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TWENTY YEARS (AND MORE) OF CONTROLLING UNFAIR CONTRACT TERMS IN SINGAPORE

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The *Unfair Contract Terms Act* and s 3 of the *Misrepresentation Act* were formally adopted from the UK into Singapore in November 1993. The *Consumer Protection (Fair Trading) Act* followed about ten years later. This article discusses how these statutes have operated, primarily by examining how they have been applied in the case law, and reflects on their *modus operandi* and capacity to promote contractual fairness.

I. INTRODUCTION

Contractual fairness is important to a strong economy: "[e]mpowered consumers are more confident to buy new or different products and services and demand choice, thereby stimulating competition and innovation from traders as well as high standards of consumer care. In turn, this drives greater productivity and economic growth."[1] Conversely, allowing unfair practices to flourish can be detrimental. A United Kingdom ("UK") investigation in 2011 estimated that the annual cost of unfair business practices in the UK was £6.6 billion.[2]

To promote the reasonableness of contract terms, Singapore adopted the *Unfair Contract Terms Act*[3] and s 3 of the *Misrepresentation Act*,[4] from the UK over 20

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1 See Department for Business, Innovation and Skills, *Empowering and Protecting Consumers: Government Response to the Consultation on Institutional Reform*, (London: BIS, April 2012) at para 8, online: Gov.uk <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253701/bis-12-510-empowering-protecting-consumers-government-response-1.pdf>.

2 Department for Business, Innovation and Skills, Office of Fair Trading and Local Authority Trading Standards Services, *Protecting Consumers: The System for Enforcing Consumer Law*, (UK: National Audit Office, 15 June 2011) at para 1, online: NAO <http://www.nao.org.uk/wp-content/uploads/2011/06/10121087es.pdf>.

3 Cap 396, 1994 Rev Ed Sing [*UCTA*].

4 Cap 390, 1994 Rev Ed Sing [*MA*].

years ago. About ten years later, Singapore passed the *Consumer Protection (Fair Trading) Act*[5] to combat unfair practices in small consumer contracts.[6] Significant enhancements to the *CP(FT)A* are currently being considered, as discussed below. Prior to the formal adoption of the *UCTA*, the Singapore courts applied the statute via the *Civil Law Act* which provided that mercantile law in Singapore was to be the same as that applying in England unless Singapore law already catered for the predicament.[7] In one such case, the Singapore High Court described the *UCTA* as "one of the most important statutes which have been enacted in recent times".[8]

In this paper I reflect on the use that has been made of the above statutes, ask what can be learned from our experience to date and, looking forward, consider how the contractual fairness agenda can be further enhanced. Anniversaries aside, this review is timely because other common law jurisdictions have recently revised their consumer protection legislation. Australia has, since 2011, adopted the *Australian Consumer Law*,[9] and the UK now has the *Consumer Rights Act 2015*,[10] which "streamlines and consolidates over 40 different pieces of consumer legislation"[11] including the consumer protection provisions formerly set out in the *UCTA* and *The Unfair Terms in Consumer Contracts Regulations 1999*.[12]

There are numerous other statutory enactments that promote contractual fairness in Singapore. Some, such as the *Moneylenders Act*[13] and the *Hire-Purchase Act*,[14] operate in narrow contexts. Such specific protections will not be discussed here. My focus is on the more generally applicable statutes: the *CP(FT)A*, *UCTA* and *MA*. The *UCTA* and *MA* are broader than the *CP(FT)A* in that their assistance is not confined to consumers and they have no claim limit. On the other hand, the *CP(FT)A* targets contractual practices more generally while the *UCTA* and *MA* target contract

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5 Cap 52A, 2009 Rev Ed Sing [*CP(FT)A*].

6 A claim limit of $30,000 applies: see *ibid*, ss 6(2), 6(6).

7 *Civil Law Act* (Cap 43, 1970 Rev Ed Sing), s 5, since repealed. The *UCTA* was applied in this way in *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] 2 SLR (R) 583 at paras 44-46 (HC) [*Kenwell*] and *Trans-Link Exhibition Forwarding Pte Ltd v Wadkin Robinson Asia Pte Ltd* [1994] SGHC 197 [*Trans-Link*]. Contrast, however, *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR (R) 195 at para 23 (HC) [*Consmat*]. See also *Brown Noel Trading Pte Ltd v Singapore Press Holdings Ltd* [1993] 2 SLR (R) 840 at para 12 (HC) [*Brown Noel* (HC)], on appeal [1994] 3 SLR (R) 114 at para 24 (CA) [*Brown Noel* (CA)].

8 *Kenwell*, *supra* note 7 at para 47.

9 *Competition and Consumer Act 2010* (Cth), Schedule 2 [*Australian Consumer Law*]. See generally S G Corones, *The Australian Consumer Law*, 2d ed (Rozelle: Thomson Reuters Lawbook Co, 2013); Justin Malbon & Luke Nottage, eds, *Consumer Law & Policy in Australia & New Zealand* (Annandale: Federation Press, 2013).

10 (UK), c 15 [*Consumer Rights Act 2015*]. See *eg*, UK Parliament, "Consumer Rights Act 2015", online: UK Parliament <http://services.parliament.uk/bills/2014-15/consumerrights.html>.

11 Mindy Chen-Wishart, *Contract Law*, 5th ed (Oxford: Oxford University Press, 2015) at para 11.1. See also Edwin Peel, *Treitel: The Law of Contract*, 14th ed (London: Sweet & Maxwell, 2015) at para 7-050 [Peel, *Treitel*].

12 SI 1999/2083.

13 Cap 188, 2010 Rev Ed Sing. Moneylenders, for example, are required to inform borrowers of the terms of the loan before contracting and provide them with the key particulars of the contract in writing after contracting: see *ibid*, ss 19, 20.

14 Cap 125, 2014 Rev Ed Sing. For example, certain rights accrue to the hirer, such as the right to terminate the agreement: see *ibid*, s 14(1).

terms, primarily those operating to restrict liability. The *UCTA* and *CP(FT)A* apply to business liability,[15] while the *MA* can apply to a contract between two consumers.

At the outset, it is important to appreciate the tensions inherent in legislating in this domain.[16] The *UCTA*, *MA* and *CP(FT)A* require the courts to evaluate and, sometimes, to interfere with the substantive bargain made by the parties. Such a requirement conflicts with our historical allegiance to contractual freedom and the idea that parties assume contractual obligations to fulfil their needs or wants; hence it is for them to determine the terms of their contracts.[17] For this reason the courts have often said that they will not make the parties' contract for them.[18] Before legislation, one method used by the courts to get around their anathema for assessing substantive fairness was to insist on procedural fairness, such as the disclosure of onerous and unusual terms and intervening in cases of defective consent, such as duress and undue influence. Nevertheless, the trigger for examining the contracting process was invariably substantive unfairness.[19] With the advent of standard terms and conditions ("T&C") it became apparent to parliaments around the world that more explicit substantive controls on contractual freedom were warranted.[20] The challenge lies in striking the optimum balance between freedom of contract and fairness.[21] While parliaments overcame some of their reluctance to intervene in the substantive bargain struck between contracting parties, for example by passing the *UCTA*, for the courts these reservations are deeply entrenched, as reflected in *Manchester, Sheffield and Lincolnshire Railway Co v Brown*:

> It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not.[22]

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15 In a few instances, the *UCTA* is not limited to business liability: see *UCTA*, *supra* note 3, s 6(4). For a discussion, see Peel, *Treitel*, *supra* note 11 at para 7-060.

16 The significance of legislating in this arena is reflected, *eg*, in: M G Clarke, "Unfair Contract Terms Act 1977: A Revolution in the Law of Contract" [1978] Scots Law Times 26 at 26; L S Sealy, "Unfair Contract Terms Act 1977" (1978) 37 Cambridge LJ 15 at 15; Brian Coote, "Unfair Contract Terms Act 1977" (1978) 41:3 Mod L Rev 312 at 313 [Coote, "UCTA"].

17 This idea is reflected in the consideration doctrine which requires consideration to be real but not adequate—the adequacy of consideration is subjective and therefore not suitable for judicial oversight.

18 See *Dunkley v Evans* [1981] 1 WLR 1522 at 1525 (QB); *Mills v Dunham* [1891] 1 Ch 576 at 580 (CA). See also Sir Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 29th ed (Oxford: Oxford University Press, 2010) at 433; H G Beale, ed, *Chitty on Contracts*, 32d ed (London: Sweet & Maxwell, 2015) vol 1 at para 14-005.

19 Chen-Wishart, *supra* note 11 at para 9.1.

20 See *eg*, John N Adams, "An Optimistic Look at the Contract Provisions of Unfair Contract Terms Act 1977" (1978) 41:6 Mod L Rev 703 at 704; see also Roger Brownsword & John N Adams, "The Unfair Contract Terms Act: A Decade of Discretion" (1988) 104 Law Q Rev 94 (a "post-war policy of consumer protection" at 94).

21 See *eg*, House of Commons, Law Commission & Scottish Law Commission, *Exemption Clauses: Second Report*, Law Com No 69, Scot Law Com No 39 (London: Her Majesty's Stationery Office, 1975) at para 147.

22 (1883) 8 App Cas 703 at 718 (HL), cited in *Tilden Rent-A-Car Co v Clendenning* (1978), 83 DLR (3d) 400 at 413 (ONSC). See also *Mogul Steamship Co Limited v McGregor, Gow, & Co* (1889) 23 QBD 598 at 620, 625, 626 (CA); Robert Bradgate, "Unreasonable Standard Terms" (1997) 60:4 Mod L Rev 582 at 589: a general test of reasonableness would "involve a direct attack on freedom of contract with which many judges would still feel uncomfortable".

I start my discussion of Singapore law with the *CP(FT)A*, on which there is little case law. I focus on its *modus operandi* of targeting unfair practices and argue that it has features that are well-designed to promote contractual fairness. My analysis of the operation of the *UCTA* and *MA* in Singapore focuses on the case law. The reception of these statutes seemed to get off to a slow start, but they have played a growing role which looks poised to continue in the future. The biggest obstacle to their effectiveness, I argue, is the flawed premise that clauses which exclude or restrict liability can be readily identified. This premise has bedevilled the application of these two statutes in Singapore, as in the UK. I end my discussion with the provocative suggestion that we reform the law to allow the courts to openly evaluate the allocation of risk reflected in the parties' agreement.

II. Methodology

This study was conducted largely through the prism of judgments and decisions of the Singapore courts, as yielded by Singapore's LawNet search engine up to 23 May 2016. The LawNet database offers the most comprehensive coverage available of Singapore case law, including all reported cases from 1965 (*ie* before the formal adoption of the *UCTA* and *MA*, and pre-*CP(FT)A*), written judgments of the Court of Appeal and the High Court from 1991 (also predating the formal adoption of the *UCTA, MA* and *CP(FT)A*), and of the State Courts from 2001.[23] As regards the *UCTA* and *MA*, unreported cases from the Supreme Court pre-1991 will not have been detected, nor State Courts decisions pre-2001.[24] While some reference is made to case data, my discussion of the *UCTA* and *MA* is based more on a substantive analysis of the cases yielded in the searches. The case data with which I have worked is set out in Annexes A and B.

III. The *CP(FT)A*

A. *Overview*

The *CP(FT)A*, which commenced on 1 March 2004, was designed to enable consumers to obtain civil redress from suppliers engaging in objectionable practices, called unfair practices, that fall short of criminality.[25] In *Speedo Motoring Pte Ltd v Ong Gek Sing*, George Wei JC said that:

> [T]he [*CP(FT)A*] serves as a protective framework which consumers can rely on in seeking recourse against vendors and suppliers, over and above any rights that they may already have under general law, such as the usual contractual and tortious remedies.[26]

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[23] See LawNet, "Services: Legal research", online: LawNet <http://www.lawnet.sg/lawnet/web/lawnet/services?tab=1&section=0>.

[24] There are at least two District Court cases that were not identified in my LawNet search as they predate 2001: see *Consmat*, *supra* note 7 at para 21.

