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# Regulating Exclusion Clauses of the Seller's Liability for Non-Conforming Goods: Comparative Accounts*

Lee, Byung Mun**

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## Ⅰ. Introduction

The definition of an exclusion clause may be made as a 'clause in a contract or a term in a notice which appears to exclude or qualify, restrict or limit a liability or legal duty which would otherwise arise'.[1] Exclusion clauses are a common feature of written, and even oral contracts in the present day and may be variously termed "exemption", "exclusion" or "exception" clauses or "disclaimers". One of the most frequently encountered

* This work was supported by the Soongsil University Research Fund.
** Assistant Professor, Department of International Commerce, Soongsil University.
1) D. Yates, Exclusion Clauses in Contracts, 2nd ed., London: Sweet & Maxwell (1982), at 1.

types of exclusion clauses is the one attempting to exclude the seller's contractual liability for non-conforming goods. Such clause may take various forms; the specific exclusion of "statutory implied conditions" or "the seller's guarantee liability", the exclusion or limitation of the right of termination, the confinement of the amount of damages that may be recoverable, or the clause to shorten a time limit allowed by law for termination or other remedies.

The clause is often open to severe criticism because they may, in reducing the liability of one party, alter a distribution of risks that the buyer would reasonably have intended.[2] Such alteration is often caused by a possibility that, although the other party agrees to the contract, he is not aware of the term in question, or does not understand its implications.[3] In addition, it may be also due to that even if he does realize what the term means, he may find that the other party is unwilling to change its "standard terms" and has no effective bargaining power to negotiate them, nor to refuse to contract.[4]

In recognition of all these problems, most jurisdictions have introduced various techniques to control exclusion and limitation clauses by applying stringent rules requiring the clauses to be incorporated effectively into the contract,[5] and by construing such clauses in a restrictive way.[6] Yet, these techniques of control which operate indirectly and concentrate on procedural, rather than substantive, considerations, proved inadequate

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

3) *Id.*

4) *Id.*

5) Yun-jik Kwak, Chae-kwon-gak-ron (Particulars in Obligatory Law), Seoul: Pak Young Sa (1998), at 39 ff.; Eun-young Lee, Min-bup-hak-gang-eoi (Lectures in Civil Law Study), Seoul: Pak Young Sa (1996), at 728; A. Guest (ed.), *op cit.*, at para. 13-011 ff.; H. Beale (ed.), Chitty on Contracts, London: Sweet & Maxwell (1999), at para. 12-013 ff.

6) Yun-jik Kwak, *op cit.*, at 42 ff.; Eun-young Lee, *op cit.*, at 728 f.; A. Guest (ed.), *op cit.*, at para. 13-019 ff.; H. Beale (ed.), *op cit.*, at para. 14-005 ff. The courts often adopt the principle of *contra proferentem* that any ambiguities in the clause would be construed contrary to the interests of the party seeking to rely on it.

because provided that the clauses are clearly worded and effectively incorporated into the contract, the courts has no power to cut it down. Therefore, most jurisdictions have employed the statutory intervention technique which allows the courts to directly control the clauses and to consider its substantive fairness.

Having said that, the purposes of this paper are twofold. The first purpose is to describe and analyze in detail the English rules on regulation of exclusion clauses of the seller's liability for non-conforming goods. In this analysis, it places the following questions; first, whether each jurisdiction treats the seller's liability for non-conformity in quality and quantity as mandatory rules, second, if it does, to what extent it is treated so (e.g., in terms of the status of the parties and the form of contract), and third, if not, in what way it controls the seller's attempt to exclude or restrict his liability for non-conformity in quality and quantity. The second purpose is to compare the rules under English law with those under Korean law and to evaluate them in light of the discipline of comparative law. In an attempt to evaluate them, it asks the question of whether a solution from one jurisdiction may facilitate the systematic development and reform of another jurisdiction.

## II. English Law

### 1. Control by Common Law Rules

In order to be effective, at the first stage, to exclude the seller's liability for non-conformity in quality or quantity a contractual clause must be validly incorporated into the contract in question. The clause can be incorporated in two ways, first, where it is in a document signed by the buyer because he may be bound by what he signs regardless of whether he

has read it,[7] second, where a reasonable notice of the clause has been given to the buyer at or before the time of contract in order to make it part of the contract.[8] What amounts to a reasonable notice is a question which depends upon the facts and circumstances of the individual case.[9] The more unusual or unexpected the clause, the greater the degree of the notice required by the courts.[10]

At the second stage, it must be shown that the clause, properly interpreted or construed, covers the loss which has arisen. The general approach the courts have adopted to the interpretation of exclusion clauses is a strict one, under which the exclusion clause is construed contra proferentem. Therefore, an exclusion clause of 'no warranty express or implied' may not exclude conditions,[11] and an exclusion of liability for breach of implied terms may not exclude liability for breach of express terms.[12]

It must be noted that English law used to adopt a doctrine known as

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7) 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).

8) 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. For the cases holding that a notice is not regarded as having been given where the clause appears on a document that would not be expected to have a contractual effect, *e.g. Chapleton v. Barry UDC* [1940] 1 KB 532 (receipt for hiring deck-chair).

9) 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.

10) See *e.g. J. Spurling Ltd. v. Bradshaw*[1956] 1 WLR 461; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] QB 433. One must note that a clause can be incorporated into a contract by a course of dealing that must be both regular and consistent. See *McCutcheon v. David MacBrayne Ltd.* [1964] 1 WLR 125. Cf. *Henry Kendall & Sons v. William Lillico & Sons* [1969] 2 AC 31.

