Ideology of marxism karl marx law contract essay

Law

\n[toc title="Table of Contents"]\n

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Introduction

‘ The rich get richer and the poor get poorer.’ In his ideology of Marxism, Karl Marx suggested that the poverty gap between the rich and poor in a capitalist country will expand greatly, tipping the balance in favour of major business enterprises, causing the inequality of bargaining power between an enterprise and a consumer to expand and nevertheless undermining the doctrine of laissez-faire. The doctrine of laissez-faire suggests that the contracting parties are free to negotiate the terms of a contract without the influence of the government. This may seem ideal but it is not entirely possible when parties with higher bargaining power are constantly dictating the terms of a contract without any possibility for the other parties to negotiate the unfavourable terms. Exclusion clause is a term often included in a contract to minimize or exclude liabilities occurred as a result of the contracting parties failing to perform their contractual obligations. To quote from 14th century English author Geoffrey Chaucer,[1]‘ Radix malorum est cupiditas’, or greed is the root of all evil, the wild ambition of business

enterprises yearning for greater profits has given them the ludicrous idea of including exclusion clauses that are extremely unfair into a contract. These unfair clauses were rampant until the judiciary and the legislations stepped in to control them and hence providing more protection to the weaker party of a contract. The common law controls, the legislative controls and also possible reforms will be critically discussed in the following paragraphs.

Common Law Controls

Before the Unfair Contract Terms Act 1977 (UCTA)[2]and The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)[3]comes into force, the common law, as suggested by Professor Brian Coote,[4]‘ has allowed freedom of exclusion to an extent greater than in most judicial system’ but the judges were not a fan of them and went on to develop two principles to regulate them. We will first look at the first principle that is by checking if the clause was properly incorporated. It should be easy to understand that without proper incorporations, the exclusion clause will not come into effect. There are a few options that have to be taken to ensure that the exclusion clauses were incorporated properly with incorporation by signature being the first option. In the case of L’Estrange v F. Graucob Ltd,[5]Miss L’Estrange voluntarily signed a ‘ Sales Agreement’ without any knowledge of the terms contained in it. Scrutton LJ[6]in his judgment stated that in the absence of fraud and misrepresentations, she is unquestionably bound by the containing terms, disregarding the fact the she has actually read it or not. Two school of thoughts emerged regarding the importance of a signature. The court decision was criticized by JR Spencer,[7]saying that there was no consensus ad idem (meetings of the mind) between the parties and the court should not

restrict the available defences of fraud, misrepresentations and non est factum (it is not my deed) just because the contract is signed.[8]Professor Atiyah[9]on the other hand confirmed the significance of a signature[10]and in Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd[11], Moore-Bick LJ[12]giving the leading judgment affirmed the principle in L'Estrange. The second option is incorporation by reasonable notice. Three requirements must be satisfied in order to rely on the terms. Firstly, notice must be given before or at the time the contract was made. In the case of Olley v. Marlborough Court Ltd,[13]the court held that since the terms were brought into attention after the contract was made at the hotel's reception desk, they do not form part of the contract and so the exclusion clauses cannot be relied on by the respondent. In the later case of Thornton v. Shoe Lane Parking,[14]Lord Denning ruled that since offer and acceptance had been made when the driver drive up to the machine and take the ticket, any terms brought to his attention after the event will have no legal effect. [15]The second requirement is that exclusion clause would only be properly incorporated if it is included in a document that was intended to have legal effect. In Chapelton v. Barry UDC,[16]the court ruled in favour of the claimant stating that the ticket containing the exclusion clause was treated as a receipt and it is not to be considered as a contractual document.[17]The third requirement is that reasonable steps must be taken to bring the exclusion clause to the attention of the other party. In Parker v. South Eastern Railway,[18]the court ruled that the limitation clause was valid even if it was printed at the back of a ticket, as there was an indication at the front. In Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd,[19]it was argued that one of the conditions, namely Condition 2,[20]was not