[25] See *Parliamentary Debates Singapore: Official Report*, vol 76 at col 3456 (11 November 2003) [*Parliamentary Debates*]. See generally Ravi Chandran, "Consumer Protection (Fair Trading) Act" [2004] Sing JLS 192.

[26] [2014] 2 SLR 1398 at para 28 (HC) [*Speedo Motoring*].

At the same time, it is evident that the Government was conscious of competing considerations when it introduced the *CP(FT)A* in Parliament. The Minister introducing the Bill, having explained its rationale as protecting small consumers against undesirable practices, identified two other principles that informed the drafting of the Bill: first, "as a society, we believe that the individual should take responsibility for his or her own action when he or she enters into a transaction" and second, consumer interests need to be balanced with the interests of traders who need certainty and should not be put to undue expense in complying with the Act.[27]

For the purposes of an "unfair practice" under the *CP(FT)A*, a "consumer" is an individual not acting exclusively in the course of a business;[28] the requirement of an individual excludes juridical persons.[29] "Supplier" is widely defined and includes someone who, in the course of a business, provides or promotes goods or services or is entitled to receive money for them.[30] The statute cannot be contracted out of,[31] and contracts are interpreted against the supplier.[32] Remedies for an unfair practice include damages, specific performance, restitution and variation of the contract.[33] In *Freely Pte Ltd v Ong Kaili*,[34] the court ruled that the measure of damages for an unfair practice is the tort measure, namely the difference in value between what was paid and what was received. For money claims brought by a consumer for an unfair practice, a limit of $30,000 applies; for non-money claims, the value of the subject matter must not exceed this amount.[35] While it is possible for a claimant to abandon any excess in a monetary claim,[36] this is unlikely to be attractive where the excess is substantial.

As a result of a 2012 amendment, the *CP(FT)A* includes particular provisions, colloquially known as the lemon law, for claims pertaining to defective goods in three types of contracts: sale of goods, transfer of goods and hire-purchase.[37] These provisions enhance the remedies available to a consumer for defective goods.[38] The lemon law provisions use a broader definition of consumer than the unfair practice provisions.[39] The *CP(FT)A* also gives consumers the right to cancel a limited number of contracts within a specified timeframe, such as unsolicited door-to-door sales and timeshare contracts.[40] The lemon law provisions and the cancellation rights do not

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27 See *Parliamentary Debates*, *supra* note 25 at col 3455.

28 *CP(FT)A*, *supra* note 5, s 12A(2): for Part III of the *CP(FT)A* which deals with non-conforming goods, the *UCTA* definition applies.

29 See Chandran, *supra* note 25 at 200; Alexander F H Loke, "The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore" [2014] Sing JLS 285 at 288.

30 *CP(FT)A*, *supra* note 5, s 2(1).

31 *Ibid*, s 13. See also *Speedo Motoring*, *supra* note 26 at paras 29-34.

32 *CP(FT)A*, *supra* note 5, s 18.

33 *Ibid*, s 7(4).

34 [2010] 2 SLR 1065 at para 81 (HC) [*Freely*].

35 *CP(FT)A*, *supra* note 5, s 6(2)(b).

36 *Ibid*, s 6(5).

37 *Ibid*, Part III. See the discussion in *Speedo Motoring*, *supra* note 26 at paras 36-41.

38 For a discussion, see Loke, *supra* note 29.

39 For an unfair practice, a consumer is an individual; for the lemon law, the *UCTA* definition is used and can embrace a company.

40 *CP(FT)A*, *supra* note 5, s 11; *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009* (S 65/2009 Sing).

address unfair terms as such and will not be considered further here. This discussion will focus, rather, on the unfair practice provisions which are capable of embracing unfair terms.

The *CP(FT)A* has an important feature not found in the *UCTA* and *MA*: it allows a "specified body" to intervene to stop an unfair practice. There is widespread recognition that an adequately funded body is essential to promote the effective operation of such legislation.[41] The specified bodies are the Consumers Association of Singapore ("CASE") and the Singapore Tourism Board ("STB").[42] They can seek a voluntary compliance agreement with a supplier to cease any suspected or actual unfair practice,[43] a declaration that an unfair practice has been or will be committed and, if necessary, an injunction to stop such a practice.[44] CASE also intervenes by issuing warnings to suppliers.[45]

B. *Unfair Practices*

An "unfair practice" is defined as:

a. Doing or saying anything that would reasonably deceive or mislead a consumer;
b. Making false claims; or
c. Taking advantage of a consumer whom the supplier knows, or should reasonably know, is unable to protect his own interests or is unable to understand the nature or effect of the transaction.[46]

In determining whether there has been an unfair practice, the Act requires a court to consider the reasonableness of the supplier's conduct.[47] The first High Court decision to consider the *CP(FT)A* was *Freely*, in which the Court elaborated on an unfair practice that consisted in deceptive or misleading conduct. Woo Bih Li J said that the test was an objective one, to be determined with regard to the effect of the supplier's conduct on a reasonable consumer.[48] As such, a supplier can be guilty of an unfair practice without intending to deceive or mislead. The Second Schedule of the Act sets out a list of 20 specific unfair practices. The use of such examples

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41 See *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297 at para 33 (HL) [*Director General*]; also Elizabeth Macdonald, "Unifying Unfair Terms Legislation" (2004) 67:1 Mod L Rev 69 at 72 [Macdonald, "Unifying"]; Chen-Wishart, *supra* note 11 at para 11.6.1. Under the *Australian Consumer Law*, *supra* note 9, Chapter 5 Part 5-1 enables public enforcement measures by the Australian Competition and Consumer Commission as well as regulators from Australia's States and Territories; in the UK, the *Consumer Rights Act 2015*, *supra* note 10, Schedules 3 and 5 enable a regulator/enforcer, including the Competition and Markets Authority and the Financial Conduct Authority to take enforcement steps under the legislation.

42 *Government Gazette*, No 450 (18 February 2004).

43 *CP(FT)A*, *supra* note 5, s 8.

44 *Ibid*, s 9.

45 See *eg*, Jessica Lim, "BreadTalk gets stern warning from Case" *The Straits Times* (7 August 2015).

46 *CP(FT)A*, *supra* note 5, s 4.

47 *Ibid*, s 5(3)(a).

48 *Freely*, *supra* note 34 at para 45.

promotes clarity in an area that is necessarily flexible,[49] and offers guidance to legal advisers, contract draftsmen and would-be transgressors.[50] Many of the specified unfair practices involve conduct that could be actionable as a misrepresentation under the common law, but the pursuit of which is made easier by the *CP(FT)A* by obviating the need to prove the elements of a misrepresentation and by affording greater remedial flexibility. Unfair practices in the Second Schedule that target unfair terms include: the use of terms that are unconscionably harsh or one-sided,[51] and the misleading use of small print.[52] There are proposals underway to amend the *CP(FT)A* and, *inter alia*, to increase the number of specific unfair practices to include, for example, bait advertising and asserting a right to be paid for unsolicited goods/services.[53]

C. CP(FT)A—*Utilisation Profile*

My search identified five cases, as set out in Annex A, in which the *CP(FT)A* was mentioned;[54] of these, three applied the Act, all to the benefit of the consumer:[55] in one there was an unfair practice,[56] in another a remedy was obtained pursuant to the lemon law,[57] and CASE obtained an injunction against a supplier in the third.[58] Although these numbers are low, they do not present a complete picture of the role that the *CP(FT)A* has played in Singapore in the last decade since many claimants will sue, if at all, in the more informal forum of the Small Claims Tribunals.[59] Of the three cases in which the *CP(FT)A* was applied, two started in the Small Claims Tribunals.[60] Also, many disputes will never reach the courts and will either be dropped, settled directly or resolved in mediation and other types of alternative dispute resolution.[61] The *CP(FT)A* may well have influenced suppliers to settle in

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49 A similar strategy is used in the *Australian Consumer Law*, *supra* note 9, s 25, and the UK's *Consumer Rights Act 2015*, *supra* note 10, Schedule 2.

50 See Elizabeth Macdonald, "Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*" (2002) 65:5 Mod L Rev 763 at 763.

51 *CP(FT)A*, *supra* note 5, Second Schedule at para 11.

52 *Ibid*, Second Schedule at para 20.

53 *Consumer Protection (Fair Trading) (Amendment) Bill*, online: Ministry of Trade and Industry Singapore <https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/Public-Consultation-on-Proposed-Amendments-to-the-Consumer-Protection-Fair-Trading-Act-CPFTA/Draft%20Bill.pdf>.

54 Search terms used were "Consumer Protection (Fair Trading) Act" and "CP(FT)A" as well as a variety of permutations such as "CPFTA" and "Consumer Protection Act".

55 The other two cases make only a reference to the Act, namely *Rikvin Consultancy Pte Ltd v Pardeep Singh Boparai* [2010] SGHC 191 at paras 3, 4 and *Unilink Credit Pte Ltd v Chong Kuek Leong* [2013] SGMC 3 at para 22.

56 *Freely*, *supra* note 34.

57 *Speedo Motoring*, *supra* note 26.

58 *Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch* [2009] SGDC 193.

59 See *Small Claims Tribunals Act* (Cap 308, 1998 Rev Ed Sing); also Ho Peng Kee, "Small Claims Process: Some Reflections" (1984) 26 Mal L Rev 17; Louis D'Souza, "An Experiment in Informal Justice: The Small Claims Tribunal of Singapore" (1991) 3 Sing Ac LJ 264; Soh Kee Bun, "Recent Changes to the Small Claims Process: The Small Claims Tribunals (Jurisdiction) Order 1997 and the Small Claims Tribunals (Amendment) Rules 1997" [1997] Sing JLS 585.

60 *Freely*, *supra* note 34; *Speedo Motoring*, *supra* note 26. Two cases that did not show up in my search were reported in the media: see Christopher Tan, "Car dealer told to honour warranty despite dispute" *The Straits Times* (4 June 2015).

61 CASE's website indicates that its mediation centre resolved 76.3% of its cases in 2015: see CASE, "Statistics", online: CASE <https://www.case.org.sg/consumer_guides_statistics.aspx>.

some such cases.[62] Statistics published on CASE's website indicate that in 2014 there were 1,367 complaints of breaches of the *CP(FT)A* and 1,175 in 2015. According to CASE, in the period of 1 March 2004 to 31 December 2015, *ie* in just under 12 years, the declaration/injunction procedure has been invoked six times, and 19 voluntary compliance agreements have been entered into.[63]

D. *Discussion*

As it stands, the *CP(FT)A* has features that are well suited to serving its contractual fairness agenda: the concept of an unfair practice is broadly defined; the list of specific unfair practices helps to give the yardstick content and promotes certainty; and giving *locus standi* to CASE and STB to intervene in a number of ways means that enforcement is not left to the public which can generally ill-afford to litigate. The dearth of cases in the formal court system is unsurprising since the Act applies only to the smallest consumer disputes. The $30,000 claim limit and confining the protection of the Act to individuals deliberately restrict its scope and are intended to strike a balance between business and consumer interests. Nevertheless, consideration should be given to whether the balance that has been struck is optimum. The claim limit has already been raised from an original limit of $20,000, and warrants further review since many transactions entered into by ordinary people would currently be excluded.[64] Confining actionable unfair practices to individuals is also arguably too restrictive.[65] As a Singapore court has recognised, small businesses often warrant similar protection to individuals.[66] The more graduated approach used in Australia is noteworthy. It avoids the stark dichotomy between consumer and business that may leave some deserving businesses unprotected. For example, the *Australian Consumer Law* offers tiers of protection against unconscionable conduct, and in some cases businesses other than public listed companies are also protected.[67]

Anecdotal evidence suggests that unfair business practices do exist in Singapore despite the existing framework: for example, some service providers may purport to exclude liability for injury, howsoever caused.[68] Since such a provision is invalid

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62 See also, Jessica Lim, "More money recouped in 2014 with Case's help" *The Straits Times* (10 June 2015).

