

Regional regulations on the fairness of commercial contracts between Australia and the United States, taking the PayPal case as an example

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Abstract: The regulation of contract fairness has been one of the focuses of scholars from various countries in recent years. This may involve the composition of the contract, the legality of the contract and the disadvantageous situation of the weak party in one contract. This essay takes the possible unfair terms in Australia's PayPal case as an example to discuss the nature of unfair terms, the necessity of ASIC intervention, regulatory measures, and related statutes in Australia. To analyse the regional regulation of this issue, the regulation of unfair terms in the United States is also discussed. By comparing the regulation methods of the two countries and analysing the impact of unfair term regulation on market fairness, some suggestions are given to Australia.

1 Introduction

The Australian Securities and Investments Commission (ASIC), an independent Australian government agency that regulates markets, [1] sued PayPal Australia Pty Limited regarding unfair term in standard form contract for customers on September 7, 2023.[2] This term states that account holders have the duty to notify PayPal about errors in fee collection within 60 days, otherwise holders would not get compensation from PayPal's errors. ASIC argues that this term unreasonably transfers the duty and responsibility for checking account from PayPal to customers, which brings the imbalance between the rights and obligations for both sides.[3] So, ASIC seeks injunctions, corrective orders, and the invalidation of this term in accordance with s12BG of the ASIC Act.[2]

This essay bases on PayPal case as the start to analyze the intervention from ASIC, explore Australia's regulatory methods and compare them horizontally with regional regulations in other nations. Section 2 will explore the nature of unfair terms. Section 3 will analyze Australia's legislatives and regulatory tools for unfair terms and interpret the potential judgment of PayPal case under existing regulations. Section 4 would analyze the US's regulatory approaches to unfair terms. Section 5 will compare the regulation measures of these two countries and explore the impact of unfair terms regulation on market fairness. Section 6 will provide regulatory advice for Australia from the comparison between regional regulations.

2 Unfair terms in this case

In this case, ASIC considered that it was unfair to impose a clause on the customer's obligation to check accounts.

[3] To interpret this case and analyze related regulations, this essay believes that the interpretation of unfair terms could be the key issue in PayPal case.

For this type of contract, this essay believes that there may be analyzed for the following elements. [4] Firstly, for contract composition, 'offer', 'acceptance', 'consideration', 'intention for legal relations', [5] 'capacity to enter' and 'certainty and completeness of contract' are often considered. In these cases, unfair contract terms are likely to be lack of completeness or clarity, and vague expression of the unfair terms might bring the contract invalid. Secondly, in terms of the legality of the contract, unfair terms for consumers may violate consumer protection laws, leading to illegality. Thirdly, undue influence and unconscionable dealing.[6] Compared with businesses, consumers are often at a disadvantaged position. When accepting the terms, consumers may have ill-considered disadvantages, or they may be suppressed by the will of business. These are potential reasons for the possibility of void contract. Based on these, the regulation of national authority is often an important factor that can efficiently test the legality, which can be the focus of this essay's analysis.

In this case, the intervened term which is about the duty for checking account term between the bank and costumers. It is in the scope of substantive fairness in contract, that is, the main issue would be whether the distribution of account responsibilities is fair. Thus, from the analysis for unfair terms, this essay believes the PayPal term is likely to be substant unfairness in consumer contract and the specific test based on related legislation would be shown later.

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3 Australian regulation and likely judgement

This section would analyze the potential judgement for PayPal case based on the statute and regulatory tools in Australia.

3.1 Regulation bodies in Australia

As mentioned, ASIC, as a government body [7], is required to promote and improve the whole financial system, enforcing the market within procedural regulations, and imposing appropriate penalties.[7] At the same time, ASIC's decisions would also be reviewed by AAT and federal court to ensure transparency and accountability.[7] Thus, in this case, from the nature and duty for ASIC, the regulation for potential unfair terms should be within the scope of ASIC regulation.

In addition to ASIC, Australia still has other tools to ensure contract fairness. First, the Australia Competition and Consumer Commission (ACCC) is also the supervisory agency, which need review commercial contracts and ensure compliance.[8] Secondly, Australia's Productivity Commission could provide suggestions for Australia's economic development. For example, in 2008, this commission issued a report recommending the formulation of unfair contract laws for consumers and small businesses.[8] Thirdly, Australian Financial Complaints Authority, consumers could complain to AFCA to obtain dispute resolution solutions for unfair terms and AFCA could assist in resolving financial complaints.[9] Additionally, ASIC, ACCC and other agencies could work together to ensure compliance consistency. Then, upon application by regulatory agencies or individual consumers, the court can judge whether the term could be treated as unfair under above Act.[9]

3.2 The statutes in Australia

The Australian Consumer Law (2011) [10] was passed for consumer protection [11]. This statute mentions that 'unbalanced rights and obligations of the two parties', 'not reasonably necessary protection for one party', and 'harm brought from terms to one party', are likely to be defined as unfair terms.[9] In this case, imposing additional checking obligations on customers may cause financial harm to customers and is not reasonably necessary to protect PayPal. Therefore, the term is likely to be defined as the unfair term under this statute.