brought to the notice of the defendant. Having reviewed the case of Parker and Thornton, Dillion LJ delivering the leading judgment[21]stated that more effort should be made to bring the condition up to the attention of the contracting party if the conditions were ‘ unusual’ or ‘ onerous’. Bingham LJ[22]concurred by quoting Denning LJ of his famous ‘ red hand guide’ in the case of J Spurling Ltd v. Bradshaw.[23]The third option is incorporation by previous course of dealing or custom. In McCutcheon v. David MacBrayne Ltd,[24]the respondent tried to rely on the exclusion clauses signed in the previous dealings with the claimant’s brother-in-law but had failed to do so as the previous dealings lack consistency and regularity.[25]Bear in mind that the number of dealings need to be great in order for the terms to be incorporated. In Henry Kendall Ltd v. William Lillico Ltd,[26]it was held that 100 similar contracts over a period of 3 years have reached the requirement of consistent dealings. On the contrary, in Hollier v. Rambler Motors, [27]Salmon LJ[28]was not satisfied with the mere 3 or 4 visits in a period of five years. When both of the contracting parties are of the same trade or industry, the courts would use a broader method on the grounds of ‘ common understanding’. In British Crane Hire Corporations v. Ipswich Plant Hire Ltd, Lord Denning[29]held that the respondents were liable even if the claimant did not bring the clause to the respondents in time. If the clauses were properly incorporated, the courts will then check to see if the wordings of the clause successfully cover the breach. Under this principle, the courts would apply the contra proferentum rule. The contra proferentum rule is a principle whereby a sense of ambiguity exits in a contract term, the ambiguity will back fire against the party relying on the term. In Andrews v. Singer,[30]the court held that since the exclusion clause applied to ‘ implied

terms', the respondent could not rely on the exclusion clause as supply of ' new Singers cars' was an express term. This principle of the common law only play very little role after the enactment of UCTA, most of it had fade with time such as the doctrine of fundamental breach. The doctrine of fundamental breach was set up by Lord Denning in Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd,[31]with the purpose of denying the possibility of reliance on the exclusion clause after the party has committed a fundamental breach of the contract.[32]The doctrine was reviewed in Securior[33]and Lord Wilberforce,[34]giving the leading judgment, suggested that the doctrine had performed a useful function but is no longer necessary after the enactment of UCTA. However, some of the rules are still in use to provide guidance. For example, the ' Canadian steamship principle' set out by Lord Morton of Henryton[35]in the case of Canada Steamship Lines Ltd v. The King[36]to govern the exclusion of liability caused by the relying parties' own negligence was constantly discussed in a number of cases[37]and in the most recent case of Mir Steel UK Ltd v. Morris & Ors, [38]Rimer LJ[39]agreed that the principle should continue to be used only as a guideline. Of all the cases given above, one might head the wrong way to think that exclusion clause is a creation of the devil to damn the weaker parties but the truth is not always so. In British Fermentation Products Ltd v. Compare Reavell Ltd,[40]the exclusion clause protected the business.

Unfair Contract Terms Act 1977

The Unfair Contract Terms Act 1977 came into force on the first day of February 1978, following the recommendation of the Law Commission to protect the consumers or businesses from businesses who had included

unfair clauses in their contracts and to remove any inequality of bargaining power between the contracting parties. Under the Act, certain exclusion clauses are automatically deemed invalid while the others are subjected to a test of reasonableness. Exclusion clauses that are considered ineffective are listed down in s. 2(1),[41]s. 5(1),[42]s. 6(1),[43]s. 6(2)[44]and s. 7(2)[45]. Under s. 2(1) and s. 5(1)(b), liability cannot be excluded where negligence are related. The definition of negligence is to be found in s. 1(1)[46]while s. 14[47]defines ‘ personal injury’. Under s. 6(2), the seller cannot exclude liability against a consumer for a breach of s. 13,[48]s. 14[49]and s. 15[50]of Sales of Goods Act 1979 (SOGA)[51]while consumer is defined under s. 12 of UCTA.[52]In R & B Customs Brokers v. United Dominions Trust,[53]it was held that business may also be considered as consumer if the transaction was merely incidental and not integral part of the business.[54]Exclusion clauses that are subjected to the reasonable test are listed down in s. 2(2),[55]s. 3,[56]s. 6(3),[57]and s. 7(3).[58]The reasonable test is set out in s. 11,[59]which does not help much in a way that the section defined reasonable as ‘ fair and reasonable’. When deciding if an exclusion clause is reasonable, the courts have to take into account Schedule 2 of the Act in which they have to consider the strength of the bargaining positions of both contracting parties, the existence of an inducement, knowledge of the clause, extent of the clause, and whether the goods in questions was made by special order. In Smith v. Eric S Bush,[60]Lord Griffiths suggested that the difficulty of the task should also be taken into account.[61]Ewan McKendrick[62]suggested that the courts had also regarded the meaning of the clause, equality of bargaining power, regard must be had to the clause as a whole, the dangers of relaxation of the clause in practice, the importance of insurance, two

different losses within the same clause and the advantage of limitation clause as a factor of consideration. Before the enactment of UCTA, there was no guideline for the draftsmen of contracts as to the standard requirement of imposing an exclusion clause. UCTA did benefit consumers and small businesses from the unfair clauses imposed by larger businesses. Whenever a breach of the Act occurred, the business in fault would incur liability and damages would be given to the other party.