63 See CASE, *supra* note 61.

64 An example comes from the 2015 media focus on hotel cancellation charges for wedding banquets. See *eg*, Valerie Koh, "CASE seeks guidelines on cancellation of hotel wedding packages" *Today* (16 March 2015). Some hotels apparently charge the full quoted price for a cancellation less than eight months from the date—a figure that could easily exceed $30,000.

65 The lemon law provisions use a broader definition of consumer, as noted above.

66 See *Jurong Port Pte Ltd v Huationg Inland Transport Service Pte Ltd* [2009] 4 SLR (R) 53 at para 19 (HC) [*Jurong Port*], in the *UCTA* context. Of course, not all individuals need protection but this can be factored into the evaluation of unfairness. See also Macdonald, "Unifying", *supra* note 41 at 80.

67 *Australian Consumer Law*, *supra* note 9, s 21. More restrictive prohibitions apply to unfair terms in standard form individual consumer contracts: see *ibid*, Part 2-3. An unfair term is one that: causes a significant imbalance in the parties' rights and obligations under the contract; is not reasonably necessary to protect the legitimate interests of the supplier; and would cause detriment (financial or non-financial) to the consumer if invoked: see *ibid*, s 24(1).

68 See *eg*, *ADX v Fidgets Pte Ltd* [2009] SGDC 393 [*ADX*]; also Calvin Yang, "Exclusion clause in PCF centre's enrolment form raises concern" *The Straits Times* (6 January 2015).

under the *UCTA*,[69] it is surely an unfair practice that should be reined in by an industry watchdog of its own initiative.[70] Although such exemptions would be struck down if challenged in court, they are insidiously harmful to those who assume, in ignorance, that the terms are binding.[71] Rather than waiting for individual challenges to such terms after an incident, it is preferable for them to be eradicated, and this is more likely to be achieved by the intervention of a proactive industry watchdog. For a flagrant disregard of s 2(1) of the *UCTA*, consideration should also be given to criminal sanctions.

To date, most interventions by CASE are prompted by a complaint, rather than being initiated by the organisation itself.[72] The Ministry of Trade and Industry ("MTI") has, however, recently consulted the public on proposed amendments to the *CP(FT)A*, including the establishment of a new agency to support the enforcement of consumer protection measures.[73] The new agency, the Standards, Productivity and Innovation Board or SPRING, will have greater powers than currently available to CASE/STB to investigate and seek declarations and injunctions against recalcitrant suppliers. There are also plans to make injunctions against such suppliers more effective, for example, by requiring the supplier to publicise the injunction and making it more difficult to avoid the injunction by opening a new business. As MTI has said, such developments enure to the benefit not only of consumers but also compliant suppliers who will benefit from greater consumer confidence and fairer competition. Hopefully, the new agency will be on the lookout for unfair practices and intervene without waiting for individual challenges. The proposed amendments should enhance the effectiveness of the *CP(FT)A* and its ability to promote contractual fairness in Singapore; the review is to be welcomed and its outcome keenly anticipated.

IV. The *UCTA* and *MA*

A. *Overview*

Singapore's *UCTA* and *MA* are materially in the same terms as their British counterparts.[74] The *UCTA* targets attempts to exclude or restrict business liability in broadly two, potentially overlapping, areas: negligent injury/damage and breach of contract with some particular provisions for goods contracts.[75] The Act either forbids the

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69 *Supra* note 3, s 2(1) forbids exclusions or restrictions of liability for negligently causing death or personal injury.

70 It seems that the UK had a similar experience: see the reference in Macdonald, "Unifying", *supra* note 41 at 72.

71 See *eg*, *ibid*.

72 Based on an interview with CASE (23 October 2014).

73 See the website of MTI Singapore, at https://www.mti.gov.sg. See also an earlier call for such a boost in Chandran, *supra* note 25 at 223.

74 As regards the *UCTA*, see the observations of Andrew Phang Boon Leong JA in *Koh Lin Yee v Terrestrial Pte Ltd* [2015] 2 SLR 497 at para 30 (CA) [*Koh Lin Yee*]. The major difference is that Part II of the British statute (which applies to Scotland) is omitted from the Singapore statute.

75 In the sale of goods context, the *UCTA* extends beyond business liability: see *UCTA*, *supra* note 3, s 6(4).

exclusion or restriction outright[76] or subjects it to a reasonableness test.[77] Some contracts, such as insurance contracts, are not subject to the key provisions in the *UCTA*, as set out in the First Schedule to the Act. The *MA* applies the *UCTA*'s reasonableness test to terms that exclude or restrict liability for misrepresentation. Any term that falls foul of the *UCTA* or *MA* is ineffective. While the common law has traditionally distinguished between clauses that exclude liability and those that limit liability, and it has generally viewed the latter as more acceptable than the former,[78] neither statute makes such a distinction although it would undoubtedly be relevant to the reasonableness question. In this paper, they will be collectively referred to as "exemption clauses".[79]

The *UCTA* is clearly intended to protect individuals but it is not exclusively for consumer protection in the narrower *CP(FT)A* sense.[80] For example, s 2 (exemptions for negligence) applies to all contracts; s 3 (exemptions for breach of contract) applies if one party "deals as consumer" or contracts on the other party's standard written terms;[81] and ss 6 and 7 (exemptions in goods contracts) disallow certain exemptions where one party "deals as consumer" and permit them in business-to-business contracts if reasonable. "Deals as consumer" is broad enough to embrace a business entity where the contract is not made in the course of its business.[82]

The application of the *UCTA* beyond the narrow consumer context is important. As noted in *Jurong Port*,[83] even business entities may find themselves in weak bargaining positions. It is evident, though, that the Singapore (and British) courts are justifiably reluctant to apply the *UCTA* to contracts between sophisticated, advised, commercial parties.[84] Some courts have gone so far as to suggest that the *UCTA* has little role to play in the commercial context.[85] Since the *UCTA* patently does apply in the business-to-business context, these statements are best understood as saying that exemption clauses in the sophisticated commercial context are likely to pass the reasonableness test.[86] The *MA*, on the other hand, is not restricted to business liability or to a consumer context.

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76 See *ibid*, ss 2(1), 6(1), 6(2), 7(2).

77 For example, *ibid*, ss 2(2), 3, 6(3), 7(3); *MA*, *supra* note 4, s 3.

78 See *eg*, *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 1 SLR (R) 701 at para 61 (HC) although, as acknowledged in *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR (R) 268 at para 24 (HC) [*Emjay Enterprises*], the distinction may not always be clear as a limitation clause in form may be an exclusion clause in substance.

79 In *Emjay Enterprises*, *ibid* at para 11 the court favoured the term "exception clause".

80 As recognised in *Kenwell*, *supra* note 7 at para 57.

81 See the discussion in *Koh Lin Yee*, *supra* note 74 at paras 21-25 where neither of these requirements was satisfied.

82 An example is *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 at 331 (CA).

83 *Supra* note 66 at para 19.

84 See the discussion in *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd* [2013] 1 SLR 1 at para 93 (HC) [*Kay Lim*]. For the British context, see Richard Lawson, *Exclusion Clauses and Unfair Contract Terms*, 10th ed (London: Sweet & Maxwell, 2011) at para 9.10.

85 In Singapore, see the trial court decision in *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2010] SGHC 351 at para 21 [*Anti-Corrosion*]; in England, see *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) at para 603 [*JP Morgan*].

86 See *eg*, *Kay Lim*, *supra* note 84 at para 93.

B. *The Reasonableness Enquiry*

Reasonableness is assessed at the time that the contract is entered into,[87] and the burden of proving reasonableness is on the party asserting it.[88] In other words, clauses that are subject to the reasonableness test are *prima facie* unreasonable.[89] Significantly, the Court of Appeal in *Koh Lin Yee* said that "in the examination of the reasonableness of the clause, the courts should not be too ready to focus on remote possibilities or to accept arguments that a clause fails the test by reference to relatively uncommon or unlikely situations".[90] Similarly, the cases suggest that a court will not interpret a term in a way that sets it up for defeat by the *UCTA*.[91] Rather, it will give the clause a more limited meaning so that it has some scope for operation. The Singapore courts have on numerous occasions said that arguments about the reasonableness of a term may require evidence and not merely argument from counsel.[92] The reasonableness enquiry is fact-specific and past precedent is therefore of limited relevance,[93] although it undoubtedly offers guidance.[94]

The Singapore courts have considered the following clauses to be unreasonable: a bank excluding liability for its employee's fraud,[95] curtailing the limitation period to nine months,[96] and an exclusion of liability for misrepresentation that was broad enough to cover fraudulent misrepresentation.[97] On the other hand, the following were considered reasonable: an exclusion of liability by a bank for unauthorised third party debits on the customer's account;[98] the exclusion of set-off rights in a

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87 *UCTA*, *supra* note 3, s 11(1). As authors have noted, if events subsequent to contract formation are known to the court, it is probably hard to ignore them: see Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Alphen aan den Rijn: Kluwer Law International, 2012) at para 1182; Brownsword & Adams, *supra* note 20 at 116; Adrian Chandler & Ian Brown, "Unreasonableness and the Unfair Contract Terms Act" (1993) 109 Law Q Rev 41 at 42, 43. The alternative of allowing subsequent events to be taken into account was considered by the English and Scottish Law Commissions: see Brownsword & Adams, *supra* note 20 at 114-116 for the history.

88 *UCTA*, *supra* note 3, s 11(5).

89 See *eg*, *Trans-Link*, *supra* note 7; *Kenwell*, *supra* note 7 at para 52; *Kay Lim*, *supra* note 84 at para 91.

90 *Supra* note 74 at para 66, citing *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep 66 at 76 (HC).

91 See *Kay Lim*, *supra* note 84 at paras 95, 97; also *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA* [2015] 1 SLR 338 at para 240 (HC) [*Telemedia*]; *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 at para 108 (HC) [*Jiang Ou*].

92 *Kenwell*, *supra* note 7 at paras 54, 59; *Kay Lim*, *supra* note 84 at para 91; *Holland Leedon Pte Ltd (in liquidation) v C & P Transport Pte Ltd* [2013] SGHC 281 at para 237 [*Holland Leedon*].

93 See *eg*, *Holland Leedon*, *ibid* at para 232; also *Koh Lin Yee*, *supra* note 74 at para 37.

94 See Phang & Goh, *supra* note 87 at para 1185; also Brownsword & Adams, *supra* note 20 at 117; Beale, *supra* note 18 at para 15-101.

95 *Jiang Ou*, *supra* note 91 at paras 118-122; *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR (R) 273 at para 63 (CA) [*Pertamina*]. As noted below, a court would not generally interpret a clause as exempting liability for fraud unless it was explicit.

96 *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR (R) 712 at paras 56-68 (HC) [*Press Automation*].

97 *Ho Leong Bok v Yeo Hoon Hua* [2006] SGDC 149 at para 19.

98 The exemption in these cases took the form of a verification and conclusive evidence clause: *Consmat*, *supra* note 7 at para 24 (*obiter*); *Tjoa Elis v United Overseas Bank Ltd* [2003] 1 SLR (R) 747 at paras 92-96 (HC) [*Tjoa Elis*] (*obiter*); *Pertamina*, *supra* note 95 at paras 60, 61 (in the business context).

loan agreement;[99] and in a sale of goods context, clauses that limited liability in respect of the goods.[100]

The *UCTA* identifies factors that may inform the reasonableness enquiry. For clauses that limit liability, it points to the availability of insurance and the ability to bear the liability.[101] For goods contracts, a number of factors are identified in the Second Schedule to the Act including the parties' relative bargaining strengths, the availability of a similar contract without the protective term, inducements received to agree to the term, and actual or constructive knowledge of the term.[102] The Singapore courts,[103] like their British counterparts,[104] have recognised that these factors are neither exhaustive, nor exclusive to goods contracts or limitation clauses. They have, accordingly, been viewed as relevant to any reasonableness enquiry. The strength of any particular factor will depend on the circumstances of each case.[105] Full acceptance of the term, in the sense of subjective knowledge of the term and a real choice to contract on that basis, has been identified as the 'umbrella' consideration underpinning the various factors in the Second Schedule.[106] Relative bargaining strength has also featured quite prominently in reasonableness discussions in the Singapore courts.[107]

It is apparent that some of the reasonableness factors may point in different directions, depending on the circumstances. An example is the widespread use of a term. On the one hand, it may portend unreasonableness because a claimant had no choice but to contract on those terms.[108] On the other hand, it may reflect that the clause is reasonably necessary to meet legitimate business needs in the defendant's industry, hence its ubiquity.[109] Another example is the effect of inducements. They presumably *prima facie* support reasonableness where the claimant accepted greater risk in exchange for another benefit; on the other hand, tempting a claimant to contract disadvantageously with a trivial inducement may be unreasonable in some circumstances. It is important for a court to evaluate which of these possibilities applies in a given case.

