ENFORCEABILITY OF EXEMPTION CLAUSES IN CONSTRUCTION CONTRACTS: A COMPARATIVE STUDY OF APPROACHES IN ENGLAND AND AUSTRALIA

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Exemption clauses are commonly provided in contracts by parties in the construction industry in an attempt to limit their liability for loss or exclude such liability altogether. The operation of exemption clauses in a legal context, however, has proved to have been fraught with great difficulties in both England and Australia. This paper seeks to address the question, “How does the enforcement of exemption clauses under Australian Law differ from the law of England?” A doctrinal legal research approach is used to establish the legal rules relating to the enforceability of exemption clauses in England and Australia. Once established, these rules are then compared and contrasted. The research found that, although the relevant law in both jurisdictions shared a common origin (the traditional English common law), there are now significant differences. These differences are primarily due to statutory regulation of exemption clauses introduced into England but not Australia, and the development and divergence of the Australian common law with respect to interpretation of exemption clauses. This paper provides a useful summary of the law pertaining to exemption clauses and, as such, will be of interest to construction and legal professionals and academics. The comparison of the law between England and Australia with respect to exemption clauses highlights an important debate as to whether freedom to contract should be regulated in commercial contracts.

Keywords: exemption clause, construction contract, contract law, unfair contract terms

INTRODUCTION

As modern construction becomes more complicated, technical and sophisticated this has been reflected in contract documentation used in the construction industry. Parties involved in the construction process face potentially catastrophic losses and therefore often seek to exclude or limit liability for such losses. Werremeyer (2006) noted that construction contracts primarily involve the transfer of risks. Fewings (2013, p267) observed that there are "various techniques in dealing with risks" which include retaining risks, insuring against risks, spreading risks as part of a portfolio or moving away from the activity or "specialising in managing it." There are a number of ways parties may seek to exclude or limit financial losses in a construction contact. One of the most frequently used methods used to exclude or limit such losses in a contract is

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through the use of exemption clauses (ECs). Graw (2008: pp 275-276) defines an EC as a term of the contract inserted to exclude or limit liability, and explains that:

> An excluding term (an exclusion clause) is one that completely excludes one party's liability ... A limiting term (a limiting clause) of much the same nature. However, it does not exclude liability entirely; it merely limits it to a particular fixed or determinable monetary amount.

For the reasons set out above ECs are part of the modern world of construction contracting and therefore understanding of ECs is important for academics and practitioners in construction management. Whilst the idea behind the EC is a relatively simple one of trying to exclude or limit liability, the operation of ECs in a legal context has been shown to be fraught with great difficulties.

Although English and Australian law share the same sources, the current approach of their respective courts shows a difference in their treatment of cases involving ECs. Whilst both countries started with the contemporaneous English common law as a basis, England has since passed the *Unfair Contracts Terms Act 1977* (UCTA), which dramatically altered how the courts deal with EC cases. Whilst Australia has enacted various legislation in the field of consumer protection law, there is nothing as far reaching as UCTA in Australia. This means that despite the historical and traditional links between the laws of England and Australia, UCTA does not apply in Australia and therefore decisions in the Australian courts use the common law as a yardstick in cases concerning ECs. The interpretation of ECs is often problematic and controversial in both countries.

This paper addresses the research question, "How does the enforcement of ECs under Australian Law differ from the law of England?" Using a doctrinal research approach, common law and legislation are considered in each jurisdiction to establish the current set of legal rules pertaining to ECs. As such, court decisions in several legal cases are considered. Although the facts of these cases are not always directly relevant to construction contracts, the legal principles emanating from the decisions are. Further, using a comparative legal research approach, the rules identified in each jurisdiction are compared and contrasted. The paper concludes by summarising the differences between English and Australian law with respect to ECs.

EXEMPTION CLAUSES IN ENGLAND CONSIDERED

There is a dichotomy in the law of contract: on the one hand, there is the doctrine of "freedom of contract" (i.e. the ability to contract on whatever terms one likes) and, on the other hand, the injustice caused by onerous and oppressive contract conditions which may be imposed by contractual parties with dominant bargaining power. Advocates for the freedom of contract justify their approach on the notional basis that "if you don't like the contract terms, then don't enter into the contract". Support for this approach may be found in the words of Forbes J, in *Salvage Associate v CAP Financial Services* [1995] FSR 654, who stated:

> Generally speaking where a party well able to look after itself enters into a commercial contract and with full knowledge of all the relevant circumstances willingly accepts the terms of the contract which provides for the apportionment of financial risks of that transaction, I think that it is very likely that those terms will be held to be fair and reasonable.

