

## EXCLUSION AND LIMITING CLAUSES

### INTRODUCTION

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A clause may be inserted into a contract which aims to exclude or limit one party's liability for breach of contract or negligence. However, the party may only rely on such a clause if (a) it has been incorporated into the contract, and if, (b) as a matter of interpretation, it extends to the loss in question. Its validity will then be tested under (c) the Unfair Contract Terms Act 1977 and (d) the Unfair Terms in Consumer Contracts Regulations 1999.

### A. INCORPORATION

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The person wishing to rely on the exclusion clause must show that it formed part of the contract. An exclusion clause can be incorporated in the contract by signature, by notice, or by a course of dealing.

#### 1. SIGNED DOCUMENTS

If the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its terms. This is so even if he has not read the document and regardless of whether he understands it or not. See:

*L'Estrange v Graucob* [1934] 2 KB 394.

However, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect. See:

*Curtis v Chemical Cleaning Co* [1951] 1 KB 805.

#### 2. UNSIGNED DOCUMENTS

The exclusion clause may be contained in an unsigned document such as a ticket or a notice. In such a case, reasonable and sufficient notice of the existence of the exclusion clause should be given. For this requirement to be satisfied:

- (i) The clause must be contained in a contractual document, ie one which the reasonable person would assume to contain contractual terms, and not in a document which merely acknowledges payment such as a receipt. See:

*Parker v SE Railway Co* (1877) 2 CPD 416

*Chappleton v Barry UDC* [1940].

- (ii) The existence of the exclusion clause must be brought to the notice of the other party before or at the time the contract is entered into. See:

*Olley v Marlborough Court* [1949] 1 KB 532.

- (iii) Reasonably sufficient notice of the clause must be given. It should be noted that reasonable, not actual notice is required. See:

*Thompson v LMS Railway* [1930] 1 KB 41.

What is reasonable is a question of fact depending on all the circumstances and the situation of the parties. The courts have repeatedly held that attention should be drawn to the existence of exclusion clauses by clear words on the front of any document delivered to the plaintiff, eg "For conditions, see back".

It seems that the degree of notice required may increase according to the gravity or unusualness of the clause in question. See:

*Thornton v Shoe Lane Parking* [1971] 1 All ER 686  
*Interfoto v Stiletto Ltd* [1988] 1 All ER 348.

### 3. PREVIOUS DEALINGS

Even where there has been insufficient notice, an exclusion clause may nevertheless be incorporated where there has been a previous consistent course of dealing between the parties on the same terms. See:

*Spurling v Bradshaw* [1956] 2 All ER 121  
cf *McCutcheon v MacBrayne* [1964] 1 WLR 125.

As against a private consumer, a considerable number of past transactions may be required. See:

*Hollier v Rambler Motors* [1972] 2 AB 71.

Even if there is no course of dealing, an exclusion clause may still become part of the contract through trade usage or custom. See:

*British Crane Hire v Ipswich Plant Hire* [1974] QB 303.

### 4. PRIVITY OF CONTRACT

As a result of the doctrine of privity of contract, the courts have held that a person who is not a party to the contract (a third party) is not protected by an exclusion clause in that contract, even if the clause purports to extend to him. Employees are regarded in this context as third parties. See:

*Adler v Dickinson* [1954] 3 All ER 396  
*Scruttons v Midland Silicones* [1962] AC 446.

### 5. COLLATERAL CONTRACTS

Even where an exclusion clause has been incorporated into a contract, it may not have been incorporated in a collateral contract. See:

*Andrews v Hopkinson* [1957] 1 QB 229.

### 6. THE BATTLE OF THE FORMS

A problem arises if *one* party sends a form saying that the contract is made on those terms but the *second* party accepts by sending a form with their own terms on and stating that the contract is on the second party's terms. The "rule of thumb" here is that the contract will be made on the last set of terms sent. See:

*British Road Services v Arthur Crutchley Ltd* [1968] 1 All ER 811.

