JUDICIAL AND STATUTORY CONTROL OF EXEMPTION CLAUSES AND UNFAIR TERMS IN ADHESION CONTRACTS IN ENGLAND AND MALAYSIA

BY

ARTIN VAQARI

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF COMPARATIVE LAWS

KULLIYYAH OF LAWS

INTERNATIONAL ISLAMIC UNIVERSITY

MALASIA

APRIL 2000

ABSTRACT

Nowadays there's a boom in business activities around the world. In order for this "boom" to be maintained, business would have to cut costs and paper work to the maximum they can.

One aspects of paper work which saves time and costs, is the drafting of a standard form of agreement, where conditions included are such that provide good legal alibis and protection for the businesses. These conditions are generally exclusions or unfair terms providing for the exemption of legal liability in case of default or breach. These exclusions and unfair terms have been considered to be detrimental to consumers in general, who do not have the power to negotiate the terms.

In trying to analyse these issues, this work deals with exemption and unfair clauses, and how far they are effective today in a legal contract.

Particular attention should be exercised by conglomerate bodies such as Multi-National Companies, Banks or Insurance companies, which heavily use standard form contracts. Despite tremendous changes in the law, many of them continue to use such exclusion and unfair terms.

The aim of this work is to provide the legal aspects that drafters of standard form contracts, exclusion and unfair terms, should consider before putting the terms into black and white. As for the consumers, they would get to know what their rights are and how to be vigilant about these rights.

So, all businesses should be cautious when drafting their agreements, and this work would help them to find out where and how they should exercise their cautiousness.

ملخص البحث

في أيامنا هذه ازدهارٌ في الأنشطة التجارية حول العالم. ولكي يدوم هذا الازدهار في التجارة ينبغي تخفيف التكلفة والتعامل الورقي إلى أقصى حدّ ممكن.

من مظاهر التعامل الورقي الذي يحفظ الزمن ويخفف التكلفة هو تصميم شكل نموذجي من الاتفاقية، حيث إن الشروط المضمّنة تزود الأعذار القانونية الجيدة والحماية للتجارة. وهذه الشّروط عموماً هي الاستثناءات أو الشروط غير عادلة التي تجرى من المسؤولية القانونية في حالة إهمال أو الاتفاقية. وتعد هذه الإستثناءاتِ والشروط غير العادلة مضرَّة للمستهلكين بشكل عام، وهم الذين لا يملكون القدرة على التفاوض على هذه الشروط.

وفي مُحَاولةِ دراسة هذه القضية، تناول هذا العمل الإعفاء والشروط الجائرة ومدى فاعليتهما في الوقت الحاضر في العقد القانوني.

وينبغي أن يعطى اهتمام الخاص من قبل المؤسسات المتعددة للأعراض الأجسامِ المختلطة مثل الشركات الدولية، والمصارف أو شركات التأمين التي تستخدم العقود ذات الأشكال النموذجية كثيراً. وعلى الرغم من التّغييرات الكبيرة في القانون، فإن عددا منها يستمر في استخدام مثل هذا الاستثناءات والشروط غير العادلة.

والهدف الأساسي لهذا العمل هو تقديم الجوانب القانونية التي ينبغي أن يراعيها مضمون العقود من ذات الأشكال النموذجية والاستثناءات والشروط غير العادلة قبل كتابة الشروط. أما بالنسبة المستهلكون فسيعرفون حقوقهم وكيف يحتاطون لهذه الحقوق.

وهكذا، ينبغي أن يحذر جميع أصحاب المصالح في وضع اتفاقيتهم وبذلك يساعدهم هذا العمل على أن يعرفوا أين وكيف يأخذون حذرهم.