11) *Wallis, Son & Wells v. Pratt & Haynes* [1911] AC 394.

12) *Andrews Bros (Bournemouth) Ltd. v. Singer and Co. Ltd.* [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 A. Guest (ed.), *op cit.*, at para. 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).

'fundamental breach of contract', under which exemption clauses might be inoperative in the case of such breach.[13] This rule has been disapproved by the House of Lords and it is now established that it should be assimilated into the rules as to construction.[14] That is, the question whether an exclusion clause covers a fundamental breach is a question of construction so that a clearly worded exclusion clause may even cover such a breach. However, 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.[15]

In addition to the above two stages, it must be also noted that there are further Common law rules to control exclusion clauses. The seller 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.[16] 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.[17]

## 2. Control by Statutes

### 1) General

The statutory control of exemption clauses in English law must be examined in light of two overlapping legal regimes; the Unfair Contract Terms Act 1977 (hereinafter UCTA) and the Unfair Terms in Consumer

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

14) *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.

15) R. Bradgate, Commercial Law, 3rd ed., London: Butterworths (2000), at 75; E. McKendrick, Contract Law, Houndmills: Macmillan (2000), at 230 f.

16) *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.

17) *Couchman v. Hill* [1947] KB 554.

Contracts Regulations 1999 (hereinafter the Regulations).[18] The reason for this is that English law has failed to consolidate the new rules, which had to be implemented by virtue of the EC Directive on Unfair Terms in Consumer Contracts,[19] with those already contained in UCTA. As a result there are two separate but overlapping legislative controls applicable to exclusion and similar clauses in contracts even though the two separate controls may generally produce the same results in many respects, but one must note that they differ in some important respects. It is accordingly crucial for the seller seeking to rely on exclusion clauses as to his liability for non-conformity to pass through the double barrier of UCTA and the Regulations. This is not only because of the different tests used but also the different scope of application between them. In UCTA, exemption clauses as to the seller's liability for non-conformity are divided into two categories;[20] clauses always ineffective[21] and clauses subject to the test of reasonablenes s.[22] *Unlike UCTA, which treats different clauses in different ways, the* Regulations control exemption clauses invariably by virtue of the test of fairness.[23]

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18) The Regulations replace earlier regulations made in 1994 which were introduced to implement the EC Directive on Unfair Terms in Consumer Contracts. For discussions on the EC Directive on Unfair Terms in Consumer Contracts or the Regulations 1994, see H. Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts", in: J. Beatson and D. Friedmann (ed.), Good Faith and Fault in Contract Law, Oxford: Clarendon (1997), at 231 ff.; R. Brownsword and G. Howells, "The Implementation of the EC Directive on Unfair Terms", (1995) J.B.L. 243; E. Macdonald, "Mapping the Unfair Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts", (1994) J.B.L. 441; F. Reynolds, "Unfair Contract Terms", (1994) 110 L.Q.R. 1; S. Weatherill, "Prospects for the Development of European Private Law Through "Europeanisation" in the European Court The Case of the Directive on Unfair Terms in Consumer Contracts", (1995) 3 Eur. Rev. of Private Law 307, at 316 ff.; R. Harrison, Good Faith in Sales, London: Sweet & Maxwell (1997), at 699 ff.

19) 93/13/EEC, O.J. No. L. 95, 21.

20) For varieties of exemption clauses, see UCTA s. 13; H. Beale (ed.), *op cit.*, at para. 14-060 ff.

21) UCTA s. 6(2).

22) UCTA ss. 3, 6(3).

23) Regulation 5, 6.

2) UCTA

(1) Clauses always ineffective

If a clause purports to exclude or restrict liability under the implied conditions under the SGA (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),[24] it is always of no effect insofar as the buyer is dealing as a consumer.[25] The buyer deals as a consumer if three conditions are satisfied; first, he is not buying in the course of a business, second, the seller is selling in the course of a business, three, the goods are of a type ordinarily supplied for private use or consumption.[26] The concept of a sale 'in the course of a business' is defined in light of the contractor's status in the particular contract rather than its general status. In R & B Customs Brokers Ltd. v. UDT Finance Ltd., the Court of Appeal held that the buyer only makes a contract 'in the course of a business' within UCTA, either where the purchase was an integral part of the business, or where it is one of a regular kind of contract made by the buyer.[27] In addition to the above three conditions, for the buyer to deal as a consumer, a sale must not be by auction or by competitive tender.[28]

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24) The SGA ss. 13, 14 and 15.

25) UCTA s. 6(2).

26) UCTA s. 12(1). Anyhow s. 14 of the SGA attaches only where the seller sells in the course of a business.

27) [1988] 1 All ER 847 (this case relied on decisionson the meaning of 'in the course of a business'in cases under the Trade Description Act; Davies v. Sumner [1984] 1 WLR 1301; Havering London Borough v. Stevenson [1970] 3 All ER 609). See also Rasbora Ltd. v. JCL Marine Ltd. [1977] 1 Lloyd's Rep. 645; Peter Symons & Co. v. Cook [1981] 131 NLJ 758. Cf. Stevenson v. Rogers [1999] 1 All ER 613 (holding that any sale by a business, whatever incidental or one-off, is deemed to be a transaction 'in the course of a business' under the meaning of s. 14 the SGA). J. de Lacy, "Selling in the Course of a Business under the Sale of Goods Act 1979" (1999) 62 M.L.R. 776; J. de Lacy, "Business Seller's Liability for the Implied Terms under the Sale of Goods Act 1979" (Jan., 2000) Insolv. L. 27.