## **B. INTERPRETATION**

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Once it is established that an exclusion clause is incorporated, the whole contract will be construed (ie, interpreted) to see whether the clause covers the breach that has occurred. The basic approach is that liability can only be excluded by clear words. The main rules of construction are as follows:

1. CONTRA PROFERENTEM

If there is any ambiguity or uncertainty as to the meaning of an exclusion clause the court will construe it *contra proferentem*, ie against the party who inserted it in the contract. See:

*Baldry v Marshall* [1925] 1 KB 260  
*Houghton v Trafalgar Insurance Co* (1954).

Very clear words are needed in a contract to exclude liability for negligence. See:

*White v John Warwick* [1953] 1 WLR 1285.

2. THE MAIN PURPOSE RULE

Under this rule, a court can strike out an exemption clause which is inconsistent with or repugnant to the main purpose of the contract. See:

*Glynn v Margetson* [1893] AC 351  
*Evans Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078.

3. THE DOCTRINE OF FUNDAMENTAL BREACH

- Prior to 1964, the common law considered that a fundamental breach could not be excluded or restricted in any circumstances as this would amount to giving with one hand and taking with the other. This became elevated to a rule of law.

- However, the rule of law approach was rejected in *UGS Finance v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep 446, on the basis that it conflicted with freedom of contract and the intention of the parties. The question of whether a clause could exclude liability for a fundamental breach was held to be a question of construction.

- The *UGS* case was unanimously approved by the House of Lords in the *Suisse Atlantique* case [1967] 1 AC 361, and *Photo Production Ltd v Securicor Transport* [1980] AC 827.

## C. THE UNFAIR CONTRACT TERMS ACT 1977

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The basic purpose of UCTA 1977 is to restrict the extent to which liability in a contract can be excluded for breach of contract and negligence, largely by reference to a reasonableness requirement, but in some cases by a specific prohibition.

1. THE SCOPE OF UCTA 1977

The Act does **not** apply to insurance contracts; the sale of land; contracts relating to companies; the sale of shares; and the carriage of goods by sea (Schedule 1); or to international supply contracts (s26).

***Business Liability and Dealing as a Consumer***

Most of the provisions of the Act apply only to what is termed "business liability". This is defined by **s1(3)** as liability arising from things done by a person in the course of a business or from the occupation of business premises. The exceptions are ss6 and 7 where the Act also applies to private contracts.

The Act gives the greatest protection to consumers. Under **s12(1)** a person "deals as a consumer" if he does not contract in the course of a business while the other party does contract in the course of a business; and if it is a

contract for the supply of goods, they are of a type ordinarily supplied for private use or consumption. But see:

*Peter Symmons & Co v Cook* [1981] 131 NLJ 758  
*R & B Customs Brokers v United Dominions Trust Ltd* [1988] 1 WLR 321.

## **2. THE MAIN PROVISIONS**

### ***s2, Exemption of Liability for Negligence***

\* Under s2(1) no one acting in the course of a business can exclude or restrict his liability in negligence for death or personal injury by means of a term in a contract or by way of notice.

\* Under s2(2) liability for negligence for any other kind of loss or damage can be excluded provided the term or notice satisfies the requirement of reasonableness.

### ***s3, Exemption of Liability for Breach of Contract***

Where one party deals as a consumer or on the other party's written standard terms of business, then the other party cannot exclude or restrict his liability for breach of contract, non-performance of the contract or different performance of the contract unless the exemption clause satisfies the requirement of reasonableness.

### ***s4, Unreasonable Indemnity Clauses***

Indemnity clauses in contracts where one of the parties deals as a consumer are unenforceable unless they are reasonable.

### ***s5, Guarantees of Consumer Goods***

A manufacturer or distributor cannot exclude or restrict his liability in negligence for loss arising from defects in goods ordinarily supplied for private use or consumption by means of a term or notice contained in a guarantee.

