Regulation of Unfair Contract Terms in English Law*

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I. Introduction

English law accepts the basic principle of freedom of contract that the parties should be free to agree on any terms that they like provided that their agreement is not illegal or otherwise contrary to public policy because it infringes some public interest.[1] However, the principle of freedom of contract has been restricted for hundreds of years. This is justified by the fact that certain contract terms, particularly in standard form, may alter a distribution of risks that the customer would reasonably intended. The alteration may often result from his simple ignorance caused by either lack of opportunity to become aware of clauses or inability to understand their full potential implications.[2] In addition, it may also result from disparity in

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1) Contracts which are illegal or contrary to public policy are basically invalid. Cf. Treitel, The Law of Contract, 10th ed., London: Sweet & Maxwell (1999), ch. 11; Beale (ed.), Chitty on Contract, 28th ed., London: Sweet & Maxwell (2002), ch. 17.

bargaining power which does not allow the customer to look after their own interests even if he is fully aware of the unacceptable clauses.[3]

In response to this problem, the common law and, more particularly, various equitable doctrines allow the courts to intervene and make contracts avoided in certain cases where the process by which the agreement had been reached was unfair.[4] In addition, English law has employed the legislative intervention technique, set forth mainly under the Unfair Contract Terms Act 1977 (here-in-after UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (here-in-after UTCCR).

Having said that, this paper purposes as follows; first, to describe and analyze in detail how English law regulates unfair contract terms, particularly, in standard form, in order to provide legal advice to our sellers residing either in UK or in Korea who plan to enter into UK markets; second, to explore any problem in the existing double legislations and put forward future direction of English law in light of the Draft Unfair Terms Bill which was currently proposed by the Law Commissioners.[5] The main concern of this paper will be confined to some of the various aspects of both judicial and statutory control of unfair terms in English law which may draw our attention in terms of domestic or international business sales. In order to achieve the first purpose of this paper, it will refer to various literature including textbooks, papers, official reports and cases relevant to UCTA and UTCCR. For the second purpose, it will employ the Joint Consultation Paper submitted by the Law Commissioners as a reference.

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2) Reynolds, Guest (ed.), Benjamin's Sale of Goods, 5th ed., London: Sweet & Maxwell (1997), at 13-002.

3) Id.

4) For example, fraud, non-fraudulent misrepresentation, duress, undue influence and unconscionability. See Treitel, op cit., chs. 9, 10; Beale (ed.), op cit., chs. 6, 7.

5) Law Commission, Unfair Terms in Contracts: A Joint Consultation Paper, CP No. 166, (3 July, 2002).

Ⅱ. Regulation by Common Law

1. General

The courts in England developed a number of ways to regulate unfair standard terms. In particular, they regulated such terms by applying stringent rules requiring the terms to be effectively incorporated into the contract, and by construing the terms in a restrictive way. The judicial technique was important because, although at common law the court has power to strike down contract terms which are contrary to public policy, it did not have the power to render them void on the basis of their unreasonableness.[6] Thus, in the absence of the power to strike down the terms by direct means, the courts sought to achieve such a goal by the indirect means of adopting a restrictive approach towards the incorporation and the construction of the terms. The judicial technique ultimately, however, proved inadequate, in particular because it concentrated on procedural, rather than substantive, considerations; it does not apply to many cases in which one party seems to have agreed to a contractual term that is very against his own interests and they do not apply at all if there has not been some procedural unfairness in the way the contract was made. In addition, the contortions necessary to regulate unfair terms by the judicial technique often resulted in the law becoming distorted.[7] In recognition of this problem, the powers of the courts have been supplemented by statutory power in UCTA and UTCCR, which allows the courts to directly regulate such terms and to consider their substantive fairness. One must bear in mind that, although UCTA and UTCCR render the judicial technique concerning exclusion and similar clauses less

6) McKendrick, Contract Law, 3rd ed., London: Macmillan Press (1997), at 195.
7) Bradgate, Commercial Law, 3rd ed., Chichester: Chancery Law Publishing (2000). at 74.

important, the technique remains important because it is sill necessary to decide whether such a clause has been made part of the contract and at least in a general way what its effect is likely to be. Therefore, a party wishing to challenge the effectiveness of an exclusion, especially one not made wholly ineffective by UCTA and UTCCR, can be expected to put forward every argument available, including that the clause was not incorporated into the contract and that it does not cover the breach in question.

2. Incorporation

A judicial means to regulate unfair standard terms is made by holding that the clause has not become part of the contract. Thus, in order to be effective, at the first stage, the clause must be validly incorporated into the contract in question. The clause can be incorporated where it is in a contractual document signed by the customer because he may be bound by what he signs regardless of whether he has read it.[8] This is well illustrated by the case of L'Estrange v Graucob[9], where the plaintiff purchased an automatic vending machine. The contract was made on terms set out in what was described by the court as 'legible, but regrettably small print'. The plaintiff signed the agreement but did not bother to read it. It was held that the plaintiff was bound by the terms of the agreement, so that the exclusion clause contained in it meant that the defendants were not liable on the basis that the machine was not fit for the purpose for which it was sold.

Even if the clause is not in the contractual document, it can be also incorporated where a reasonable notice of the clause has been given to the

8) But it is not applied where its effect has been misrepresented (the clause is still part of the contract, but it is not enforceable) or where non est factum can be pleaded (see Saunders v. Anglia Building Society (No. 2) [1971] AC 1039).

9) [1934] 2 KB 394.

customer at or before the time of contract in order to make it part of the contract.[10] What amounts to a reasonable notice is a question which depends upon a number of factors. Such notice will not be regarded as having been given if the clause appears on a document that would not be expected to have contractual force, for instance, some types of receipt,[11] or a catalogue.[12] The test of whether a document has contractual force or not depends on an objective test: would a reasonable person have assumed that the document was to be a contractual document?[13] In addition, the contractual notice must be a reasonable one which depends upon the facts and circumstances of the individual case.[14] The more unusual or unexpected the clause, the greater the degree of the notice required by the courts. Thus, in order to satisfy this, the other party's attention has to be specifically drawn to the terms incorporating the exemption clauses, or at least due prominence has to be given to such clauses with bold or red type, or by having a special note drawing the other party's attention to the clauses.[15]

One must note that a clause can be also incorporated into a contract by a course of dealing that must be both regular and consistent.[16] If there is such course of dealing, it is assumed that the parties have assented to the incorporation of the normal terms into the subsequent contract. The

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10) For the cases holding the notice was ineffective because it was given after the time of contract, see e.g., Olley v. Marlborough Court Ltd. [1949] 1 KB 532; Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163.

11) Chapelton v. Barry UDC [1940] KB 532 (receipt for hiring deck-chair).

12) Walls v. Centaur Co. Ltd [1921] 126 L.T. 242.

13) Richards, Law of Contract, 2nd ed., London: Pitman Publishing (1995), at 135. See Alexander v. Railway Executive [1951] 2 KB 882; Roe v. Naylor Ltd [1917] 1 KB 712.

14) See e.g., Thompson v. L. M. and S. Ry [1930] 1 KB 41; The Mikhail Lermontov [1990] 1 Lloyd's Rep. 579, 594; Sugar v. London, Midland and Scottish Railway Co. [1941] 1 All ER 172.