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99 *Koh Lin Yee*, *supra* note 74 at para 69 (*obiter*).

100 *Press Automation*, *supra* note 96 at paras 69-79; *Anti-Corrosion*, *supra* note 85 at para 21 (*obiter*).

101 *UCTA*, *supra* note 3, s 11(4).

102 See *ibid*, Second Schedule.

103 *Koh Lin Yee*, *supra* note 74 at paras 37, 54; see also *Pertamina*, *supra* note 95 at para 69.

104 See *eg*, *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1985) 2 Construction LR 109 at 131 (QB); *Phillips Products Ltd v Hyland* [1987] 1 WLR 659 at 667 (CA) [*Phillips Products*].

105 See *eg*, Andrew Phang Boon Leong, ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 07.146 [Phang, *Contract*].

106 Phang & Goh, *supra* note 87 at para 1190. See also *AEG (UK) Ltd v Logic Resource Ltd* [1996] Comm LC 265 at 274 (Hirst LJ), at 279 (Hobhouse LJ, dissenting on the issue of incorporation) (CA) [*AEG*].

107 See *eg*, *Koh Lin Yee*, *supra* note 74 at paras 55, 70; *Pertamina*, *supra* note 95 at para 69; *Anti-Corrosion*, *supra* note 85 at para 21. For a similar observation based on a review of English cases, see M H Ogilvie, "'Reasonable' Commercial Contracts and the Unfair Contract Terms Act 1977" (1991) 19 Can Bus LJ 357 at 380.

108 See *Kenwell*, *supra* note 7 at para 59; also *Holland Leedon*, *supra* note 92 at paras 236-238.

109 See *Press Automation*, *supra* note 96 at para 75. This may be the view taken by the court in *Tjoa Elis*, *supra* note 98 at para 95. See also *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2014] 1 SLR 985 at para 23 (HC); *Koh Lin Yee*, *supra* note 74 at para 69.

C. UCTA/MA—*Utilisation Profile*

The total number of cases yielded by my search which refer to the *UCTA* or *MA*,[110] some only tangentially, is 72, as set out in Annex B;[111] and a term was considered unreasonable, *ratio* or *obiter*, in around 15% of those cases.[112] For a 22-year period,[113] these figures are perhaps low and may suggest that the *UCTA* and *MA*'s impact in Singapore has not been significant. It must be remembered, however, that some cases may not have been captured by the search and, as with the *CP(FT)A*, the statutes may have influenced disputing parties to settle in some instances and may even have prompted changes in the T&C used by dominant contracting parties.[114]

Amongst the cases in Annex B are cases that make only a passing reference to the *UCTA* or *MA*, thus reducing the number of significant cases.[115] In other cases the *UCTA* or *MA* discussions, while brief, are significant because they signal a willingness to use the statutes.[116] In a number of cases yielded by the search, the statutes were held not to be applicable because, for example: the contract was not subject to the *UCTA* being one specified in the First Schedule;[117] the preconditions of s 3 of the *UCTA* were not met;[118] no duty/liability arose and hence the exemption was not pertinent;[119] the exemption clause was not pleaded;[120] and the exemption

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110 The first case citing the *UCTA* yielded by my searches is *Consmat*, *supra* note 7.

111 Search terms used: "unfair contract terms act", "UCTA" and permutations thereof. First instance decisions and appeals have been treated as separate cases.

112 Including three cases expressing the similar view that an exemption of liability by a bank for the fraud of its employee would be unreasonable.

113 Based on 1994 as the starting point; however, as indicated earlier, the *UCTA* was applicable in Singapore earlier via the *Civil Law Act*, *supra* note 7.

114 One may also take the view that the "lack of litigation attests to its success". See Meryll Dean, "Unfair Contract Terms: The European Approach" (1993) 56:4 Mod L Rev 581 at 589. On the other hand, she points to the narrow scope of the *UCTA*, the "avoidance tactics" that may be used by some and the inadequacy of the remedies.

115 For a non-exhaustive list, see *Chu Said Thong v Vision Law LLC* [2014] 4 SLR 375 at para 169 (HC); *Susilawati v American Express Bank Ltd* [2009] 2 SLR (R) 737 at para 70 (CA); *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 3 SLR (R) 55 at para 302 (HC); *Citibank NA v Lee Hooi Lian* [1999] 2 SLR (R) 1 at para 62 (HC); *Dauphin Offshore Engineering & Trading Pte Ltd v Private Office of His Royal Highness Sheikh Sultan bin Khalifa bin Zayed bin Zayed Al Nahyan* [1999] SGHC 201 at para 48; *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR (R) 244 at para 5 (HC); *Trans-Link Exhibition Forwarding Pte Ltd v Wadkin Robinson Asia Pte Ltd* [1996] 1 SLR (R) 424 at paras 9, 11 (CA); *A A Valibhoy and Sons (1907) Pte Ltd v Banque Nationale de Paris* [1994] 2 SLR (R) 14 at para 52 (HC); *Brown Noel* (HC), *supra* note 7 at para 12, on appeal *Brown Noel* (CA), *supra* note 7 at para 24.

116 For example: in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 at paras 23, 24 (CA) [*CKR*], the Court of Appeal considered, *obiter*, that a clause limiting the right to contest a call on a performance bond was potentially subject to the *UCTA*, *supra* note 3, s 13; in *Als Memasa v UBS AG* [2012] 4 SLR 992 at para 27 (CA) [*Als Memasa* (CA)], the Court of Appeal suggested that non-reliance clauses may be subject to the *UCTA* and *MA*; in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at para 38 (CA), the Court of Appeal indicated that a disclaimer that prevents an assumption of responsibility, and therefore a duty of care from arising, could be subject to the *UCTA*; in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR (R) 518 at para 32 (CA) [*Ng Giap Hon*], the Court of Appeal said that an entire agreement clause could be caught by the *UCTA*.

117 See *Pontiac Marina Private Limited v Richmall Holdings Pte Ltd* [1997] SGHC 305.

118 See *Koh Lin Yee*, *supra* note 74 at paras 22-25.

119 See *Ng Kong Teck v Sia Kiok Kok* [1996] 2 SLR (R) 720 at paras 31, 33, 36 (HC) [*Ng Kong Teck*].

120 See *Panwah Steel Pte Ltd v Burwill Trading Pte Ltd* [2006] 4 SLR (R) 559 at para 29 (CA) [*Panwah*].

clause was overridden by an express warranty.[121] Predictably, the requirement of reasonableness has given rise to the most disputes. In other words, few of the cases involve those provisions of the *UCTA* that outlaw exemptions for death, personal injury or pertaining to the implied terms in goods contracts.[122]

Of the cases in which the *UCTA* has been raised, disputes between banks and customers feature prominently. One such case, *Als Memasa* (CA), saw the Court of Appeal expressing disapproval at the banking practice of using T&C "to protect themselves from bad or even negligent advice to invest in financial products which may not be appropriate to the clients' risk profiles or their financial needs".[123] Amongst other things, the Court, urged the courts to make greater use of the statutory tools available to combat one-sided contract terms.[124] With this in mind, in the sub-sections that follow, I discuss several issues pertaining to the application of the *UCTA* and *MA* in Singapore, some of which may also be relevant to the utilisation of the *CP(FT)A*.

1. *No Dedicated Enforcement Agency*

Unlike the *CP(FT)A*, which makes provision for CASE/STB to act in response to identified unfair practices by seeking a voluntary compliance agreement, a declaration or an injunction, there is no watchdog that can challenge unreasonable terms under the *UCTA* or *MA*. This renders the protection of the latter elusive to many individuals and small businesses which will be reluctant, sometimes unable, to spend the money and time on a claim against a dominant contracting party. As Professor Mindy Chen-Wishart has put it: "[i]t is clear that, in consumer contracts, reliance on action by individuals is *wholly inadequate* to vindicate the protection conferred by [the *UCTA*]."[125] This problem can be ameliorated to some extent by piggy-backing on the *CP(FT)A*, as discussed earlier. Unreasonable terms under the *UCTA* or *MA* would, at least sometimes, constitute unfair practices that can be taken up by CASE (provided they have a consumer context) and be dealt with via the voluntary compliance agreement and declaration/injunction procedures. This reinforces the value of a proactive body that intervenes in response to detected needs.

2. *Caution about Applying the* UCTA *and* MA

There is little visible use of the *UCTA* via the *Civil Law Act* in the years between 1978, when it became effective in the UK, and November 1993, when it was formally adopted in Singapore.[126] A similar observation can be made about the *MA*. One explanation is caution about embracing the controversial jurisdiction to evaluate the fairness of contract terms. In *Panwah*, the Court of Appeal expressed surprise that

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[121] See *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 at paras 45-47 (CA).

[122] See, however, *ADX*, *supra* note 68; *Xu Jin Long v Nian Chuan Construction Pte Ltd* [2001] 3 SLR (R) 494 (HC) [*Xu Jin Long*]; *Ho See Jui v Liquid Advertising Pte Ltd* [2011] SGHC 108 [*Ho See Jui*].

[123] *Supra* note 116 at para 26. The non-reliance clause was the specific clause the Court had in mind in this case.

[124] *Ibid* at para 29.

[125] Chen-Wishart, *supra* note 11 at para 11.6.1.

[126] I am aware of two District Court cases that apparently relied on the *UCTA* in 1988 and 1990, as referred to in *Consmat*, *supra* note 7 at para 21.

the *UCTA* was not raised during the trial.[127] The halting reception of the *UCTA* and *MA* may also have been exacerbated by the fact that the *Civil Law Act* did not specifically identify the *UCTA* and *MA* as being applicable in Singapore; it stated, in more general terms, that mercantile law in Singapore was to be the same as that applying in England.[128] Yet, the relevance of the *UCTA* was appreciated in the legal community, as is evidenced by the fact that students enrolled in the Bachelor of Laws programme at the National University of Singapore were already learning about the *UCTA* in their contract law curriculum from 1978.[129] It should be added that Singapore may not be unique in experiencing such a slow start for the *UCTA* and *MA*. In *Phillips Products*, Slade LJ expressed surprise that, some seven years after the *UCTA*'s enactment in the UK, he was referred to only one reported case involving the statute.[130]

The first reported Singapore case on the *UCTA* appears to be *Consmat*.[131] The bank's T&C included a verification and conclusive evidence clause ("verification clause") which required the customer to verify its bank statements within seven days of receipt and notify any errors to the bank. Such verification clauses, which effectively exclude the bank's liability for unauthorised debits, have become ubiquitous in bank T&C in Singapore. The customer sought to avoid the effect of the verification clause by relying on the *UCTA* via the *Civil Law Act*. Reticence about using the *UCTA* is detectable firstly, in the holding that the *UCTA* did not apply because local law, in the form of the *Bills of Exchange Act*,[132] already dealt with the matter. Since the *Bills of Exchange Act* does not contemplate verification clauses (or exemption clauses of any kind), it does not appear to govern the situation.[133] Secondly, the *obiter* view that the verification clause was reasonable fails to engage fully with the reasonableness factors identified in the *UCTA*.[134] Amongst other things, the court emphasised the claimant's free choice in entering into the agreement and acceptance of the terms of the contract,[135] and it noted that there was no evidence that the claimant was unable to negotiate a variation of the bank's terms.[136] The factors of bargaining strength and the customer's subjective knowledge of the term do not appear to have been factored in, and the absence of evidence about the bank's willingness to negotiate the terms should have favoured the customer, since the bank bears the burden of proving that the terms are reasonable. The court also rejected the argument that the

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127 *Supra* note 120 at para 29.

