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Question 1

Issue

In the assessment of legal principles governing exclusion clauses in contractual dealings, were the exclusion and limitation clauses properly incorporated?

Legal perspective

In contractual agreements where exclusion or exemption clauses have been incorporated, it will be construed to have the creation of the contract, and the contractual parties shall be bound by its terms and clauses.[1] Importantly, these clauses are binding to the contracting parties regardless of the fact that the concerned entities have read and understood the contractual contents.[2] Nonetheless, this doctrine can only be inapplicable if either party influenced the conclusion of the contract through misrepresentation.[3] Correspondingly, for the exclusion clause to have a desired intended effect on the contract, both parties must make it clear that such terms indeed form part of the agreement.[4]

Fundamentally, in situations where exclusion clause is incorporated in a contract, it is reasonable that adequate notice must be made concerning the incorporation of such a clause as indicated in *Olley v Marlborough Court*.[5] As posited in *Thompson v LMS Railway*[6] the notice in relation to the exclusion clause ought to be adequately reasonable for it to be enforced.[7] Nevertheless, actual notice of the clause does not need to be issued. Devoid

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[1] *L'Estrange v Graucob* [1934] 2 KB 394
[2] Ibid
[3] *Curtis v Chemical Cleaning Co* [1951] 1 KB 805
[4] *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Parker v SE Railway Co* [1877] 2 CPD 416
[5] [1949] 1 KB 532
[6] [1930] 1 KB 41
[7] R. G. Lawson, E*xclusion Clauses and Unfair Contract Terms* (Sweet & Maxwell, 2011) 117

of a sufficient notice accompanying the exclusion clauses a prior regular itinerary of transactions between the contracting parties will be considered a sufficient notice as illustrated in *McCutcheon v MacBrayne*.[8] Conversely, there are different standards when it comes to a transaction between an undertaking and a consumer and that between businesses.[9] Remarkably, as articulated in *Hollier v Rambler Motors*[10] commercial dealings between businesses often assume a lower standard if prior transactions are used in lieu of an adequate notice regarding an exclusion clause. This position is based on the presumption that a private consumer is asymmetrically disadvantaged when an exclusion clause is included in a contract. Equally, as stated in *British Crane Hire v Ipswich Plant Hire*[11] a trade custom can be used in place of course of dealing or adequate notice. The assumption here is that individuals engaging in a particular business are presumed to be well versed in the customs of doing such trade.

It is not lost that the courts are under a duty to abide by the doctrine of privity of contract as dictated in *Scruttons v Midland Silicones*[12] taking cognisant of recognised rules of construction interpretation of exclusion clauses.[13] For instance, in scenarios where an exclusion clause raises uncertainty, the court would invoke the *contra proferentem* doctrine as shown in *Baldry v Marshall*[14] by interpreting the clause against the party that incorporated it in the contract.[15] In addition, if the exclusion clause attempts to exclude or limit liability for negligence, the reasoning in *White v John*

[8] [1964] 1 WLR 125
[9] R. G. Lawson, *Exclusion Clauses and Unfair Contract Terms* (Sweet & Maxwell, 2011) 17
[10] [1972] 2 AB 71
[11] [1974] QB 303
[12] [1962] AC 446
[13] Ewan McKendrick, *Contract Law* (Springer, 2017) 122
[14] [1925] 1 KB 260; *Houghton v Trafalgar Insurance Co. Ltd* [1954] 1 QB 247.
[15] Ewan McKendrick, *Contract Law* (Springer, 2017) 229

Warwick[16] demands that such words must be apparent and devoid of any ambiguity.