Unfair Terms in Consumer Contracts Regulations 1994

The Unfair Terms in Consumer Contracts Regulations 1994 was implemented by the UK Parliament and came into force on 1 July 1995. It was later revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 which came into effect on 1 October 1999. As the first major European intervention in domestic contract law, the objective of the EC is to unify the contract law of the member states to provide a more convenient system for business transactions. While the UCTA only covers clauses, the UTCCR provides a wider coverage and provide coverage to all the unfair terms. Regulation 4 of the UTCCR states that the Regulations only apply in ‘ contracts concluded between a seller or a supplier and a consumer.’ Unlike that of the definition given in UCTA, Regulation 3 defines ‘ consumer’ narrowly and states that ‘ consumer’ only refers to a ‘ natural person acting for purposes outside his trade, business or profession’. It means that the UTCCR only provides protection for consumers and businesses are not protected. Regulation 5 together with Regulation 6 provides the principle and assessment of unfair terms. Regulation 5(1) states that ‘ contractual term which has not been individually negotiated shall be

regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer’. In Director General of Fair Trading v. First National Bank[63]the term ‘ good faith’[64]and ‘ significant imbalance’[65]was analysed by Lord Bingham to provide a better understanding. Schedule 2 of the UTCCR provides a list of terms which may be regarded as unfair and work only as a guideline. Regulation 7 states that any written term should be in plain and intelligible language while paragraph 2 of the regulation is of the same meaning of contra proferentum rule whereby the ambiguity of the term would be used against the party relying it. Unlike UCTA where a failure to follow it would certainly amount to termination and repudiation of the contract, Regulation 8 of the UTCCR states that the unfair term will not be binding and in paragraph 2, ‘ the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.’

Reform

The introduction of UCTA and UTCCR in the UK jurisdiction proved to have a great impact on unfair terms. As suggested by Macdonald,[66]‘ Together they (UCTA and UTCCR) provide a powerful weapon against unfair terms.’ However, Law Commissioner Professor Hugh Beale[67]argued that ‘ they contain inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects’, causing what Macdonald suggested as ‘ great complexity for those affected by them’. [68]Causing a series of inconvenience and troubles, the Law Commission published a law report[69]in February 2005, aiming to unify and simplify the

UCTA and UTCCR and nevertheless maintaining the protection provided to consumers.[70]Under the summary provided by the Law Commission,[71]for consumers, the draft Bill aims to extend the covered terms, continue holding the term limiting liability for death or personal injury, include negotiated clauses as well as standard clauses and also putting the onus of proof on the party relying on the exclusion clause. The reason the burden of proof lies on the business is influenced by the fact that the business have far greater resources compared to the consumer. Having said so, this decision will surely be a breach of rule of law whereby ‘ everyone is innocent until proven guilty’. Nevertheless, the report also recommends improved protection for small businesses and micro-businesses as they frequently find themselves signing contracts containing unfair terms.

Conclusion

It is easy to understand that the reason why major businesses would twist and turn the exclusion clauses in a way that it sounds or look more appealing to the other party, the customers would be put off by the straightforwardness of the exclusion clauses. The way the business enterprises set out the exclusion clauses before the legislature steps in was like casting a rod in the middle of the ocean. The hook was either hidden or distracted from the fishes, those who go for the bait did not know or had closed their mind to what is behind it and were often caught up in a mess. The problem is there was no actual guideline or restriction for the bait and it was not the fishes’ decision to be involved in such mess, the fishermen were merely trying their luck to catch them. After UCTA was introduced, the bait is controlled by the government, all of a standard size. Those who brought their

own bait would not be allowed while some have to be subjected to a ‘ reasonable test’. When the UTCCR was introduced, the government did not interfere the fishes who were caught after negotiating with the fishermen, however, the Regulations seek to subject those without a negotiation to a fairness test. The reformation of the law would certainly be a huge asset for the UK jurisdiction. The contradictions and confuses would be resolved while the gap of inequality of bargaining power would reduce, but only time could tell the true effect of it. what they did is to take the bait off the hook, restricting the freedom of the fishermen, leaving the bare hook in the water, those who are willing to take the risk will go on and take it without the allurement of the bait. Not simply indicated, but a default choice, business will drop, no actual guideline, innocent consumers, heyday, negotiations