128 *Civil Law Act*, *supra* note 7, s 5, since repealed.

129 Author interview with alumnus (24 October 2015); interview notes retained by author.

130 *Supra* note 104 at 661. See also the reference to the *UCTA*'s "slow start" and that it was yet "to realise its full potential" by Edwin Peel, "Making More Use of the Unfair Contract Terms Act 1977: *Stewart Gill Ltd v Horatio Myer & Co Ltd*" (1993) 56:1 Mod L Rev 98 at 103 [Peel, "Making More"]; Dean, *supra* note 114 at 589 had commented on the "remarkable absence of case law on the consumer protection provisions" of the *UCTA* and that "the courts have had very little opportunity to develop the concept of 'reasonableness' under [s] 11 of the Act."

131 *Supra* note 7.

132 Cap 23, 2004 Rev Ed Sing.

133 In this respect, see Poh Chu Chai, *Banking Law*, 2d ed (Singapore: LexisNexis, 2011) at 761.

134 See also *ibid* at 762.

135 In other cases, the courts have said that knowingly or willingly contracting is not dispositive: see *Holland Leedon*, *supra* note 92 at para 234; *Kay Lim*, *supra* note 84 at para 93; *Kenwell*, *supra* note 7 at para 58.

136 *Consmat*, *supra* note 7 at para 25. In the later case of *Kenwell*, *supra* note 7 at para 59, the court said that arguments about a contractual choice needed to be supported by evidence.

short verification period of seven days rendered the clause unreasonable. In the later decision of *Tjoa Elis*, the court suggested that seven days for an individual customer may be too short.[137]

There are two contrasting cases in which the *UCTA* was invoked via the *Civil Law Act*. The first is *Trans-Link*,[138] where the High Court dismissed a litigant's attempt to rely on exemption clauses as it had not pleaded and proved that the terms were reasonable under the *UCTA*. The second case is *Kenwell*,[139] where an exemption clause was held by the High Court to have failed the reasonableness test. It should be noted, though, that *Kenwell* was heard in 1997/1998 by which time the *UCTA* had been cemented in Singapore's statute books.

Even after the *UCTA* and *MA* were formally adopted, there are cases in Singapore and England that are conservative about the statutes' potential. One such case is *Chok Boon Hock v Great Eastern Life Assurance Co Ltd*,[140] in which an insurance agent sued his principal when his commissions were reduced pursuant to a variation clause. It was pleaded that the variation clause was unreasonable under s 3 of the *UCTA*. The *UCTA* argument was, however, subsequently dropped; in this respect the court indicated, somewhat cryptically, that the plea "was rightly withdrawn".[141] An attempt to invoke s 3(2)(b)(i) of the *UCTA* against a variation clause failed some years later in the English case of *Paragon Finance plc v Nash*.[142] However, more recently, in *AXA Sun Life Services plc v Campbell Martin Ltd*, Stanley Burnton LJ in the Court of Appeal (England) saw scope for the *UCTA* to apply to a variation clause.[143] This development is a positive one since variation clauses, giving one party superior power to alter the bargain, are clearly capable of abuse and it is appropriate that their use in standard T&C should be subject to judicial scrutiny.[144]

Another relatively early case in which the *UCTA* was not fully embraced is *Ri Jong Son v Development Bank of Singapore Ltd*.[145] Here an unauthorised debit from a bank account was procured by a joint-account holder who forged the other's signature. The bank's T&C included a provision that the bank would not be liable for loss occasioned without the bank's fault;[146] forgery of the customer's signature was expressly identified as a possible scenario. The High Court held, uncontroversially, that the clause did not have to satisfy the reasonableness test of the *UCTA* under s 2(2) because the bank was not attempting to exclude liability for negligence.[147] However,

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137 *Supra* note 98 at para 92.

138 *Supra* note 7.

139 *Supra* note 7.

140 [1998] 2 SLR (R) 878 (HC).

141 *Ibid* at para 19. See also Law Commission & Scottish Law Commission, *Unfair Terms in Contracts: A Joint Consultation Paper*, Law Com Consultation Paper No 166, Scot Law Com Discussion Paper No 119 (London: TSO, 3 July 2002) at para 5.19.

142 [2002] 1 WLR 685 (CA) [*Paragon*]. The *UCTA*, *supra* note 3, s 3(2)(b)(i) imposes the standard of reasonableness on any term that entitles one party to render contractual performance that is substantially different from that which the other party reasonably expects.

143 [2011] 2 Lloyd's Rep 1 at para 50 (CA) [*AXA*]. See also Beale, *supra* note 18 at para 15-085.

144 The common law has attempted to control discretions: see *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at para 85 (HC) but the standard is not high: "arbitrariness, capriciousness, perversity and irrationality".

145 [1998] 1 SLR (R) 824 (HC) [*Ri Jong Son*].

146 See *eg*, the similar clause in the T&C of United Overseas Bank Ltd in *Tjoa Elis*, *supra* note 98 at para 109.

147 *Ri Jong Son*, *supra* note 145 at para 39.

s 3 was more pertinent as the bank was excluding liability for payment without a mandate—a breach of contract.[148] The Court's *obiter* view of reasonableness has also attracted criticism.[149]

3. *The Common Law Tools for Controlling Exemption Clauses Remain Popular*

Prior to the introduction of legislative controls on unfair terms, the English courts established a tradition of curbing exemption clauses through various techniques,[150] including restrictive incorporation and interpretation. Thus, the courts have sometimes found that objectionable exemption clauses have not been incorporated into the contract because they were introduced after the contract was concluded, thereby obviating the need for recourse to the *UCTA* and *MA*. This technique has proved to be most effective in unsigned contracts.[151] So too, any exemption clause must be construed to ascertain that the clause covers the events that have transpired; if not, recourse to the *UCTA* and *MA* becomes unnecessary.[152]

These common law techniques to control unfair terms are alive and well in Singapore. At the same time, there is clear authority that the courts should not adopt a strained or artificial approach to incorporation or interpretation in order to quash an exemption clause. Thus, in *Press Automation*,[153] Judith Prakash J endorsed the "common sense" view of Hobhouse LJ in his minority judgment in *AEG*,[154] that strict incorporation criteria were no longer necessary in the light of the *UCTA* which now regulates unreasonable exemption clauses. For a similar approach as regards interpretation, reference can be had to *Telemedia*. The clause in question was a verification clause which required the customer to verify its bank statements within 30 days and notify the bank of any errors. In an *obiter* discussion, the court rejected a watered-down interpretation that subverted the intent of the clause; it confirmed that the purpose of the clause was to protect the bank from unauthorised transactions by third parties.[155]

Once it is accepted that an artificial approach to interpretation is not warranted, entrenched practices, such as the well-known approach developed in *Canada Steamship Lines Ld v R*, must be called into question.[156] *Canada Steamship* has been applied in a number of Singapore cases and was recently described as "an established part of our law".[157] Yet, the continued use of *Canada Steamship*, particularly its third

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148 In this respect, see Poh, *supra* note 133 at 744.

149 *Ibid* at 744, 745.

150 For a discussion of other techniques, such as fundamental breach and unconscionability, see Lawson, *supra* note 84 at ch 3, 4.

151 For a Singapore example, see *Holland Leedon*, *supra* note 92 at paras 212-226.

152 See *eg*, *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at para 113 (CA); *Ho See Jui*, *supra* note 122 at para 95.

153 *Supra* note 96 at para 40.

154 *Supra* note 106 at 277. See also *Huationg (Asia) Pte Ltd v Lonpac Insurance Bhd* [2016] 1 SLR 1431 at paras 71, 72 (HC).

155 *Telemedia*, *supra* note 91 at paras 231-241. The availability of the *UCTA* to counter attempts to exclude fraud by the bank's employee was also duly noted. See also *Pertamina*, *supra* note 95 at para 58.

156 [1952] AC 192 at 208 (PC) [*Canada Steamship*].

157 *Holland Leedon*, *supra* note 92 at para 208. See also *Pars Carpet Gallery Pte Ltd v Marina Centre Holdings Pte Ltd* [1996] 3 SLR (R) 915 at paras 24-32 (HC).

limb,[158] is inconsistent with the message that the *UCTA*, and not the rules governing incorporation and interpretation of terms, should be left to deal with the substantive fairness of terms. It is contrived to say that a clause, worded widely enough to embrace negligence, will not be taken to cover negligent damage if another category of damage is potentially covered by the clause. Rather, the stance of the Court of Appeal in *Pertamina*, in an analogous scenario, is preferable. The question in *Pertamina* was the scope of an exemption clause (in the form of a verification clause) that was worded widely enough to embrace third party fraud, albeit no specific mention was made of fraud. The Court ruled that the clause was wide enough to protect from such third party fraud.[159] In light of *dicta* that the *UCTA* is now the primary tool for controlling unreasonable exemption clauses, it seems appropriate for the courts to reconsider the continued role of *Canada Steamship* in cases where the *UCTA* and/or *CP(FT)A* apply. *Canada Steamship* was developed before the *UCTA* in an era when the control of exemption clauses had to be generated by the courts. Today, the two approaches do not sit comfortably together.[160]

4. *Invoking/Pleading the* UCTA *and* MA

The Singapore courts have demonstrated a willingness to entertain *UCTA* and *MA*-based arguments without insisting on formal pleading requirements. Such an approach is supported as consumers and small businesses are more likely to be unrepresented and hence more likely to fall foul of pleading rules. In *Tjoa Elis*, the High Court entertained a reasonableness argument even though the Act was not specifically identified.[161] In another banking case, *Pertamina*, the Court of Appeal appears to have invoked the *UCTA* in the absence of any *UCTA*-based argument.[162] A stricter approach adopted in a District Court decision should be seen in the context of its facts: in *Auto Palace Pte Ltd v Sean Liew Cheng En* it was held that a litigant that wishes to rely on the *UCTA* must plead it, or at least indicate that reasonableness is contested.[163] On the facts of the case, the *UCTA* seems to have been raised at a very late stage and with little merit.[164] The Court also indicated that, in any event, the clause in question passed the test of reasonableness.[165]

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158 In *Canada Steamship*, *supra* note 156, the Privy Council set out three principles to guide the interpretation of exemption clauses in which negligence liability is at stake: (1) If the language of the clause expressly exempts liability for negligence, it must be respected. (2) If exemption for negligence is not express, is the exempting language of the clause nevertheless wide enough to embrace negligence? (3) If yes, is some other category of damage also potentially covered? If yes, the clause should be taken to exclude that other damage and not negligently-caused damage.

159 *Pertamina*, *supra* note 95 at para 58.

160 Similar comments may be apposite for the *contra proferentem* principle although it is not intended to explore that further here. The restrictive common law approaches may still be appropriate when the *UCTA* and *CP(FT)A* are not applicable.

161 *Supra* note 98 at para 92. Because of a factual finding, the *UCTA* discussion was *obiter*.

162 *Supra* note 95 at para 69. See also *ALS Memasa v UBS AG* [2012] SGHC 30 at para 73 [*Als Memasa* (HC)].

163 [2013] SGDC 110 at para 38 [*Auto Palace*]. The reasoning was that the *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), o 18 r 8 requires facts which constitute a defence based on a statute to be pleaded as they render the other party's claims or defences not maintainable.

164 *Auto Palace*, *supra* note 163 at para 40.

165 *Ibid* at para 41.