15) See e.g. J. Spurling Ltd. v. Bradshaw [1956] 1 WLR 461; Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. [1989] QB 433.

16) Henry Kendall & Sons v. William Lillico & Sons [1969] 2 AC 31. For the view that there is no need for consistency, but knowledge of the clauses, actual and not constructive, and assent to them, see McCutcheon v. David MacBrayne Ltd. [1964] 1 WLR 125.

question of what amounts to a course of dealings is a matter for the courts to decide as a question of fact. In Hollier v. rambler Mortors(AMC) Ltd,[17] three or four occasions in a period of five years were held to be insufficient to establish a course of dealing. There is one exception to the existence of a course of dealing where each party is involved, or used to dealing, in a particular trade and deals in circumstances in which standard terms are normally applicable, even though not referred to at the time of contacting. In British Crane Hire Corporation Ltd v. Ipswich Plant hire Ltd,[18] for instance, it was held that an oral contract between the parties was subject to the standard terms and conditions of a trade association on which the parties normally contracted. This principle could presumably apply even to first-time dealings between traders.[19]

3. Construction

Another means by which English courts regulate unfair standard terms may seen in the way the courts have construed such terms. In order to restrict the effectiveness of the terms, the courts adopted a strict approach, construing them contra proferentem, meaning that any ambiguity in the clause would be construed contrary to the interests of the party seeking to rely on it. Therefore, even if the clause has been validly incorporated into the contract in question. the residual question is whether the clause, properly interpreted or construed, deals with and covers a particular matter which has arisen. Although the contra proferentem rule is applicable to any ambiguous contractual term, it has been applied particularly stringently to exclusion clauses. This can be illustrated by the following cases. In Baldry v. Marshall,[20] the defendant car dealers supplied a Bugatti which proved

17) [1972] QB 71.
18) [1975] QB 303.
19) Reynolds, Guest (ed.), op cit., at 13-014.
20) [1925] 1 KB 260.

unsuitable for the required touring purposes in the contract which contained a clause excluding 'guarantees or warrantees, statutory or otherwise'. The plaintiff rejected the car and claimed to recover the price. It was held that the stipulation as to the suitability of the car was a condition, not a guarantee or a warranty, and as such was not covered by the exclusion clause. The attitude of the court in the above case was clearly to construe the clause against the person seeking to rely on it. Another example can be seen in Wallis, Son & Wells v. Pratt & Haynes[21] where there was a contract for the sale of seeds containing an exclusion clause which sated that the sellers gave 'no warranty express or implied' as to the description of the seeds. The buyers brought an action for damages against the sellers who supplied the seeds which did not correspond with the description. The court held that the clause could not exclude conditions but warranties so that the sellers could not rely on it to exempt his liability for the breach of a condition to provide goods in correspondence with the description. The further example can be seen in Andrews Bros (Bournemouth) Ltd. v. Singer and Co. Ltd[22] where the contract for 'new Singer cars' contained a clause which excluded 'all conditions, warranties and liabilities implied by statute, common law or otherwise'. One of the cars delivered by the dealer was a used car and when sued for damages he attempted to rely on the clause. It was held that the term regarding 'new Singer cars' was an express term and thus the clause which concerned only implied terms, did not protect the dealer.

However, this strict approach does not apply to limitation clauses with the same rigour as it applies to exclusion clauses. In Ailsa Craig Fishing

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21) [1911] AC 394.

22) [1934] 1 KB 17. For further examples as to the matter of construction of exclusion clauses of the seller's liability for non-conformity, see Reynolds, Guest (ed.), op cit., at 13-022 ff. (if there is a gross non-conformity between the goods as described in the contract and as delivered, the courts may hold that an exemption clause purporting, e.g., to require the buyer to take the goods 'with all faults and imperfections', to deprive the buyer of the right to reject, or to exclude the seller's liability for errors of description, is not applicable to a failure to provide the contract goods).

Co Ltd v. Malvern Fishing Co Ltd,[23] Lord Wilberforce said that limitation clauses were not viewed with the same hostility as exclusion clauses because of their role in risk allocation and because it was more likely that the other party would agree to a limitation clause than an exclusion claus e;[24] the implication from this is that exclusion clauses may remain subject to stricter, and perhaps still artificial, rules of construction.[25] This view to distinguish between exclusion clauses and limitation clauses has been criticized in that it ignores the risk allocation function of exclusion clauses and it is by no means certain that the other party would be more willing to agree to a limitation clause, particularly where the limit is trivial.[26] It is submitted that instead of the distinction, uniform rule of construction should be applied to all contract terms.[27] However, it must be noted for the present that the position in English law is that the distinction still exists, though what it is likely to mean in practice is not easy to say.[28]

Another aspect of the contra proferentem rule can be seen where a party seeks to exclude from liability for negligence; clear and unambiguous words are needed to exclude liability for negligence. This is because it is "inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence."[29] In particular, where a party was potentially liable on both strict and negligence bases, the court may construe a clause excluding liability as applying only to the strict liability unless the clause specifically refers to negligence, or at least it is wide enough to cover liability for

23) [1983] 1 All ER 101,

24) [1983] 1 All ER 101, 124.

25) Atiyah, Adams and Macqueen, The Sale of Good, 10th ed., London: Longman (2001), at 227.

26) McKendrick, op cit., at 197; Atiyah, Adams and Macqueen, op cit., at 226 ff.

27) McKendrick, op cit., at 197.

28) See George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. [1983] 2 AC 803. For the Australian case which rejected the distinction, see Darlington Futures Ltd. v. Delco Australia Pty Ltd. [1987] 61 ALJR 76. Cf. Photo Production Ltd. v. Securicor Transport Ltd. [1980] AC 827.

29) Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd. [1973] QB 400, 419, per Buckley L.J.

negligence (e.g., referring to loss "howsoever caused").[30]

In addition to the strict approach to restrict unfair terms mainly by the contra proferentem rule, the courts used to adopt another approach by a doctrine known as 'fundamental breach of contract'; they developed a substantive rule of law that exemption clauses which sought to exclude liability for such breach would be inoperative.[31] One should bear in mind that a fundamental breach does not mean a simple breach of condition but one that goes to the very core of the contract itself. Whether a particular breach is regarded as fundamental or not depends upon the facts of the particular case and the burden of proof lies on the party alleging the fundamental breach to prove it.[32] Thus, in a number of well known cases, once found that a person had committed a fundamental breach of contract, he was not permitted to rely on an exclusion clause drafted in very wide terms.[33] However, the doctrine of 'fundamental breach of contract' has been disapproved by the House of Lords and it is now established that it should be assimilated into the rules as to construction.[34] That is, the question whether an exclusion clause covers a fundamental breach is a question of construction, having regard to the degree of risk assumed by the parties to the contract and the possibility of the risk being offset by

30) White v. John Warwick & co. Ltd. [1953] 1 WLR 1285. In this case, the plaintiff hired a bicycle from the defendant but, while he was riding it, the seat tipped forward thereby injuring him. The contract contained a clause stating 'nothing in this agreement shall render the owners liable for any personal injury'. The court held that the clause was sufficient to cover liability in contract for the defendant supplying a defective bicycle, but not in negligence.