28) UCTA s. 12(2).

(2) Clauses subject to reasonableness test

Unlike the above category of clauses always ineffective, some clauses in the other category may be valid but only if they satisfy the requirement of reasonableness. In relation to our discussion about the seller's liability for defective goods, clauses subject to the requirement of reasonableness can be divided into two groups; clauses regarding quantitative and qualitative defects.

First, if a clause excludes or restricts the seller's liability about quantitative defects, it is invalid where it does not fulfil the requirement of reasonableness.[29] The requirement applies whether or not the buyer is dealing as a consumer but, if he is not, then it only applies where the buyer is dealing on the other party's 'written standard terms of business'.[30]

Second, if an exclusion clause relates to the implied conditions in ss. 13-15 of the SGA, but the buyer is not deemed to deal as a consumer within the scope of s. 6(2) of UCTA, the reasonableness requirement applie s.[31] Unlike the exclusion clause as to the seller's liability about quantitative defects, it is immaterial whether the buyer is purchasing on the other party's written standard terms of business.[32]

The reasonableness requirement, strictly speaking, differs according to whether an exclusion clause is related to quantitative and qualitative

29) UCTA s. 3(2).

30) UCTA s. 3(1). Cf. *McCrone v. Boots Farm Sales Ltd.* [1981] SLT 103 (a Scottish case on the meaning of the equivalent phrase 'standard form contract' where Lord Dunpark said that the term is wide enough "to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proposer applies without material variation to contracts of the kind in question"). Although the object of the concept of standard terms is in principle to identify contracts which are not individually negotiated, a buyer may deal on standard terms even where there has been negotiation, which may depend on the question of fact. See St Albans City and District Council v. International Computers Ltd [1996] 4 All E.R. 481; see also *Salvage Assn. v. Cap Financial Services Ltd* [1995] F.S.R. 654; The Flamar Pride [1990] 1 Lloyd's Rep. 434.

31) UCTA s. 6(3).

32) P. Atiyah, J. Adams and H. MacQueen, The Sale of Goods, 10th ed., London: Longman (2001), at 243; A. Guest (ed.), *op cit.*, at para. 13-083.

defects. As to the former, 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.[33] Regarding the latter, there are guidelines set out in Schedule 2.[34] 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;[35] (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term;[36] (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;[37] (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,

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33) UCTA s. 11(1).

34) UCTA s. 11(2). 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).

35) *Woodman v. Photo Trade Processing Ltd.* (7 May 1981, unreported), cited in Lawson, "The Unfair Contract Terms Act: A Progress Report" (1981) 131 N.L.J. 933, at 935. In this case, a clause in a contract for the processing of a roll of photographic film which provided the limitation of the developer's liability to the cost of replacement of the unprocessed film was held unreasonable where the customer claimed damages for the loss of pictures of a family wedding. The court was influenced by the fact that the customer had little choice: few film processors accepted greater liability than the defendants and the industry code of practice required processors to offer a two-tier service whereby the processor would accept greater liability on payment of an increased price.

36) 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 (a clause requiring notification of rejection within 7 days in a contract for the supply of a printing machine was held ineffective partly because of its lack of clarity as to what was required).

37) *R.W. Green Ltd. v. Cade Bros. Farms* [1978] Q.B. 574 (a short time limit on claims on a bulk sale of seed potatoes was held unreasonable as to latent defects).

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.38) Although Schedule 2 is applicable strictly only to the cases of the exclusion clauses as to the implied conditions, one must note that the courts are likely to consider the guidelines in other cases.39)

3) Regulations

The Regulations impose two requirements; the requirement that the terms be 'plain, intelligible language' which applies only to any written term40) and the requirement of fairness which applies to any term (whether written or oral).41) In relation 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.42) This effect does not seem to add more than the principle of contra proferentem that has been long recognised in English law. The particular importance of the Regulations in English law, concerning exclusion clauses as to the seller's liability for non-conformity, 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.

As to the scope of Regulations, it applies to any contract made between a 'seller or supplier' and 'consumer', subject to certain exclusions.43) 'Consumer' is defined as 'a natural person who, in contracts covered by

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38) UCTA s. 11(4). Cf. *Salvage Assn. v. Cap Financial Services Ltd*[1995] F.S.R. 654 (a clause limiting liability to 25,000 was held unreasonable when the party relying on the clause had indemnity insurance of 5,000,000).

39) *Stewart Gill Ltd. v. Horatio Myer & Co. Ltd.* [1992] QB 600; 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 R. Bradgate, *op cit.*, at 86; H. Beale, *op cit.*, at 235; A. Guest (ed.), *op cit.*, at para. 13-085; H. Beale (ed.), op cit., at para. 14-082.

40) Regulation 7(1).

41) Regulation 5(1).

42) Regulation 7(2).

