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## TOPIC HIGHLIGHT

Contract Law

### Protections Against Unfair Exclusion Clauses: A Shield Against a Drafter's Sword

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#### What are “Exclusion Clauses”?

The infamous case of *L'Estrange v Graucob* [1934] 2 KB 394 clarifies that individuals are bound by what they sign until and unless it is proven that there was fraud, misrepresentation, or mistake. This is in line with the doctrine of *laissez-faire* that promotes the freedom for parties to negotiate contractual terms. Therefore, caution must be exercised when entering into contracts. However, parties with stronger bargaining powers in the name of “*freedom*” usually include certain complex contractual terms which are unfair to the other side.

These clauses allow a party to avoid or limit its contractual obligations and liabilities. They can be disguised as actual contractual terms or even notices. Their usage is common in business agreements as generic standard-form contracts are drafted for various transactions, not requiring negotiations between the parties, and allowing them to predict situations in which liability would be attached. Despite these advantages, exclusion clauses can also serve an oppressive function, denying the opposite parties' right to claim reliefs for breach of contract.

#### The Malaysian Position

##### (a) Part IIIA of Consumer Protection Act (CPA) 1999

Part IIIA of the CPA provides a shield against exclusion clauses drafted by suppliers. Whilst the latter provisions of the CPA provides the general application of the statute to all contracts, Section 2(1), specifically limits its application to consumer contracts & trade transactions.

The Act’s method of governing unfair contract terms is through an approach which separates both procedural unfairness, regarding the manner and process in which the contract was constructed, and substantive unfairness, which relates to the specific nature of the contractual terms which are unfair in either its purpose or application.

Exclusion clauses fall under the spectrum of substantive unfairness, which is governed under Section 24D(1)(d) and (e). Here, a contractual term which excludes or restricts liability for negligence or breach of express or implied terms, without adequate justification, is substantively unfair. Section 24D(2) provides the Tribunal or Court with a list of circumstance to consider in assessing substantive unfairness. For exclusion clauses specifically, the relevant considerations include whether the contractual term allows the supplier to engage in unilateral termination & modification of the contract.

A term which excludes or restricts liability on behalf of the supplier is automatically deemed void, regardless of its plain reading. In contrast with the *contra proferentem* rule (explained below), no weight is given to the ambiguity and construction of the exclusion clause.

(b) The *Contra Proferentem* Rule

In applying the doctrine of *contra proferentem*, clauses which are ambiguous are to be interpreted against the interests of the drafter. This doctrine helps police the effect of the clause vis-a-vis the party, by neutralizing the apparent advantage the clause may have given the drafter. The setback of this doctrine, is that it only triggers on the satisfaction of the existence of an ambiguity, as indicated by the Privy Council in *Kandasami v Mohd Mustafa* [1983] 2 MLJ 85. The Federal Court took the opportunity in *CIMB Bank Bhd. v Maybank Trustees Sdn. Bhd.* [2014] 3 CLJ 1 to reaffirm this principle and held that whether a party can rely on an exclusion clause is a matter of construction, and *contra proferentem* would force a strict interpretation against the drafter.

(c) Section 29 of the Contracts Act (CA) 1950

Another statutory protection is provided under Section 29 of the CA 1950. Under this provision, an agreement that contains a limitation or exclusion of the right to enforce their contractual rights is void through legal proceedings.

This provision and its application was highlighted by the Federal Court in *CIMB Bank Bhd. v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1. The issue was whether Section 29 could render void, an exclusion clause which barred the respondent from claiming all damages resulting from the appellant's breach of contract. The clause in point was a clause that barred a claim for damages. It was held that despite not barring legal proceedings to be instituted, a clause that excluded the right to damages or any remedy, which is ancillary to a cause of action, would equally be struck down as void under Section 29.

This case and Section 29 would foreseeably apply only to exclusion clauses which avoid all forms of damages. Based on this, it is viewed that exclusion clauses would not contravene Section 29 if it does not prescribe an absolute limit.

### Position in United Kingdom

Generally, the party incorporating a limitation clause is usually economically superior to his contracting party. Whilst preserving the integrity of freedom to contract, the Courts in the UK had attempted to correct the imbalance by requiring the exclusion clause to be in clear unequivocal language. The legislator's initiative in providing protection to the weaker party to a transaction led to the Unfair Contract Terms Act 1977 (UCTA). This Act in general ensured that contractual terms are fair to both parties.

Under this Act, exclusion clauses relating to liability for death or personal injury resulting from negligence is absolutely prohibited whilst exclusion clauses relating to breach of conditions and warranties under specific contracts are subject to the test of reasonableness.

### The Test of Reasonableness

The notion of reasonableness is inherently subjective, and it is for this reason the Act provides guidelines for the Court to exercise their discretion by reference to the provision of reasonableness when considering the validity or otherwise of the clause.

The test of reasonableness under the Act attracted criticism because it leaves parties with uncertainty as to the drafting and in daily transactions. However, the test of reasonableness under the Act serves a valuable guide to both contracting parties and the Courts when dealing or faced with exclusion or limitation clauses.

The power of the Court to strike down contractual clauses does appear to oust the concept of freedom of contract. However, what the Act provides is a mechanism to protect parties to a contract where a clause is inserted excluding or limiting their rights. This becomes more pronounced where parties have unequal bargaining powers. Therefore, the protection afforded by the Act guided by the test of reasonableness is a necessary shield for such parties.

### Consumer Rights Act 2015

The Consumer Rights Act was enacted to consolidate consumer rights under which unfair terms in consumer contracts were policed. Under this Act, there is no test of reasonableness, but its substitute is the broad definition of “unfair”. The test of what is “unfair” is similarly a guide to contracting parties and the Courts viewing a particular contractual clause.

In the UK, there are now 2 statutory regimes running parallel governing a broad group of contractual parties aided by differing tests but ultimately serving the same objective of protecting contracting parties from unreasonable or unfair clauses.

### Singapore

In Singapore, the UCTA 1977 has similar provisions protecting specifically parties to consumer contracts.

### Conclusion

It is understood that common belief dictates that parties are bound by any and all of the contractual terms they agree upon. However, it is pertinent to also understand that weaker parties should not merely accept any exclusion of liability as authoritative, and despair in their disadvantageous position. A more regulated protection regime in Malaysia, as in UK and Singapore, may be an answer to arrest the exploitation of savvy drafters attempting to ingeniously skirt or evade their contractual obligations and liabilities by incorporating unreasonable or unfair clauses.

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