Markedly, courts are under a duty to weigh the effects of the exclusion clause that has been included in the contract. As put forward in *Evans Ltd v Andrea Merzario Ltd,*[17] any exclusion clause that is found to be repugnant or incompatible with the main objective of the contract will be struck off.[18] Notably, there has been a controversial inclusion of the doctrine of the rule of law in so far as exclusion clauses are concerned. This has been so because common law often favours the doctrine of freeness to engage in contract and the overall objective of the contracting parties. Importantly, the court in *UGS Finance v National Mortgage Bank of Greece* stated that these two doctrines could only be overlooked if the exclusion clause results in a fundamental breach based on the prevailing circumstances.[19]

Correspondingly, exclusion clauses are often considered unfair to one party to a contractual agreement. Statutorily, the Unfair Contract Terms Act of 1977 in its superficial form governs the transactions between traders and consumers.[20] However, the court may interpret the statute to involve transactions between traders taking cognisant of prevailing circumstances as exemplified in *Peter Symmons & Co v Cook*[21] and *R & B Customs Brokers v United Dominions Trust Ltd.*[22] As stipulated under section 2(1), exclusion clauses that attempt to either limit or exclude negligent liability either by use of notice or a trade custom will be deemed repugnant and inapplicable. Notably, subsection 2 intimates that exclusion clause limiting or restricting

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[16] [1953] 1 WLR 1285
[17] [1976] 1 WLR 1078; *Glynn v Margetson* [1893] AC 351
[18] R. G. Lawson, *Exclusion Clauses and Unfair Contract Terms* (Sweet & Maxwell, 2011) 104
[19] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen* Centrale [1967] 1 AC 361; *Photo Production Ltd v Securicor Transport* [1980] AC 827
[20] Section 1(3) and s12(1) Unfair Contract Terms Act 1977
[21] [1981] 131 NLJ 758
[22] [1988] 1 WLR 321

liability in negligence can be excusable if either the notice or custom is construed as consistent with the prerequisites of reasonableness. Likewise, as explained in section 3, a contracting party will be prohibited from incorporating and enforcing exclusion clauses if such clauses are deemed to be restricting a party from contractual breach if the subject matter is a consumer product. This position will be enforced even if the transaction is between businesses as the products transacted will ultimately be transferred to the consumer. Exclusion in this aspect can only be allowed if it satisfies the prerequisite of reasonableness.

According to section 11(1), the prerequisite of reasonableness is not absolute or preset and has to be weighed by prevailing circumstances. The circumstances in question are; the bargaining ability of the parties in contract, inducement to contract, understanding the nature of the contract, and whether the goods were custom made for the customer. Moreover, section 13(1) prevents a party from masking exclusion clauses.

Application

Uniquely, contracting parties are bound by the contractual clauses regardless of the fact that they have read and understood the contract. Therefore, the excuse that Isra whom was entrusted to negotiate the contract with Petty Production that she cannot remember the clauses will not be admitted. Markedly, the only excuse that will be accepted is if there was a misrepresentation. Equally, Petty production intended that the exclusion clause be effective by including it in the contract. Importantly, the inclusion of an exception clause is not sufficient if it does not bear an adequate prior notice or it is the basis of the industrial custom. These prerequisites must be consistent with the condition of reasonableness. In this respect, there is no sufficient evidence that adequate notice was issued. In lieu of that, it is unlikely that a machinery manufacturing company would want to limit

liability based on its own breach. Obviously, negligently manufactured machinery have a tendency to cause injuries and deaths.

Comparatively, the contractual agreement between Gilmour and Northern raises the question of interpretation of exclusion clauses. For Gilmour to rely on exclusion clauses it inserted on the contract, it must abide by the prerequisites or reasonableness and certainty. If the clauses raise the problem of vagueness, it will be interpreted *contra proferentem* against Gilmour. Further, the clauses will have to be struck off if it is considered repugnant and inconsistent with the main objective of the contract. The objective in this instance is that the goods are consistent with the description and are of merchantable quality. Moreover, if Northern is the consumer or intends to pass the goods procured from Gilmore to a third consumer, the provisions of section 2 and 3 of the Unfair Contract Terms Act of 1977 will be applicable. Consequently, Gilmour will not be allowed to enforce the exclusion clauses unless the court deems it reasonable.