43) Regulation 4(1).

these Regulations, is acting for purposes which are outside his trade, business or profession'.[44] 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'[45] (but note that insofar as ss. 13-15 of the SGA are concerned, such goods will be still within UCTA),[46] and second, it covers the consumer's purchase at an auction sale or by competitive tender.[47] 'Seller or supplier' for the purpose of the Regulations is meant 'any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.[48] This definition could be also wider than that of UCTA in that, if the R & B cas e[49] is applied to the question whether the seller acted 'in the course of a business' under UCTA,[50] it may cover the case, for instance, where a company sells off one of its old cars because the sale may not be 'in the course of a business' under UCTA[51] (but note that so far as ss. 13-15 of the SGA are concerned, it may be still caught by UCTA).[52] In addition, one must also note that the scope of the Regulations is wider in that unlike UCTA,[53] it does not require that the contract as a whole be on standard

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44) Regulation 3(1).
45) UCTA s. 12(1)(c).
46) UCTA s. 6(3).
47) UCTA s. 12(2). See H. Beale (ed.), *op cit.*, at para. 15-017; P. Atiyah et al, *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 would not be a 'consumer' under the Regulations. H. Beale (ed.), *op cit.*, at para. 15-017; R. Bradgate, *op cit.*, at 86; J. Beatson and D. Friedmann (ed.), *op cit.*, at 238.
48) Regulation 3(1).
49) [1988] 1 All ER 847.
50) It is submitted that the position in English law is not clear because R & B case concerns the status of the buyer rather than the seller. R. Bradgate, *op cit.*, at 81 ff.
51) *Id*, at 89. However, if Stevenson v. Rogers case 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 the Regulations and UCTA. R. Bradgate, *op cit.*, at 89.
52) UCTA s. 6(3).
53) However, it is also narrower in that while UCTA can be applied to both negotiated and non-negotiated terms in consumer contracts, the Regulations

terms;[54] the Regulations apply to individual terms and it expressly stipulates that the fact that an individual term has been negotiated shall not impede the application of the Regulations to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.[55]

Regarding the test of fairness, the Regulations set 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.[56] In assessing the 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.[57] 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.[58] Although it is not expressly stipulated in the

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are applicable only to terms which have not been 'individually negotiated', as defined in Regulation 5(2). R. Bradgate, *op cit.*, at 91.

54) R. Bradgate, *op cit.*, at 91. Thus, the Regulations do not raise the difficulties under s. 3 of UCTA where a standard term is used as a basis for negotiation leading to variation of some of its terms. Id. Cf. H. Beale (ed.), *op cit.*, at paras. 14-069, 15-024.

55) Regulation 5(3).

56) Regulation 5.

57) Regulation 6(1). For the detailed explanations on these factors, see H. Beale (ed.), *op cit.*, at para. 15-039 ff.

58) Regulation 6(2) cf. *Director General of Fair Trading v. First National Bank plc.* [2000] 2 All ER 759 (it was held that a term in a consumer credit agreement which provided that, in the event of default by the consumer, interest should continue to be payable on any outstanding sums at the contract rate and that interest on the debt would continue to run after any judgment, did not define the main subject matter because it related to default interest and did not concern the adequacy of the price or remuneration); *Falco Finance Ltd. v. Gough* [1999] C.C.L.R. 208. Although Regulation 6(2) may possibly involve the implied conditions under the SGA, it is submitted that it is unlikely to exclude the conditions from the test of fairness because otherwise the Regulations may lose their substantial power to control unfair terms. R. Bradgate, *op cit.*, at 91. One must note that, in any case, the exclusion of the core terms applies only if the term in question is expressed in plain and

Regulations, the requirement of plain and intelligible language in any written term of a contract[59] 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.[60] In addition, the Regulations contain an 'indicative and non-exhaustive list(s) of the terms which may be regarded as unfair'.[61] 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.[62]

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'.[63] Although there is little guidance as to the requirement in the Regulations, the recitals to the EC Directive on Unfair Terms in Consumer Contracts 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 consumer, and (d) whether the seller or supplier has dealt fairly and equitably with the consumer.[64] 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 Schedule

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intelligible language (Regulation 6(2)) and the terms can be taken into account when assessing the fairness of individual terms covered by the Regulations. R. Bradgate, *op cit.*, at 92; H. Beale (ed.), *op cit.*, at para. 15-027.

59) Regulation 7.

60) H. Beale (ed.), *op cit.*, at para. 15-071; H. Beale, *op cit.*, at 248; cf. UCTA Schedule 2(c). However, one must note that it may overlap with the factor of "all the circumstances attending the conclusion of the contract" in Regulation 6(1). H. Beale (ed.), *op cit.*, at para. 15-041.

61) Regulation 5(5), Schedule 2.

62) The main concern in this thesis that is the seller's liability for non-conformity in quality and quantity draws one's attention in particular to para. 1(b) of Schedule 2.

63) Regulation 6(1). See R. Bradgate, *op cit.*, at 92.

64) Recital 16. These factors were included in Schedule 2 of the 1994 Regulations, which was omitted from the 1999 Regulations because the Schedule was not justified by the text of the EC Directive on Unfair Terms in Consumer Contracts.

2 of UCTA.[65] 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.[66] 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."[67]

## III. Korean Law

### 1. General

The rules on the seller's guarantee liability for non-conforming goods in Korean law[68] are of a non-mandatory nature.[69] Thus, the parties are allowed to insert a clause in the contract to exclude or restrict the seller's guarantee liability and the clause is in principle valid insofar as it is effectively incorporated into the contract and its content is clear.[70] However, if, notwithstanding that the seller is aware of the existence of a defect, he inserts the exemption clause, the clause is void and he is liable for the

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

66) H. Beale (ed.), *op cit.*, at para. 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 the Regulations nor the EC Directive on Unfair Terms in Consumer Contracts provides a rule for the burden of proof of fairness. *Id.*, at para. 15-047.

