

Chapter VI
Control of Exemption Clauses

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6.0 Introduction

Before the enactment of the CECO, the court had no power to refuse to give effect to exclusion clauses on the ground that they are unreasonable or unconscionable when the clause is effective. The Law Reform Commission found that there was a need to control the inclusion exemption clauses, particularly in situations where parties were not in equal bargaining position. CECO limits the extent of contractual terms that attempt to avoid civil liability for breach of contract, negligence or other breaches. CECO also controls the use of domestic arbitration clause in consumer contracts.

6.1 Exclusion Clauses

Whether a clause is an exclusion clause is a matter of substance, not the form (**Johnstone v Bloomsbury Health Authority** [1992] QB 333 (CA))

In general, there are 2 types of exclusion clauses (**Moschi v Lep Air Services Ltd** [1973] AC 331):

- (1) clauses seeking to exclude or cut down a primary obligation
- (2) clauses seeking to qualify the right of the promisee upon certain breach (e.g. denying or limiting the right to rescind; limiting the amount of damages; specifying a time limit)

Including clauses that attempt to:

- (1) make the liability or its enforcement subject to restrictive or onerous conditions;
- (2) exclude or restrict any right or remedy, or subject a person to any prejudice to pursue the same
- (3) exclude or restrict rules of evidence or procedure (**s.5(1) CECO**)

Non-exclusion clauses:

- *Scott v Avery* clauses (arbitration clauses making of an award is a condition precedent to any right of action) (**Scott v Avery** (1856) 5 HL Cas 811)
- Liquidated damaged clause (**Dunlop Pneumatic Tyre Co Ltd v New Sarage & Motor Co** [1915] AC 79)

Arbitration clauses are not exclusion clauses but are subjected to s.15 CECO (**s.5(2) CECO; s.20(3) Arbitration Ordinance (Cap.609)**) – see 6.6.6 below

6.2 Effectiveness under the Common Law

6.2.1 Requirements

Requirements for an exclusion clause to be effective at common law:

- (1) It was incorporated as a term of the contract by reasonable notice
- (2) It will be construed strictly against the party who relied on it (*contra proferentem* rule)
- (3) Third party cannot rely on the clause

6.2.2 Incorporation

The clause must be incorporated into the contract at the time the contract is made (**Always Win Ltd v Autofit Ltd** [1995] 2 HKC 48 (HC))

Exceptions

- subsequent variation of terms
- there has been a previous course of dealing between the parties and the exclusion clause operates has on previous occasions where the other party was put on notice (**Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd** [1969] 2 AC 31 (HL))

- both parties are in the same line of business of equal bargaining power; and the contractual terms is a common practice in that field (**British Crane Hire Corp” Ltd v Ipswich Plant Hire Ltd** [1975] QB 303)
- an apparently post-contractual document (e.g. a confirmation note) with proper interpretation of parties’ conduct (**Roe v RA Naylor Ltd** [1917] 1 KB 712 (DC))

6.2.3 Reasonable Notice

The party whom the term operates against must be given reasonable notice (**Ashdown v Samuel Williams & Sons Ltd** [1957] 1 QB 409)

- Actual notice (**Parker v South Eastern Railway Co** (1877) 2 CPD 416)
- Noting binding if there was no reason to believe the clause was included (**Chapelton v Barry UDC** [4940] 1 KB 532)
- May be binding even if the contracting party did not read the clause, if he believed it to be existed (**Hood v Anchor Line (Henderson Bros) Ltd** [1918] AC 837 (HL))
- If the disability of a party is known to another party, additional steps must be taken to ensure notification (**Thompson v London, Midland and Scottish Railway Co** [1930] 1 KB 41)
- Where clause is printed in a language the party does not understand, the other party has to do all he reasonably could to draw attention of that clause (**Chan Woon-hung (t/a Ocean Plastic Factory) v Associated Bankers insurance Co Ltd** [1993] 2 HKLR 127)
- The more onerous the consequences of the clause, the more forceful the notice must be (**Spurting Ltd v Bradshaw** [1956] 2 All ER 121)