There is case authority in the UK that the party who wishes to rely on an exemption clause must ordinarily make that clear in the pleadings. In *Sheffield v Pickfords Ltd*,[166] the Court of Appeal (England) ruled that a party relying on terms to which the *UCTA* applies must expressly or impliedly allege the terms to be reasonable in the pleadings. The other party need not allege unreasonableness.[167] It is also worth noting that the UK's *Consumer Rights Act 2015* requires a court to consider whether a term is fair irrespective of the issue being raised by either party.[168] Such an institutionalised, proactive approach by the courts, at least for unrepresented parties, should help to increase the utilisation of these statutes and improve their effectiveness.

5. *The Inhibiting Effect of Past Decisions*

Most disputes involving the *UCTA* and *MA* will, for obvious reasons, be those hinging on the question of reasonableness. As indicated above, reasonableness is a fact-specific enquiry that requires weighing up all the relevant facts. Although predictions can be made based on how the test was applied in past cases, previous rulings on reasonableness are not binding and the appellate courts generally respect a trial court's view on reasonableness because there is "room for a legitimate difference of judicial opinion".[169] As such, the outcome of a reasonableness argument is inherently uncertain. Since there is inevitably a cost associated with making any argument in litigation, the uncertainty about the outcome may deter parties from invoking the *UCTA* or *MA*.[170] Ordinarily, though, one would not expect this to affect the utilisation of the statutes unduly since uncertainty is inherent in any litigation. The other party to the dispute faces the jeopardy that the term will be held to be unreasonable, *ie* "the uncertainty works both ways".[171]

The position changes, however, when past cases suggest a trend for resolving the reasonableness enquiry in favour of one party. Over time, a view of reasonableness may become so settled that lawyers and litigants no longer consider it sufficiently open to challenge, or worth challenging. This may have happened in Singapore where, for instance, banks have successfully defended their verification clauses on numerous occasions under the *UCTA*.[172] *Consmat*, for example, was followed some years later by a factually similar case, *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd*,[173] yet there is no mention of the *UCTA* in

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166 [1997] Comm LC 648 (CA).

167 *Ibid* at 650, 651. See also *Leofelis SA v Lonsdale Sports Ltd* [2008] Eur TMR 63 at para 137 (CA); *Laceys Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369 at 384 (CA); *AEG*, *supra* note 106 at 278 (Hobhouse LJ, dissenting on the issue of incorporation). This is consistent with the position that the person relying on the term has the onus of proving that it is reasonable: *UCTA*, *supra* note 3, s 11(5).

168 *Supra* note 10, s 71(2).

169 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 816 (HL).

170 See a similar observation in Andrew B L Phang, "Exception Clauses and Negligence: The Influence of Contract on Bailment and Tort" (1989) 9:3 Oxford J Legal Stud 418 at 424.

171 Adams, *supra* note 20 at 706.

172 The courts' views on the clauses in *Consmat*, *supra* note 7 and *Tjoa Elis*, *supra* note 98 were, however, *obiter*.

173 [1999] 2 SLR (R) 518 (HC) [*Stephan*].

the reported case.[174] By the time *Pertamina* was decided, the verification clause had been the subject of litigation on at least three prior occasions.[175] The verification clause was clearly controversial and it had not before been considered by Singapore's apex court, yet its validity under the *UCTA* was apparently not raised by the appellant.[176] The reason is not apparent but one possibility is pessimism about the likelihood of a favourable outcome, such that the decision was taken not to argue it.[177]

Past decisions, even if not strictly of precedent value, help parties predict the outcomes of their cases and reduce spurious allegations of unreasonableness. As such, they play a useful role. At the same time, there is a danger that past precedents will have an inhibiting effect. This possibility should be countered, and one way to counter it is for the courts to invoke the *UCTA* or *MA* if the parties fail to do so—which reiterates the point made in the preceding section. Such a practice will help to advance the contractual fairness agenda that the *UCTA*, *MA* and *CP(FT)A* embody by ensuring that the statutes are not overlooked or side-lined by an apparent trend in past decisions.[178]

6. *Conceptual Instability Obstructs the* UCTA *and* MA *from Realising their Intended Potential*

The *UCTA*'s *modus operandi* is to target "almost exclusively" exemption clauses.[179] It is doubtful that the drafters of the *UCTA* and *MA* intended for the statutes to hinge on technical distinctions: "we regard this expression [exemption clause] not as a legal term of art but as a convenient label for a number of provisions which may be mischievous in broadly the same way."[180] However, when introduced into an environment that is cautious about evaluating substantive fairness, the labels used by statutes to demarcate their jurisdiction assume importance. In the case of the *UCTA* and *MA*, it became necessary to recognise clauses that exclude or limit liability and distinguish them from clauses that demarcate or define liability.

The legitimacy of such an endeavour was challenged even before the advent of the *UCTA* by Professor Brian Coote who argued that clauses that exempt liability do not operate defensively to shield a party from liability it would otherwise have; rather, they indicate that no liability has been assumed in respect of those matters

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174 In this respect, see Poh, *supra* note 133 at 778.

175 *Consmat*, *supra* note 7; *Stephan*, *supra* note 173; *Tjoa Elis*, *supra* note 98.

176 See *Pertamina*, *supra* note 95 at para 69.

177 The Court of Appeal nevertheless addressed the application of the *UCTA* and expressed the view that the clause, in the circumstances of that case (notably that the customer was a business entity), was reasonable: see *ibid*. Another case where the failure to rely on the *UCTA* is surprising, is *Als Memasa* (HC), *supra* note 162: see *ibid* at para 73.

178 More recent cases involving bank-customer disputes suggest that banks should not be complacent about the reasonableness of their terms. Aside from *Als Memasa* (CA), *supra* note 116, discussed earlier, there are a number of cases indicating that verification clauses that purport to exempt the bank for unauthorised transactions procured fraudulently by a bank employee, are unreasonable: *Jiang Ou*, *supra* note 91 at paras 118-122; *Pertamina*, *supra* note 95 at para 63; *Telemedia*, *supra* note 91 at para 240.

179 Peel, *Treitel*, *supra* note 11 at para 7-051.

180 House of Commons, *supra* note 21 at para 146. See also the argument made in Lau Kwan Ho & Tan Ben Mathias, "Basis Clauses and the Unfair Contract Terms Act 1977" (2014) 130 Law Q Rev 377.

identified by the exemption clause.[181] This view reflects Coote's theory of contract as voluntarily assumed obligations.[182] At the risk of over-simplification, it means there is no such thing as a clause that exempts liability. If correct, the *UCTA* and *MA* would have no scope of operation.

The English and Singapore courts subscribe, however, to a more nuanced position that both species exist: there are duty-defining terms (sometimes called basis clauses) which are beyond the reach of the *UCTA* and *MA*, and there are exempting terms that are subject to their scrutiny. For example, in *Deutsche Bank AG v Chang Tse Wen* the Singapore Court of Appeal said that clauses that in substance exempt liability would be treated as such but, on the other hand, the effect of a contract's terms may be that there is "no duty to begin with".[183] Herein lies the problem: although the courts recognise that some clauses may be exempting in substance albeit not in form, and in such cases they will pierce the veil and subject the clause to the *UCTA* or *MA*,[184] there seems to be no satisfactory basis on which to distinguish them from duty-defining clauses that do not fall under the *UCTA* and *MA*'s jurisdiction. Since the ability to make this distinction is crucial for the *UCTA* and *MA*'s application, the statutes' operation is continuously hampered. In the words of Professor Elizabeth Macdonald concerning the *UCTA*: "there is a conceptual vacuum at the centre of the Act."[185] Judicial acknowledgement of the problem comes from Lord Steyn who referred to the "endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision".[186]

The Singapore High Court decision in *United Overseas Bank Ltd v Mohamed Arif*[187] is a nice illustration of the difficulty in making the distinction. In this case, a clause allowed the bank to refuse to execute oral instructions from the customer "without incurring any responsibility for loss, liability or expenses".[188] The Court said that s 3 of the *UCTA* was not applicable as a refusal to act on oral instructions was not an attempt to exempt liability for breach of contract. This view is a tenable one. However, for two reasons, the clause could also have been viewed as an exemption clause. First, under the common law, a bank is obliged to act on its

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[181] Brian Coote, *Exception Clauses: Some Aspects of the Law Relating to Exception Clauses in Contracts for the Carriage, Bailment and Sale of Goods* (London: Sweet & Maxwell, 1964) ch 1. See also Coote, "UCTA", *supra* note 16 at 312, 314; Ogilvie, *supra* note 107 at 382; Norman Palmer & David Yates, "The Future of the Unfair Contract Terms Act 1977" (1981) 40:1 Cambridge LJ 108 at 123: "the Act may prove to be ill-adapted to cope with the demands thus made upon it." See the counter-view of Gerard McMeel, "Documentary Fundamentalism in the Senior Courts: The Myth of Contractual Estoppel" [2011] LMCLQ 185 at 205; Adams, *supra* note 20 at 703.

[182] See *eg*, Brian Coote, *Contract as Assumption II: Formation, Performance and Enforcement*, ed by J W Carter (Oxford: Hart Publishing, 2016) at 214-220.

[183] [2013] 4 SLR 886 at para 68 (CA) [*Deutsche Bank*]. The context was the existence of a duty of care in tort. See also *Ng Kong Teck*, *supra* note 119 at paras 31, 33, 36; *Boustead Singapore Ltd v Arab Banking Corp (BSC)* [2015] 3 SLR 38 at paras 216-220 (HC).

[184] See *Deutsche Bank*, *supra* note 183 at para 68; also *Ng Giap Hon*, *supra* note 116 at para 32; *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR (R) 537 at paras 37-39 (CA) [*Lee Chee Wei*].

[185] Elizabeth Macdonald, "Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts" [1994] J Bus L 441 at 442 [Macdonald, "Mapping"]. See also Ewan McKendrick, *Contract Law*, 11th ed (London: Palgrave, 2015) at paras 11.1, 11.9.

[186] *Director General*, *supra* note 41 at para 34. The statement was made in the context of the UK's *The Unfair Terms in Consumer Contracts Regulations 1999*, *supra* note 12.

[187] [1994] 1 SLR (R) 530 (HC) [*United Overseas Bank*].

[188] *Ibid* at para 56.

customer's instructions, oral or written; therefore refusing to act on oral instructions is ordinarily a breach of contract and hence the clause in question was, arguably, in substance excluding liability for such breach. Second, the clause arguably used the language of exemption: "without incurring any responsibility for loss, liability or expenses".[189] The duty-defining/duty-exempting distinction made no difference in this case as the clause was, in any event, surely reasonable under the *UCTA*.[190] However, the reasoning is different as a duty-defining term obviates any need to talk about the *UCTA* and reasonableness.

The *United Overseas Bank* scenario also illustrates how clever drafting can avoid exempting language, thereby reducing the chances that the *UCTA* or *MA* will apply. The bank could have drafted its T&C to say that the bank would only act on written instructions. Such wording avoids exempting language and hence presents more as duty-defining. A similar point is apposite for the *MA*.[191] For example, in *Ng Kong Teck*,[192] a false representation was made as to the built-in area of a property. The High Court agreed with English authority that a term that limited the authority of an agent to make representations did not invoke the *MA*.

To some extent, the problem of camouflage was anticipated by the *UCTA*'s drafters in the form of s 13(1) of the *UCTA* which provides that an attempt to achieve an indirect exemption, for example for negligence or breach of contract, meets the same fate as a more transparent provision.[193] Section 13(1) identifies the techniques that it targets, for example: restricting the remedies available for a breach of a duty of care or a breach of contract, or restricting the applicable rules of procedure/evidence instead of directly excluding liability. So too, excluding the duty of care, as opposed to liability for negligence, and excluding certain implied terms in goods contracts, will be caught. However, as some Singapore cases show, the duty-defining/duty-exempting dilemma dogs s 13(1) too. In *Gao Bin v OCBC Securities Pte Ltd*,[194] the High Court ruled that an anti-set-off clause was not subject to the *UCTA* as it did not restrict liability—the claimant could still claim in separate proceedings. The Court, with some justification, viewed the clause as defining the parties' rights. The Court of Appeal in *Koh Lin Yee* has since weighed in and said that in the overall scheme of s 13, an anti-set-off clause is subject to the *UCTA*.[195] As regards the *MA*, there is no equivalent of the *UCTA*'s s 13 although it is strongly arguable that the indirect exempting techniques targeted by s 13(1) should, if used in a misrepresentation context, nevertheless be subjected to the reasonableness test on the basis of the substance over form approach endorsed by the Singapore courts. However, the duty-defining/duty-exempting shadow hovers here too.