A case which upholds the attitude of the judiciary in a construction context can be found in Lord Pearson's speech in *Trollope& Colls Ltd v North West Metropolitan Hospital Board* (1973) 9 BLR 60, where Lord Pearson stated:

> The basic principle [is] that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvements might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied **even if the court thinks some other terms would have been more suitable"** [emphasis added].

This speech encapsulates the argument that the courts will not interfere where the words used are clear and unambiguous.

The counterpoint to this approach, however, is the view that the law ought to take cognisance of unequal bargaining power and oppressive behaviour. Accordingly, the courts throughout the years have tried to steer a middle path, attempting to uphold the parties' rights to make contracts on any terms they choose (as long as the contract is not tainted by illegality) whilst at the same time frowning upon extreme instances of what might be perceived as "sharp practice" or "unconscionability". As such, ECs have long been regarded as controversial and attracted the attention of the courts. For example, as long ago as 1877, the case of *Parker v SE Railway Co* (1877) 2CPD 616 considered the validity of an EC on the back of a left luggage ticket.

In the landmark case of *L'Estrange v Graucob* [1934] 2 KB 394, it was finally established that where a person signs an agreement which includes an EC then that person is bound by it whether or not the person bothered to read the agreement or not. However, the extent of *L'Estrange* was limited by a decision in *Curtis v Chemical Cleaning Company* [1951] 1KB 805 where it was decided that an EC in a signed document is ineffective if the other party has made a misrepresentation. Where a document containing an EC is unsigned, however, the traditional stance of the common law has been to generally require that reasonable and sufficient notice of the EC be given in order that the EC be valid (*Olley v Malborough Court* [1949] 1 KB 532; *Thompson v LMS Railway* [1930] 1 KB 41; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163).

For a number of years it was argued than an EC could not exclude a fundamental breach of contract (see, for example, *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936). This view, however, was rejected in *UGS Finance v National Mortgage Bank of Greece* [1964] 1 Lloyds's Rep 446 (henceforth "*UGS*") on the grounds that such a rule of law interferes with the parties' "freedom of contract" rights. The decision in *UGS* was re-affirmed in the *Suisse Atlantique* [1967] 1 AC 361 and later in *Photo Productions Ltd v Securicor Transport* [1980] AC 827. The latter two cases confirmed the principle that liability for a fundamental breach of contract can be excluded by an EC. However, this principle is affected by a technical rule known as *contra preferentem* (against the preferred) discussed below, and UCTA discussed later.

Where ambiguity in the wording of ECs has rendered their meaning uncertain, the courts have applied the *contra preferentem* rule, thereby interpreting the EC against the interests of the party seeking to rely upon the EC (*Baldry v Marshall* [1925] 1 KB 260; *Houghton v Trafalgar Insurance Co* [1953] 2 All ER 1409; *White v Warwick* [1953] 1 WLR 1285). It should not be thought that *contra preferentem* represents English Law from a by-gone age. As recently as July 2012, in *Markerstudy v Endsleigh* [2009] EWHC 281 (henceforth "*Markerstudy*"), the court had to decide on the meaning and extent of the following passage:

> Neither party shall be liable to the other for any indirect or consequential loss (including but not limited to loss of good will, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with this agreement.

As Robinson (2010) commented:

> It was common ground this clause excluded "indirect and consequential loss" and that, by itself, this was of limited effect as it did not prevent recovery of "*losses which flow naturally from a breach without other intervening cause and independently of special circumstances*".The contentious issue was other heads of loss in the parenthesis. Were they:
>
> - freestanding, so that both direct and indirect loss of goodwill, business, profit and economic loss are excluded. This would be a potent exclusion and would severely hamper Markerstudy's ability to recover; or
> - qualified by the words "indirect or consequential" - i.e. loss of goodwill, business, profit and economic loss is to not be excluded if it flows naturally from the breaches

The judge decided that the latter view was correct and, as a consequence, the EC offered much less protection than Endsleigh had anticipated.