6.2.4 *Contra proferentem* rule

Ambiguous and imprecise terms cannot be relied on (**Vastfame Camera Ltd v Birkart Globistics Ltd** [2005] 4 HKC 117 (CFI))

The rule will be less strictly applied in clauses seeking only to limit but not to exclude liability (**Ails a Craig Fishing Co Ltd v Malvern Fishing Co Ltd** [1983] 1 All ER 101)

Any exclusion clause will be construed in consistence with the purpose of the contract (**Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale** [1967] 1 AC 361 (HL))

- For clauses attempting to exclude losses caused by negligence, the wording must be sufficiently clear, e.g. by using expression as “however caused” (**The Stella** [1900] P 161)
- The court will pay extra attention to clauses that seek to exclude liabilities for deliberate breach of contractual obligation (**Carewins Development (China) Ltd v Bright Fortune Shipping Ltd** (2009) 12 HKCFAR 185)
- Misdelivery or other loss of goods arising from negligence will not usually be a sufficient departure from the contract intended for (**Hollins v J Davy Ltd** [1963] 1 QB 844)
- But the protection will loss if he knows that the misdeliver is to the wrong person or in an unauthorised manner (**Alexander v Railway Executive** [1951] 2 KB 882)

6.2.5 Third Party's Rights

If a third party is to be affected by the exclusion clause, he must either be a party to the contract containing the exclusion clause or to some other contract containing the same term (**Scruttons Ltd v Midland Silicones Ltd** [1962] AC 446)

6.3 Applicability of CECO

6.3.1 Application

CECO is applicable to contract made after 1.12.1990 (**s.19 CECO**)

Sections 7, 8, 9, 10, 11 & 12 CECO apply only to business liability for breach of obligations or duties arising from:

- (a) act or omit by a person in the course of a business; or
- (b) the occupation of premises used for business purposes of the occupier (**s.2(1) CECO**)

Sections 8, 9, 10, 11, 12, 15 & 17 CECO apply to cases where one party is dealing as consumer.

To prevent evasion of statutory control by means of setting up another contract, a secondary contract which contains a term to prejudicing or taking away rights of CECO is not binding (**s.14 CECO**)

CECO does NOT apply to a clause of transferring liability to other (**Thompson v T Lohan (Plant Hire) Ltd [1987] 1 WLR 649**)

6.3.2 Exclusion

6.3.2.1 *Exempted in CECO*

CECO is not applicable to any contractual provision which is authorised or required by Ordinance or is made to comply with any international agreement (**s.18(1) CECO**)

6.3.2.2 *Exempted Supply Contracts*

CECO does not apply to exempted supply contracts. (**s.16(1) CECO**)

Exempted supply contract means a contract:

- (a) of sale of goods or a contract where the possession or ownership of goods passes; and
- (b) made by parties whose places of business (or habitual residences) are in different countries or territories or outside Hong Kong; and
- (c) where:
 - (i) the goods are or will be carried in foreign jurisdiction;
 - or
 - (ii) the offer and acceptance or the delivery of goods have been done in or from foreign jurisdiction (**s.16(3) CECO**)

6.3.2.3 *Exclusion of particulars provisions*

Sections 7, 8, 9 are excluded in:

- (a) insurance contract
- (b) contract relating to creation, transfer or termination of an interest in land
- (c) contract relating to creation, transfer or termination of a right or an interest in patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property
- (d) contract relating to formation or dissolution of an institute or its constitution, rights or obligations of its corporators or members;
- (e) contract relating to creation or transfer of securities or of right or interest therein. (**para.1 Sch.1 CECO**)

Sections 7(2) & (3), 8, 9 and 12 are excluded except in favour of a person dealing as consumer:

- (a) contract of marine salvage or towage
- (b) charter party of a ship or hovercraft
- (c) contract for the carriage of goods by ship or hovercraft (**para.2 Sch.1 CECO**)

