A COMPARATIVE STUDY OF COMMON LAW JURISDICTIONS ON EXCLUSION CLAUSE AND ITS RAMIFICATIONS ON CONSUMER RIGHTS: BANGLADESHI LAW IN CONTEXT

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ABSTRACT

Exclusion clauses exclude or limit the liability that are ascribed to a contracting party and often put in a contract to obtain unfair advantage. The increasing use of exclusion clauses in standard form contracts (SFC) has now become a predominant feature of consumer contracts as it is more convenient to serve the purpose of the modern corporate interest. SFC's are essentially on "take it or leave it" basis where consumer's participation is consisted of mere adherence with no scope of negotiations. The predicaments caused by the exclusion clause in SFC create unequal bargain position of the parties in a consumer contract and curtail their freedom of contract. Though the general view is that, parties to a contract are free to enter into a contract with the terms and conditions of their own choice but due to the drastic effects of wide and sweeping exclusion clause courts have become rather unreceptive to the exclusion clause. Legislatures have intervened into these risky financial transactions and introduced the concept of corporate responsibility and statutory protection for the consumers to ensure and facilitate a fair, reasonable and valid conclusion of consumer contract. This contribution aims at a comparative analysis of legal doctrine, statutory provisions and judicial decisions of England, America and Australia, as the major common law jurisdictions, to protect the consumer rights. It further explores, with special emphasis on, the Bangladeshi legal regime to find out appropriate legal mechanisms with a view to encountering the impacts of exclusion clause on consumer rights.

I. INTRODUCTION

The wake of industrial revolution has brought fundamental changes into the technology, policy and practice in the domain of trade and commerce. At the current stature of corporate world, a business entity is required to enter into innumerable contracts with its consumers. In the commercial affair, standard form of contracts (SFC) in a sense facilitates the commercial transactions by reducing cost and making it more convenient. In SFC, the contracts are pre-drafted with uniform set of printed(but most of the time the qualifications are buried in small or fine prints and unnoticeable) conditions and consumers are not in a position to shop around for better terms, either because of the

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monopolistic nature of the author or because all competitors offer more or less similar clauses.[1]

Hermeneutic legal investigation demonstrates that the development of standard form contracts (SFC) has been accompanied by a growth in the use of exclusion clauses.[2] The insertion of exclusion clause into contracts, shoot up by the large scale and widespread practice of concluding the contract in standardized form by the business enterprises, brought a "bleak winter"[3] into the concept of consumer rights. Exclusion (also known as exemption or limiting liability clause) clauses are defined as a clause or term in a contract which appears to restrict and exclude the liability of the contracting party.[4] In a consumer contract, sellers and suppliers possess a considerable advantage by inserting exclusion clauses and having a predominance over their contractual obligations which left the customers with 'no option but to adhere'.[5] Thus, by exempting the contractual liability, exclusion clause creates structural inferiority[6] within a contract and curtails a consumer's rights to freedom of contract. However, increasing awareness in consumer rights has paved the way for legal mechanisms to be endeavoured so that the corporate world cannot misuse the exclusion clauses in a contract to extract unfair advantage. The critical yet timely issue needs greater legal attentions that it achieved so far with view to according better protection of consumer rights.

On such premise, this contribution tends to explore that how the common law jurisdictions worldwide have tried to protect the consumers' rights affected by the exclusion clause or similar unfair contract terms. In doing so, the article would first provide an overview of the concept of freedom of contract and its complicated relation with doctrine of inequality of bargaining power. It, then, focuses on the legal complexities of the perception of 'weaker party' and 'unfairness' in a consumer contract with exclusion clause. Accentuating the normative human rights standards, the article would shed lights on the legal mechanism as adopted in common law and statutory enactments under three major common law jurisdictions, namely UK, USA and Australia, with purpose of protecting consumers from harsh exclusion clauses or unfair terms. And

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1 Kessler, F. , 'Contracts of Adhesion--Some Thoughts About Freedom of Contract' 43 (1943) *Columbia Law Review*, pp.629-642, at p. 631 http://digitalcommons.law. yale.edu /fss_papers/2731,(Last accessed on 23/1/2017)

2 Mckendrick, E., "*CONTRACT LAW*", London,2011, at p.185

3 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA, Civ 5

4 *supra note* 2 at p.184

5 *Cheshire, Fifoot and Furmston's Law of Contract*, Paperback edition (16th), London, 2012, at p.26

6 Reich, N., *Markt und Recht*, New York 1974, at p. 182

finally, it shall ventilate the legal mechanism and remedy, if any, are available under the heretofore relevant legal provisions of Bangladesh.

II. FREEDOM OF CONTRACT AND INEQUALITY OF BARGAINING POWER: RELATION AND DICHOTOMY

The concept of free-market and laissez-faire economics have been established primarily based on doctrine of "freedom to contract" as its bedrock. Perhaps, the doctrine of "freedom of contract" in some ways or others found its first statutory manifestation in the Constitution of United States.[7] As per this doctrine, individuals possess the the terms on which and the party with whom they want to enter into a contract. The doctrine of "freedom of contract" lies at the core of "will theory of contract"[8] that basically enables individuals to enter into agreements of their own choice on their own terms. Thus, the concept of freedom of contract comes to rest on the idea of equal bargain power of the contracting parties. On the other hand, the phrase "inequality of bargaining power" appears to have been first ever used by the British philosopher, John Beattie Crozier.[9] It is, however, noteworthy that though the concept of inequality of bargaining power was and is particularly recognized in reference to the workers' rights, undeniably, it is of great relevance to the SFC, especially, of huge implications to the contract agreed by the consumers. For instance, deliberate insertion of exclusion clauses in SFC and the abuse of dominant position[10] by the contracting parties injected the issue of inequality of bargaining power which ultimately resulted in concern for protecting consumer rights. Lord Reid's remarks in *Suisse Atlantique Societe d' Armentem Maritime SA vs. NV Rotterdamsche Kolen Centrale,*[11] may further demonstrate that how seriously the court has ventilated the relation and dichotomies between freedom of contract, inequality of bargaining powers:

> "Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions, which are now so common. In the ordinary way the

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7 US Bill of Rights, (1791), Amendment no. 5 *"…nor be deprived of life, liberty, or property, without due process of law…"*

8 See for example Steyn J. *Associated Japanese Bank (International) LTD v Credit Du Nord S.A.*[1989] 1 W.L.R. 255, at 264; *Supra* note 2, p.2

9 B Crozier, *The Wheel of Wealth; Being a Reconstruction of the Science and Art of Political Economy on the Lines* (1906) Part III, ch 2, 'On the tendency to inequality', at p. 377,

10 While providing features of abuse of dominant position, Article 102 of EU Treaty refers: *".. direct or indirectly imposing unfair prices or other unfair trading, constraints imposed by the undertaking customers or unequal treatment of trading parties and making use of tying contracts, forcing unnecessary supplementary obligations on customers and other price or non price strategies…"*

11 [1967] 1 AC 36, at p. 406.