31) See e.g., Karsales (Harrow) Ltd. v. Wallis [1956] 1 WLR 936.

32) Hunt and Wnterbotham (West of England) Ltd. v. BRS (Parcels) Ltd. [1962] 1 All ER 111.

33) Alexander v. Railway Executive [1951] 2 KB 882; Sze Hai Tong Bank Ltd. v. rambler cycle Co. Ltd. [1959] AC 576; Yeoman Credit Ltd. v. Apps [1962] 2 QB 508; Charterhouse Credit Co. Ltd. v. Tolly [1963] 2 QB 683. Most of the examples in sale of goods concern what may be regarded as a total failure to supply the contract goods.

34) Suisse Atlantique Socit d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 AC 361; Photo Production Ltd v. Securicor Ltd. [1980] AC 827; Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. [1983] 1 WLR 964. The position is now effectively confirmed by s. 9 of UCTA.

insurance, so that a clearly worded exclusion clause may even cover such a breach. Nevertheless, one must note that it is likely that the courts will show their reluctance in general to uphold the exclusion clause as to a fundamental breach unless it is not clearly and fairly susceptible of only one meaning.[35]

4. Other Common Law Rules

In addition to the above judicial rules, it must be noted that there are further rules to control unfair terms. First, a party cannot rely on an exclusion clause where he misrepresents, whether fraudulently or otherwise, the terms or effect of the clause inserted by him in a contract.[36] Second, he is not also allowed to rely on an exclusion clause contained in a written document when it is overridden by an express inconsistent undertaking given at or before the time of contract.[37] In Couchman v. Hill,[38] there was an auction sale under terms stating that lots were sold "with all faults, imperfections and errors of description". The plaintiff asked the defendant and the auctioneer at the time of sale if a heifer was "unserved", and received an affirmative answer. The court held that it was an overriding warranty as to a specific matter and liability for breach of it would not be exempted by the general exclusion clause.

35) Bradgate, op cit., at 75; McKendrick, op cit., at 230 f.

36) Curtis v. Chemical Cleaning and Dyeing Co. [1951] 1 KB 805. See also Jaques v. Lloyd D. George & Partners Ltd. [1968] 1 WLR 625; Charlotte Thirty Ltd. v. Croker Ltd[1990] 24 Const.L.R. 46.

37) Couchman v. Hill [1947] KB 554.

38) Id.

Ⅲ. Regulation by Statutes

1. General

It has been examined above how the common law rules regulate unfair terms in contract. As described above, the approach taken by common law was centred on procedural considerations mainly by the indirect means of adopting a restrictive approach towards the incorporation and the construction of the terms. This approach has been proved inadequate in that provided a clause was sufficiently clearly drafted and was effectively incorporated into the contract, the courts had no power at common law to restrict it on the basis of substantive unfairness. In recognition of this problem, statutory intervention has been developed. The principal legislation which was enacted in 1977 is UCTA and most recently a new form of legislative intervention has been brought into force by the medium of statutory instrument, UTCCR, which implements the EC Directive on Unfair Terms in Consumer Contracts (here-in-after the Directive).[39] Before exploring the provisions of both UCTA and UTCCR in detail, bear in mind that if a party seeks to rely on a standard term, it is crucial for him to pass through the double barrier of UCTA and UTCCR. This is because English law has failed to consolidate the new rules, which had to be implemented by virtue of the Directive, with those already contained in UCTA; consequently, there are two separate but overlapping legislative controls applicable to various forms of standard terms in contracts which, as will be examined below, differ not only in their scope of application but also in their test used to assess the fairness of term.

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39) 93/13/EEC, O.J. No. L. 95, 21.

2. UCTA

1) General

The control exercised by UCTA over exclusion clauses in contracts is complex in nature and by no means comprehensive. It creates a two-tier system for the regulation of exclusions, providing greater protection for consumers and those who are required to contract on another party's standard terms, than for businesses who may be better placed to guard their own interests. There are three broad divisions of control; (a) control over contract terms which exclude or restrict liability for negligence,[40] (b) a general control in limited circumstances over contract terms which exclude or restrict liability for breach of contract or which purport to entitle one of the parties to render a contractual performance substantially different from that reasonably expected of him or to render no performance at all,[41] (c) control over contract terms which exclude or restrict liability for breach of certain terms implied by the Sale of Goods Act 1979 (here-in-after the SGA).[42] These controls may be overlap so that in certain cases one may rely on more than one section. Once the contract term is subject to the control of UCTA, that control may adopt one of two forms; first, it may be rendered absolutely ineffective,[43] second, it may be effective only if reasonable.[44] In the following sections of this chapter we shall explore the various types of clauses which fall within the scope of UCTA and the reasonableness test.

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40) UCTA s. 2.
41) UCTA s. 3.
42) UCTA s. 6.
43) UCTA ss. 2(1), 6(1), (2),
44) UCTA ss. 2(2), 3, 4, 6(3).

2) Types of clauses regulated

(1) Negligence Liability

The first regulation which UCTA deals with is placed on clauses to exclude or restrict liability for negligently inflicted loss.[45] When one attempts to exclude or restrict liability for negligence, there are several points which must be born in mind. First, the regulation by UCTA is only applicable to 'negligence' so that it is not extended to any attempt to exclude or restrict strict liability. Negligence includes not only liability arising from a common law duty of care, such as that in tort, but also liability arising from breach of a contractual duty to exercise reasonable care, such as that implied into contracts for services[46] and liability for breach of the common duty of care imposed on occupiers of premises.[47] [48] It does not matter whether the breach occurs as a result of an intentional act or negligence, while liability arises directly or vicariously.[49] Second, it applies only to 'business liability' which is defined as "liability for breach of obligations or duties arising _ (a) from things done or to be done by a person in the course of business (whether his own business or another's); or (b) from the occupation of premisses used for business purposes of the occupier."[50] It is clear that only (a) will be relevant in issues involving sale of goods. 'Business' includes a profession and the activities of any government department or local or public authority,[51] which may indicate that a business is not necessarily conducted for profit.[52] Third, it is not

45) UCTA s. 2.
46) Supply of Goods and Services Act 1982 s. 13.
47) Under the Occupier's Liability Act 1957.
48) UCTA s. 1(1).
49) UCTA s. 1(4).
50) UCTA s. 1(3).
51) UCTA s. 14.
52) Reynolds, Guest (ed.), op cit., at 13-066.

only applicable to contractual terms but also to non-contractual notices which purport to exclude or restrict liability for negligence.[53] Fourth, it adopts two methods of control which depend upon the nature of the loss suffered; (a) liability for death or personal injury caused by negligence cannot be excluded or restricted,[54] (b) liability for other types of loss can be excluded only if the exclusion satisfies the requirement of reasonableness.[55]

(2) Liability for Breach of Contract

① Liability arising in Contract

The regulation under UCTA extends to liability arising in contract and it is only applied to two types of contract. First, it is applied where one party 'deals as consumer'.[56] A person deals as a consumer if three conditions are met: (a) he neither makes, nor holds himself out as making, the contract in the course of a business, (b) the other party does make the contract in the course of a business, and (c) where the contract involves the supply of goods, the goods are of a type ordinarily supplied for private use or consumption.[57] The key question in defining 'deals as consumer' is on the meaning of 'in the course of a business'. It is to be noted that whether one makes the contract in the course of a business depends upon his status in the particular contract rather than his general status.[58] Thus, it is held that, to be in the course of business, the transaction must be an integral

53) UCTA s. 2.