Sections 7(2) & (3), 8 and 9 are excluded in contract of carrying goods by ship or hovercraft except in favour of a person dealing as consumer (**para.3 Sch.1 CECO**)

Sections 7(1) & (2) are excluded in contract of employment except in favour of employee (**para.4 Sch.1 CECO**)

Sections 8 & 9 are excluded in exempted supply contracts (**s.16(2) CECO**) (see 7.3.2.2 above)

6.3.3 Contracting Out / Choice of Law Clauses

CECO reliefs are not available to contracts that normally would be governed by foreign law (**s.17(1) CECO**), except:

- The term appears to be imposed mainly for the purpose of evading the operation of CECO (**s.17(2)(a) CECO**); or
- One of the parties dealt as consumer who was then habitually resident in Hong Kong (**s.17(2)(b) CECO**)

Habitual resident:

- Distinguished from ordinary residence and equivalent to the residence required to establish domicile without the element of animus (**Cruse v Chittum (formerly Cruse)** [1974] 2 All ER 940)
- A temporary absence is immaterial provided that there is an intention to return (**R v St Leonard's Shoreditch, Inhabitants** (1865) LR 1 QB 21)
- A person may be resident in more than one place at the same time (**Levene v IRC** [1928] AC 217)

Tung Ho Wah v Star Cruises (HK) Ltd [2006] 3 HKLRD 254 (DC)

- ✧ **Facts:** P was a passenger of D's cruise. A confirmation slip that P signed referred to the terms and conditions of carriage of D only available upon request and on D's website. An exclusive jurisdiction was present and Malaysian law was the choice of law.
- ✧ **Held:** The confirmation slip constituted sufficient notice. The exclusive jurisdiction and choice of law clause

formed part of the contract. UCO is still applicable even s.7(2)(a) UCO limited the applicability of the choice of law clause. The exclusive jurisdiction clause was held not unconscionable because it is within common sense and practical convenience to have uniformity of treatment was reasonably necessary to protect D's legitimate interests, whose passengers might be coming from various countries throughout the cruise journey.

6.4 Definitions

6.4.1 Deals as Consumer

Consumer: One who uses a commodity or service for non-commercial purpose

It is a deal as a consumer if:

- (a) a party neither makes the contract in the course of a business nor holds himself out as doing so;
- (b) the other party does make the contract in the course of a business; and
- (c) the goods passing or services provided are of a type ordinarily supplied or provided for private use, consumption or benefit (**s.4(1) CECO / s.2A(1) SOGO / s.3(1) UCO / s.4(1) SSITO**)
 - **Rasbora v JCL Marine** [1977] 1 Lloyds Rep 645: A company director who bought a power boat for the company's use has been held to be dealing as consumer

Not applicable to:

- a sale by auction or by competitive tender (**s.4(2) CECO / s.2A(2) SOGO / s.3(2) UCO**)
- All parties are not acting in the course of business
- All parties act in the course of business

The burden of proof is on the person claiming that a party does not deal as consumer (**s.4(3) CECO / s.2A(3) SOGO / s.4(2) SSITO / s.3(3) UCO**)

6.4.2 In the Course of Business

6.4.2.1 *Business*

Includes a profession, activities of a public body, public authority and government (**s.2(1) CECO / s.2(1) SOGO / s.2 SSITO / s.2(1) UCO**)

Business generally means a regularly conducted commercial enterprise (**IRC v Marine Steam Turbine Co Ltd** [1920] 1 KB 193)

- A single transaction can be a “business” (**Re Abenheim, ex p Abenheim** (1913) 109 LT 219) but distinction is drawn between isolated transactions and the carrying on of a business (**Re Griffin, ex p Board of Trade** (1890) 60 LJQB 235)

Profession

- Question of degree and fact (**Robbins Herbal v FCT** (1923) 32 CLR 457)
- generally implies special knowledge attained after study and is distinguished from mere skill (**IRC v Maxse** [1919] 1 KB 647 (CA))

A view to be profit-making or be commercial in nature is not essential (**Town Investment Ltd v Department of Environment** [1978] AC 359)

- Include a charitable home (**Rolls v Miller** [1881-1885] All ER Rep 915)
- Include activities intended to be carried out on at a loss permanently (**Rolls v Millerabove; South-West Suburban Water Co v St Marylebone Guardians** [1904] 2 KB 174)

6.4.2.2 *In the Course of*

No statutory definition.