67) *Id.*

68) Korean Civil Code (hereinafter KCC) Arts. 570 ff.

69) Yun-jik Kwak, *op cit.*, at 254; Eun-young Lee, *op cit.*, at 796; Sang-kwang Lee, "Ha-ja-dam-bo-chaek-im-eoi Ki-bon-moon-jae (The Basic Matters in the Seller's Guarantee liability)", (1998) 5(1) *Bee-kyo-sa-bup* 283, at 309 ff.; Hyung-bae Kim, Chae-kwon-gak-ron (Particulars in Obligatory Law), Seoul: Pak Young Sa (1997), at 349.

70) *Id.*

defect under the seller's guarantee liability[71] because it is deemed to be contrary to the general principle of good faith.[72]

## 2. Statutory Control

The fact that the seller did not know of the existence of a defect does not necessarily render that the exemption clause is always valid because it must also pass through statutory control of standard terms under by the Korean Act on Regulation of Standard Terms of 1986 (hereinafter KARST).[73] The clause falls within the scope of the application of KARST if;[74] first, the standard term forms a part of the contract,[75] second, it has not been individually negotiated,[76] third, it has been pre-formulated in advance,[77] and fourth, it is intended to be incorporated into numerous contracts.[78] One must note that the application of KARST does not depend on whether the

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71) KCC Art. 584.

72) Yun-jik Kwak, op cit., at 254. Cf. Hyung-bae Kim, op cit., at 349 (in this case the seller will be liable not only for the defect under the seller's guarantee liability, but also for the breach of his duty to disclose the existence of a defect).

73) For the general explanation of KARST, see Sang-jeong Lee, "Yak-kwan-kyu-jae-bup So-go (A Study on Regulation of Standard Term Act)", (1989) 1 *So-bi-ja-saeng-hwal Yeon-koo* 48.

74) KARST Art. 2(1).

75) It is not important whether it forms a part of main or auxiliary obligations. Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", (May, 1987) 317 *Sa Bup Haeng Jeong* 43, at 43.

76) Insofar as a term has been subject to negotiation, it is out of the scope of KARST even if the term has not been changed in the process of negotiation. However, it is crucial that the buyer must have a real opportunity to scrutinise and influence the substance of the term. Young-gap Kim, "Yak-kwan-kyu-jae-eoi Bup-ri-wa Soo-jeong-hae-seok-eoi Moon-jae (The Legal Theories on Standard Terms Regulations and the Matters of Modification Interpretation)" (1997) 46(1) *Bup-jo* 80, at 86 f.

77) It does not matter who drafted the term, whether it be the supplier, a trade association, or even a commission representing the interests of persons usually confronted with standard terms of that kind. What is important is that the term has been introduced into the contract by one party. See Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 43.

78) The intent to use the term as a standard one in numerous contracts is sufficient, but the term for one-off contract is out of the scope. *Id.*; Young-gap Kim, *op cit.*, at 85 f.

buyer is a consumer or a businessman,[79] and the fact that a standard term has been individually negotiated does not necessarily mean that the remainder of the contract is not governed by KARST.[80]

Given that a clause to exclude or restrict the seller's guarantee liability falls within the scope of KARST, there are three relevant hurdles for the seller to overcome to get the clause to be effective.

First, the clause is not deemed to be incorporated into the contract where the seller fails to fulfil the duties to give notice of[81] or to elucidate the substance of the clause.[82] As regards notice, it must be given in a reasonable manner the parties could expect in a transaction in question in order to provide the buyer a reasonable opportunity to obtain knowledge of the clause.[83] However, even if it is reasonably expected that notice may be given by other means than tendering a written standard term, the seller is still obliged to provide an exemplar of the term which can be kept by the buyer where the buyer requests it.[84] It is also required that the contents of the terms be written in conspicuous and comprehensible language.[85] Regarding the duty to elucidate, one must note that it is limited to the essential part of the contract and it is not required where the nature of the contract makes it significantly difficult.[86] The crucial test to decide the

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79) *Id.*

80) *Id.*

81) KARST Art. 3(1).

82) KARST Art. 3(2). The buyer who has signed a document including the clause may still claim that it was not effectively incorporated on the basis of the seller's failure to give notice or to elucidate the substance of the clause.

83) KARST Art. 3(1). It could be done by tendering the written standard terms, by oral statements or by posting a conspicuous notice at the place the contract is made. Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 45.

84) KARST Art. 3(1).

85) Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), Seoul: Pak Young Sa (1994), at 117. Cf. The Korean Supreme Court Case, 9/3/1999, 98 Da 43342 (where a party tendered a document that generally and abstractly introduces the contents of insurance, it was held that he did not fulfil his duty to explain unless the other party knew or could have been aware of them).