The decision in *Markerstudy* also reflects the traditional view of the English common law that consequential losses may be distinguished from direct losses according to the two limbs of damages in the test of remoteness laid down by court in the landmark case of *Hadley v Baxendale* (1854) 9 Exch 341. In other words, direct losses are to be equated with losses flowing naturally from the breach (the "first limb"), and consequential losses are to be equated to losses which were within the reasonable contemplation of the parties as a probable result of the breach at the time they made the contract (the "second limb").

The *Unfair Contracts Terms Act 1977*

In an attempt to regulate the potential for a contractual party to impose an unduly harsh or unfair EC on the other party, the UK Parliament passed the *Unfair Contracts Terms Act 1977* (UCTA). Adriaanse (2010, p263) observed that, "Despite its name, the *Unfair Contracts Terms Act 1977* ("UCTA") deals with exclusion clauses, and not with terms that are unfair".

UCTA (s 2(1)) provides that any term or notice excluding or restricting liability for death or personal injury is void. UCTA (s 2(2)) further provides that in the case of other loss or damage, exclusions or restrictions of liability are subject to a requirement of "reasonableness". Crucially "reasonableness" is not defined. However, the Act provides the following "guidelines" (in Schedule 2 to the Act) in order to assess reasonableness:

> (a) the strength of the bargaining positions of the parties relative to each other, taking into account among other things) alternative means by which the customer's requirements could have been met;
>
> (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
>
> (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

Despite the guidelines set out above, sometimes the concept of "reasonableness" can be difficult for the courts to deal with. This is demonstrated below in two recent cases involving ECs, namely *The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd* [2012] EWHC 2137 (TCC) (henceforth "*TTPM*") and *Allen Fabrications Ltd v ASD Ltd* (2012) EWHC 2213 (TCC) (henceforth "*Allen*").

***TTPM* and *Allen* considered**

In *TTPM*, the project managers (TTPM) failed to arrange for the formal execution of a construction contract for works known as "H5", which was the provision of bedrooms and other facilities for students at a private boarding school. TTPM had issued a series of letters of intent to the contractor working at the site but crucially had not warned their client of the inherent risks of using letters of intent. The works were completed late and the College (Employer) sought to recover liquidated damages under the contract. Due to the fact that no formal contract had been executed, and no mention of liquidated damages had been made in any of the letters of intent, the College was unable to recover any liquidated damages and therefore sued TTPM alleging professional negligence. TTPM denied negligence and pointed out a condition in their terms of engagement limiting their liability to the amount of their fees (which was £111,321). The College's claim was far higher than the amount paid in fees. TTPM argued that the wording of the EC was clear and, as the parties had equal bargaining power, the EC ought to be considered to be "reasonable".

The judge agreed with TTPM that the wording of the EC was clear, yet he still found it to be unreasonable. TTPM's terms required them to maintain £10 million of professional indemnity insurance (effectively paid for by the College via TTPM's fees), but the EC limited liability to £111,321. In effect this meant that the College was paying for £10 million worth of insurance, which was more or less worthless because liability had been capped at such a low amount. Furthermore, the parties had worked together on two previous projects without this onerous EC being incorporated, yet TTPM had not specially drawn the College's attention to it when it was used in the terms of engagement for the H5 works. For the reasons stated above, the EC in *TTPM* was deemed to be unreasonable and unenforceable.

In *Allen* the works comprised the construction of a two storey workshop. The Client was a boat building company, Bembridge. The main contractors were PB Structures who were responsible for constructing a platform for entry and removal of boats from the workshop. PB Structures sub-contracted construction of the platform frame to Allen. The platform required a steel grating to be placed over the steel frame to take the weight of the boat, trolley and labourers. Allen subcontracted the supply of the gratings to ASD.

In September 2006 an employee of Bembridge was standing on the platform pushing a boat into the workshop when the grating gave way. The employee fell 3.4 metres and the employee was severely injured which left him incapacitated. Bembridge did not contest the employee's claim and paid out £7 million in compensation. Bembridge sought contribution from various parties including PB Structures which produced a "domino effect", i.e. PB Structures sued Allen who, in turn, sued ASD alleging that the latter, as suppliers of the grating, failed to supply the correct number of fixings and /or failed to advise Allen on the correct method of fixing.

