms that give an advantage to one party in a contract while giving a disadvantage or negative impact to another. With the rapid development of information technology, online business has increased and resulted in the wide use of online contracts. Therefore, it has been a common practice for the commercial industry to use standard-form contracts. The airline industry has become important nowadays because people commonly use the service to purchase flight tickets to travel to other countries for vacation, work, and study abroad. It is more efficient, easier, and practical to purchase flight tickets online, yet when the buyer uses the airline website to book flight tickets especially by ticking a box to affirm the acceptance of the contract of carriage, they are bound to the agreed terms and conditions. The objective of this paper is to discuss the protection of consumers against unfair terms in the online booking of flight tickets. The focus of this study is to 1) discuss unfair contract terms and standard form contracts; 2) identify unfair terms in online booking flight tickets, and 3) suggest the protection of the consumer in online booking flight tickets. This study is purely qualitative where it is based on library research and involves conceptual discussion and legal analysis. This study proposes to use nudges for public awareness and as a preventive measure. The use of a nudge is to minimize the effect of unfair terms without modifying the terms and conditions of the contract of carriage in the booking of flight tickets.

**Keywords:** *Unfair terms; Protection of consumers; Online booking flight tickets, Nudges.*

## Abstrak

*Terma tidak adil ialah terma yang memberi kelebihan kepada satu pihak dalam kontrak dan memberi kekurangan atau kesan negatif kepada pihak lain.*

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*Perkembangan pesat teknologi maklumat menyebabkan perniagaan dalam talian telah meningkat dan mengakibatkan penggunaan kontrak dalam talian secara meluas. Oleh itu, telah menjadi amalan biasa bagi industri komersial untuk menggunakan kontrak bentuk seragam. Industri penerbangan penting pada masa kini kerana orang ramai menggunakan perkhidmatan tersebut untuk membeli tiket penerbangan untuk melancong ke negara lain bagi bercuti, bekerja dan belajar di luar negara. Ianya lebih cekap, mudah dan praktikal untuk membeli tiket penerbangan secara dalam talian, namun apabila pembeli menggunakan laman web syarikat penerbangan untuk menempah tiket penerbangan terutamanya dengan menanda kotak untuk mengesahkan penerimaan syarat pengangkutan, mereka terikat dengan terma dan syarat yang dipersetujui. Objektif kajian ini adalah untuk membincangkan perlindungan pengguna terhadap syarat-syarat yang tidak adil dalam tempahan tiket penerbangan secara dalam talian. Fokus kajian ini adalah untuk 1) membincangkan kontrak tidak adil dan kontrak bentuk seragam; 2) untuk mengenal pasti syarat yang tidak adil dalam tempahan tiket penerbangan secara dalam talian, dan 3) untuk mencadangkan perlindungan pengguna dalam tempahan tiket penerbangan secara dalam talian. Kajian ini menggunakan kajian kualitatif berdasarkan kajian perpustakaan yang melibatkan perbincangan konsep dan analisis undang-undang. Kajian ini mencadangkan untuk menggunakan dorongan untuk kesedaran awam dan sebagai langkah pencegahan. Penggunaan dorongan adalah untuk meminimumkan kesan terma tidak adil tanpa mengubah terma dan syarat asal kontrak pengangkutan dalam tempahan tiket penerbangan.*

**Kata Kunci:** *Terma tidak adil; Perlindungan pengguna; Tempahan tiket penerbangan secara dalam talian, Dorongan.*

## **Introduction**

Transforming traditional business systems to online business has evolved the marketplace by creating relationships between industry players; this phenomenon has contributed to market structure developments (Shahjee, 2016). Technology advancement can lead to changes in consumer behavior. The internet introduces e-commerce and expands businesses to the online world. This transformation creates a new approach to the formation of contracts with challenges between sellers and buyers.

Standard form contracts are often used in consumer contracts such as flight tickets, banking and financial services, couriers, mobile phone contracts, pay-TV, rental vehicles, reward programs, residential tenancies, and utilities. However, some terms and conditions implemented in standard-form contracts use unfair terms that are also detrimental to buyers as sellers offer a one-sided benefit contract. Shaik Ahmad Yusoff, Mohamed Isa, and Abdul Aziz (2012) argued that unfair contract terms in standard form contracts have been debated since the 1990s on online contracts,

consumer contracts, and other types of contracts. In the context of the tremendous expansion in trade and business, and consumer rights, the issue has now become a matter of great importance.

According to Ghirardelli (2015), an online contract does not provide adequate assurance of the existence and content of the terms and conditions. Therefore, the parties of the online contract must always be aware of the terms and conditions that bind them. The same phenomenon can be seen in the airline industry where most commercial airline companies implemented online booking to purchase flight tickets.

