

PRESS RELEASE

CONTROL OF EXEMPTION CLAUSES

The widespread use of terms in contracts and notices which exclude or limit liability for damage, personal injury or death should be controlled says the Law Reform Commission.

2. In its Report on the Control of Exemption Clauses, published today, the Commission recommends that these terms should either have no effect at all or be allowed to take effect only if they are reasonable. The scheme of control follows the United Kingdom's Unfair Contract Terms Act 1977 and applies only where a transaction is made in the course of a business. Commission Secretary, Bertrand de Speville, said: "If two neighbours agree that one of them should repair the television set of the other, there is no reason why they should not be left free to agree between themselves who should be responsible if the repair fails. Generally the one who supplies the service will be doing the other a favour. Their relationship is a social one and the supplier of the service will normally have a strong incentive to protect the interests of the other. The use of an exemption clause in that context is neither prevalent nor gives rise to concern. But the situation is very different where a person buys goods from a shop or sends a suit to the dry cleaners or parks his car in a public car park. There the use of clauses exempting the supplier of the goods or services from liability for damage arising from defects in the goods or failure to provide a proper standard of service is very common. The consumer does not realise the significance of the exemption clause and, even if he does, is in no position to bargain with the supplier for a change in the clause. The balance between the supplier and consumer needs to be redressed. The report makes a number of proposals on how that should be done."

3. The report is the result of 2 years' work and wide consultation by a sub-committee of the Commission which included businessmen and lawyers under the chairmanship of Commission Member, Mr Arjan Sakhrani, Q.C. The sub-committee's work was examined in detail by the Commission itself. Dealing with the objection that any general control over exemption clauses is an unjustifiable interference with freedom of contract, the Commission says "In our view the objection is valid only to the extent that there is true freedom of contract to interfere with. The objection has no validity where there is no real possibility of negotiating contract terms, or where a party is not expected to read a contract carefully or to understand its implications without legal advice. It is only in those circumstances that we believe that legislative intervention is justified. We share the view of the English and Scottish Law Commissions and of the legislatures of several Commonwealth jurisdictions that in many cases exemption clauses operate against the public interest. We believe that the prevailing judicial attitude of suspicion, if not hostility, to such clauses is well founded. From the responses received from those who were consulted, we are left in no doubt that the misuse of these clauses is objectionable. Some are totally unjustified. Others may operate fairly or unfairly, efficiently or inefficiently, depending on

the circumstances."

4. If the Commission's proposals were made law, exemption clauses in two specific categories of transaction would be controlled: firstly, consumer transactions, where one party deals as consumer and the other deals in the course of a business; and secondly, standard form contracts, where one party deals on the other party's standard terms of business. Standard form contracts are characterised by the absence of negotiation in most situations where they are used - the customer has no opportunity to negotiate the terms that limit or exclude liability. The offer is made to him on a "take it or leave it" basis.

5. Under the proposals, the use of exemption clauses would not be prohibited. They would however be controlled in two ways: either they would have no effect at all or they would be effective only to the extent that a court was satisfied that the clause was reasonable.

6. The following terms and notices would be absolutely ineffective:

- (a) the exclusion or restriction of liability for death or personal injury resulting from negligence;
- (b) the exclusion or restriction of liability contained in a "guarantee" attached to consumer goods where loss or damage is caused by the negligence of the manufacturer or distributor and arises from the goods proving defective while in consumer use;
- (c) in any consumer contract under which the ownership or possession of goods passes, the exclusion or restriction of liability for breach of the terms that the goods will correspond with the description or sample or will be merchantable quality or fit for any particular purpose.

All other terms and notices in transactions that would be controlled would be ineffective only if they were held to be unreasonable. Whether a term was reasonable would depend on the circumstances known to the parties when the contract was made. In deciding whether it was reasonable to include an exemption clause in the contract the court would have regard to a number of factors, including the relative strength of the bargaining position of the parties and, in particular, the language in which the contract is expressed, given that the overwhelming majority of the population in Hong Kong is non-English speaking.

7. The Report is published in English and Chinese and is on sale to the public at Government bookshops.

8. Comments on the Report are welcomed and should be sent to the Secretary for Trade and Industry, Central Government Offices, Lower Albert Road, Hong Kong.