86) KARST Art. 3(2).

essential part of the contract is whether the buyer would have entered into the contract had he been given an explanation.[87] However, the duty of explanation is not applied where the buyer already knew or could not have been unaware of the clause.[88] In addition, an exclusion clause in a written document cannot be incorporated where it is overridden by an individually negotiated agreement that is inconsistent with the clause.[89]

Second, the clause cannot be effective by the operation of the following rules; that a standard clause must be both objectively and consistently interpreted in light of average customers,[90] that it must be interpreted in accordance with the principle of good faith,[91] and that ambiguous clauses are construed against the drafter.[92]

Third, where a clause excludes or restricts the seller's guarantee liability, or a clause makes the liability or its enforcement subject to restrictive or onerous conditions, the clause is not deemed to be enforceable 'unless there is a reasonable ground for insertion of the clause'.[93] In addition, if the

87) Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), *op cit.*, at 118; Oh-seung Kwon, So-bi-ja-bo-ho-bup (Consumer Protection Law), Seoul: Bup Moon Sa (1997), at 117; Dong-hoon Kim, "Yak-kwan-kyu-jae-eoi Pan-rae-wa-e-ron (Cases and Theories on Standard Terms Regulations)" (1997) 42(12) *Ko-shi-gae* 115, at 117. See e.g., the Korean Supreme Court Cases, 12/12/1995, 95 Da 11344 25/6/1996, 96 Da 12009. Cf. For the insurance cases where it was held a certain clause was not incorporated due to the drafter's failure to explain, see the Korean Supreme Court Cases, 12/4/1996, 95 Da 4893 8/3/1996, 95 Da 53546 11/8/1995, 94 Da 52492 14/10/1994, 94 Da 17970 10/3/1992, 91 Da 31883.

88) See e.g., the Korean Supreme Court Cases, 11/5/1999, 98 Da 59842 7/9/1999, 98 Da 19240 9/3/1999, 98 Da 43342 27/11/1998, 98 Da 32564 9/9/1997, 95 Da 45873.

89) KARST Art. 4. Cf. The Korean Supreme Court Cases, 28/3/1989, 88 Da 4645 26/11/1985, 84 DaKa 2543. It is not important whether the agreement is reached orally or in writing. Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 46. However, it does not mean the clause is invalid because it may be restored where the agreement is subsequently found ineffective. Young-gap Kim, *op cit.*, at 92.

90) KARST Art. 5(1). Cf. The Korean Supreme Court Cases, 25/6/1996, 96 Da 12009 26/5/1995, 95 Da 36704 Ji-yeol Son, "Yak-kwan-ae-kwan-han Pan-rae-eoi Dong-hyang (The Trend of Cases Regarding Standard Terms)", (1988) 10 *Minsa-panrae-yoenkoo* 408, at 422.

91) KARST Art. 5(1).

92) KARST Art. 5(2). Cf. the Korean Supreme Court Case, 25/6/1996, 96 Da 12009.

93) KARST Art. 7(3).

goods are sold by sample or by description as to quality or performance, a clause to exclude or restrict the seller's guarantee liability rendered by the sample or the description is invalid insofar as it cannot be shown a reasonable ground for the clause.[94] In determining the existence of a reasonable ground, one must take into account all the relevant circumstance of the transaction in question at the time of contract and all other terms of the contract.[95] For instance, if an exemption clause is offset by a lower price, it may evidence that there is a reasonable ground.[96] However, a lower price does not always constitute a reasonable ground because it must be proved that the loss of the buyer's rights due to the exemption clause was reasonably compensated by the reduced price.[97]

Given that all the above three requirements are satisfied, the question arises whether an exclusion clause of the seller's guarantee liability is always effective. It is related to the matter of the applicability of the general provision under KARST that is the general gauge to assess the fairness of a standard term.[98] On the one hand, some argue that, once the clause has passed a test specifically designed for exclusion clauses of the seller's guarantee liability, it is not justifiable to impose another test by the general provision on the clause.[99] On the other hand, others contend that even if the clause is valid in terms of the specifically designed test, it may be still

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94) *Id.*

95) Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 48. The burden of proof is on the supplier who seeks to rely on the clause. Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), *op cit.*, at 186 f., 209. However, any attempt by the seller to exclude or restrict the buyer's right to rescission rendered by the seller's guarantee liability is unequivocally void. KARST Art. 9(1); Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), *op cit.*, at 264 ff.

96) *Id.*

97) *Id.*

98) KARST Art. 6.

99) Koch/Stübing, AGB, (1977), § 9, Rdn. 6; cited in Eun-young Lee, Yak-kwan-kyu-jae-bup(Regulation of Standard Term Act), op cit., at 191, n. 2. Cf. Prof. Eun-young Lee also stands with this view, but note that the 'reasonable ground' test is in fact executed on the basis of criteria stipulated in the general provision.

invalidated where it infringes the fairness rules stated in the general provision.[100] The rules are that where the clause prejudices the customer in a manner that violates the command of good faith, the clause is deemed unfair.[101] In the case of doubt about the fairness of a standard clause, KARST uses three presumptions to determine when such a clause prejudices the buyer contrary to the general principle of good faith.[102] One is a presumption of unfairness of a standard clause when it creates any unreasonable disproportion to the detriment of the buyer.[103] The test of unreasonable disproportion must be assessed in light of comparison between benefits rendered by the clause to the customer and those to the supplie r.[104] In addition, the test must depend upon what are reasonable interests from the point of view of the run of average customers.[105] Another presumption of unfairness is the cases where a standard clause is so unusual that the buyer could not reasonably expect it.[106] In assessing unexpectedness of a clause, all the relevant circumstances must be taken into account at the time of contract in light of the run of average customers,[107] which includes conspicuousness and comprehensibility of the clause that the court may find crucial.[108] The other presumption is

100) Kyung-hwan Jang, "A Study on the General Provisions of Regulation of Standard Term Act", PhD thesis, The Graduate School of Seoul National University, (1990), at 80 ff.

101) KARST Art. 6(1).