Something is done in the course of a business if it is done as

part of its activities (**Charles R Davidson & Co v M'Robb (or Officer)** [1918] AC 304)

A contract is made in the course of a business if:

- (a) there is some degree of regularity in respect of the transactions; or
- (b) the transaction is an integral part of the contracting party's business (**R & B Brokers Co Ltd v United Dominions Trust Ltd** [1988] 1 WLR 321)

It is for the person claiming that a party does not deal as consumer to prove that he does not (**Natamon Protpakorn v Citibank NA** (unreported, HCA 190/2005))

R & B Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321 (CA):

- ✧ Facts: R&B was a shipping broker company consisting 2 persons. It bought a second-hand car from United Dominions Trust. The car was flawed but an exemption clause in the contract excluded the implied conditions of fitness for purpose. R&B argued that the exemption clause was contrary to Unfair Contract Terms Act 1977 and United Dominions defended that R&B was not a consumer and that UCTA is not applicable.
- ✧ Held: The mere fact that it was being put under the company's name did not make R&B out of the scope of consumer. Buying of car was incidental to the business and the director was mainly using it to get to work.

Stevenson v Rogers [1999] 1 All ER 613 (CA):

- ✧ Facts: D was a fisherman who sold his fishing boat to the C. The boat was not of satisfactory quality. D argued that his business was fishing-selling but not that of fishing boats; as such, selling his boat was not in the course of his business and the Sale of Goods Act was not applicable.
- ✧ Held: Broad interpretation was adopted and this sale was in the course of D's business.

6.4.3 Contract for the Supply of Service

6.4.3.1 Service

Any rights, benefits, privileges or facilities provided in trade and commerce (“HK English-Chinese Legal Dictionary”, 2005, LexisNexis)

- Including the “the act of helping or doing work for another” (**PCCW-HKT Telephone Ltd v The Telecommunications Authority** (Unreported, HCAL 152/2002))
- All forms of facilities given by banks (loans, saving accounts and current accounts) (**R v Widdowston** [1986] Crim LR 233, CA)
- Private bank service (**Chang Pui Yin v Bank of Singapore** [2017] 4 HKLRD 458)
- Computer software (**Stephenson Blake (Holdings) Ltd v Street Heaver Ltd** [1994] CLR 17)
- Building management service (**The Grande Properties Management Ltd v Bolex Investment Co Ltd** (Unreported, DCCJ 21516 & 21517/2001))
- Professional beautician (**Nam Cheuk Yin v Ng Yim Hing** [2003] 2 HKLRD 195)
- Security alarm system provider (**Thomsen v Johnson Burglar Alarms Co Ltd** [2001] 4 HKC 666)
- Legal service (**Feerni Development Ltd v Daniel Wong & Partners** [2001] 1 HKC 373)
- Cargo handler (**Alcatel Cable Contracting Norway AS v Titan Logistics Pte Ltd** [2000] 3 HKLRD 720)
- Contractor (**Hong Kong Hua Guang Industrial Company (a firm) v Midway International Ltd** (Unreported, HCA 7671/1996)): Duty to hire a competent and trustworthy subcontractors)
- consultancy service for obtaining licenses and designing pub and decoration work (**A Pub (HK) Co Ltd v Tang Yuk Lan Alan t/a A Plus Design & Contracting** (Unreported, DCCJ 3129/2005))

6.4.3.2 Contract

Contract includes deed (**Toscano v Holland Securities Pty Ltd** (1985) NSWLR 145)

6.4.3.3 The Supply of Service

It means a contract under which a person agrees to carry out a service (**s.3(1) SSITO / s.2(1) UCO**)