## Literature Review

Contracts are essential for the successful operation of commercial developments such as international commodities, transportation, and insurance (Beatson, Burrows, & Cartwright, 2016). Before the introduction of online flight ticket booking, the terms and conditions were normally printed on the back of the tickets. However, the terms and conditions are now available for download on airline websites or at ticketing facilities (Tang, 2016). Booking online flight tickets has become common in the new era and is gaining popularity in the Asia Pacific region, especially in the Philippines, Thailand, Hong Kong, and Malaysia (Kiong, Gharleghi, Yin-Fah, & Kei, 2014).

Purchasing flight tickets online is more efficient, easier, and faster by clicking a box to accept the contract. However, the buyer is bound by the terms and conditions offered by the airline company for booking flight tickets. Commonly, buyers often accept the offers and did not read and understand the terms and conditions because they need the airline's service. In this context, the buyer is relying on a contract with a "take-it or leave-it" basis. Noto La Diega and Walden (2016) contended that the consumer is the weaker party due to the inability to grasp the contract thoroughly without any reasonable possibility of negotiating the terms and conditions.

The Consumer Protection Act (CPA) of 1999 was enacted to strengthen consumer protection and ensure that consumers' rights are protected (Naimat & Abu Bakar, 2021). Referring to Loos & Luzak (2016), "contractual terms" describe and confer the right and obligations of the parties in a contract. In the context of written contracts, all terms must be written in plain and understandable language. If a term is discovered to be unfair in the agreement, the remaining part of the agreement may still be legally binding on the parties in a contract. Hence, to alert the consumer about unfair terms, nudge is a useful strategy to be used in the airline industry. A nudge is an approach that aims to influence people's decisions by modifying the circumstances of the decision-making (Vigors, 2018).

## Methodology

This article adopts a qualitative method approach which is based on library research and involves conceptual discussion and legal analysis. According to Abdullah (2018), the research is qualitative because it does not engage with statistical data analysis. The data in qualitative research are often acquired through three fundamental methods, which can be used independently or jointly, i.e., direct observation, in-depth interviews, and document analysis (Webley, 2010). Referring to Fitri, Rosalia, & Artati (2017), a conceptual analysis of the study attempted to identify the legal issues and the legislation. This article is a conceptual paper that employs doctrinal research to discuss unfair contract terms and standard form contracts, to explore unfair terms in online booking flight tickets in Malaysia, and to provide suggestions to protect consumers. For data collection, this research used library research comprising primary and secondary sources. Primary sources included statutes and case law while secondary sources included books, journals, reports, conference papers, and other periodicals. The research focused on Air Asia Airlines as the sample of standard form contracts of carriage to analyze unfair terms in the conditions of carriage provided on the Air Asia websites in booking flight tickets. To achieve this aim, this article refers to the provisions of the CPA 1999 that govern matters relating to unfair contract terms.

## Discussion

Nowadays, the airline industry becomes significantly important as people use airlines and purchase online tickets to travel to other countries for traveling, business, and studying abroad. According to Abeyratne (2005), the airline industry has taken immediate action to reach the ultimate aim of 100% of flight tickets being issued online. The nature of e-tickets in the airline industry is rapidly changing and needs careful adaptation by the contract's drafter.

In Malaysia, commercial airlines are offered by Air Asia, Air Asia X, Firefly, Malindo Air, Malaysia Airlines (MAS Airlines), and MASwings. Air Asia was the first company that launched an electronic ticketing system (Kiong et al., 2014) This initiative corresponds to their core value as a low-cost carrier. Most major airlines provide electronic tickets via an online booking system that allows buyers to purchase tickets by directly inserting data into the airline's website. Correspondingly, the terms and conditions in standard form contracts for the booking of flight tickets offer and enforce obligations between the airline and passengers. Flight ticket in the form of paper or electronic record issued by an airline or a travel agency is used to confirm that a person has a right to a seat on a commercial flight (Abeyratne, 2005).

Consumers are often in a disadvantageous position and lack the power to protect themselves from dishonesty by suppliers and manufacturers (Naimat & Abu Bakar,

2021). Rodl contended that the fair procedure for the formation of contracts shall be represented as freedom of contract, in so far as it includes not only the willingness of each party to consent but also, in all likelihood, equal bargaining power (Rodl, 2013). According to Bolgar (1972), exclusion, limitation, and disclaimer clauses are always legally enforceable and should be brought to the attention of the contracting party. Subject to time constraints and the need for the services, the buyer always browses the terms and conditions without reading them thoroughly and properly before deciding and giving their consent to purchase. Willett (2011) highlighted that important terms must be given appropriate attention whether in the circumstances of limitation of consumer rights or imposing major obligations on buyers.