Conclusion

By and large, in the contractual agreement between Northern and Petty Production, the incorporation of exclusion clauses is enforceable because it is contrary to the trade customs of the manufacture of machinery. Realistically, an exclusion clause limiting the liability of such manufacture is fatal as poorly manufactured machinery cause significant losses. Equally, the exclusion clauses in the contract between Northern and Gilmore is unenforceable due to the fact that it is inconsistent with the main objective of the contract which is to supply goods that fit the description and of merchantable quality.

Question 2

Introduction

Remarkably, the utilization of exclusion clauses in contracts has never been disapproved by courts unless if they are found to be repugnant, unreasonable, and inconsistent. Parties intending to incorporate exclusion clauses are presumed to be in a strong bargaining position. Notably, the utilization of standard-form contracts to covertly introduce and unreasonable exclusions of liability may unintentionally expose the drafting party to undesired legal challenges. In this paper, I am going to advice Northern on the enforceability of the exclusion and limitation clauses included in their standard terms of trading.

Clause 1

Exclusion clauses that restrict negligence liability are generally difficult to enforce. They can only be accorded credence if they are found to be reasonable based on the prevailing circumstances. Notably, in a bid to limit negligent liability in the inter-business transaction, the frequency of previous dealings and the acceptable customs in such business have to be assessed. Consequently, if the other contracting party is a regular customer, then the exclusion clauses will be enforceable whereas it will not be easy to enforce on one time customers.[23] Another way where one can rely on an exclusion clause is if it is permitted by a trade custom.[24]

Uniquely, relying on a trade custom in this instance will not be simple as there is a requirement to abide by the provisions of reasonableness. For instance, it will not be reasonable for one to procure goods whose main intention is to cause either death or harm negligently. Consequently, the

[23] *McCutcheon v MacBrayne* [1964] 1 WLR 125
[24] *British Crane Hire v Ipswich Plant Hire* [1974] QB 303

exclusion clause must not be repugnant or inconsistent with the central objective of the contract.[25] Although contractual dealings are subject to contractual privity and independence, the court might strikeout this clause for violating a fundamental breach unless it is circumstantially reasonable to do so.[26] In addition, the Unfair Contract Terms Act under section 13 prohibits the use of exclusion clauses to limit liability, in this case, the tort of negligence and vicarious liability.[27]

Clause 2

Any undertaking dealing with the supply of goods must ensure that such products meet the requisite description and must be of merchantable quality. Consequently, exclusion clauses in this respect can only be allowed if the other party is a frequent customer. Customarily, any purchase of the goods should confer title from the seller to the buyer especially if the buyer is doing so as a bonafide purchaser of value.[28] Equally, section 13[29] prohibits the use of exclusion clauses to prevent the applicability and enforceability of implied terms.

Importantly, the exclusion clauses can only be enforceable if it is found not to be inconsistent or repugnant to the main objective of the contracting parties. Comparatively, the exclusion clause will only be enforceable if the other party fully understands the nature of such clauses.[30] Subsequently, this clause will be deemed voidable if it does not meet the standards of reasonableness by limiting remedies or rights thus subjecting the other party

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[25] *Glynn v Margetson* [1893] AC 351
[26] *UGS Finance v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep 446; *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361; *Photo Production Ltd v Securicor Transport* [1980] AC 827.
[27] *Lister v Hesley Hall Ltd* [2001] UKHL 22
[28] Sale of Goods Act 1979 s12
[29] Unfair Contract Terms Act 1977
[30] S. 13 Unfair Contract Terms Act 1977

to contractual prejudice. In the inter-business transaction, the purchasing party retains remedy for breach of warranty.[31]

Clause 3

Although it is prudent for the purchaser to conduct an inspection for goods purchased, such inspections should not be used to limit the purchaser his or her rights or remedies.[32] However the notion that an exclusion clause purporting to eliminate implied terms relating to quality will be impossible to enforce unless the court is satisfied that the condition of reasonableness has been satisfied. Fundamentally, the chances of enforceability of this clause are likely to be higher if the other party is a regular purchaser under such contract.[33]

Apparently, the exclusion of implied term related to quality can be enforceable in this case if the quality of goods supplied by Northern can be ascertained by a one-time inspection. Accordingly, goods are impliedly considered fit for quality if; they fit the purpose they were made for, its appearance and finish are devoid of defects, and they are safe and durable.[34] In instances where the purchaser informs Northern on the intended purpose, this clause will be deemed void if liability rises due to the goods being unable to meet such purpose.