- Whether or not goods are also transferred or bailed and whatever is the nature of the consideration for the service (**s.3(2)(b) SSITO / s.2(2)(b) UCO**)
- A credit card agreement was an agreement for the supply of services covered by the UCO (**Hang Seng Credit Card Ltd v Tsang Nga Leem** [2000] 3 HKC 269)
- Loan contract (**Freeway Finance Company Ltd v Tam Chuen On Raymond** (Unreported, HCA 61/2010))

Not include

- Contract of service (i.e. employment contract) or apprenticeship (**s.3(2)(a) SSITO / s.2(2)(a) UCO**)
- Tenancy contract for the supply of a service (**Dunn v Bradford Metropolitan District Council** [2002] All ER (D) 479)
- Contracts of guarantee (**Chekiang First Bank Ltd v Ng Chun Hing Benjamin** (Unreported, HCA 3473/2000))

6.4.4 Goods

Goods includes chattels personal, emblements, industrial growing crops, things attached to the land which are agreed to be severed before sale, but NOT non-physical items, choses in action, intangible rights (**s.2(1) CECO / s.2(1) SOGO / s.2(1) UCO**)

- A ship (**Behnke v Bede Shipping Co** [1927] 1 KB 649)

- A coin sold as a collector's piece (**Moss v Hancock** [1899] 2 QB 111)
- Flowers as fructus industrials (**Chan Juen v Yu Fook Shung** [1987] 3 HKC 539)
- Domestic animals (**Wong Ng Kai Fung Patsy v Yau Lai Chu t/a New-Date Pet Trimming Salon** [2005] 4 HKC 42 (CFI))
- Food and drinks supplied to customers at a hotel (**Wood v TUI Travel Plc** [2017] EWCA Civ 11)
- CD containing software (**Southwark London Borough Council v IBM UK Ltd** (2011) 135 Con LR 136)

Does not cover: the sale of land, non-physical items, choses in action, intangible rights, money (but not coins), human parts, intellectual property, computer software, record in digitized form, information.

6.4.5 Notice

Notice: Includes an announcement, whether or not in writing, and any other communication or pretended communication (**s.2(1) CECO**)

6.5 Reasonableness

6.5.1 Basic Standard (s.3 CECO)

The requirement of reasonableness is satisfied only if the term was a fair and reasonable one to be included having regard to the circumstances known to or in the contemplation of the parties when the contract was made (**s.3(1) CECO**)

- Relevant considerations include the strengths of the parties bargaining positions, the customer's knowledge of the clause and consent (**Overseas Medical Supplies Ltd v Orient Transport Services Ltd** [1999] 1 All ER (Comm) 981)

For sections 11 and 12, Schedule 2 is applicable (**s.3(2) CECO**)

In relation to notice (other than a notice having contractual effect), it is reasonable only if it would be fair and reasonable to allow reliance on it in all the circumstances (**s.3(3) CECO**)

- An entire agreement clause is not an unreasonable exclusion of liability for misrepresentation (*obiter*: **Cheng Kwok Fai v Mok Yiu Wah Peter** [1990] 2 HKLR 440)

The language of the contract term or notice is a relevant factor for the requirement of reasonableness (**s.3(4) CECO**)

- Convoluted and prolix clauses in small print are unreasonable (**Stag Line Ltd v Tyne Ship Repair Group Ltd, The Zinnia** [1984] 2 Lloyd's Rep 211)
- English exemption clause with limited knowledge of P and no attempt to explain the clause to P in a language P understands (**Oriental Pearl South Africa CC v Bank of Taiwan** [2006] 4 HKLRD 242)

For a contract term or notice attempting to restrict liability to a specified sum of money, the resources of the person to rely on the term and the cover of insurance are a relevant factor for the requirement of reasonableness (**s.3(5) CECO**)

- Clauses containing clear, specific and unambiguous limitation of the D's liability, where both parties have equal bargaining positions, will normally be reasonable (**Orient Technologies Ltd v A Plus Express (HK) Ltd** [2004] 4 HKC 72)
- Limitation of liability by a party with minimal knowledge of the extent of possible liability is not unreasonable (**Singer Co (UK) Ltd v Tees & Hartlepool Port Authority** [1988] 2 Lloyd's Rep 164)