102) KARST Art. 6(2).

103) KARST Art. 6(2-1).

104) Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 47. Cf. Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), *op cit.*, at 185 f.

105) Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 47.

106) KARST Art. 6(2-2).

107) Eun-young Lee, Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act), *op cit.*, at 188 f. Cf. the Korean Supreme Court Cases, 27/12/1994, 93 Da 29396 11/12/1990, 90 DaKa 26553 (the cases show the courts are generally reluctant to judge the unfairness of a clause on the basis of unexpectedness; Dong-hoon Kim, *op cit*, at 120).

108) Kyung-hwan Jang, *op cit.*, at 207 (criticising that this test of unexpectedness is already dealt with in the matter of incorporation and it should not be a part of the unfairness test to control substances of the clause).

concerned with standard clauses that contradict the rights and obligations inherent in the nature of the contract.[109] This presumption applies to the cases where standard clauses eviscerate terms that are material to the contract; a clause to entitle the supplier to render a contractual performance substantially different from what was reasonably expected of the customer at the time of contract.[110]

# Ⅳ. Comparative View and Evaluation

## 1. Comparative View

As was examined, the approaches to control of exclusion clauses in English law and Korean law are similar in general that in order to be effective, the clause is subject to the following tests; whether it is properly incorporated into the contract, whether its proper interpretation covers the loss which has arisen, and whether it is fair or reasonable. There seems no particular difference in the second test in a sense that the construction of the clause is executed in a restrictive way in each jurisdiction, whereas the first and the third test seem to show some dissimilarities.[111]

Regarding the first test, it seems different in that unlike English law, the buyer's signature on a document including a clause in question is not

109) KARST Art. 6(2-3).

110) Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 47 f. This presumption applies, e.g., to a dragnet security clause which has the effect that, as long as any item purchased from the seller is not yet completely paid for, all the other goods bought from the seller serve as security for the open balance and can be repossessed upon default of any payment because the extended possibility of repossession makes it difficult for the buyer to obtain unrestricted possession of the purchased goods.

111) Although there is no requirement in English law that it must be construed by virtue of the principle of good faith, it is unlikely that thorough examination of the cases in English law would produce different results from Korean law.

necessarily a crucial factor to decide whether the clause is incorporated into the contract in Korean law and in that there is no counterpart in English law of the seller's duty to explain the essential part of the contract. However, it seems similar in light of their application of stringent rules requiring the clause to be effectively incorporated into the contract, one of which requires the seller to give the buyer a reasonable notice of the clause.[112)]

In respect of the third test, one needs a further examination, particularly, in the ambit of the application of the reasonableness or fairness test and in the factors to be considered for the test. First, as to the ambit of the application of the reasonableness or fairness test, UCTA seems broader than KARST in that it is not restricted to the terms which have not been individually negotiated. Although the Regulations are similar to KARST in this light, the requirement in KARST that it be intended to be incorporated into numerous contracts has no counterpart in the Regulations. However, given that most standard terms in consumer contracts are generally intended to be incorporated into numerous contracts, this seems to bear no significance in practice. Second, regarding the factors to be considered in defining reasonableness or fairness, the tests of 'unreasonable disproportion' and 'unreasonable ground' under KARST seem similar to the test of fairness under the Regulations in that they appear to focus on imbalance in terms of value for money and all other terms of an agreement. In addition, the test of 'unexpectedness' and 'contradiction of material terms' under KARST and that of 'reasonableness' in UCTA look alike in the respect that they are both most concerned with the matter of the customers' reasonable awareness. The difference is in that, compared to KARST, English law has relatively detailed rules along with the guidelines for the application of reasonableness test under UCTA. However, one must note that the general requirement of good faith in KARST may consider the same guidelines as English law, producing the same results in practice.

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112) For example, both jurisdiction requires the seller to give the buyer a reasonable notice of the clause.

The striking feature of English law from the point of view of Korean law is that any attempt by the seller to exclude or restrict the seller's liability for defective goods in quality is invariably void in consumer sales. In contrast, Korean law must look at the same test of fairness and that of reasonable grounds as in commercial sales. Although it is submitted that those tests must be construed in a stricter way in consumer sales,113) it does not necessarily render the clause always invalid.

## 2. Evaluation

It has been submitted that the problems of fairness associated with the use of standard terms occur in the following cases; first, where the customer is unfairly taken by surprise due to his ignorance of the terms, and second, where even if he knows of the substance of the terms and objects to it, he is met with a take-it-or-leave-it situation.114)

The first case is related to the situations where had the customer been aware of the implications of exclusion clauses, he would not have accepted it or would have taken steps to safeguard his position. Given that the vast majority of customers' complaints about exclusion clauses of the seller's liability for non-conforming goods are likely questions of unfair surprise,115) one's first question should be whether he was aware of the clauses and their implications. However, in light of the useful functions of standard terms for mass-contracts, the test of unfairness does not necessarily require that the clauses provide the customer with individualized information, but it should suffice that they are conspicuous and transparent from the point of

113) Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", *op cit.*, at 48.

114) H. 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.