54) UCTA s. 2(1). For instance, a clause in a contract for the sale of electrical or mechanical equipment purporting to absolve the seller from liability for death or personal injuries caused by the equipment.

55) UCTA s. 2(2). An example in the context of sale may be a clause where the seller disclaims liability for loss of or damage to the goods prior to delivery, whether by his negligence or not.

56) UCTA s. 3(1).

57) UCTA s. 12(1). A sale by auction or competitive tender is not deemed to be a consumer sale. UCTA s. 12(2). In other cases, the person seeking to rely on the exclusion clause bears the burden of proof that the other party did not deal as a consumer. UCTA s. 12(3).

58) Bradgate, op cit., at 81.

part of the business carried on or be of a type regularly entered into.[59] Second, it is applicable where one deals on the other's written standard terms of business. The notion of 'standard terms of business' is not defined. However, it is submitted that the notion should be given a wide interpretation to include both terms prepared by or for an individual business and those prepared for a particular trade by or under the auspices of a trade association or similar body,[60] provided that those terms are regularly used by the contractor seeking to rely on them.[61] The terms need not be printed and they may be incorporated into the contact orally, or by reference to a notice or by course of dealing insofar as they are written down somewhere.[62] The phrase 'standard form contract' expressed in the relevant provision in Scotland has been interpreted that it is "wide enough to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proponer applies, without material variation to contracts of the kind in question".[63] The notion of standard terms in fact aims to identify contracts which are not individually negotiated. Nevertheless, where there has been negotiations around standard terms and amendments agreed, it is a question of fact whether one party is deemed to have dealt on those standard terms which are regulated by s. 3 of UCTA.[64]

Once falling within one of the above two types of contract, first, one cannot by reference to any term in the contract exclude or restrict his liability for breach of contract except insofar as the term satisfies the requirement of reasonableness.[65] It is restricted to business liability[66] and

59) R & B Customs Brokers Co Ltd v. United Dominions Trust [1988] 1 All ER 847.

60) For instance, INCOTERMS 2000 prepared by ICC.

61) British Fermentation Products Ltd v. Compair Reavell Ltd [1999] 2 All ER(Comm) 389; Bradgate, op cit., at 83 f.

62) Reynolds, Guest (ed.), op cit., at 13-084; Bradgate, op cit., at 84.

63) McCrone v. Boots Farm Sales Ltd, 1981 S.C. 68, 74 per Lord Dunpark.

64) St Albans City and District Council v. International Computers Ltd [1996] 4 All ER 461; The Flamar Pride [1990] 1 Lloyd's Rep 434; Salvage Assn v. Cap Finacial Services Ltd [1995] FSR 654.

assumed that there has been a breach of contract.[67] One can, therefore, exclude or restrict his liability by a clause drafted so as to define in limited form the contractual duty provided that it is not treated as an attempt to avoid UCTA's provisions.[68] [69] Second, one can not claim to be entitled (i) to render a contractual performance substantially different from that which was reasonably expected of him or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all unless the clause is a reasonable one to have been included in the contract.[70] It is, unlike s. 3(2)(a) of UCTA, applied to the cases where there is no breach of contract at all, but where the obligation as to performance has been limited or qualified.[71] If given wide reading, s. 3(2)(b) of UCTA extends its scope to many types of term commonly found in standard form contracts: for instance, clauses excluding liability for late delivery, permitting a seller to deliver a greater or lesser quantity of goods than provided for in contract, or force majeure clauses which entitle a seller to suspend or postpone delivery of goods, or to deliver substitute goods, or to cancel the contract, upon the happening of events outside his control.[72] In the cases of s. 3(2)(b)(i) of UCTA, the question arises where one tries to define the contractual performance reasonably expected of a contractor; should one take into account the disputed term in defining that expectation? It is submitted that the court may define the contractual performance reasonably expected apart from the disputed term in question.[73]

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65) UCTA s. 3(2)(a).
66) UCTA s. 1(3).
67) McKendrick, op cit., at 210.
68) UCTA s. 13.
69) Reynolds, Guest (ed.), op cit., at 13-083.
70) UCTA s. 3(2)(b).
71) Guest, Beale (ed.), op cit., at 14-070.
72) Bradgate, op cit, at 78; Guest, Beale (ed.), op cit., at 14-070 f.
73) Zockoll Group Ltd v. Mercury Communications Ltd [1998] EMLR 385.

② Implied Terms under ss. 12, 13, 14 and 15 of the SGA

UCTA also regulates contract terms which purport to exclude or restrict contractual liability for breach of the implied conditions as to the goods in sales contracts. First, the implied conditions as to title[74] can never be excluded or restricted by virtue of any contract term.[75] Second, the seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose[76] cannot be also exempted or restricted by reference to any contract term insofar as the buyer is dealing as a consumer.[77] [78] However, if the buyer is not deemed to deal as a consumer within the scope of s. 6(2) of UCTA, an exclusion clause relating to the above seller's undertakings may be fully effective provided that it fulfills the requirement of reasonableness.[79] Note that the controls by UCTA on any attempt to exclude or restrict these implied terms is specifically not limited to business liability.[80] Yet, one should remember that s. 14 of the SGA attaches only where the seller sells in the course of a business.[81]

③ Indemnity Clause

A contract may often stipulate a clause under which a party promises to indemnify the other for any liability incurred by him in the performance of contract. UCTA controls the clause by providing that a person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of

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74) SGA s. 12.
75) UCTA s. 6(1).
76) SGA ss. 13, 14, and 15.
77) UCTA s. 6(2).
78) For the meaning of 'deals as a consumer', see supra n. 22-25 and accompanying texts.
79) UCTA s. 6(3).
80) UCTA ss. 1(3), 6(4).
81) For more detail in this regard, see Reynolds, Guest (ed.), op cit., at 13-072.

contract, except to the extent the term satisfies the requirement of reasonableness.[82] Note that it only applies to the cases where the party required to give indemnity deals as consumer[83] and the liability against which indemnity is sought must be related to a business liability.[84] [85]

3) Test of Reasonableness

Unlike some of standard terms always ineffective under UCTA,[86] others may be valid only if they satisfy the requirement of reasonableness.[87] UCTA provides some guidance regarding how reasonableness is to be assessed. In relation to a contract term, the test is whether the term was a fair and reasonable one to have included in the contract, having regard to circumstances which were, or ought reasonably to have been, known to the parties at the time when the contract was made.[88] Regarding a term excluding liability for breach of the implied terms in sales contracts, there are guidelines set out in Schedule 2 for the reasonableness test.[89] [90] They include following factors: (a) the relative strengths of the parties' bargaining positions, taking into account alternative means by which the customer's requirements might be met; (b) whether the customer received any inducement to agree the term, or in accepting it had an opportunity of entering into a similar contract with any other person without accepting a similar term;[91] (c) whether the customer knew or ought reasonably to have

