EC is a term 'which excludes or modifies an obligation, whether primary (in the contract) or general secondary (obligation to pay compensation)…that would otherwise arise under the contract by implication of law.' – *photo productions v securicor.* Effect of an exemption clause – the definitional view (laissez faire) OR the exclusory approach (paternalistic and interventionist). Controlling exemption clause: incorporation, construction and statutory regulations.**<u>INCORPORATION</u>SIGNATURE**Usually binds (*L'Estrange v Graucob*), unless exceptions apply: if there has been a misrepresentation (*Curtis v Chemical Cleaning*); if the document has no contractual effect eg a time sheet (*Grogan v Robin Meredith Plant hire*); if the defence of Non est factum (the deed is not mine eg fraud) applies (*Saunders v Anglia Building Society*).**REASONABLE NOTICE**Proferens must take reasonable steps to bring the term to the other party's notice – *Parker v South Eastern Railways***Incorporation by reference?** (refer to another document). This is classed as reasonable notice - *Thompson v London, Midland & Scottish Railway; O'Brien v MGN ltd***Timing**Notice must be given before or at the time of contracting – *Olly v Marlborough Court Hotel* (EC was on back of hotel door, so D could not rely on it)*; Thornton v Shoe Lane Parking* (machine sales)**Onerous clause**If onerous clause, greater notice required - *Thornton v Shoe Lane parking; Interfoto picture library v stiletto visual programming.*NB. Signature will incorporate onerous clause except in extreme circumstances (non est factum –fraud/misrep) – *Chemical Transport Inc. Exnor Craggs Ltd* or fraud.**Contractual document**A written document or notice which includes the clause must be one which has contractual effect (not time sheets or receipts)– *Chapleton v Barry UDC; Grogan v Meredith.* However, the ct will look at each case.**COURSE OF DEALING**Must be consistent and regular – *McCutcheon v David MacBrayne*3/ 4 times in 5yrs – not incorporated – *Hollier v Rambler Motors*3-4 times a month for 3 years – incorporated – *Harry Kendall & Sons v William Lillico & Sons*5 times over 13 months – incorporated – *Petrotrade inc v Texaco.* It was regular for that type of business.**<u>CONSTRUCTION</u>**It is the courts interpretation. They will give the clause its natural and ordinary meaning ie does the clause cover the breach, whether fundamental or otherwise? – *George Mitchell v Finney Lock Seeds.* So does the wording cover the breach? Does it exclude or limit liability?1.Contra Proferentum: any ambiguity in the clause will be construed against the proferens – *Andrews brother v singer & co; Houghton v Trafalgar insurance co ltd.*2.Excluding liability for negligence. Negligence here is breach of duty of care in tort and breach of contractual duty to exercise reasonable care and skill eg *S13 SGSA 1982.*Apply: *The Canada Steamship* Test per Lord Mortona)Does clause specifically refer to negligence OR synonym of negligence? – *Monarch Airlines Ltd v London Luton Airport* 'any act or omission, neglect or default'.b)If no clause, is the clause wide enough to cover negligence? Eg 'how so ever caused' or 'we accept no liability'.c)If yes, is the clause too wide? Ie some ground other than negligence which is not too fanciful or remote– *white v warwick; EE Caledonia ltd v orbit valve co.* If negligence is too wide, it fails. Where clauses ONLY excluding negligence it will work - *alderslade v hendon v laundry.* NB Recent approach to *Canada Steamship* – 'broad guidelines not prescribing rigid rules' (*HIH Casualty & general insurance v chase manhattan bank)*A clause which limits rather than excludes liability is read less restrictively – *Aisla Craig v Malvern Shipping*.**The (obsolete) doctrine of fundamental breach**Cannot exclude liability for 'fundamental breach'. Doctrine finally consigned to history – *photo productions v securior***Third party and exemption clauses work** – *Scruttons ltd v midland sillicones ltd/ NZ shipping co ltd v AM Satterthwaite*. Also Contract (Rights of Third Parties Act) 1999 – s1(6) and s6(5) can exempt third parties.