Counsel for ASD argued that it had no contractual obligations to Allen other than supply and that they (ASD) sought to rely on their standard terms and conditions which contained the following:

> We are not liable for any other loss or damage (including indirect or consequential loss, loss of profits or loss of use) arising from the contract or the supply of goods or their use even if we are negligent.
>
> Our total liability to you (from one single cause) for damage to property caused by our negligence is limited to one million pounds.
>
> For all other liabilities not referred to elsewhere in these conditions our liability is limited in damages to the price of the goods.

Allen sought to prove that the ECs above were "onerous" and as such that they were required to be specifically brought to Allen's attention. The inference was that ASD's ECs were "unreasonable" and therefore ought to be stuck down by UCTA. The judge rejected this argument making the point that, having conducted business together over 250 times, Allen must have been sufficiently aware of ASD's terms. The judge also noted that Allen's standard terms contained similar wording to ASD's and, therefore, could not be construed as being unreasonable. Therefore ASD's contribution was limited in this case to the purchase price of the goods i.e. £705. The judge also noted that Allen was adequately protected by insurance.

The two recent cases discussed above show that despite UCTA's guidelines, the courts still have problematic issues to deal with when deciding "reasonableness".

EXEMPTION CLAUSES IN AUSTRALIA CONSIDERED

To consider the use of contractual ECs in Australia, it is necessary to categorise contracts into two types:

- Contracts for the supply of goods or services to a consumer which are covered by the Australian Consumer Law (*Competition and Consumer Act 2010 –* Schedule 2); and
- All other commercial contracts.

Contracts for the supply of goods and services to a consumer

The *Australian Consumer Law* ("ACL") aims to protect consumers who have entered into contracts by implying certain "guarantees" into contracts for the supply of goods and services such as, amongst others: guarantees relating to title (s 51), undisturbed possession (s 52), undisclosed securities (s 53), acceptable quality (s 54), fitness for purpose (ss 55 & 61), and due care and skill (s 60).

The ACL (s 64) renders void any contractual term that purports to exclude, restrict or modify any of the guarantees implied into such contracts with consumers. However, where the contract is for goods or services not of a kind ordinarily acquired for personal, domestic or household use or consumption, the supplier is allowed to limit its liability as prescribed in the ACL (s 64A (1) and (2)). Such limitation, however, is subject to it being fair or reasonable for the person who supplied the goods or services to rely on the limiting term of the contract (s 64A(3)). Notably, the test to assess reasonableness set down by the ACL (s 64A(4)) is almost identical to that used by UCTA, as discussed above, in England.

Commercial Contracts

In order to establish the enforceability of ECs in contracts other than those with a consumer covered in the ACL, it is necessary to consider Australian common law. The Australian common law adopted many of the English common law fundamental principles with respect to ECs. For example,

- ECs must be contained within documents which are contractual (*Causer v Browne* [1952] VLR 1; *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749; *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661);
- Reasonable steps must be taken to bring the EC, and its contents, to the notice of those against whom the clause may be used before or at the time the contract is entered into (*Oceanic Sun Line Special Co Inc v Fay* (1988) 165 CLR 197); and,
- Generally, persons are bound by ECs in contractual documents which they have signed (Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] 218 CLR 471; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165).

Despite these common principles, the fundamental difference between Australian and English law is that there is no general requirement for an EC to satisfy a statutory test of reasonableness in Australia as there is under UCTA in England. As such, courts in Australia will generally seek to uphold any clearly drafted ECs which parties, regardless of bargaining power, have freely agreed in their contract. In other words, Australian courts do not have the obligation, or discretion, to strike an EC out of a contract solely on the basis that it appears unfair to the party against whom it is being used. Having said this, the Australian courts view ECs with caution and, therefore, have been all too willing to limit their application by:

- placing a heavy burden on the party attempting to rely on the clause to show that the exclusion term is part of the contract;
- construing any ambiguity in the clause against the party relying on the clause (the *contra proferentum* rule); and,
- interpreting the clause strictly according to the precise meaning of the wording.