82) UCTA s. 4(1).
83) UCTA s. 4(1). For the meaning of 'deals as a consumer', see supra n. 22-25 and accompanying texts.
84) UCTA s. 1(3).
85) Thus, it does not apply to contracts between business concerns or between private individuals, nor where it is the business concern which must indemnify the consumer. See Reynolds, Guest (ed.), op cit., at 13-086.
86) UCTA ss. 2(1), 6(1), (2).
87) UCTA ss. 2(2), 3, 4. 6(3).
88) UCTA s. 11(1).
89) UCTA s. 11(2).
90) The onus of proving that it was reasonable to incorporate a term in a contract lies on the party so contending. UCTA s. 11(5).
91) Woodman v. Photo Trade Processing Ltd. (7 May 1981, unreported), cited in

known of the existence and extent of the term;[92] (d) where the term excludes or restricts liability unless some condition is complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;[93] (e) whether the goods were manufactured, processed or adapted to the special order of the customer. Where an exclusion clause seeks to restrict the liability of the seller to a specified sum of money, regard is to be had in particular to: (a) the resources available to the party relying on the term for the purposes of meeting the potential liability; (b) how far it was open to him to protect himself by insurance.[94] Although Schedule 2 is applicable strictly only to the cases of the exclusion clauses as to the implied terms, one must note that the courts are likely to consider the guidelines in other cases.[95]

4) Attempts at Evasion

UCTA has a number of anti-evasion provisions within it designed to prevent UCTA from being circumvented. They are as follows.

First, one may attempt to avoid any limit imposed by UCTA by wording clauses other than as exclusions of liability. However, it should be noted that UCTA extends its scope of control to other types of contract term which (a) make a liability or its enforcement subject to restrictive or onerous conditions; (b) exclude or restrict any right or remedy, or subject a

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Lawson, "The Unfair Contract Terms Act: A Progress Report" (1981) 131 NLJ 933, at 935.

92) Terms in small print or in difficult language are likely to be held unreasonable. See The Zinnia [1984] 2 Lloyd's Rep. 211; Knight Machinery Holdings Ltd. v Rennie [1995] S.L.T 166.

93) R.W. Green Ltd. v. Cade Bros. Farms [1978] QB. 574.

94) UCTA s. 11(4). Cf. Salvage Assn. v. Cap Financial Services Ltd [1995] F.S.R. 654.

95) The Flamar Pride [1990] 1 Lloyd's Rep. 434; Singer Co. (U.K.) Ltd. v. Tess and Hartlepool Port Authority [1988] 2 Lloyd's Rep. 164, 169. See Bradgate, op cit., at 86; Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts", in: Beatson and Friedmann (ed.), Good Faith and Fault in Contract Law, Oxford: Clarendon (1995), at 235; Reynolds, Guest (ed.), op cit., at 13-085; Guest, Beale (ed.), op cit., at 14-082.

person to any prejudice in consequence of pursuing a remedy; (c) exclude or restrict rules of evidence or procedure.[96] In relation to sales contracts, an example of (a) might be a time limit on claims; of (b) a term taking away or limiting his right to reject defective goods, or requiring him to pay the expenses of re-delivery on rejection; and of (c) a term expressing that a signature on a delivery note shall be conclusive evidence that goods are in conformity with the contract.[97] However, UCTA does not apply to arbitration clauses, although they are subject to control under the Arbitration Act 1996 and UTCCR.[98]

Second, one may often insert a clause which specifies a choice of foreign law in their contracts in the hope of evading the application of UCTA. Notwithstanding the clause, note that UCTA is still in force where it appears to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the application of UCTA or where one of the parties is dealt as consumer in the making of the contract and was then habitually resident in UK, and the essential steps necessary for the conclusion of the contract were taken there.[99] Similarly, UTCCR is still effective notwithstanding any contract term which applies or purports to apply the law of a non-Member State, provided that the contract has a close connection with the territory of the Member States.[100] It should be noted that while the parties cannot avoid UTCCR by choosing the law of a non-Member State, they are free to choose the law of another Member State. Thus if a contract which has its closest connection with England is agreed to be subject to the law of some other Member State, UTCCR will not apply.[101]

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96) UCTA s. 13(1).

97) See Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd [1978] QB 574.

98) UCTA s. 13(2).

99) UCTA s. 27(2).

100) UTCCR reg 9.

101) Instead the consumer will receive the protection provided by the Directive as implemented in that other Member State.

Third, one may seek to evade UCTA by the use of another contract, for instance where a term in a contract between a manufacturer and a purchaser purports to affect the rights of the buyer against the seller under the SGA. In response to this evasion, UCTA states that a term excluding or restricting liability, which is contained in a separate contract rather than in the contract giving rise to the liability, is ineffective insofar as it attempts to take away a right to enforce a liability which under UCTA cannot be excluded or restricted.[102]

5) International Supply Contracts

The limits imposed by UCTA on the effectiveness of contract terms excluding or restricting liability are inapplicable to international supply contracts,[103] nor are the terms of such a contract subject to any requirement of reasonableness under ss. 3 and 4 of UCTA.[104] The purpose of this exclusion from the ambit of UCTA seems to be in the undesirability to subject UK exporters to restrictions not applicable to elsewhere.[105] Although it is far from clear in the meaning of 'international supply contracts' which are defined in s. 26(3) of UCTA, it may exclude most international sales from the ambit of UCTA. However, note that several exceptional cases in which they are still within the ambit of UCTA can be made unless either of the following two requirements is satisfied. First, an international supply contract must be made by parties in different states.[106] Thus, assuming (it may be quite common) that two businessmen who carry on their business in England make a contract for the sale of mobile to be shipped from Korea C.I.F. London, this case may be still within the ambit of UCTA. Second, it must fulfil one of the following conditions: (a) it

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102) UCTA s. 10. See Tuder Grange Holdings Ltd v. Citibank NA [1992] Ch 53.
103) UCTA s. 26(1).
104) UCTA s. 26(2).
105) The Law Commission's 1969 Report: Exemption Clauses in Contracts, First Report: amendments to the Sale of Goods Act 1893(Law Com No 24), at 120.
106) UCTA s. 26(3)(b).

involves carriage of goods between States, (b) offer and acceptance are made across State borders, or (c) the goods are delivered in a different State to that where the contract was made.[107] At first sight, it looks easy to fulfil anyone of the above conditions. However, it seems hardly true in that the interpretation of those conditions gives rise to many difficulties. For instance, suppose that an English seller makes a sales contract with a Korean buyer in England which specifies for delivery F.O.B. London. The buyer intends to ship the goods to Korea, and the seller is aware of this but it is not deemed to be a term of the contract. This case cannot be necessarily said that it involves carriage of goods between States.[108] Unlike UCTA, UTCCR does not exempt international contracts, consequently. it will apply whenever the law of part of the UK applies.