<u>STATUTORY REGULATION</u>(UCTA 1977 Covers business liability: exemption or limitation clauses re contractual and tortious liability (s1(3)) and for PI and death, non-contractual notices (s2(1)).S1(1) <u>Negligence</u> – 'breach of any term to take reasonable care or exercise reasonable skill'. NB s13 SGSA 1982S2 Control over terms that exclude or restrict liability for **negligence**. S2(1) cannot exclude or restrict liability for death or PI resulting from negligence BUT S2(2) dealing with other loss or damage from resulting negligence can be excluded BUT clause/notice will be subject to <u>reasonableness test</u> (s11 & sch.2). S11(3) specifically for notices.**S1(3) Act applies to <u>Business Liability</u>** – liability arising from things done in the course of business AND from the occupation of business premises (see also s14).S3 Control over terms that exclude or restrict liability for **breach of contract.**S6 Control over terms that exclude or restrict liability in contracts for the **sale and supply of goods.S12 Dealing as <u>Consumer</u>** – where NOT dealing in course of business AND other party IS dealing in course of business – *R & B Customs Brokers v United Dominions Trust* (decided the company car was a consumer purchase as it was not integral to the business)*/ Stevenson v Rogers/ Feldaroll Foundry plc v Hermes Leasing ltd.***S13 <u>Varieties</u> of exemption clauses** – a) making liability subject to restrictive or onerous conditions b) Excluding or restricting any right or remedy c) Excluding or restricting rules of evidence or procedure – *Stuart Gill v Horatio Myer***The Reasonableness Test**S11(1) 'a fair and reasonable one to have been included having **regard to the circumstances** which were, or **ought reasonably** to have **been, known** to or **in the contemplation** of the parties **when the contract was made**'Reasonableness of a clause is a question of fact left to the discretion of the court (***George Mitchell v Finney Lock Seeds***)Reasonableness broadly unaffected by the seriousness of the loss or damage sustained. Also, the circumstances known to one party only are irrelevant eg market difficulties involved in procuring product.S11(4) Limitation Clauses: Relevant factors in determining reasonableness. S11(4)(a) <u>Resources</u> of party relying on clause. S11(4)(b) Whether party relying could have <u>insured</u> – *St Albans v International Computers ltd* (policy decision and international companies have insurance so they should pay)S11(3) – non-contractual notices. **Burden of proving that a contract term is reasonable rests upon the person claiming that it is** (s11(5))**<u>Guidelines</u> schedule 2** (note s11(2)), but "the considerations there set out are normally regarded as being of general application to the requirement of reasonableness" – *Stewart Gill v Horatio Myer.*a)strength of bargaining positions; b) inducement to agree to term; c)knowledge of the term; d) compliance with condition; e)special order **CASES:** *George Mitchell v Finney Lock Seeds*/ The software cases eg *Watford Electronics v Sanderson* – reasonable ECs negotiated by experienced business people/ The 'soft drinks' cases eg *Britvic Soft Drinks v Messer UK Ltd* – unreasonable EC in standard form contract concerning non-contemplated risk.**Liability arising in contract – S3**Breach of general contract term (NOT implied by SGA/SGSA), where business to consumer contract on standard terms. Can only exclude/restrict liability and render substantially different/no performance IF terms satisfies reasonableness test (S11 & sch.2)Cases: *R & B Customs Brokers v United Dominions Trust/ Stevenson Rogers/ Feldaroll Foundry plc v Hermes Leasing ltd.***Liability from breach of Sale and Supply of Goods – S6**S6-where excluding liability for breach of terms implied by SGA 79 & SGSA 82.S6(1)(a) – s12 SGA 79 (ie title) can NEVER be excluded or restricted.S6(2)(a)- as against CONSUMERS as ss13,14 and 15 SGA 79 cannot be excluded or restricted.S6(3) – as against NON-CONSUMERS, ss13-15 of the SGA 79 can be excluded or restricted in so far as it is reasonable to do so. Requirement of the of reasonableness (s11 & sch.2). All above are true for corresponding SGSA terms.