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189 Professor Macdonald has suggested that clauses which use the language of exemption should be treated as exemption clauses: see Elizabeth Macdonald, "Exception Clauses: Exclusionary or Definitional? It Depends!" (2012) 29 J Cont L 47 at 50 [Macdonald, "Exception Clauses"].

190 See *Morrell v Workers Savings & Loan Bank* [2007] UKPC 3 at para 10 where the Privy Council noted that "[a] bank may not be bound, or prudent, to accept purely oral instructions."

191 See *eg*, Edwin Peel, "Reasonable Exemption Clauses" (2001) 117 Law Q Rev 545 at 549 [Peel, "Reasonable"].

192 *Supra* note 119 at paras 31, 33, 36.

193 *Ie* it is either ineffective or it must be reasonable. Section 13 is a complex provision and its intended scope has been contentious: see *eg*, *Koh Lin Yee*, *supra* note 74 at paras 49-52.

194 [2009] 1 SLR (R) 500 at paras 13, 14 (HC).

195 *Koh Lin Yee*, *supra* note 74 at paras 52, 64.

It is striking that those provisions of the *UCTA* that clearly outlaw certain contract terms have not, to the same extent, been haunted by the duty-defining/duty-exempting dilemma. An example is the prohibition on exempting liability for negligent death or personal injury.[196] As noted earlier, these sections have seen far less litigation than those sections imposing a reasonableness test. The clear prohibition on such terms is perhaps a factor although it does not really explain why duty-defining arguments have taken less hold. The reason, I suggest, is that the default liability in such cases is well-defined by the law of negligence and sale of goods. This has given the courts firm ground on which to reject duty-defining arguments in physical injury, death and consumer goods cases.[197]

In summary, the current statutory framework must contend with terms that exclude or restrict liability, and terms that define liability.[198] It assumes, unwisely, that there is a rational distinction between these two categories when, in reality, drawing the distinction is problematic.[199] The boundaries are hard, if not impossible, to define, and this undermines the ability of the *UCTA* and *MA* to operate effectively.[200] The courts and academics have suggested tests to draw the distinction. One of the first was the 'but-for' test,[201] but it has rightly been criticised for being too inclusive and "bringing clauses inappropriately within the Act".[202] A more recent judicial approach that has some merit, at least in a misrepresentation context, is to apply the *UCTA* or *MA* where the term is an artificial construct in that it "attempts to rewrite history or parts company with reality".[203] Professor Macdonald has proposed a "perspective" approach although, on her own admission, it is unavoidably complex.[204]

V. A Different Strategy: Assess Risk Allocation

In view of the problematic duty-defining/duty-exempting distinction, consideration should be given to alternative approaches. The alternative proffered here is that we switch to evaluating the reasonableness or fairness of the risk allocation reflected

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196 See also *UCTA*, *supra* note 3, ss 6(1), 6(2), 7(2).

197 See *Xu Jin Long*, *supra* note 122 at para 6; *Phillips Products*, *supra* note 104 at 666.

198 A third possibility, although practically less of a concern, is clauses that present as exemption clauses but in substance are not: see Macdonald, "Exception Clauses", *supra* note 189 at 50.

199 Notwithstanding the statement by Gloster J in *JP Morgan*, *supra* note 85 at para 601 that "[t]here is a clear distinction between clauses which exclude liability and clauses which define the terms upon which the parties are conducting their business". See McKendrick, *supra* note 185 at para 11.15; also Lau & Tan, *supra* note 180.

200 Referred to by Mindy Chen-Wishart as the "jurisdictional problem at the heart of [the *UCTA*]" in Chen-Wishart, *supra* note 11 at para 11.4.5.3. Elizabeth Macdonald has called it a "vexed" and "very difficult" question: see Macdonald, "Unifying", *supra* note 41 at 87, note 134, 93. See also Beale, *supra* note 18 at para 15-070; McKendrick, *supra* note 185 at para 11.10. Professor Coote warned of the problems: see Coote, "UCTA", *supra* note 16 at 314.

201 See *Smith v Bush* [1990] 1 AC 831 at 857 (HL).

202 Macdonald, "Mapping", *supra* note 185 at 447. See also McKendrick, *supra* note 185 at para 11.10; *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] 2 Lloyd's Rep 92 at para 104 (QB). The 'but-for' test is incompatible with the assumption theory of contract.

203 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2011] 1 Lloyd's Rep 123 at para 314 (QB). See also *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333 at 2347 (QB). There is some support for this approach in Singapore: see *Als Memasa* (HC), *supra* note 162 at para 73.

204 Macdonald, "Exception Clauses", *supra* note 189 at 50, 53, 72, 73.

in the contract. The reason why the *UCTA* and *MA* attempt to regulate clauses that exempt liability, is that they allocate risk.[205] That being the case, we should regulate risk allocation, not its proxy, thereby obviating the need to make the duty-defining/duty-exempting distinction. A focus on risk allocation will cut straight to the reasonableness inquiry. Admittedly, such an approach will increase the number of cases in which terms are subjected to the reasonableness test but this is preferable to an approach that gives the court "no opportunity to police such clauses".[206] As Professor Edwin Peel has said, the meritorious and unmeritorious claims can be sorted out at the reasonableness stage.[207] The risk of opening the floodgates, can also be managed, as elaborated below. The Court of Appeal's decisions in *Als Memasa* (CA),[208] *Lee Chee Wei*[209] and *Koh Lin Yee*[210] all supported the greater use of the *UCTA* and *MA* to control clauses that pose particular problems for the *UCTA* and *MA*, namely non-reliance, entire agreement and anti-set-off clauses. An expanded jurisdiction to evaluate fairness through the medium of risk allocation would advance that goal.

The risk allocation approach can be illustrated briefly with reference to a few of the cases discussed here. In *United Overseas Bank*,[211] the clause allowed the bank to refuse to execute oral instructions. The clause allocates risk to the customer by limiting the way in which he may bind his bank. Instead of getting bogged down in duty-defining/duty-exempting arguments, the court can turn directly to whether the allocation of risk is reasonable. In *Deutsche Bank*,[212] the bank and customer contracted on the basis that responsibility for investment decisions lay with the customer. Under my scheme, the question will be whether it is reasonable in all the circumstances for the risk to have been allocated in this way. In *Als Memasa* (CA), where the Court expressed concern about banks using non-reliance clauses to protect themselves from misrepresentation in wealth management contracts, a court would assess the reasonableness of allocating the risk of misrepresentation to the customer.

This suggestion to assess risk allocation is not as radical as it admittedly appears. The germ of the idea is already reflected in the *UCTA*,[213] most particularly s 3(2)(b)(i) which imposes the familiar standard of reasonableness on any term that entitles one party to render contractual performance that is substantially different from that which the other party reasonably expects. Unfortunately, as it stands, this provision is flawed as it ignores the problem that a contracting party's expectations are surely shaped (if not determined) by the terms of the contract that he/she enters into: "[it] assumes that there is a *normative standard of reasonable expectations* which is ascertainable, independent of the *expectations* defined in the contractual document itself."[214] One may argue that the courts should try to make something meaningful

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[205] See *eg*, McKendrick, *supra* note 185 at para 11.2.

[206] Peel, "Reasonable", *supra* note 191 at 549. See also McKendrick, *supra* note 185 at para 11.15.

[207] Peel, "Reasonable", *supra* note 191 at 549.

[208] *Supra* note 116.

[209] *Supra* note 184.

[210] *Supra* note 74.

[211] *Supra* note 187.

[212] *Supra* note 183.

[213] See Macdonald, "Unifying", *supra* note 41 at 93; also the argument by Lau & Tan, *supra* note 180.

[214] Chen-Wishart, *supra* note 11 at para 11.4.5.4 [emphasis in original]. See also Phang, *Contract*, *supra* note 105 at para 07.119; Lawson, *supra* note 84 at para 8.13.

out of s 3(2)(b)(i) on the basis that Parliament obviously intended it to play a role in the *UCTA* toolbox,[215] but the mental gymnastics required seem to have inhibited its potential. Section 3(2)(b)(i) is also limited to controlling clauses that affect the *performance* of the party seeking to rely on it, a concept that has been restrictively interpreted. In *Paragon*, the Court of Appeal (England) held that a lender's right to increase the interest payable on a loan was not subject to s 3(2)(b)(i) as it affected the borrower's performance, not the lender's.[216] For these reasons, claimants in England have had mixed success with this provision,[217] while in Singapore it has rarely been utilised.[218]

The use of risk allocation as a touchstone also finds support in a number of Singapore cases that considered unfair terms under the *UCTA* framework. Thus, in *Pertamina*, the Court of Appeal said that verification clauses "employed in a banker and corporate customer relationship afford a practical and reasonable device for pragmatic management of risk allocation."[219] Similarly, in *Lee Chee Wei* the Court of Appeal recognised that entire agreement clauses "perform a useful role as legitimate devices for the allocation of risk between the parties", while at the same time it reminded us of the court's jurisdiction to police the use of such clauses.[220] The High Court, in *Kay Lim*, considered a clause in a construction contract to reflect "the allocation of contractual risk that two commercial parties of equal bargaining power are entitled to agree upon."[221]

Understandably, a broader touchstone that evaluates risk allocation prompts concerns about eroding contractual freedom.[222] As mentioned at the outset, the courts have a long-standing resistance to evaluating the substantive fairness of contract terms. Ring-fencing their jurisdiction to do so by confining it to clauses that exempt liability offers some comfort, but this ring-fence is more apparent than real. I would venture to suggest that when a court rules under the current *UCTA*/*MA* framework that a term is duty-defining rather than exempting, in most cases it is expressing the view that the term is reasonable in all the circumstances of the case.[223] That being

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[215] I have made this argument before: see Sandra Annette Booysen, "'Pay Now: Argue Later': Conclusive Evidence Clauses in Commercial Loan Contracts" [2014] J Bus L 31 at 42-44.

[216] *Supra* note 142 at paras 73-77.

[217] Contrast *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49 at paras 28-37 (EAT); *Do-Buy 925 Limited v National Westminster Bank Plc* [2010] EWHC 2862 (QB) at para 95; *Timeload Limited v British Telecommunications Plc* [1995] EMLR 459 at 468 (CA); *Zockoll Group Limited v Mercury Communications Limited* [1999] EMLR 385 at 395 (CA); *AXA*, *supra* note 143 at para 50. See also Macdonald, "Unifying", *supra* note 41 at 81; Booysen, *supra* note 215 at 42, 43.

[218] See also Macdonald, "Unifying", *supra* note 41 at 81.

[219] *Supra* note 95 at para 60. See also *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696 at para 39 (CA) citing *EA Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029.

[220] *Supra* note 184 at paras 36-39.

[221] *Supra* note 84 at para 95. This view was based on the Court's interpretation of the term. See also *Telemedia*, *supra* note 91 at para 240 where the High Court referred to risks in a bank-customer contract that properly reside with the bank.

[222] For trenchant criticism of judicial control over contract content, see Palmer & Yates, *supra* note 181 at 127-129. For a defence of substantive fairness, see Stephen A Smith, "In Defence of Substantive Fairness" (1996) 112 Law Q Rev 138.

[223] Admittedly, this will not always be the case. In *Crestsign Limited v National Westminster Bank plc* [2014] EWHC 3043 (Ch) at paras 119, 120, the court considered a term to be duty-defining (a basis clause) but expressed the view that if it was subject to the *UCTA*, it would fail the reasonableness test. The case is on appeal to the Court of Appeal (England).

the case, evaluating the reasonableness of a contract's risk allocation offers a more satisfactory basis for the courts to continue what they are already doing.