The current common law principle with respect to the construction of ECs was laid down by the High Court of Australia in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510-511 (henceforth "*Darlington*"), as follows:

> the interpretation of an exclusion clause is to be determined by construing the clause ***according to its natural and ordinary meaning***, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra preferentem in case of ambiguity. [emphasis added]

In *Darlington*, Delco instructed a commodity broker to engage in commodity futures dealings on its behalf. The broker engaged in dealings described a 'day trading' purporting to act on behalf of Delco, and exposed Delco unduly suffering huge losses. Delco had, in fact, not authorized day trading under the contract and sued for $279,715. The broker attempted to rely on two exclusion clauses in the contract:

Clause 6 – which absolved the broker of responsibility for any loss arising in any way out of trading activity undertaken on behalf of [Delco] whether pursuant to the agreement or not.

Clause 7 – which limited the liability of the broker in respect of any claim arising out of or in connection with the relationship established by the Agreement or any conduct under it or any orders or instructions given to $100.

The court held that read in context, the words of clause 6 plainly (according to their natural and ordinary meaning) refer to trading activity undertaken by the broker for Delco with Delco's authority, whether pursuant to the Agreement or not. Consequently, the court found that clause 6 should not apply in these circumstances because it was not consistent with the intention of the parties for unauthorized trading to be considered as being 'undertaken on behalf' of Delco. However the court considered that it was consistent with the intention of the parties for unauthorized trading to be considered as being 'in connection with the relationship' and therefore within the scope of clause 7. Therefore, the broker's liability was limited to $100 in respect of each of the unauthorised trades.

Despite the Australian courts cautious approach to interpretation of ECs, two recent decisions (*Owners Strata Plan 62930 v Kell & Rigby Pty Ltd* [2009] NSWSC 1342; *Lane Cove Council v Michael Davies & Associates Pty Ltd & Ors* [2012] NSWSC 727) have held that the words of a clause in a retainer agreement (for engineer and architect firms respectively) which limited liability "whether under the law of contract, tort ***or otherwise***" [emphasis added] were wide enough in their ordinary meaning to limit liability for a claim under statute – specifically for misleading or deceptive conduct under the TPA (now the ACL). In both cases, the court found that the clause did not amount to a contracting out of the TPA (which is forbidden under the legislation), but simply reflected the parties intentions to impose temporal and monetary limits on the damages that may be awarded under statutory provisions.

The Australian courts have never adopted an approach that forbids contractual clauses which exclude liability for fundamental breach of contract. In this respect, the courts have always upheld the parties' right to freedom of contract. The Australian approach, much like the one eventually reached by the English courts (as discussed above), is to decide whether the words of the exclusion clause read in their context and circumstances, and given their precise meaning, are wide enough to exclude liability for the fundamental breach that has occurred (*City of Sydney Council v West* (1965) 114 CLR 481; *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp. Berhad* (1989) 167 CLR 219).

Traditionally, with respect to clauses excluding liability for consequential loss, the Australian common law has followed the English approach (as discussed above) that consequential losses equate to those falling within the second limb of the test for remoteness in *Hadley v Baxendale* (1854) 9 Exch 341. However, in its 2008 decision in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26 (henceforth "*Peerless*"), the Victorian Court of Appeal found the English position to be "flawed" (*Peerless* at [87]). Instead, in defining consequential loss, Nettle JA (*Peerless* at [87]) preferred a distinction

> between 'normal loss', which is loss that every plaintiff in a like situation will suffer, and 'consequential losses', which are anything beyond the normal measure, such as profits lost or expenses incurred through breach.

The *Peerless* decision is highly significant in that it has the effect of expanding the definition of consequential loss in the context of ECs. As Nettle JA explained, under this definition, "some 'consequential loss' may well fall within the first rule in *Hadley v Baxendale* as loss arising 'naturally', ie. according to the usual course of things,

from the breach of contract." The *Peerless* decision has subsequently been followed by the New South Wales Court of Appeal and the South Australian Supreme Court in *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd* [2009] NSWCA 224 and Alstom Ltd v Yokogawa Australia Pty Ltd and Anor (No 7) [2012] SASC 49 (henceforth "*Alstom*") respectively.