APPROVAL PAGE

I certify that I have supervised / read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Prof. Dr. Syed Misbahul Hasan
Supervisor

I certify that I have supervised / read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Prof. Dr. Mohd. Akram Shair Mohmad
Examiner
Head Dept. of Public Law

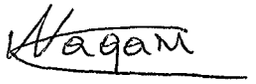
This dissertation was submitted to the Law Centre and is accepted as partial fulfillment of the requirement for the degree of Master of Comparative Laws.

Assoc. Prof. Dr. Abdul Mohaimin Noordin Ayus
Acting Dean, Kulliyyah of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own research and investigation, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Artin Vaqari

Signature: 

Date: 14 April 2000

DEDICATION

I DEDICATE THIS WORK TO BOTH OF MY PARENTS,
MOTHER AND FATHER, ESPECIALLY THE LATTER,
HOPING THAT HIS SOUL IS RESTING IN PARADISE

ACKNOWLEDGMENTS

Praise be to God, Almighty, the Sustainer of the Heavens and Earth. It was with his help and guidance that this work came into being after long and persistent efforts.

I would like to thank very much, Prof. Dr. Syed Misbahul Hassan and Prof. Haji Mohd. Akram of the Kulliyyah of Laws, who helped me with their suggestions in improving the quality of this work.

Also, I would like to thank Mdm. Nuraini of the IIU Law Library, who never said no to any requests of mine for materials and articles for this dissertation.

I thank all the other people who are not mentioned here, for whatever help they have given to me, and may Allah bless them all.

Any shortcomings in this work, are solely mine.

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CHAPTER 1

INTRODUCTION.

There are a wide range of business activities and services, provided today by many enterprises and corporations. Being profit-making in nature, they regard their profit vis-a-vis costs, as the most important aspect of the business. The lower the costs, the higher the profits and vice-versa.

While corporations have made advancement towards "customer care" attitude, so that they may have a competitive edge, they are not reluctant at all in order to maximise their profits, to avoid any legal responsibilities that law may attach to their relationship with the customers. Further to be cost effective, the legal agreements are standardised. These standardised agreements, while proving most beneficial to the corporations and companies drafting them, are not so to the other parties dealing with them.

There are business agreements where parties may negotiate and reach an agreement acceptable and fair to both parties (which however is not always the case). On the other hand, where these agreements are entered with consumers in general, there are no negotiations, and there is little choice left to the consumer. The question "to be or not to be" may be translated into "to agree or not to agree"? That's the only choice a consumer has, if that can be called a choice. If an individual wants to lead a normal life, to open a bank account, to buy a house,

car, furnitures, to travel, etc., the answer then would be: "to agree". What else can he do?

These agreements would not be disadvantageous to the consumers if the corporations had a fair point of view, considering not only their interest, but also that of the consumers. This would be an over-altruistic view. On the contrary, we find that human altruism is limited, perhaps this being the very nature of man.[1]

Having in view their own interest, corporations try as far as possible to draw agreements which are advantageous to themselves. A monologue of a company may run as follows: "Wouldn't it be great that my company were not liable, if I did not fulfil my promise? Or wouldn't it be fantastic, if I didn't have any liabilities and obligations at all, and my promise would be binding in honour only? At most, I will lose a customer, but not my money."

While this can be an extreme view, it is quite common to see many standardised forms of agreements, containing all sorts of clauses and terms excluding liability for almost anything. It is normal to see such terms, such as "the company shall not be liable for any loss whatsoever", or the company "shall not be responsible or liable for any liability or obligation"[2].

These clauses, are the so-called exemption or exclusion clauses. Exemption clauses exclude the liability of the party inserting them, if there is any breach of the obligations arising under the law for that particular liability.

The subject of exemption clauses has been dealt with in many works, the leading and most outstanding of which is Professor Coote's "Exception Clauses"[3]. The subject has drawn wide attention from all parties be they courts, legal writers, or legislature.