Choi and Triantis argued that courts should not interfere in commercial contracts on the grounds only of procedural concern of unequal bargaining power unless the imbalance was a result of the weaker party lacking the chance of reading or understanding the unfair terms (Choi & Triantis, 2012). Mallor contended that the procedural aspect of unfairness focuses on facts related to the process of negotiation or non-negotiation (Mallor, 1986).

## **Unfair contract terms**

The Malaysian Consumer Protection Act 1999 (CPA 1999) was amended in 2010 by the Consumer Protection (Amendment) Act 2010 which was inserted into the Act Part IIIA entitled "Unfair Contract Terms". The addition of Part IIIA is a welcome move towards greater consumer protection in Malaysia.

Section 24A(c) of the CPA 1999 defines 'unfair terms' as "a term in a consumer contract which, concerning all circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer."

Section 24C(1) of the CPA 1999, states that: "A contract or a term of a contract is procedurally unfair if it had resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or how 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."

Section 24C(2) of the CPA 1999 provides that: "For this section, a court or the Tribunal may take into account the following circumstances:

- (a) the knowledge and understanding of the consumer concerning the meaning of the terms of the contract or their effect;
- (b) the bargaining strength of the parties to the contract relative to each other;
- (c) reasonable standards of fair dealing;
- (d) whether or not, before or at the time of entering into the contract, the terms of the

contract were subject to negotiation or were part of a standard form contract.

Section 24D(1) of the CPA 1999 provides that: “A contract or a term of a contract is substantively unfair if the contract or the terms 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.”

By referring to CPA 1999 (Amendment 2010), the requirements used in tested unfair terms in online booking flight tickets are (i) the terms caused a significant imbalance between contracting parties' rights and obligations; (ii) the terms are not reasonable to protect the legitimate interests of the party who would benefit from using the terms; and (iii) if the terms are used, it would cause detriment to a party.

### **Standard form contract**

A standard form contract sometimes referred to as a ‘contract of adhesion’, ‘leonine contract’, a ‘boilerplate contract’, or a ‘take-it or leave-it contract’ is a contract drafted by one party and agreed upon by another party where the terms and conditions are not negotiated. According to section 24A(b) of the Consumer Protection Act 1999, a standard form contract is defined as “a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry.”

Standard terms and standard-form contracts are usually used to legalize transactions. Before the payment and execution of the agreement, customers must agree and consent to all the standard terms. According to Abu Bakar and Amin (2016), in some circumstances, standard-form contracts result in unfairness among consumers.

Referring to SA Alsagoff (2010), the concept of freely negotiated agreements between parties has given way to the need for a standard set of printed conditions. Standard form contracts are not negotiable contracts because they have already been drafted by the dominant party and are based on the ‘take-it-or-leave-it’ concept, which requires the buyer to have only two options: (i) to agree with the contract's terms as they accept the offer in a contract or (ii) to leave it by not continuing with the transaction.

### **Unfair terms in online booking flight tickets**

In Malaysia, commercial airlines are offered by Air Asia, Air Asia X, Firefly, Malindo Air, Malaysia Airlines (MAS Airlines), and MASwings (Abdul Razak, Abd Ghadas, A Suhaimi, & Mohammad Udin, 2021). Based on the examination of standard form conditions of carriage in the booking of flight tickets in Malaysia, it is observed that

several areas can be deemed as unfair contract terms namely (i) the reservation of the right with or without prior notice; (ii) the right to vary, delete or add any terms; (iii) the use of an exclusion clause; (iv) the terms and conditions of the contract of carriage shall prevail; and (v) a limited liability clause. Table 1 presents the terms and conditions for booking flight tickets by Air Asia airlines that are deemed to be unfair.

**Table 1: Terms and Conditions in Booking of Flight Tickets that Deemed to be Unfair**

<b>Reserve the right with or without prior notice</b>	
Condition 4.5	“All fares, prices, flight schedules, routes published, pre-booked products, and services are correct at the time of publication and are subject to change at any time and from time to time without prior notice.”
Condition 5.9.1	...We reserve the right, without prior notice, to amend/change the prices or substitute any component for inflight products or services...
Condition 5.9.2	We reserve the right, without prior notice, to amend/change the prices for prebooked meals...
<b>Right to vary, delete or add any terms</b>	
Condition 5.2	“These are governed by specific terms that vary from time to time. Please contact us for further details.”
<b>Exclusion clauses</b>	
Condition 5.10.2	AirAsia shall not be liable for any information, products, or services as specified in travel insurance policies.
Condition 9.1	...times shown in timetables, schedules, or elsewhere are subject to change at any time and from time to time. We are not liable in any way whatsoever for any loss incurred by passengers as a result of such change.
Condition 31	The failure by Malaysia Airlines to exercise its rights will not be construed as a waiver or relinquishment of the future performance of any of its rights, and Passenger’s obligations concerning such future performance shall continue in full force and effect.
<b>The Terms &amp; Conditions of the contract of carriage shall prevail</b>	
Condition 2.2	Except as provided in these Terms & Conditions, in the event of inconsistency between these Terms & Conditions and our Conditions of Contract or any other regulation we may have to deal with particular subjects, these Terms & Conditions shall prevail.
<b>Limitation of liability clause</b>	
Condition 6.1.4	The options outlined in Article 6.1.3 (a) to (b) are the sole and exclusive remedies available to you and we shall have no further liability to you.