3. UTCCR

1) General

UTCCR imposes two requirements; (a) the requirement of transparency that the terms be 'plain, intelligible language' which applies only to any written term[109] and (b) the requirement of fairness that they be fair which applies to any term (whether written or oral).[110] As to the former, where there is doubt as to the meaning of a written term, it shall be interpreted in a way most favourable to the consumer.[111] This effect does not seem to add more than the principle of contra proferentem that has been long recognised in English law.[112] Due to the dual statutory control of exemption clauses in England, the particular importance of UTCCR in

107) UCTA s. 26(4).
108) Treitel, Guest (ed.), op cit., at 18-221.
109) UTCCR reg 7(1).
110) UTCCR reg 5(1).
111) UTCCR reg 7(2).
112) Cf. Furmston (ed.), Butterworths Law of Contract, London: Butterworths, (1999), at 542.

English law is found where their scope of application is wider than UCTA and where their test of fairness differs from the test of reasonableness in UCTA. In this light, the scope of application and the fairness test under UTCCR will be examined below in turn.

2) Scope of UTCCR

UTCCR applies to any contract made between a 'seller or supplier' and 'consumer', subject to certain exclusions.[113] 'Consumer' is defined as 'a natural person who, in contracts covered by UTCCR, is acting for purposes which are outside his trade, business or profession'.[114] This definition seems wider than that of UCTA in that, first, as regards contracts for the sale of goods, it does not require that the goods be 'of a type ordinarily supplied for use or consumption'[115] (but note that insofar as ss. 13-15 of the SGA are concerned, such goods will be still within UCTA),[116] and second, it covers the consumer's purchase at an auction sale or by competitive tender.[117] 'Seller or supplier' for the purpose of UTCCR is meant 'any natural or legal person who, in contracts covered by UTCCR, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.[118] This definition could be also wider than that of UCTA in that, given that R & B case[119] is applied for the question whether the seller acted 'in the course of a business' under UCTA,[120] it may cover the case, for instance, where a company sells off

113) UTCCR reg 4(1).
114) UTCCR reg 3(1).
115) UCTA s. 12(1)(c).
116) UCTA s. 6(3).
117) UCTA s. 12(2). See Whittaker, Beale (ed.), op cit., at 15-017; Atiyah, Adams and Macqueen, op cit., at 257. Cf. It is also narrower than that of UCTA in that it clearly excludes a company so that the buyer in R & B Customs Brokers ([1988] 1 All ER 847) would not be a 'consumer' under UTCCR. Whittaker, id.; Bradgate, op cit., at 86; Beale, Beatson and Friedmann (ed.), op cit., at 238.
118) UTCCR reg 3(1).
119) [1988] 1 All ER 847.
120) It is submitted that the position in English law is not clear because R & B

one of its old cars because the sale may not be 'in the course of a business' under UCTA.[121] However, if Stevenson v. Rogers case[122] is applied, any transaction other than a purely private one may be 'in the course of a business', which leads the case to fall within the scope of both UTCCR and UCTA[123] (but note that insofar as ss. 13-15 of the SGA are concerned, it may be still caught by UCTA).[124] In addition, one must also note that the scope of UTCCR is wider in that unlike UCTA,[125] it does not require that the contract as a whole be on standard terms;[126] UTCCR applies to individual terms and it expressly stipulates that the fact that an individual term has been negotiated shall not impede the application of UTCCR to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.[127]

3) Test of Fairness

UTCCR sets out two sets of criteria to be taken into consideration in determining the fairness of a term; first, the term must create a significant imbalance in the rights and obligations of the parties under the contract, to the detriment of the consumer, and second, the creation of that imbalance must be contrary to the requirement of good faith.[128] In assessing the

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case concerns the status of the buyer rather than the seller. Bradgate, op cit., at 81 ff.

121) Id, at 89.

122) [1999] 1 All ER 613.

123) Bradgate, op cit., at 89.

124) UCTA s. 6(3).

125) However, it is also narrower in that while UCTA can be applied to both negotiated and non-negotiated terms in consumer contracts (UCTA s. 3(1)), UTCCR are applicable only to terms which have not been 'individually negotiated', as defined in UTCCR reg 5(2). Bradgate, op cit., at 91; cf. Scott and Black, Cranston's Consumers and the Law, London: Butterworths (2000), at 90 f.

126) Bradgate, op cit., at 91. Thus, UTCCR does not raise the difficulties under UCTA s. 3 where a standard term is used as a basis for negotiation leading to variation of some of its terms. Id.

127) UTCCR reg 5(3).

128) UTCCR reg 5.

fairness of a term, the following factors should be also taken into account; first, the nature of the goods or services, second, all the circumstances attending the conclusion of the contract, and third, all other terms of the contract or of a contract on which it is dependent.[129] One must note that the assessment of fairness does not extend to the matters of core terms; the main subject matter of the contract and the adequacy of the price.[130] Although it is not expressly stipulated in UTCCR, the requirement of plain and intelligible language in any written term of a contract[131] is likely to constitute an important factor in the assessment of fairness because an unintelligible term may deprive a consumer of a real opportunity of becoming acquainted with its effect.[132] In addition, UTCCR contains an 'indicative and non-exhaustive list(s) of the terms which may be regarded as unfair'.[133] This list is a list for the terms which it contains are not necessarily to be held unfair, but they will provide a general presumption of unfairness.

In most cases, the crucial criteria in the assessment of fairness are likely to be the general requirement of good faith and its relationship with the requirement of 'significant imbalance'.[134] Although there is little guideline as to the requirement in UTCCR, the recitals to the Directive provide the following factors to which regard should be had in the assessment of good faith; (a) the strength of the bargaining positions of the parties, (b) whether the consumer had an inducement to agree to the term, (c) whether the goods or services were sold or supplied to the special order of the

129) UTCCR reg 6(1). For the detailed explanations on these factors, see Whittaker, Beale (ed.), op cit., at 15-039 ff.

130) UTCCR reg 6(2); cf. Director General of Fair Trading v. First National Bank plc. [2000] 2 All ER 759; Falco Finance Ltd. v. Gough [1999] C.C.L.R. 208.

131) UTCCR reg 7.

132) Whittaker, Beale (ed.), op cit., at 15-071; Beale, op cit., at 248; cf. UCTA Schedule 2(c). However, note that it may overlap with the factor of "all the circumstances attending the conclusion of the contract" in UTCCR reg 6(1). Whittaker, Beale (ed.), op cit., at 15-041.

133) UTCCR reg 5(5), Schedule 2.

134) UTCCR reg 6(1). See Bradgate, op cit., at 92.

consumer, and (d)whether the seller or supplier has dealt fairly and equitably with the consumer.[135] These factors seem more or less similar to the guidelines in the assessment of 'reasonableness' under UCTA as the first three factors are found in UCTA Schedule 2.[136] The fourth factor appears to suggest that it differs from UCTA in that the seller's conduct after the conclusion of the contract may also form a factor for the test of good faith.[137] However, one must note that insofar as the requirement of good faith is intended to qualify the fairness of the term, it seems irrelevant to the fairness of a party's post-conduct, and consequently it seems to become clear that the fourth factor is already included in the general test's reference to "all the circumstances attending the conclusion of the contract. "[138]

Ⅳ. Future Direction of English Law

1. Consumer Sales

1) Controls over Individually Negotiated Terms

It has been submitted that the problems of fairness associated with the use of standard terms are related to unfair surprise and lack of choice, especially in the consumer context.[139] The former occurs where had the customer been aware of the implications of an exclusion clause, he would

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135) Recital 16.