The concern with exemption clauses is that they involve two basic problems. The first one is the conflict between the freedom of contract, let the parties decide what terms including exemption clauses, they want in the contract, after all it is their contract and they know best what suits them; and the reluctance of the courts to be used as a vehicle of fraud or oppression in enforcing harsh exemption clauses. The second problem concerns the fundamental or *raison d'etre* of a contract: is it a set of promises, binding on and relied upon by the parties and enforceable by courts, or should a contract be reduced, by means of broadly drafted exemption clauses, to a mere declaration of intent, not binding on the parties to it?[4]

This work does not deal with all legal and social aspects related to exemption clauses. This would require perhaps a voluminous work. There are only certain aspects of exemption clauses, which are covered here.

The study attempts to take a new look at the law relating to exemption clauses in Malaysia. The corresponding English law on which Malaysian law is based is critically examined. The Malaysian position, where necessary and possible, has been provided under a separate sub-heading. But sometimes Malaysian cases are introduced and included side by side

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1 See, Hart. H.L.A., *The Concept of Law*, 2nd ed., Oxford: Clarendon Press, 1994, p. 196.

2 For example, this clause is found in Moneylink Rules and Regulation of Standard Chartered Bank Malaysia Berhad, which govern the relationship of bank account holders and the Bank.

3 Coote, B., *Exception Clauses*, London: Sweet & Maxwell 1964.

with their English counterparts.

However, limitations apply to the scope of this work. There is no coverage on third parties and exemption clauses, although some mention is made under the chapter on bailment. Also, while the Malaysian Hire-Purchase Act 1967, is the only piece of legislation offering some kind of protection to the consumers, since its provisions cannot be excluded,[5] it is not covered here.

This work contains 10 chapters. We start with a definition of exemption or exclusion clauses. For simplicity purposes, there is no distinction drawn between exemption and exclusion clauses, and both terms refer to the same thing.[6] After the definition, the function of exemption clauses is discussed, with the debate centered on whether they are mere defences, or they exclude the duty or liability arising in the first place. Then standard form contracts or contracts of adhesion are dealt with, followed by a suggestion on how the courts may view adhesion contracts, which are not based on the pre-supposed freedom of contract principle, but that there is merely an adherence to the contract by the consumer.

In the third chapter some rules of construction, which have been used by the courts, when dealing with exclusion clauses, are elaborated. Details are given relating to the incorporation of exemption clauses in contract, and special reference is made to "parole evidence rule". Ticket cases are considered, followed by a suggestion on how the courts should

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4 Hayek, E. J., "Exemption Clauses – the Canadian Approach", [1991] *Journal of Contract Law* 51, at p. 58.

5 Section 34 of Hire-Purchase Act 1967.

6 There is however a difference between exclusion and limitation clauses. See below, p. 146.

deal with such cases. Then, there is some elaboration of other rules of construction such as extent of the application of the clause, burden of proving whether an exemption clause is applicable, the battle of forms, the "red hand" and *contra proferentum* rule. At the end of this chapter, a conclusion is given, outlining the importance of the rules of construction and how far they are reliable, in determining the applicability or non-applicability of an exemption clause.

In chapter four, the focus is on exclusion of liability for negligence. After the English law relating to exemption clauses and negligence is discussed, the Malaysian law is elaborated under a separate sub-heading. Later, we go in some more specific discussion of professional liability, which covers professionals such as doctors, lawyers, auditors, surveyors of properties. Mention is made of some specific statutory provisions dealing with such liability, and how it can be excluded.

In chapter five, the contract of bailment is taken up. The law relating to bailees and the exclusion of liability by them is considered. While some mention is made of English position, this chapter deals mostly with Malaysian cases, since there are specific statutory provisions dealing with the duty of the bailees. Sections 104 and 105 of Contracts Act 1950 are discussed, with specific reference to the duty of the bailee to take reasonable care of the goods bailed, the burden of proving the absence of duty of care in case of loss or damage to the goods bailed. Then, the argument is concentrated on whether the duty to take reasonable care can be excluded or not. Finally, mention is made of statutory provisions exempting bailees from their