The burden is on the person who claims that a contract term or notice satisfies the requirement of reasonableness to prove that it does (**s.3(6) CECO**)

6.5.2 Guideline (Sch.2 CECEO)

The guideline in Schedule 2 should be considered, even though the Schedule does not apply to the section being considered (*Obiter*, **Always Win v Autofit Ltd** [1995] 2 HKC 48)

For sections 11(3), 12(3) & 4, the following are relevant:

- (a) the strength of the bargaining positions including alternative means
- (b) any inducement
- (c) customer's knowledge of or ought to know the existence and extent of the term (including custom of the trade and any previous course dealing)
 - Where the contract has been signed by the customer, it is usually binding on him regardless of his knowledge of the existence if the term (**L'Estrange v F Graucob Ltd** [1934] 2 KB 394)
 - Where the customer did not know the term and no adequate steps had been taken for drawing customer's attention, the term does not form part of the contract (**Thornton v Shoe Lane Parking Ltd** [1971] 2 QB 163 (CA))
 - A clear clause negotiated by a trade association and used for many years is *prima facie* fair and reasonable (**George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd** [1983] 2 AC 803)
- (d) the reasonableness of the condition imposed
- (e) existence of special order of the customer for manufacture, processing or adaption (**Sch.2 CECEO**)

6.6 Specific Situation

6.6.1 Negligence Liability (s.7 CECEO)

This section applies to cases of business liability whether or not one party is a consumer (**ss.2(2) & 7 CECEO**)

- For liability to death or personal injury resulting from negligence, it cannot be excluded by contract or notice (**s.7(1) CECO**)
- For liability to other loss or damage resulting from negligence, it can be excluded upon satisfaction of requirement of reasonableness (**s.7(2) CECO**)
- Awareness of the contract term or notice purports to exclude liability for negligence is not taken as indication of voluntary acceptance of any risk (**s.7(3) CECO**)

Whether the breach was inadvertent or intentional or whether liability for it arose directly or vicariously (**ss. 2(3) & 7 CECO**)

When the terms were unconscionable, they would also fail the requirement of reasonableness (**Chang Pui Yin v Bank of Singapore** [2017] 4 HKLRD 458: The non-reliance clause and risk statement were held not fair and reasonable since they were to rewrite history to exempt duties to the investors. See 7.3.2.4)

Negligence: the breach of:

- obligation of taking reasonable care or exercising reasonable skill in performance
- common law duty to take reasonable care or exercise reasonable skill (but not stricter duty)
- common duty of care under Occupiers Liability Ordinance (Cap. 314) (**s.2(1) CECO**)
-

Personal injury: includes any disease and any impairment of physical or mental condition (**s.2(1) CECO**)

6.6.2 Breach of Contract (s.8 CECO)

This section applies only to cases of business liability and where one party deals as consumer or on the other's written standard terms of business (**ss.2(2) & 8(1) CECO**)

The benefited party cannot

- exclude liability for breach of contract
- claim to be entitled to render a contractual performance substantially different
- claim to be entitled to no performance at all

unless it satisfies the requirement of reasonableness (**s.8(2) CECO**)

✧ **Orient Overseas Container Inc v Regal Motion Industries Ltd** [1994] 1 HKLR 282 (HC):

- Facts: D2 provided driver to transport goods for D1, during which a traffic accident happened. D2 relied on a clause printed on a cargo receipt issued by them, which stated that the owner of goods shall be responsible for the damage done to the goods during loading and unloading and the consignor shall purchase its own insurance.
- Held: The exemption clause did not cover damage to the goods, not to mention that D2 failed to prove that the reasonableness test had been satisfied. The short duration of the contract and the inability of D1 to exercise substantial control over the arrangements are particularly crucial in this case

6.6.3 Unreasonable Indemnity (s.9 CECO)

This section applies to cases of business liability and where one party is a consumer (**ss.2(2) & 9(1)&(2) CECO**)