Legitimate concerns about sweeping powers to evaluate the contents of contracts for reasonableness can be met. There are a number of options. Methods already used by the *UCTA* can continue to be applied, such as confining the jurisdiction to consumer and standard form contracts. Another option is to limit the evaluation of risk allocation to those cases where the contract was concluded without the benefit of legal advice.[224] As in Australia and the UK, the price and main subject matter of the contract can be put beyond scrutiny.[225] The courts should also be robust in dismissing spurious arguments about an unreasonable allocation of risk, and use costs orders to penalise parties who advance such arguments without merit. Over time, the legitimate scope to evaluate risk allocation will be demarcated by the courts doing what they have done for some time, and shown they are equal to: balancing fairness and certainty. The current *UCTA* rules forbidding the exemption of liability in certain cases, for example negligent death and personal injury, can also be accommodated in a risk allocation framework. Thus, the legislation can provide that where liability for negligently causing death or personal injury is at stake, any attempt to allocate risk in a way that departs from the allocation by the common law will be void.

VI. Conclusion

The *CP(FT)A* has a number of features that equip it to fulfil its contractual fairness agenda, which features may be further enhanced by proposed amendments to the legislation. The number of cases that have utilised the *UCTA* and *MA* to control unreasonable terms in Singapore is greater than for the *CP(FT)A*, but they still seem relatively small in view of the import and intent of these statutory controls. In this respect, the UK had a similar experience: aside from the comment cited earlier by Slade LJ in *Phillips Products*,[226] it has also been said that the *UCTA* in the UK "has failed to give the level of protection that a consumer might reasonably expect."[227] Of course, all three statutes may have been the impetus for settlements and fairer T&C that would not otherwise have happened.

Although the uptake of the *UCTA* and *MA* in Singapore may have been slow to start, there are signs that this is changing. The utilisation of the *UCTA* and *MA* appears to be on the rise: more than a third of the cases in Annex B date to 2012 or later *ie* to roughly the last five years; in a number of more recent cases, the Court of Appeal has also highlighted the utility of the *UCTA* to combat unreasonable terms;[228] and it is noteworthy that the Court in *Koh Lin Yee* devoted a substantial portion of

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[224] See *Koh Lin Yee*, *supra* note 74 at para 57.

[225] See *Australian Consumer Law*, *supra* note 9, s 26; *Consumer Rights Act 2015*, *supra* note 10, s 64(1).

[226] *Supra* note 104 at 661, where Slade LJ expressed surprise that he was referred to only one reported case involving the statute. See also the reference to the *UCTA*'s "slow start" and that it was yet "to realise its full potential" by Peel, "Making More", *supra* note 130 at 103; Dean, *supra* note 114 at 589 commented on the "remarkable absence of case law on the consumer protection provisions" of the *UCTA* and that "the courts have had very little opportunity to develop the concept of 'reasonableness' under [s] 11 of the Act."

[227] Dean, *ibid* at 590.

[228] See *eg*, *CKR*, *supra* note 116 at paras 23, 24; *Deutsche Bank*, *supra* note 183 at para 68; *Als Memasa* (CA), *supra* note 116 at para 27; *Lee Chee Wei*, *supra* note 184 at paras 36-39.

its judgment to an analysis of the *UCTA*.[229] The absence of *locus standi* for CASE and STB can to some extent be addressed via the *CP(FT)A* since unreasonable terms may constitute unfair practices. A more fundamental problem with the *UCTA* and *MA* is the focus on clauses that exempt liability, which means that the courts will face on-going arguments about duty-defining terms and will be required to make distinctions for which no satisfactory test exists.

These issues lead to the question of reform. In the context of statutory reform, I have suggested that consideration be given to an overarching, flexible principle of evaluating the fairness of risk allocation. Aside from the duty-defining/duty-exempting problem, another reason to move away from the current framework is that "the scope of protection provided by [the *UCTA*] is rather arbitrary."[230] An evaluation of risk allocation avoids this pitfall and can apply to other acknowledged problem areas, including penalties and contractual discretions such as variation clauses. Once a reform agenda is embraced, the need for separate pieces of legislation must also be questioned. There is an overlap in the protections offered by the *UCTA*, *MA* and *CP(FT)A*. It may be more satisfactory to consolidate the legislative control in this domain and bring them under one umbrella,[231] even if some different treatment continues to be accorded to individual consumer contracts and those concluded between business parties.

This paper is situated in the context of a broader, on-going debate about how the law can promote contractual fairness. The debate about a greater role for unconscionability and/or a duty of good faith is one way in which this question is receiving consideration in the common law. In the statutory context, reforming a country's contractual fairness regime is a complex task that must consider more facets than have received attention here.[232] However, depending on the appetite for change, there are ways in which Singapore's statutory framework can better advance the goals of contractual fairness. Some suggestions made here are more modest than others, but the boldest may offer the clearest path to a coherent regime that accomplishes the goal of contractual fairness. Similar to the last paradigm shift that recognised the need to assess fairness in some cases, the suggestion is to cease the problematic preoccupation with exemption clauses and start evaluating risk allocation.

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229 *Koh Lin Yee*, *supra* note 74.

230 Macdonald, "Unifying", *supra* note 41 at 81.

231 Such consolidation was one of the motivations for the *Australian Consumer Law*, *supra* note 9 and the UK's *Consumer Rights Act 2015*, *supra* note 10.

232 For example, this paper has not discussed those contracts partly or fully excluded from the scope of the *UCTA* and *CP(FT)A*. See *UCTA*, *supra* note 3, First Schedule, including: insurance contracts and contracts creating/transferring an interest in securities; *CP(FT)A*, *supra* note 5, First Schedule, including: contracts for the acquisition of an interest in land and employment contracts.

Annex A—*CP(FT)A*

1. *Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch* [2009] SGDC 193
2. *Rikvin Consultancy Pte Ltd v Pardeep Singh Boparai* [2010] SGHC 191
3. *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 (HC)
4. *Unilink Credit Pte Ltd v Chong Kuek Leong* [2013] SGMC 3
5. *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 (HC)

Annex B—*UCTA* and *MA*

1. *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR (R) 195 (HC)
2. *Brown Noel Trading Pte Ltd v Singapore Press Holdings Ltd* [1993] 2 SLR (R) 840 (HC)
3. *United Overseas Bank Ltd v Mohamed Arif* [1994] 1 SLR (R) 530 (HC)
4. *A A Valibhoy and Sons (1907) Pte Ltd v Banque Nationale de Paris* [1994] 2 SLR (R) 14 (HC)
5. *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd* [1994] 3 SLR (R) 114 (CA)
6. *Trans-Link Exhibition Forwarding Pte Ltd v Wadkin Robinson Asia Pte Ltd* [1994] SGHC 197
7. *Trans-Link Exhibition Forwarding Pte Ltd v Wadkin Robinson Asia Pte Ltd* [1996] 1 SLR (R) 424 (CA)
8. *Ng Kong Teck v Sia Kiok Kok* [1996] 2 SLR (R) 720 (HC)
9. *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR (R) 244 (HC)
10. *Oversea-Chinese Banking Corp Ltd v Timekeeper Singapore Pte Ltd* [1997] 1 SLR (R) 392 (HC)
11. *Pontiac Marina Private Limited v Richmall Holdings Pte Ltd* [1997] SGHC 305
12. *Ri Jong Son v Development Bank of Singapore Ltd* [1998] 1 SLR (R) 824 (HC)
13. *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] 2 SLR (R) 583 (HC)
14. *Chok Boon Hock v Great Eastern Life Assurance Co Ltd* [1998] 2 SLR (R) 878 (HC)
15. *Citibank NA v Lee Hooi Lian* [1999] 2 SLR (R) 1 (HC)
16. *Dauphin Offshore Engineering & Trading Pte Ltd v Private Office of His Royal Highness Sheikh Sultan bin Khalifa bin Zayed bin Zayed Al Nahyan* [1999] SGHC 201
17. *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 3 SLR (R) 55 (HC)
18. *Xu Jin Long v Nian Chuan Construction Pte Ltd* [2001] 3 SLR (R) 494 (HC)
19. *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR (R) 712 (HC)
20. *Tjoa Elis v United Overseas Bank Ltd* [2003] 1 SLR (R) 747 (HC)
21. *Public Prosecutor v Lee Koon Fook* [2005] SGDC 100

22. *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR (R) 268 (HC)
23. *Smart Modular Technologies Sdn Bhd v Federal Express Services (M) Sdn Bhd* [2006] 2 SLR (R) 797 (HC)
24. *Ho Leong Bok v Yeo Hoon Hua* [2006] SGDC 149
25. *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR (R) 273 (CA)
26. *Panwah Steel Pte Ltd v Burwill Trading Pte Ltd* [2006] 4 SLR (R) 559 (CA)
27. *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR (R) 411 (CA)
28. *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR (R) 537 (CA)
29. *Orient Centre Investments Ltd v Société Générale* [2007] 3 SLR (R) 566 (CA)
30. *Raffles Money Change Pte Ltd v Skandinaviska Enskilda Banken AB (Publ)* [2008] SGDC 70
31. *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR (R) 500 (HC)
32. *Raffles Money Change Pte Ltd v Skandinaviska Enskilda Banken AB (Publ)* [2009] 3 SLR (R) 1 (HC)
33. *Susilawati v American Express Bank Ltd* [2009] 2 SLR (R) 737 (CA)
34. *Beckkett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR (R) 452 (CA)
35. *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR (R) 518 (CA)
36. *Jurong Port Pte Ltd v Huationg Inland Transport Service Pte Ltd* [2009] 4 SLR (R) 53 (HC)
37. *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156
38. *ADX v Fidgets Pte Ltd* [2009] SGDC 393
39. *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 (HC)
40. *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 (CA)
41. *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 (HC)
42. *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2010] SGHC 351
43. *Subramaniam s/o Muneyandi v Pandiyan John* [2011] SGHC 102
44. *Ho See Jui v Liquid Advertising Pte Ltd* [2011] SGHC 108
45. *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 (HC)
46. *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 (CA)
47. *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 (CA)
48. *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28
49. *ALS Memasa v UBS AG* [2012] SGHC 30
50. *Dr El Masry Ashraf v United Overseas Bank Limited* [2012] SGDC 142
51. *Als Memasa v UBS AG* [2012] 4 SLR 992 (CA)
52. *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd* [2013] 1 SLR 1 (HC)
53. *Tembusu Growth Fund Ltd v Actatek, Inc* [2013] SGHCR 2
54. *Zhu Yong Zhen v AIA Singapore Pte Ltd* [2013] 2 SLR 478 (HC)
55. *Auto Palace Pte Ltd v Sean Liew Cheng En* [2013] SGDC 110
56. *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 (HC)
57. *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886 (CA)
58. *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2014] 1 SLR 985 (HC)

59. *Holland Leedon Pte Ltd (in liquidation) v C & P Transport Pte Ltd* [2013] SGHC 281
60. *Defu Furniture Pte Ltd v RBC Properties Pte Ltd* [2014] SGHC 1
61. *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909 (HC)
62. *AmFraser Securities Pte Ltd v Goh Chengyu* [2014] SGHCR 14
63. *Chu Said Thong v Vision Law LLC* [2014] 4 SLR 375 (HC)
64. *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA* [2015] 1 SLR 338 (HC)
65. *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 (CA)
66. *Koh Lin Yee v Terrestrial Pte Ltd* [2015] 2 SLR 497 (CA)
67. *Fact 2006 Pte Ltd v First Alverstone Capital Ltd* [2015] SGHCR 5
68. *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52
69. *Boustead Singapore Ltd v Arab Banking Corp (BSC)* [2015] 3 SLR 38 (HC)
70. *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 (CA)
71. *Goldring, Timothy Nicholas v Public Prosecutor* [2015] 4 SLR 742 (HC)
72. *Huationg (Asia) Pte Ltd v Lonpac Insurance Bhd* [2016] 1 SLR 1431 (HC)