Report of a Panel Meeting 22nd March at the Law Society on Problems arising from the Unfair Contract Terms Act 1977

(Chairman: Dr. H.E. Gumbel)

Mr. Konrad Schiemann opened the meeting by discussing each section in Part I of the Act in some detail giving illustrations as to how he thought the sections might operate in practice.

It was admitted that in some areas we should have to wait for case law to interpret the wording, particularly as to whether a term of an exclusion clause was reasonable within the meaning of the Act.

One very interesting view Mr. Schiemann took of section 10, was that any form of discharge taken by an insurer in settling a liability claim on behalf of the insured, might well come within the wording of this section as being a secondary contract evading further liabilities the insured was later found to have incurred. Presumably he was thinking of such phrases as "in full settlement of all claims whether now or hereafter to become manifest". It is difficult to see how insured can otherwise cover themselves in this respect when settling a claim, without violating section 10, if Mr. Schiemann is right.

Mr. Frank Eaglestone said that there seems to be two schools of thought on the question of indemnity clauses being caught by sections 2 and 3 of the Act. Clearly section 4 catered for indemnity clauses but this was limited to protecting consumers. What about the position of non-consumers? It had been said that Smith v South Wales Switchgear Ltd. (1978) would have been caught by section 2(1) of the Unfair Contract Terms Act although the clause concerned was unsuccessful in overcoming the common law controls. The implication was that if the word "negligence" had been used, the clause would have passed the common law test, but it would still have fallen foul of the 1977 Act. Mr. Eaglestone doubted whether this was correct. In Smith's case, the plaintiff was injured due to Chrysler's negligence and the latter claimed under an indemnity clause against South Wales Switchgear, the employers of Smith, who had been joined in the action by a third party notice because of the alleged indemnity.

Now the Law Commission in their second report on exemption clauses say "In view of the suggestion made to us that contracts of indemnity should have been and were not covered by the provisional proposals made in our joint document, perhaps we should say that in our view any provision whereby a person has to indemnify another from the consequences of the former person's having exercised a right or remedy is a provision restricting the exercise of such a right or remedy and should accordingly be treated as an exemption clause."

From this definition, it will be appreciated that an indemnity clause which operates against a party who is not exercising a right or remedy is by implication not an exemption clause. In Smith's case, South Wales Switchgear did not have to give an indemnity as a consequence of exercising a right or remedy. Therefore, on this test, it would seem that this type of indemnity clause is not governed by section 2 or for that matter section 3 of the 1977 Act. There is another reason for arguing that this statement is correct. This is that section 4 so far as consumers are concerned, would be unnecessary if sections 2 and 3 applied to all indemnity clauses, and in fact section 2(1), which renders clauses to which it applies ineffective, would clash with section 4, which renders clauses to which it applies subject to a test of reasonableness.

Mr. Schiemann agreed with Mr. Eaglestone on this point.

Mr. Eaglestone raised a few other problems which were discussed.

Mr. Gordon Sanders said he queried whether the Act was really welcomed by insurers as Mr. Schiemann suggested. Insurers depend in transacting their business, on interpreting new statutes with a fairly high degree of certainty and there was too much that was uncertain about this Act. Furthermore, the insurers and their insured had only been given some three months between the time the Act received the Royal Assent until it came into force. Even the legal opinions which his firm of brokers had received showed considerable divergence of opinion, particularly on the problem raised by Mr. Eaglestone concerning indemnity clauses.