## Suggestions

As explained in this research with the literature by scholars, the buyer always has no room to negotiate the terms and conditions in the standard form contract. Therefore, Fangfei Wang (2015) contended that the seller has to notify a buyer fairly and reasonably, especially where an unclear term is used. To notify users about the use of terms that are coercive, unfair, invasive, and unexpected in online contracts, Ghirardelli recommended businesses may adopt new methods for users to alert the terms before they make the correct decision before entering into the contract (Ghirardelli, 2015). Hence, to protect the consumer, this study suggests the introduction of nudges for public awareness in Malaysia. In this research, the legal mechanism is focused on preventive measures such as the use of nudges that will not affect the contract.

A nudge is used to influence someone's decisions and actions. Thaler and Sunstein suggested the idea of a nudge in 2008, based on studies from behavioral science, political theory, and behavioral economics (Gregor & Lee-Archer, 2016). Nudge represents graphic notifications that serve as a basic reference where it has to be presented by using large fonts, bold fonts, and bright colors (Sunstein, 2014).

The buyer needs to be warned of the important terms before agreeing to the purchase. To obtain the buyer's attention, the terms can be displayed as a 'pop-up' before the purchase is made. Therefore, the use of unfair terms must be highlighted to the buyer's attention using a nudge as a notification during the purchase process and displaying it as a 'pop-up'.

The objective of having a nudge is to minimize the effect of the use of unfair terms since it will not modify the terms and conditions of the contract of carriage in the booking of flight tickets. It does, however, remind or alert the buyer to the unfair terms used. Rather than being 'adherent' to agree to the contract, the mechanism used is to remind buyers whether or not they wish to continue with the contract offered by the seller. The use of a nudge will establish a significant balance between the seller's obligation and the consequences of the buyer agreeing to the contract. Sunstein (2014) contended that some nudges are more generally known as a kind of 'soft paternalism', to preserve absolute freedom of choice. Schmidt (2017) indicates that nudges ensure the freedom of choice by assisting people in making a choice based on their specific preferences. Therefore, a nudge allows people to make better decisions for themselves as well as respect their freedom.

Nudge must be present in a transparent manner. People's concerns in making choices can be reduced as clarity and transparency are enhanced (Sunstein, 2014). The buyer needs to agree to terms and conditions that are clear and understandable. Therefore, the main objective of the nudge approach is transparency, and the

meaning behind it is clear (Hansen & Jespersen, 2013). When a buyer decides to proceed with the purchase of flight tickets, a nudge can appear on the website to notify or remind them of specific terms and conditions. This mechanism would be as a seller's obligation to warn the buyer of the terms and conditions offers will result in a significant imbalance between the parties' obligations and rights; and when relying on the terms, it will detriment the buyer.

Hence, to implement nudges, airline companies can apply the existing terms and conditions of the contract of carriage in the booking of flight tickets, by highlighting the unfair terms used and designing a nudge to appear on the flight ticket booking website. In addition, the nudge should be presented in layman's language so that the buyers can grasp the simple language used.

## Conclusion

It can be concluded that nudges are a digital approach to make the customer aware of the unfair terms used in the contract of carriage. The approach is straightforward and only requires the website's drafter and designer. It is an endeavor of the seller's responsibility. Apart from that, when the buyer agrees to the question given using a nudge, it might minimize the effect of unfair terms. As the legal effect of unfair terms is void, by introducing nudges in layman's terms, the buyer will be aware of the contract's terms used. The introduction of nudges in the airline websites is important to notify the buyers of the unfair terms in the conditions of carriage. When the nudges are shown on the website, the buyers are reminded of several terms and conditions (unfair terms) before continuing with the purchase. It is viable to develop a nudge using the existing terms and conditions of the contract of carriage of airline companies to notify the buyers and minimize the effect of unfair terms. Hence, this suggestion is an immediate action that can be taken by the airline industry where the formation of a nudge depends on the drafter of the terms and conditions of airline companies as well as the designer of the airline websites.

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