### ***s6, Exemption of Implied Terms in Contracts of Sale and Hire-Purchase***

\* In contracts for the sale of goods and HP, the implied terms as to title cannot be excluded or restricted by a contract term: s6(1).

\* The implied terms as to correspondence with description or sample, fitness for purpose and satisfactory quality cannot be excluded or restricted by any contract term against a person dealing as a consumer: s6(2).

\* Where the person is not dealing as a consumer, such liability can only be excluded or restricted in so far as the term is reasonable: s6(3).

### ***s7, Exemption of Implied Terms in other Contracts for the Supply of Goods***

\* Exclusion clauses relating to title in contracts of hire are subject to the reasonableness test.

\* The implied terms as to correspondence with description or sample, fitness for purpose and satisfactory quality cannot be excluded or restricted at all in consumer contracts.

\* Where the person is not dealing as a consumer the exemption is subject to the requirement of reasonableness.

### ***s8, Exemption of Liability for Misrepresentation***

Any clause which excludes or restricts liability for misrepresentation is ineffective unless it satisfies the requirement of reasonableness.

### ***s10, Exclusion Clauses in Secondary Contracts***

Section 10 contains an anti-avoidance provision which prevents the rights preserved under one contract from being removed by a secondary contract.

## **3. THE REQUIREMENT OF REASONABLENESS**

Under **s11(1)** the requirement of reasonableness is that "the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

Section **11(2)** provides that, in determining whether the clause is a reasonable one for the purposes of ss6 and 7, regard shall be had to the Guidelines set out in **Schedule 2** of the Act, which are as follows:

- (1) The bargaining strengths of the parties relative to each other and the availability of alternative supplies.
- (2) Whether the customer received an inducement to agree to the term. (The supplier may have offered the customer a choice: a lower price but subject to an exemption clause or a higher price without the exemption.)
- (3) Whether the customer knew or ought reasonably to have known of the existence and extent of the term.
- (4) Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.
- (5) Whether the goods were manufactured, processed or adapted to the special order of the customer.

Under **s11(3)** in relation to a notice (not being a notice having contractual effect), the requirement of reasonableness is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen. This provision applies a test of reasonableness to disclaimers for tortious liability. See:

*Smith v Eric Bush* [1989] 2 All ER 514.

Under **s11(4)** where the exclusion clause seeks to limit liability rather than exclude it completely, the court must have regard to two factors: the resources available to meet the liability, and the extent to which insurance cover was available to the party aiming to limit liability. See also:

*Ailsa Craig Fishing Co v Malvern Fishing Co* [1983] 1 All ER 101

*George Mitchell v Finney Lock Seeds Ltd* [1983] 2 All ER 737

*St Albans District Council v ICL* [1996] 4 All ER 481.

**Section 11(5)** provides that it is up to the person who claims that a term or notice is reasonable to show that it is.

#### 4. s13 CLAUSES

A party to a contract may try to disguise an exclusion clause, even though the effect of such a clause is to exclude liability. Section 13(1) tries to stop this and prevents:

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding or restricting rules of evidence or procedure.

Such clauses are void or must be reasonable if they exclude or restrict liability respectively. Section s13, for example, will apply to terms: (a) imposing a time limit for making claims; (b) limiting a buyer's right to reject defective goods; and (c) stating that acceptance of goods shall be regarded as proof of their conformity with the contract. See also:

*Stewart Gill v Horatio Myer* [1992] 2 All ER 257.

**D. UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999**

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These Regulations revoke and replace the Unfair Terms in Consumer Contracts Regulations 1994 which implemented the Council Directive on unfair terms in consumer contracts. They came into force on 1<sup>st</sup> October 1999. They re-enact Reg. 2 to Reg. 7 of those Regulations with modifications to reflect more closely the wording of the Directive.

The Regulations apply, with certain exceptions, to unfair terms in contracts concluded between a consumer and a seller or supplier and provide that an unfair term is one which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. An unfair term shall not be binding on the consumer. Schedule 2 contains an indicative list of terms which may be regarded as unfair.

See separate Handout for details.