Clause 4

Markedly, section 13 of Unfair Contract Terms Act prohibits the use of clauses that disguise the exclusion clauses. Remarkably, a clause that imposes a time limit for making claims will be regarded as an exclusion clause. Nonetheless, this clause is enforceable if the customers in question

[31] Sale of Goods Act 1979 s15A
[32] S. 13 Unfair Contract Terms Act 1977
[33] *McCutcheon v MacBrayne* [1964] 1 WLR 125
[34] Sale of Goods Act s 14 (2)B

are regular and there are past dealings on similar clause.[35] Comparatively, this clause can only adequately satisfy the reasonableness test if defects can be ascertained within the stipulated seven day period.

Notably, this clause limits the rights and remedies of the purchaser after the expiry of seven days. Nevertheless, this provision will be made void unless the court determines that the current and future defects can be ascertained in that period. Equally, the defects in question must cover fitness for purpose, appearance and finishing, durability and safety.[36] Moreover, if this position is brought to the attention of the purchaser before the contract get concluded, it will be deemed reasonable and enforceable.[37]

Clause 5

Even though section 13 of Unfair Contract Terms Act limits the use of exclusion clause, it will deem enforceable if it turns out to be reasonable as per the prevailing circumstances. Limitation of the nature and extent of liability is likely to be controversial as it is not possible to predict all liabilities. Consequently, there is a likelihood that this clause may be ambiguous thus making it be interpreted *contra preferatum* against Northern.[38] The only time this clause can be enforceable is if it actually cures the losses through repair and replacement. Notably, defects in goods can cause destruction to other products, personal injury or death of which it may not be able to remedy by conducting repairs or replacement. Identically, the exclusion clause will be deemed reasonable if both the purchaser and Northern are at par on the issue of bargaining strength. Moreover, this

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[35] *McCutcheon v MacBrayne* [1964] 1 WLR 125
[36] Sale of Goods Act s 14 (2)B
[37] Ibid s 14 (3)
[38] *Baldry v Marshall* [1925] 1 KB 260

clause can only be reasonable if the purchaser is not induced into purchasing the goods for reasons such as lower price with an exclusion clause option. [39]

Clause 6

Realistically, one company cannot be held liable for the other's loss-making unless if such loss is largely contributed by the other party. Illustratively, the court will not deem it reasonable if the economic or consequential loss incurred by the purchaser is because of defective goods procured from Northern. Substantially, the court will have to access such loses before imposing liability. If the loss is as a result of products not being able to perform its intended purpose, then the exclusion clause will be held inoperative.[40]

According to the rule of law, whoever breaches should be held culpable and whoever suffers from such a violation should be sufficiently remedied.[41] In addition, if the consequential loss is as a result of Northern breaching its express and implied terms including but not limited to warranty and quality, they should be held responsible.[42]

Conclusion

Certainly, the enforceability of these exclusion clauses will depend on each of them fulfilling the prerequisites of reasonableness. Remarkably, factors such as; previous dealings, bargaining strength, the intended purpose of the goods, the rule of law, inducement to contract, and the extent of the breach will be assessed to determine the applicability and enforceability of the exclusion clause.

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[39] Section 11(2) Unfair Contract Terms Act 1977
[40] *Glynn v Margetson* [1893] AC 351
[41] *UGS Finance v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep 446
[42] Sale of Goods Act s. 13 and s.14

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