Common law controls or statutory controls law contract essay

Law

Firstly, there are two types of common law controls, one being through incorporation and the other being through construction or the also known as the contra proferentum rule. The means through incorporation is to see the validity on whether it was brought to notice to the buyer or at least whether the buyer had given consent to all the terms. There are three means in which the exclusion clause may be incorporated, that is via signature, a reasonable notice or through previous course of dealing. Through signature the courts takes into account that the buyer or customer had given notice to contract of what he signing. But this type of incorporation is rather trivial, because it is unfair to say that through signing a written document, one is assume to give full consent, but without taking into account how long the documents. These documents can range from few pages to few hundred pages, and it should be reasonable enough to foresee that one would not read the entire contract if the signature is needed at the moment. Courts have sort of given a general rule that as said above, where the signature is given it assume that the buyer is aware. On another note, the famous case of L'Estrange v Graucob[1], where the claimant purchased a cigarette vending machine for use in her cafe. She signed an order form which stated in small print 'Any express or implied, condition, statement of warranty, statutory or otherwise is expressly excluded'. The vending machine did not work and the claimant sought to reject it under the Sale of Goods Act for not being of merchantable quality but nevertheless the courts held that the claim is unsuccessful because of her signing the contract. But given the case where there has been a misrepresentation on the part of the seller, the general rule shall not apply on the basis it is unfair to mislead with a leading

case example of Curtis v Chemical Cleaning and Dyeing Co[2]. In this case Ms Curtis had ask the dress cleaners about the exempting clause in the document she was about to send. The reply that the cleaners gave was different as to what happen to her dress which was stained. The cleaners still relied on the exemption clause but the courts held that there was a misrepresentation so the clause should not be valid. So given the earlier statement that where the contract is long and hard to comprehend, then the courts would say that a man should not sign any document that he does not understand, unless he prepared to be bound by the terms of the contract. Professor Atiyah had commented on this incorporation method where he said " A signature is, and is widely recognised even by the general public as being a formal device, and its value would be greatly reduced if it could not be treated as a conclusive ground of contractual liability at least in all ordinary circumstances". What he means is that, the signature is a significant part of society as it shows that someone gives consent when concluding contracts or to proof credit card purchases. For people to discredit the signature at this point of time would create chaos and create unnecessary problems for the courts to come up for a different means to show that the party gives his consent. Moving on is that, we should take note whether the exemption clause was brought to the notice of the buyer and whether it was reasonable enough. Talking about reasonableness is another issue. So the courts have taken an objective approach to solving the issue of reasonableness as to asking the ordinary man on the Clapham omnibus. To consider whether it was brought to a standard of reasonable notice, the few factors to take into account is that, what was the time of the notice, the form of the notice and

in more modern cases the effect of the clause. In the case of Parker v South East Railway[3], the clauses were printed on the cloakroom ticket and the court held that it was valid. But it was only valid, if the business whom incorporated the clause, had taken reasonable steps to ensure there was reasonable notice of the clauseOn the discussion of time of notice, the leading case is Thornton v Shoe Lane Parking[4]where the case facts are as follow. Mr Thornton had parked his car at the Shoe Lane parking lot. Later when he returns to the car park to retrieve the car, he got himself into an accident which injured him. The exemption clause is this case was printed on the back of the ticket. The question is, whether he was bound by it. This case needs to go back to the basis of the formation of the contract that is where the offer is and where is the acceptance? It could be say, the moment he drove into the parking that was an offer and the moment he pressed the button to receive the ticket that is acceptance. But if this is the case, then the clause is said to be brought to his notice after the he had accepted the offer and that would mean that the clause was not in fact part of the original contract. This is indeed the case facts which Lord Denning had decided on. So the courts held that for the clause to be in effect, it must come before or during the time of contracting. The other factor for incorporation by reasonable notice is that of the form in which the notice of the exclusion clause was given. An example of where the time of notice can take place can be seen during a simple dinner when paying for the meal. One would ask for the bill to see how much is needed to pay, that piece of paper, is very likely to contain the contractual terms, where after one pays for the meal, they would get the receipt which does not contain any contractual terms but

merely acts as an acknowledgement. This example should also portray that contractual terms can be found in other type of types, such as tickets, notice boards and etc. an example of these types of scenario can be seen in the case of Chapelton v Barry UDC[5]where the courts held that, the ticket was deemed to act like a receipt and could not possibly have contain any contractual terms. Next, another method of incorporation can be through a previous course of dealing, where for example, the buyer intends to practice archery at a range and he notices the exemption clauses stated there, and still continues to practice there. The buyer had continuously practice at the range countless of times till on one unlucky day, the notice containing the exemption clauses is taken down for updating, he shoots himself in the foot. The courts in this scenario would say that the clauses are still in effect because there is more than one contract previously. This can also be seen in the case of Spurling v Bradshaw[6]where the decision of the courts is the same as the scenario above but in a later case of Hollier v Rambler Motors (AMC)[7], the court held the opposite and said that the previous course of dealing was not sufficient enough to justify the clause. The decision made by the Court of Appeal, centralized on what was the definition of a course of dealing and they held that one hundred similar contracts over a period of three years can mean a course of dealing which can be seen in the case of Henry Kendall Ltd v William Lillico[8]. Another case contradicting the case of Spurling v Bradshaw is the case of McCutcheon v David MacBrayne[9], where lord Devlin had stated " previous dealings are only relevant if they prove knowledge of the terms actual and not constructive and assent to them". The quote means that without proper knowledge of the terms, it should not