The consumer party cannot be made to indemnify another person in respect of liability that may be incurred negligence or breach of contract of other party, unless it satisfies the requirement of reasonableness. (**s.9(1) CECO**)

- Including vicarious liability or liability incurred by other person (**s.9(2) CECO**)

6.6.4 Defective Goods (s.10 CECO)

It applies to cases of business liability (including one party is consumer) (**ss.2(2) & 10(1) CECO**)

- Except contracts where possession or ownership of the goods passed (e.g. a contract of sale or a hire purchase agreement) (**s.10 (3) CECO**)

In case of goods ordinarily supplied for private use or consumption, liability for the loss or damage (not limited to death or personal injury) cannot be excluded if it:

- (a) arises from the defective goods in consumer use; and
- (b) results from the negligence during manufacture or distribution of the goods (**s.10(1) CECO**)

- Goods in consumer use: When the goods is use or in possession for use other than exclusively for the purposes of a business. (**s.10(2)(a) CECO**)

The exclusion by way of operating by reference to a guarantee of the goods is also prohibited (**s.10(1) & (2) CECO**)

- Guarantee: written promise or assurance of that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise (**s.10(2)(b) CECO**)

6.6.5 Seller's Liability (ss.11 & 12 CECO)

Section 11 applies to all contracts of sale of goods (**s. 11(4) CECO**)

- Seller's implied undertakings as to title (s.14 SOGO): cannot be excluded (**s.11(1) CECO**)
- Seller's implied undertakings as to conformity of goods with description or sample, or quality or fitness for a particular purpose (ss.15, 16 & 17 SOGO):
 - cannot be excluded where one party is a consumer (**s.11(2) CECO**)

- can be excluded where one party is NOT a consumer only if it satisfies the requirement of reasonableness (**s.11(3) CECO**)

Section 12 applies to cases of business liability under a contract where the possession or ownership of goods passes under the law other than sale of goods (**s. 12(1) CECO**)

- Seller's liability as to correspondence with description or sample, or quality or fitness for a particular purpose:
 - cannot be excluded where one party is a consumer (**s.12(2) CECO**)
 - can be excluded where one party is NOT a consumer only if it satisfies the requirement of reasonableness (**s.12(3) CECO**)
- Liability relating to the right to transfer ownership of the goods, or give possession; or the assurance of quiet possession to take the goods cannot be excluded except it satisfies the requirement of reasonableness (**s.12(4) CECO**)

Contracts covered under section 12 are e.g. contracts of hire, contracts of exchange, contracts for the provision of services where goods are used or supplied, etc

6.6.6 Arbitration (s.15 CECO)

An agreement to submit arbitration cannot be enforced except with the consumer's written consent signified after the dispute unless it is according to sections 7, 8, 9 or 12 and it also be excluded under Sch.1 CECO (**s.15 CECO**)

6.7 Other Statutory Controls

In contract for the sale of goods, an exemption clause (**s.57 SOGO**)

- exempt from implied undertakings as to title, free from incumbrances and quiet possession (s.14 SOGO) is void
- exempt from implied undertakings as to compliance with description, quality or fitness and correspondence with sample is void in consumer case and no void when it satisfies requirement of reasonableness

Any purported exclusion or limitation of liability of an employer in respect of personal injuries to an employee is void (**s.22(2) LARCO**)

6.8 Effect of Exemption / Limitation Clauses

If the matter is within that protection, that is no breach at all and no further question can arise as to the defendant's liability (**Photo Production Ltd v Securior Transport Ltd** [1980] AC 827)

- Once the court ruled that the exemption clause was effective, the court had no power to rewrite the contract for the parties under CECO (**Kanson Crane Service Co Ltd v Bank of China Group Insurance Co Ltd** [2003] 3 HKC 602 (CH))

If it is outside that protection, the clause can have no effect, whether or not the innocent party rescinds the contract (**Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale** [1967] 1 AC 361 (HL))