Unfair Terms In Consumer Contract Regs 99 (UTCCR) Main distinctions from UCTA:**Reg 3 Consumer** – only natural or legal person acting for purposes outside his trade, business or profession – narrower than UCTA 77.**Reg 4 Scope of Regs** – Business to consumer. Apply to all unfair terms in contracts – wider than UCTA 77.**Reg 5 Unfair** – Not 'individually negotiated' 'contrary to good faith', which causes 'significant imbalance in the parties' rights to the consumer's detriment.**Reg 6 Unfairness assessed taking account** – subject matter, all circumstances surrounding conclusion of contract, all other terms of contract.**Reg 7 Plain, intelligible languageReg 8 Effect of unfair term** – shall not be binding, contract continues if possible.**Sch.2** Indicative/non-exhaustive list unfair terms (terms in the past that have decided to be unfair) – ***Director General of Fair Trading v First National Bank***Sch2(1)(a) – limiting liability where death or PI.**Sch2(1)(e) – requiring a disproportionately high sum in compensation (penalty clause)NB UCTA ONLY APPLIES TO EC.**

Misrepresentation is a vitiating factor. The effect of misrep is that is makes the contract voidable ie makes it weak. The court may allow rescission for all types of misrepresentation. It is first important to distinguish between a mere puff (hyperbolic ambiguous statements as seen in *Dimmock v Hallett*), which is not actionable and also terms (contractual promise as seen in *J.Evans & Son v Andrea Merzario Ltd*), which give an action for breach. **An actionable misrepresentation is an unambiguous false statement of fact or law, made to the C and which induces the C to enter into the contract with the statement maker, such that they might sustain loss. All elements must be proven. UNAMBIGUUS AND FALSE**It has to be unambiguous – *McInerny v Lloyds Bank Ltd.* If wording is clear, the C can't manipulate the meaning. False – *Avon Insurance Plc v Swire Fraser.* It has to be substantially correct, then it is not false ie not a misrep.**STATEMENTS OF LAW OR FACT<u>Statements of fact:</u>** A representation is not an undertaking to do, or not to do something. It is a statement asserting a given state of affairs (*Klienwort Benson Ltd v Malaysia Mining Corp*). 1.**Conduct may be fact**: Attempts at concealment (Gordon v Selico); conduct (*Spice Girls ltd v Aprilia WS*)2.The statement must be clear and unambiguous false statement of fact not opinion – *Bisset Wilkinson.* A layman's **opinion** with no greater knowledge than C is **not fact**. However, **opinion with greater knowledge** may be **fact** – *Smith v Land & Housing Property Corp.* If the facts are not equally well know on both sides, then a statement of opinion involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion.3.**Expert opinion may be fact** where expert gives opinion in area of their expertise – *Esso v Marden*4.**Future intention is not fact**. "A representation that something will be done in the future cannot be true or false at the moment it is made" – *Beattie v Ebury.* There is no duty to inform other party of change of future intentions – *Wales v Wadham*.**Must be a fact not a promise**. A representation is different from a promise and is not an undertaking to do or not do something. It is a statement asserting a given state of affairs – *Kleinwort Benson Ltd v Malaysia Mining Corp*.However, a **dishonest statement of intention is fact** –*Edgington v Fitzmaurice*.5.**Silence is not a fact**. No general duty to disclose information – *Keates v The Earl of Cadogan; Sykes v Taylor-Rose*.However, half truths (*Dimmock v Hallett; Notts Patent Brick & Tile v Butler*) and continuing representations, which were true initially but false at the time of contracting (*With v O'Flanagan*) eg contracts uberrimae fidei (insurance contract) and fiduciary relationships. This didn't apply in *Wales v Wadham*, as this is about intentions. Commercially it is probably different.**<u>Statement of law:</u>** *Pankhania v Hacknet LBC*) can constitute a misrep.**ADDRESSED TO THE PARTY MISLED**Misreps can be addressed directly to the C or they can be addressed indirectly through a third party, if D knew at the time that the statement would be passed on – *Commercial Banking co of Sydney v RH Brown & co.***MATERIALITY AND INDUCEMENT***Test for materiality is objective ie does the statement relate to issue that would influence the reasonable man? – *Pan Atlantic Insurance Co ltd v Pine Top Insurance Co ltd**If statement is found to be material, actual inducement will be inferred (*Smith v Chadwick*), subject to d proving otherwise (subjective test).*If the statement is not material, actual inducement cannot be inferred, unless the c can prove subjective inducement (*Museprime properties v Adhill properties*)*There is a debate as to whether the misrep must have been material - *Pan Atlantic Insurance Co ltd v Pine top insurance co ltd*.*Inducement need not be the sole factor (*Edginton v Fitzmaurice),* but it must be a factor (*JEB Fasteners v Marks Bloom*)*There is no inducement where c is unaware of the representation (*Horsfall v Thomas*), the c knew that the statement was untrue (*Redgrave v Hurd*), or the C did not rely on misrep (*Smith v Chadwick*), or the rep did not affect the c's judgment ie no inducement if rely on own investigation (*Attwood v Small).* *However, even if have investigated, partial reliance on misrep also is sufficient – *Edginton v Fitzmaurice*.*It seems to now depend on whether it might be reasonable to check – *Smith v Eric Bush* **(if the c is a commercially aware party then may be reasonable to expect them to have checked whether the statement was true or not)**If don't check and should have or do a negligent job of checking then may be a defence of contrib neg for the d in limited circums – if misrep is fraudulent then investigation is ignored by court – *S.Pearson & Son Ltd v Dublin Corp.*