The definition [12] of unfair term in the ASIC Act (2001) is like the Australian Consumer Law (2011) [11]. The ASIC Act also mentions that if a business still relies on unfair terms defined by the court, it is deemed to contravene the ASIC Act, and the court may grant an injunction, make remedy order or make other appropriate orders.[12] In this case, if the court determines that the term as unfair term in the future and PayPal still uses it after judgement, it may receive an injunction from court, or it may need to pay remedy to the consumer.

Australia unfair contract terms regulations [5] [9] [11] [13] state both parties should have a control for contract and unilateral changes in the characteristics of the services or goods provided under the contract would be seen as unfair. [8] In PayPal case, the responsibility for checking the account is transferred from PayPal to the customer. It is likely that PayPal has unilaterally changed the service characteristics. Additionally, this term makes PayPal and the consumers do not have equal power to control the contract, because consumers need accept these terms without any other choice. If the term would be classified as an unfair term, then the term will be invalid, but the other parts of the contract will still be valid.[8]

Therefore, under ASIC's application, based on the Australian Consumer Law (2011) [11], the Competition and Consumer Act (2010) [14] and the Corporations Act (2001) [15] [33], the court is likely to hold PayPal's terms unfair and therefore invalid.

4 Regulations in the US

To gain a deeper understanding of the regulation of unfair terms, this essay believes that the regulation methods in different regions can be compared. Thus, relevant regulations on unfair terms in the United States will be analyzed in this section. [10]

Unfair terms for consumers also exist in the US, but its regulation methods are different from Australia. Refutation of unfair terms in the US is mainly divided into two levels: federal and state. [16] At federal level, the Federal Trade Commission (FTC) promulgated consumer protection regulations, conducts investigations, and takes enforcement actions. [17] The Uniform Commercial Code (UCC) (1952) also govern all states from federal level. [18] At state level, states have statutory enforcement mechanisms to protect consumers and could promulgate related consumer protection laws. [16] In most states, if a term is determined to be unfair, then it is invalid, and the other parts of the contract are still valid. In addition to regulation through the statutes and regulations, common law will also be used to resolve unfair terms. Courts will define rights for individuals who have been unfairly treated by merchants and the remedy should base on the principles of unconscionability and good faith. [16]

Thus, the US follows the regulatory principles of statutory law and common law for unfair terms with regulation from both federal and state level. [16] Such a model has some advantages. For example, the autonomy regulation of states helps to figure out more effective regulation models, and states could also respond faster than federal. [16] However, due to the autonomy regulation among states, there might exist inconsistency between different states. [16]

5 Regional regulations and market fairness

This essay has analyzed Australia's relevant legislation and regulatory tools. It has also horizontally stated the regulation of similar situations in the US. [17] The comparing between jurisdictions and the effect for market

fairness would be analyzed in this section.

5.1 Comparing regional regulations

As mentioned before, Australia's regulation is mainly government agencies at the federal level, namely ASIC and ACCC, while the United States focuses more on state regulation. After analysis, this essay believes that the contract clauses in the PayPal case that add additional responsibilities to customers are invalid under Australian law. In addition, if this scenario is used under the US legal system, due to the imbalance of rights and obligations, this clause can also be deemed unfair and invalid, but it is likely to be implemented through different administrative or judicial procedures.

Although these two countries are both democracies, adopting a federal system and separation of powers, there is a certain degree of difference in jurisdiction over the fairness of contracts. These different regulatory controls may be related to the different social backgrounds and legal structures in each region. Under the federal system of the United States, there are more than fifty states with their own government systems, which operate separately from the federal government system, and has its own constitution and statute. [18] There are Uniform State Laws to reduce the inconsistency of different states in the legal system, but uniform laws may not be adopted by individual states. [18] Similarly, Australia has six states and a federal government, and the Australian Constitution also advocates the consistency of states and the commonwealth. It can be seen from the number of states in the two countries that Australian regulations involving interstate trade are more likely to be unified, while US regulations are more likely to be dispersed across states, which is consistent with reality. Moreover, although Australia's federal system is derived from the tradition of English common law, it has the characteristics of a unique local legal system. For example, Australia partially recognizes Aboriginal customary law [19] which enhances the hybrid nature of Australian law. [20] However, Aboriginal customary law is not divided according to states, which can also explain the rationality of the commonwealth having broader regulation. In addition, this essay mainly focuses on the comparative analysis of regional regulation, and the deeper reasons for differences will not be discussed.

