Outline Solutions to Questions in Chapter 6

Question 1

- The advice to Dr Know is concerned with the legal validity of exemption clauses. An exemption clause is a clause attempting to exclude or limit liability.
- In order to be valid a clause must be incorporated into the contract; it must cover the liability sought to be excluded and survive scrutiny under statute (Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999).
- A clause may be incorporated through notice, given before or at the time of the contractor through a previous course of dealings. For incorporation by notice, reasonable steps must have been taken to bring the clause to the other party’s attention before the contract is made. What is reasonable is measured objectively. If the clause is brought to a party’s attention after the contract is made, as in Olley v Marlborough Court (1949), the clause will not be incorporated into the contract.
- The ticket for the bag - is it a contractual document, Chapleton v Barry UDC (1940)? If it is not a contractual document Dr Know will not be bound by its terms.
- The notice in the hotel room - has this come to Dr Know’s attention after the contract has been made? In which case it will not be incorporated into the contract.
- A clause may be incorporated by course of dealing, Spurling v Bradshaw (1956), Hollier v Rambler Motors (1972). Dr Know may have stayed at the hotel before, as she has attended the conference for the last 5 years, but would this be enough to constitute past dealings?
- If an exemption clause has been incorporated then it must cover the loss in question. The courts generally require that attempts to exclude liability for negligence should be absolutely clear.
- Discuss the possible application of the Unfair Contract Terms in Contract Act 1977 (UCTA) and the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR). Under the UCTA some clauses are made totally ineffective and others are subject to reasonableness. Terms which exclude or restrict liability for negligence resulting in death or personal injury are invalid. Terms excluding other loss or damage are subject to the reasonableness test.
- Even if the clause has been incorporated into the contract it will not be effective as regards the injury to Dr Know’s arm as this was caused through the hotel’s negligence. With regard to the other losses if the clauses are valid then they will be subject to the reasonableness test.
Question 2
(a) A solus agreement is where a seller of a product agrees with a supplier that he will obtain a product solely from him usually for a special discount. Such clauses in contracts are *prima facie* (initially) void because it is not in the public interest to impede competition or freedom of movement. However, such clauses may be valid, if the person seeking to enforce them can show that in their particular circumstances the restraint is reasonable. British Petrol PLC would have to show that the restraint was reasonable, *Esso Petroleum v Harpers Garage* (1968). Hari will only be bound by the restraint clause if the courts decide that it is reasonable taking into the account time limit etc.
(b) A restraint clause may restrict an employee’s freedom to contract both during his period of employment and after the termination of his employment. The courts determine reasonableness in the way most likely to produce a fair outcome for both parties, recognising the unequal bargaining strength of the employer and the employee. A restraint will only be reasonable if it is no wider than needed to protect the employer’s legitimate interests, such as trade secrets and does not place unreasonable restraints on the employee. If Dairy Ltd can show the clause is reasonable then Gerald will be bound by it, *Forster & Sons Ltd. v Suggett* (1918). If a restraint clause is too wide, the court may agree to sever part of the clause allowing the reasonable part of the clause to continue. *Goldstoll v Goldman* (1915). For example the court may decide to sever ‘any other confectionary’ and leave the remaining part of the clause.

Question 3
(a) A puff, sometimes called trader’s hype, is a mere boast, often a gimmick used to advertise a product. Buyers are not expected to take such statements as literally true. Examples of trader’s hype include statements such as a washing powder ‘washes whiter than white’. A representation is a pre-contractual statement that induces a party to enter into a contract. It is not a term of a contract. A statement that forms part of a contract is a term of a contract. A term might be a condition, a warranty or an innominate term.
(b) Conditions are fundamental terms of a contract. If a condition is broken the innocent party can treat the contract as discharged and claim damages, or can continue with the contract and claim damages. Warranties are minor terms of the contract. If a warranty is broken damages can be claimed but party claiming damages must continue with the contract or that party will be in breach. There are instances where it is difficult to assign a term as either a condition or a warranty, until the effect of the breach of the term is established. Terms which cannot be assigned into either category are referred to as innominate terms. If the breach is relatively minor only damages can be claimed.
but if the breach is fundamental the injured party can treat the contract as discharged.

**Question 4**

- Exemption clauses must comply with the Unfair Contract Terms Act 1977. Under this Act some clauses are made totally ineffective and others are subject to a reasonableness test.
- The Act only applies to business liability and does not apply to transactions between private parties. Terms which exclude or restrict liability for negligence resulting in death or personal injury are invalid (s.2(1)), whilst other loss or damage is subject to the reasonableness test (s.2(2)).
- The reasonableness test has been considered in a number of cases, such as *George Mitchell v Finney Locke Seeds* (1983), *St Albans City and District Council v International Computers Ltd* (1996).
- Unfair Terms in Consumer Contracts Regulations 1999 resulted from an EU Directive and apply to any non-negotiated term in a contract made between a seller or supplier of goods or services and a consumer.
- Where the Regulations apply they ask whether the term is ‘unfair’ i.e. ‘contrary to the requirements of good faith, it causes a significant imbalance in the party’s rights and obligations arising under the contract, to the detriment of the consumer’.
- A term which is deemed to be unfair according to the criteria laid down in the Regulations is not binding on the consumer.