136) UCTA Schedule 2(a), (b) and (e).

137) Whittaker, Beale (ed.), op cit., at 15-044. While UCTA clearly stipulates the burden of proof of reasonableness on the party seeking to rely on the exclusion clause in question (s. 11(5)), neither UTCCR nor the Directive provides a rule for the burden of proof of fairness. Id., at 15-047.

138) Id.

139) Beale, "Unfair Contracts in Britain and Europe", (1989) 42 Current Legal Problems 197, at 201 ff.; cf. Suisse Atlantique Socit d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, 406, per Lord Reid.

not have accepted the clause or would have taken steps to safeguard his position. The latter arises where the customer is well aware of the implications of an exclusion clause, but he has no choice but to accept the clause because he has no bargaining power to get it changed and is unable to find another supplier who will offer better terms.

Having said that, as examined above, UTCCR applies only to terms which were not individually negotiated, whereas the application of UCTA to terms in consumer contracts does not depend upon whether the term was negotiated. In the combined instrument, it appears that most negotiated terms are subject to review under UCTA. However, some of negotiated terms fall outside the scope of UCTA because s. 3 of UCTA mainly deals with terms that affect the business's liability or the way it has to perform; thus, terms that affect what are the consumer's obligations rather than those of the business do not come within UCTA. The problem arises in that potential unfairness can be also seen in terms which relate to the consumer's own performance rather than that of the other party; for instance, deposits and forfeiture of money paid clauses, default rates of interest, price variation clauses. In response to this problem, the Commissioners propose in their consultation paper that the controls should extend even to negotiated terms for reasons found, in particular, in the nature of the problems over unfair terms.[140] Given that a primary cause of unfavorable terms in contracts is that many consumers are ignorant of their existence or their implications, it seems true that there is less likely to be a problem with negotiated terms.[141] This is not only because the consumer will be certainly aware of their existence, but also because if the business is willing to negotiate the contractual terms and each side understands the issues, there is no reason to suppose that the business will insist on less favorable terms than the consumer wants and is prepared to pay for.[142]

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140) Law Commission, op cit., at para. 4.42 ff.
141) Law Commission, op cit., at para. 4.48.
142) Id.

However, the question arises whether for any negotiation to be meaningful, the consumer genuinely has a clear idea of what he is agreeing and its foreseeable implications. Given that there are likely to be few cases in which the consumer will have a full grasp of the risk that the proposed term represents to him except as to the core terms such as the subject-matter of the contract or the price,[143] it may be better for other than core terms to be under review whether or not they are negotiated.[144]

2) Two Kinds of Unfairness

For a criterion to assess the fairness of a term, UTCCR uses the phrase "significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." It is submitted that it is unfortunate to use this criterion which has connotations of exploitation in terms of value for money.[145] This is because harsh terms are frequently balanced by a low price;[146] thus, the real question on the fairness of standard terms should be placed on not only whether the contract is a reasonable balance in terms of value for money, but also whether the customer genuinely appreciates the harshness of the terms or wants such a

143) For example, it is very hard for the consumer to genuinely understand the impact of a clause purporting to exclude liability for death or personal injury caused by negligence; he is most unlikely to have any real understanding of just how serious the financial consequences of even relatively minor injuries can be, let alone how likely it is that such an injury might occur. Law Commission, op cit., at para. 4.51.

144) Law Commission, op cit., at para. 4.50.

145) Law Commission, op cit., at para. 4.90.

146) That is, when suppliers offer more favourable terms with a higher price, many consumers often fail to understand the reason for the higher price and even think not worthwhile to scrutinize it so that they will naturally seek a less expensive contract elsewhere. It may, thus, result in that the suppliers are likely to find it more profitable if he shifts more risks expressively to the ignorant consumers by using standard terms. At the end, the consumers' preference over the price may produce a tendency toward harsh standard terms with a lower price where they are ignorant of full information about the standard terms. Goldberg, "Institutional Change and Quasi-invisible Hand", (1974) 17 J. of Law and Economics 461, at 483 ff.; Trebilcock, "An Economic Approach to the Doctrine of Unconscionability", in: Reiter and Swan (ed.), Studies in Contract Law, London: Butterworths (1980), at 379 ff.; Beale, Beatson and Friedmann (ed.), op cit., at 232.

deal.[147] In this light, the Law Commission proposes factors to be taken in account for assessing the fairness of a term which relate to fairness in substance as well as procedural fairness. Factors for procedural unfairness are, for instance, the consumer's knowledge and understanding, the strength of the bargaining positions of the parties, the nature of the goods and services and the other terms of the contract or of any other contract on which it is dependent.[148]

2. Business Sales

It has been said that the problems of standard form contracts result from unfair surprise and lack of choice particularly in the consumer context. It seems true that terms of many standard forms are more likely fair and reasonable in the business-to-business context than in the consumer context. The reasons for that are that the business customer may generally have more expertise to scrutinize the terms and some influence over a supplier where it intends to make similar purchase in future.[149] However, even if not so severe as in the consumer context, standard form contracts cause problems, in the business-to-business context, which are similar to those affecting consumer contracts.[150] These problems are due to, first, the costs to a business in reading and ascertaining the impact of the terms which are hard to understand or, even if clear, difficult to know how they will affect the customer,[151] second, little more bargaining power as against a supplier than would a consumer, for instance, where a supplier sells its

147) Law Commission, op cit., at para. 4.90.

148) Draft Unfair Terms Bill, Schedule 1, ss. 2 ff. Factors for fairness in substance, see Draft Unfair Terms Bill, Schedule 1, s. 1.

149) Law Commission, op cit., at para. 5.18. In addition, the business customer may be able to call on a trade association to negotiate better terms on its behalf and even if unfavorable terms are unalterable, it may be able to insure against the risk. Id.

150) Law Commission, op cit., at para. 5.17.

151) Especially where to evaluate their impact require information (such as the other party's reliability) which the customer will not have readily available.

output to a single purchaser seller.[152] It seems true that UCTA, especially s. 3, deals with some of those problems. Yet, as mentioned above, s. 3 of UCTA mainly deals with terms that affect the business's liability or the way it has to perform but terms that affect the other party's obligation which have an equal potential for unfairness. Therefore, it is proposed that the power to challenge unfair terms in business-to-business contracts be extended from the types of term subject to the reasonableness test of UCTA to the wider range covered.[153]

Having said that, the question arises whether the extension should apply to all, or only to a limited type of business-to-business contracts. It is considered whether any extension should be limited only to protecting small businesses or occasional business customers. It is submitted that, as experienced in the number of reported cases, the problems posed by unfair terms are not confined to small businesses or occasional business customers.[154] On this basis, the Law Commission proposes that it be better to treat all businesses alike in being able to benefit from the protection, allowing the courts to take into account the size of the business, and whether it makes transactions of the kind in question regularly or only occasionally, in assessing the fairness of the terms complained of.[155] Another question arises whether the controls over unfair terms extended to negotiated terms in the consumer contexts as discussed above should apply to business-to-business contracts. It is suggested that it is unnecessary to extend the general controls to terms which have been negotiated between businesses.[156] This is because, given that there has been negotiation on a particular term, this means that the business concerned will at least be

152) Law Commission, op cit., at para. 5.17.