implicated that term would exist now. Another mode of common law control for exemption clause is through construction of the clause itself. In this mode, the courts would look at the clause, if it’s incorporated, in a sense to see whether the clause holds any ambiguity as followed by the contra proferentum rule. This rule is a more strict control as the clause would be interpreted in a way that is less favourable to the party relying on the clause. Basically the courts would look at the claim, and look towards at the clause, with applying this rule to see whether the clause covers the claim. In the case of Hollier v Rambler Motors, the owner was held negligent of the fire that caused damage to the cars on the premises, the court held in this case that the defendant did not specify whether the clause would in fact cover and negligence on their part. It should be noted, if the party who created the clause did specify negligence in some way, the courts would allowed that clause to exempt liability. There are other types of common law controls that do hold some authority but remains less significant than the previous controls as mentioned. The others being, whether there was a misrepresentation as seen in the case of Curtis v Chemical, or whether there have been inconsistent oral promises, where the oral promises made can make the exemption clauses not valid as seen in the case of Mendelssohn v Normand[10], where the defendant had ask the claimant to leave the car door open where the clause states that the garage is not responsible for goods stolen. The courts held that the oral statement made would nullify the clause, which mean the claim is successful. As said earlier, there are also statutory controls main based on the Unfair Contract Terms Act 1997(UCTA) and the more recent Unfair Terms in Consumer Contracts Regulations 1999

(UTCCR) which is loosely based on the Directive on Unfair Terms in Consumer Contract 1993. In the UCTA, section 2 (1)[11]states that no one can exclude liability for death or personal injury caused by negligence, where personal injury is defined in section 14[12]as any diseases including any impairment of physical or mental condition and the definition of negligence in section 1(1)[13]as the breach of any express or implied contractual obligations to take reasonable care or exercise reasonable skill in the performance of the contract or of the common duty as proposed by the Occupiers Liability Act 1957. In laymen terms, the definition of personal injury basically mean that, any physical injuries cause or even any mental problems cause which is recognised clinically can be counted as a personal injury and is claimable. But is should be noted, that given where it is reasonable to do so, where negligence of one party that cause some harm short of death or personal injury can be limited or excluded as stated in section 2(2).[14]It should also be noted that both the provisions under section does not take into account whether the one of the parties contracting is a consumer. And the term consumer under UCTA could mean also that a business also can be counted as a consumer as seen in section 12 of the UCTA.[15]In the case of R & B Customs Brokers Co v United Dominions Trust[16], given both the parties are business, the Court of Appeal held that, Bells who had purchased cars for both business and personal use were deemed to be consumers where the question purported by the court that whether the transaction made is an integral part of the business or merely incidental. If it was integral, then it would have been said that the transaction was made in the course of a business and not otherwise. If one

would also want to know the definition of a business, then one can find it under section 1(3) of the UCTA.[17]The word reasonable is under heavy criticism as the definition given under section 11is less than useful.[18]The section state that reasonable is a termed as fair and reasonable, which is absurd. In the case of George Mitchell v Finney Lock Seeds[19], the courts held that the a term is unreasonable for the purpose of the UCTA if it was unfair in view of the parties knowledge at the time the contract was made. Currently, in determining reasonableness, the courts would look at the parties contracting and whether it had equal bargaining power as seen in the case of Watford Electronic v Sanderson CFL[20]. The case of George Mitchell v Finney Lock Seeds also coincides with the provisions of section 3[21]that states; liability cannot be excluded for non-performance of the contract which also means if that there was a breach in the terms of the contract the clause would not be valid. Other provisions such as section 6(2)[22]does not allow the exclusion of section 13, 14 and 15 of the Sales of Good Act 1979 (SOGA)[23], if the business is dealing with consumer with the exception where it is reasonable to exclude the sections under SOGA which is mentioned under section 6(3).[24]A case example of this section can be seen in Britvic Soft Drinks v Messer UK[25], in which the court ruled that the limitation clause seeking to limit the defendant’s liability under section 14 of the SOGA in this case cannot be reasonable hence it cannot be applied. Next, the UTCCR holds similar objectives like UCTA but can be differentiated by one thing that is its take on the definition of a consumer that can be seen under regulation 3 which states that a consumer must be a natural person acting outside the course of his business[26]. Another difference here is that

UTCCR also defines what an unfair term is where if it’s not been individually negotiated it shall be regarded as unfair if one is given in bad faith or one that causes an imbalance which disfavours the consumers under Regulation 5 (1).[27]To see what good faith or what is an imbalance means, the case of Director General of Fair trading v First National Bank plc[28]brings light onto this subject. It said in this case that the UTCCR do not apply to core contractual terms, but the courts will interpret narrowly the concept of a core term. A further analysis can also found in regulation 6 where it states that an assessment of unfair terms must take into account the nature of the goods and the terms of the contract.[29]