115) In the present state of empirical knowledge, this proposition can be made only at a guess. See H. Beale, "Unfair Contracts in Britain and Europe", *op cit.*, at 201; J. Beatson and D. Friedmann (ed.), *op cit.*, at 247.

view of the run of average customers.[116] Although both English law and Korean law do not expressly require that the clauses be conspicuous and transparent, English law may protect the run of average buyers from an unintelligible clause because the requirement of conspicuousness and transparency is likely to constitute a factor in assessing the test of unreasonableness under UCTA[117] and possibly the test of fairness under the Regulations.[118] In contrast, it is not clear that the buyers are properly protected in Korean law in relation to an exclusion clause of the seller's liability for non-conforming goods. The reason for this is that it is arguable that the test of unexpectedness in KARST which undoubtedly takes into account the matter of conspicuousness and transparency should be imposed on an exclusion clause of the seller's guarantee liability even after it has satisfied with the test specifically designed for the clause in KARST which does not seem to concern the matter.

The second case is of relevance 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. One of the reasons why one ever strikes down a clause which is well understood but cannot be negotiated rests on feelings that there are, as a matter of social policy, certain rights of which the customer should not be deprived and certain obligations that suppliers should not be able to avoid.[119] This seems true where the law prohibits a clause excluding liability for death and injury resulting from negligence.[120] However, regarding our main concern that is

116) H. Beale, "Unfair Contracts in Britain and Europe", *op cit.*, at 202; J. Beatson and D. Friedmann (ed.), *op cit.*, at 247.

117) UCTA Schedule 2(c); *Stag Line Ltd. v. Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep. 211.

118) Regulation 7.

119) Cf. Law Commission 69, *Second Report on Exemption Clauses in Contracts,* (1975), at para. 146; H. Beale, "Unfair Contracts in Britain and Europe", *op cit.*, at 205.

120) UCTA s. 2(1) cf. KARST Art. 7(1) (it prohibits a clause excluding any legal liability caused by gross negligence or by intention). See H. Beale, "Unfair Contracts in Britain and Europe", *op cit.*, at 205.

an exclusion clause of the seller's liability for non-conforming goods, the question arises whether the same is also true of the rule of English law forbidding a clause excluding certain implied conditions in consumer sales. It has been argued that it may be justified on the ground that cases in which a particular consumer is fully aware of the clause and willing to accept it are so rare that it is better to ban the exclusion clause in every case.[121] In addition, it could be also justified on the basis that a control by virtue of the 'reasonableness' test and its likely uncertainty would weaken the consumer's bargaining position.[122] If one assumes that these justifications are correct, it seems unfortunate in that Korean law does not allow the absolute ban.

In addition, it is unsatisfactory that the reasonableness test under Korean law is not applicable to the terms which have been individually negotiated. This is because there would be no means under Korean law to effectively control a take-it-or-leave-it situation in relation to such negotiated terms.

121) H. Beale, "Inequality of Bargaining Power", (1986) 6 *O.J.L.S.* 123, at 135.

122) Law Commission 24, Exemption Clauses in Contracts First Report, (1969), at para. 73; H. Beale, "Inequality of Bargaining Power", *op cit.*, at 135. Cf. It is also justified as paternalism that even if consumers are willing to take the clause, they should not be allowed to do so because it is not in their real interests. D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power", (1982) 41 *Maryland L. R.* 563.

# V. Conclusion

According to the purposes set at the beginning of this paper, it has investigated the English rules as to the exclusion of the seller's liability for non-conforming goods in comparison with Korean law. It has found that the matters of unfairness associated with exclusion clauses of the seller's liability for non-conforming goods, particularly in standard form, are mostly attributable to unfair surprise or take-it-or-leave-it situations.

On this basis, it argued that any unfairness caused by the customer's ignorance could not be properly corrected under Korean law. This is because Korean law is unclear on the question of whether the test of unexpectedness in KARST which concerns the matter of conspicuousness and transparency should be imposed on an exclusion clause of the seller's guarantee liability for non-conforming goods.

In addition, it contended that the position in Korean law that, unlike English law, it does not absolutely ban a clause excluding or limiting the seller's liability for non-conforming goods in consumer sales does not seem to properly protect the consumers' interests. There are two reasons submitted for this; first, most consumers would not generally enter into a contract providing such a clause, second, the consumer's bargaining position would not be secure with a control by virtue of the 'reasonableness' test.

Furthermore, it asserted that, for the control of a take-it-or-leave-it situation, the reasonableness test under Korean law should be also applicable even to the terms which have been individually negotiated.

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## ABSTRACT

Regulating Exclusion Clauses of the Seller's Liability for Non-Conforming Goods: Comparative Accounts

Lee, Byung Mun

This article primarily concerns the various aspects of the rules to control express terms particularly in standard form which seek to absolve either wholly or in part from the seller's liability for non-conforming goods. It describes and analyzes in detail how English law regulates such terms. In this analysis, it places the following questions; first, whether each jurisdiction treats the seller's liability for non-conformity in quality and quantity as mandatory rules, second, if it does, to what extent it is treated so and third, if not, in what way it controls the seller's attempt to exclude or restrict his liability for non-conformity in quality and quantity. In addition, it attempts to compare the rules under English law with those under Korean law and to evaluate them in light of the discipline of comparative law. In an attempt to evaluate them, it asks the question of whether a solution from one jurisdiction may facilitate the systematic development and reform of another jurisdiction. The evaluation is based upon the idea that the problems of fairness associated with the use of standard terms occur where the customer is unfairly taken by surprise due to his ignorance of the terms, or where even if he knows of the substance of the terms and objects to it, he is met with a take-it-or-leave-it situation.

Key Words : Unfair Contract Terms; Standard Form Contract; UCTA; UTCCR; Exclusion Clauses; Seller's Guarantee Liability