153) Law Commission, op cit., at para. 5.25.

154) Law Commission, op cit., at paras. 5.27 ff., 5.31 ff.

155) Law Commission, op cit., at para. 5.40.

156) Law Commission, op cit., at paras. 5.43 f. In this light, the existing controls over negotiated exclusion clauses in s. 6(3) of UCTA are not needed, although those in s. 2(2) of UCTA may be necessary because they are likely risky and anti-social. Law Commission, op cit., at paras. 5.45 ff.

aware of the term, and so have had the opportunity to consider the possible consequences of entering into a contract on that basis. Even if it does not have the bargaining power to leave out a possible unfair term, it may be able to ensure its position by inserting into the contract other terms of the contract more favourable, or, alternatively, by accepting the risk and insuring against it.[157]

V. Concluding Remarks

This study has examined how English law regulates unfair contract terms, particularly, in standard form, in order to provide legal advice to our sellers residing either in UK or in Korea who plan to enter into UK markets. The legal advice in which the sellers may be interested could be made as follows. First, although the courts now have statutory power to directly control unfair terms by virtue of UCTA and UTCCR, which render the common law rules less important, those rules remain important since it is sill necessary to decide whether a clause has been made part of the contract and at least in a general way what its effect is likely to be. Second, UCTA and UTCCR exist separately so that any standard term can be effective only when passing through the double barrier of those legislations; third, the contract terms which are subject to UCTA are divided into three parts; (a) contract terms which exclude or restrict liability for negligence, (b) contract terms which exclude or restrict liability for breach of contract or which purport to entitle one of the parties to render a contractual performance substantially different from that reasonably expected of him or to render no performance at all, (c) contract terms which exclude or restrict liability for breach of certain terms implied by the Sale of Goods Act 1979. Fourth, once a contract term is subject to the control of

157) Law Commission, op cit., at para. 5.43.

UCTA, that control may adopt one of two forms; (a) it may be rendered absolutely ineffective, (b) it may be effective only if reasonable. Fifth, one's attempt to evade any limit imposed by UCTA by wording clauses other than as exclusions of liability may be failed since UCTA extends its scope of control to other various types of contract term. Sixth, despite the fact that UCTA expressly excludes international supply contracts from its scope, note that several exceptional cases are still under the control of UCTA as specified in s. 26 of UCTA and UTCCR invariably applies whether it is a international contract or not. Seventh, any attempt to evade the controls of UCTA and UTCCR by a choice of foreign law clause may be unsuccessful where the contract would otherwise be subject to the law of UK. Eighth, UTCCR mainly concerns consumer sales and controls unfair terms by imposing the requirement of transparency that the terms be 'plain, intelligible language' which applies only to any written term and the requirement of fairness that they be fair which applies to any term (whether written or oral).

It has also attempted to explore any problem in the existing double legislations and put forward future direction of English law in light of the Draft Unfair Terms Bill which was currently proposed by the Law Commissioners. It argued as follows. First, it is submitted that given that the consumer is unlikely to genuinely have a clear idea of the risk that the proposed term represents to him except as to the core terms such as the subject-matter of the contract or the price, it may be better for other than core terms to be under review whether or not they are negotiated. Second, since harsh terms in standard form contracts are frequently balanced by a low price, it is argued that the real question on the fairness of standard terms should be placed on not only whether the contract is a reasonable balance in terms of value for money, but also whether the customer genuinely appreciates the harshness of the terms or wants such a deal. Third, it is contended that the power to challenge unfair terms in business-to-business contracts should be extended from the types of term

subject to the reasonableness test of UCTA to the wider range covered like terms that affect the customer's obligation which have an equal potential for unfairness. This is because standard form contracts cause problems even in the business-to-business context which are similar to those (unfair surprise and lack of choice) affecting consumer contracts. However, it is submitted that the control should not be extended to terms which have been negotiated between businesses.

BIBLIOGRAPHY

Atiyah, Adams and Macqueen, The Sale of Goods, 10th ed., London: Longman, 2001.

Beale, "Unfair Contracts in Britain and Europe", 42 Current Legal Problems 197. 1989.

Beale (ed.), Chitty on Contract, 28th ed., London: Sweet & Maxwell, 2002.

Beatson and Friedmann (ed.), Good Faith and Fault in Contract Law, Oxford: Clarendon, 1995.

Bradgate, Commercial Law, 3rd ed., Chichester: Chancery Law Publishing, 2000.

Furmston (ed.), Butterworths Law of Contract, London: Butterworths, 1999.

Goldberg, "Institutional Change and Quasi-invisible Hand", 17 J. of Law and Economics 461., 1974.

Guest (ed.), Benjamin's Sale of Goods, 5th ed., London: Sweet & Maxwell 1997.

Law Commission's 1969 Report: Exemption Clauses in Contracts, First Report: amendments to the Sale of Goods Act 1893 (Law Com No 24).

Law Commission, Unfair Terms in Contracts; A Joint Consultation Paper, CP No. 166, 2002.

Mckendrick, Contract Law, 3rd ed., London: Macmillan Press, 1997.

Reiter and Swan (ed.), Studies in Contract Law, London: Butterworths, 1980.

Richards, Law of Contract, 2nd ed., London: Pitman Publishing, 1995.

Scott and Black, Cranston's Consumers and the Law, London: Butterworths, 2000.

Treitel, The Law of Contract, 10th ed., London: Sweet & Maxwell, 1999.

ABSTRACT

Lee, Byung Mun

English law accepts the basic principle of freedom of contract that the parties should be free to agree on any terms that they like unless their agreement is illegal or otherwise contrary to public policy because it infringes some public interest. On the other hand, it has been limited for hundreds of years on the basis that certain contract terms, particularly in standard form, may alter a distribution of risks that the customer would reasonably intended. The alteration may often result from his simple ignorance caused by either lack of opportunity to become aware of clauses or inability to understand their full potential implications. In addition, it may also result from disparity in bargaining power which does not allow the customer to look after their own interests even if he is fully aware of the unacceptable clauses. In response to this problem, English law has employed both judicial and statutory intervention techniques to control unfair contract terms. This study describes and analyzes in detail how English law regulates such terms, particularly, in standard form, in order to provide legal advice to our sellers residing either in UK or in Korea who plan to enter into UK markets. It also attempts to explore any problem in the existing double legislations of UCTA and UTCCR and put forward future direction of English law in light of the Draft Unfair Terms Bill which was currently proposed by the Law Commissioners. The main concern of this paper will be confined to some of the various aspects of both judicial and statutory control of unfair contract terms in English law which may draw our attention in terms of domestic or international business sales.

Key Words: Unfair Contract Terms; Standard Form Contract; UCTA; UTCCR