5.2 Effects on market fairness

At present, the pursuit of fairness in commercial contracts is still an important part of the regulations in various countries. The different approaches to commercial contracts in different jurisdictions could have different effects on shaping the fairness of their markets. [21]

Australia's ASIC or the US's FTC plays important role in commercial contracts, which helps for market fairness. First, commercial contracts are an important basis for transaction in the market. The regulation of contract terms is closely related to market operations, and the regulation of microstructure has potential economic importance. Thereby participating in the market with visible hands and

guiding the market operation [22]. Second, the regulatory process may strengthen consumers' perceptions of unfairness. [23] The PayPal case in this essay involves lots of consumers, and the related standard clauses are also relatively common. This regulation could have large coverage and can effectively strengthen consumers' awareness of rights protection. In addition, some scholars worry that excessive emphasis on contract jurisdiction and market fairness may affect the efficiency of the market. [24] However, this essay still believes that in market quality, market fairness accounts for a higher proportion than market efficiency. When both parties of a commercial contract participate in market behavior, if the emphasis on fairness is weakened for the sake of efficiency, there may be risks such as 'the leaving of weak party after losing their rights and interests' and 'speculative strategy of the strong part'. [24]

It can be seen from the analysis that restrictions on unfair terms contribute to market fairness. However, choosing different regional regulations may bring about different models of market frameworks. Compared with the US, the federal jurisdiction of Australia's ASIC and ACCC [25] is more likely to shape consumers in different states to have similar perceptions of fairness and awareness of rights protection. But in the ever-changing world of business, the same basic principles and unified legal solutions may not lead to ideal results. It is possible to learn from the US's more flexible and state-specific regulatory methods. [19] Thus, based on the regulatory policies of different countries, the next part is regulatory recommendations for Australia.

6 Regulation suggestions for Australia

Although Australia's regulation of unfair terms can protect consumer rights and enhance social fairness to a certain extent, by comparing with the US, this essay argues that there is some inspiration could be provided for Australia.

Firstly, increase state-level regulation. The government departments with regulatory functions for unfair terms, such as ASIC and ACCC, are mostly at the federal level. It could contribute to the uniformity of the entire nation but may not be able to adjust flexibly for specific consumer issues in the certain state. [16] Therefore, based on the US regulatory model, states adopting their own legislation and tools to solve unfair terms may be an efficient way to promote regulation, because it is more in line with the characteristics of each state. Similarity, the six states in Australia also have their own characteristics and strengthening state-level regulation will make it more likely to find regulatory methods suitable for each state. However, this may bring about issues of inconsistency between states and possible regulatory arbitrage in state-to-state transactions [26]. This essay also believes that the Uniform State Laws of the United States can also be used to ensure consistency among different states. [18] However, in actual operation, using regulations to ensure consistency between states may again weaken state-level regulation. So how to balance autonomy and consistency is a part worth continuing to explore in the future.

Secondly, pay more attention to transaction itself. As mentioned, Australia and the US all regulate and restrict unfair terms to enhance the confidence in this market and improve the fairness of the financial market. However, the current regulation is always limited to the fairness of standard terms in consumer contract and does not much involve the fairness of the transaction itself, [22-27] which might bring the invisible unfairness when complying with process requirements. Although the contract complies with regulatory requirements, there are substantial inequalities in the transaction process, which may evade regulation and harm the fairness of the market. For example, whether there is a substantial suppression of the free will of the weaker party outside the terms of the contract, and whether there is substantial inequality in the process of reaching the agreement. [6] Therefore, this essay believes that in addition to the regulation of unfair standard terms, the substantive intervention in contract should also receive attention from ASIC and other regulatory tools, but the regulation of the substance must not interfere excessively with the freedom of contract.[28]

By exploring and comparing the regulatory methods of Australia and the US, this essay believes that Australia could imitate the US to set state autonomy to some extent. [29] This essay also calls both countries to regulate the transaction fairness of contract. [30] By comparing different regional regulations, it may improve existing judicial methods and be more helpful in resolving disputes.

7 Conclusion

In conclusion, this essay has stated the scenario in PayPal case, evaluated the importance of ASIC intervention, and analyzed the relevant legislation to figure out the potential judgment in Australia. In addition, this essay has also compared Australia and the US's regulatory approaches for unfair terms and provides Australia with policy suggestions. However, there are also some potential risks when learning from the jurisdictional methods of other countries. For example, inconsistency between different states may occur after increasing state authority. Then, how to avoid risks when learning from other regional regulations will be meaningful research. In addition, this article only focuses on one individual case, and there is room for further discussion of unfair terms to solve existing problems from a broader perspective, such as how to balance fairness and freedom in contracts, and how to balance state autonomy and state consistency.[31] The deeper analysis may require some social science tools to analyse the data [32] to find the balance and the regulatory approach that works best for the country.

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