In *Alstom*, Bleby J explained:

> To limit the meaning of indirect or consequential losses and like expressions, in whatever context they may appear, to losses arising only under the second limb of *Hadley v Baxendale* is, in my view, unduly restrictive and fails to do justice to the language used. The word "consequential", according to the Shorter Oxford English Dictionary means "following, especially as an effect, immediate or eventual or as a logical inference". That means that, unless qualified by its context, it would normally extend, subject to rules relating to remoteness, to all damages suffered as a consequence of a breach of contract.

Thus, at least in Victoria, New South Wales and South Australia, ECs which exclude liability for consequential loss are likely to have a wider coverage than a similar term in English law.

THE CONSTRUCTION OF LIMITATION VERSUS EXCLUSION CLAUSES

The English approach to limitation clauses was stated by Lord Wilberforce in *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd* [1983] 1 WLR 964 at 966 as follows:

> Clauses of limitation are not to be regarded with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.

In the same case, Lord Fraser stated:

> Such [limiting] conditions will of course be read contra proferentum and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses.

This position was affirmed by the House of Lords in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737.

Such an approach has not been adopted by the Australian courts. In Australia limitation clauses are construed by the courts in exactly the same way as exclusion clauses (see, for example, *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36) according to the principle set out in *Darlington* (as discussed above). The rationale behind the court's reasoning for such equal treatment is that "a limitation clause may be so severe in its operation as to make its effect virtually indistinguishable from that of an exclusion clause." (*Darlington* at 511).

Koffman and Macdonald (2007: pp197-198), however, have observed that some support for a move towards the Australian position with respect to limitation clauses might be found in some English decisions. They state:

> In HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349 Lord Hoffmann emphasized that construction is a matter of looking for the parties' intention. He referred to Lord Fraser's statement in Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd (1983) as to the distinction to be made between limitation and exclusion clauses and doubted that Lord Fraser had been intending to make a 'mechanistic'

rule (at [63]). Also, in BHP Petroleum v British Steel [2000] 2 All ER (Comm) 133 at [43] Evans LJ favoured the single line that:

> 'The more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the court's approach should be in requiring that clause should be clearly and unambiguously expressed.'

CONCLUSION

The traditional English common law position with respect to ECs has generally been one which upholds the contractual parties' rights to freedom of contract; in other words, as long as an EC is well drafted and unambiguous, under the common law it is likely to be valid. On the other hand, where there is ambiguity in the wording of an EC, the traditional English common law position has been to construe the clause *contra proferentem* (i.e. against the interests of the party seeking to benefit from the EC). This traditional English common law position was adopted by the Australian courts.

The English law with respect to the enforceability of ECs, however, has since been regulated by legislation in the form of UCTA. Under UCTA, in order for an EC to be effective in England, it must be deemed to be reasonable in accordance with the reasonableness test laid down in the legislation. This gives the English courts the power to interfere with the parties' right to freedom of contract in circumstances where the court believes the EC is unreasonably onerous or harsh to one of the contractual parties. Consequently, UCTA provides the scope for parties to mount challenges to ECs in court even if they are clearly drafted. However, whilst UCTA provides an avenue for the courts to rectify any perceived commercial injustices with respect to the operation of ECs, the concept of reasonableness as set out UCTA guidelines can often be difficult for the courts to deal with.

With the exception of contracts for the supply of goods and services to consumers, there is no statutory regulation on the enforceability of ECs in Australia. As such, with respect to ECs, the Australian law continues to uphold freedom of contract in commercial contracts, even in circumstances where operation of the EC appears to be unreasonably onerous or harsh on one of the contractual parties. This being said, the Australian courts do approach the interpretation of ECs cautiously. In addition to the traditional application of the *contra proferentum* rule, since the *Darlington* decision in 1986, Australian common law has consistently interpreted the wording of ECs strictly according to its natural and ordinary meaning in the light of the contract as a whole.

Furthermore, the approach of the Australian common law has diverged from the traditional English common law with respect to the construction of limitation clauses as opposed to exclusion clauses, and the definition of consequential loss in the context of ECs. The English approach appears to judge limitation clauses to less exacting standards than exclusion clauses, whereas the Australian approach does not differentiate between the two. The Victorian, New South Wales and South Australian courts have all recently widened the scope of ECs for consequential loss, such that a far broader category of damages may be categorised as consequential loss than under the traditional English common law position.

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