

Excluding Liability



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Excluding Liability

It is common for certain kinds of contract to include clauses which seek to exclude or limit liability. Equally, businesses may seek similarly to exclude or limit liability by disclaimer notices in reports, valuations or the like. Parties may want to protect themselves from paying out damages in the event of a breach of contract or in the case of negligence, or limit the amount they have to pay.

In this area, English law has taken the approach that the principle of freedom of contract must be balanced against public policy concerns that a party who freely undertakes a binding contract obligation, or who causes damage or loss through negligence, should not have complete freedom to avoid responsibility for its actions or failures. To help strike this balance, English law has developed a mix of statutory rules and case law which must be taken into account when negotiating or reviewing these clauses. The principles developed particularly seek to protect consumers, and innocent parties who do not have the same bargaining power as the party in default.

In this guide, we refer to exclusion clauses in contracts, and to disclaimers, as exclusion provisions.

Exclusion provisions

Common law principles

Some exclusion provisions will seek to exclude a party's liability altogether; others will seek to put a limit on liability. Aside from the intervention of statute, case law has shaped principles to follow in deciding whether an exclusion provision is effective.

In the case of a contractual exclusion clause, the relevant provision must properly form part of the contract. Whether a clause in a contract, or a disclaimer, the provision must also be fairly brought to the attention of the innocent party, cover the particular circumstances that have occurred and not be undermined by any misrepresentation on the part of the party seeking to rely on the provision.

A court asked to uphold an exclusion provision will expect that provision to be clearly and unambiguously expressed. If there is any doubt or ambiguity, the provision will generally be interpreted against the party seeking to rely on it. This is known as the 'contra proferentem' principle. A business seeking to exclude liability for negligence does not necessarily need to include express reference to 'negligence', and the court will not go looking for ambiguity where none

really exists, but the intention must be clear, and an exclusion provision where the meaning is not as plain as the nose on its face may well fall.

Courts may be more willing to uphold provisions which limit liability, as opposed to those which try to exclude it altogether.

Statutory Controls

Legislative provisions give further protection against unfair exclusion clauses. These include the Unfair Contract Terms Act 1997 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).

UCTA

UCTA applies to liability arising in the course of a business and can apply to both business/consumer and business/business contracts. It regulates terms that seek to exclude liability for negligence or breach of contract.

Any exclusion provision which seeks to exclude or restrict liability for death or injury resulting from negligence is prohibited and will be struck out.

For other loss or damage, UCTA provides that a person cannot exclude or limit his liability for negligence except in so far as the provision satisfies a statutory test of reasonableness.

Where one party is a consumer, or deals with another party on that party's written standard terms of business, the other party cannot exclude liability for breach of contract unless, again, the term satisfies the requirement of reasonableness. A consumer for these purposes means, broadly, someone who enters into a contract with another party otherwise than in the course of a business.

The basic requirement of reasonableness in UCTA is that the relevant provision is a fair and reasonable one having regard to the circumstances when the contract was made or when the liability for negligence arose.

In assessing whether the requirement has been satisfied, the court may have regard to a number of factors, including:

- the relative bargaining powers of the parties;
- whether the provision was brought to the attention of the other party;
- whether the other party had a reasonable opportunity of obtaining the advice, or entering into a contract,

with someone else without the provision; and

- the practical consequences, which would normally include considering the sums of money involved and the ability of the parties to bear them (which may in turn require a review of the availability of insurance).

Exclusion clauses in standard term agreements can easily fall foul of the UCTA. This is particularly relevant when a business is doing business with the public under standard terms and conditions.

Different provisions of UCTA apply depending on which type of exemption clause is used and on whether the other party is a consumer or another business.

UCTA does not apply to all contracts so it is important to check whether it would apply to your contract. For example, the Act does not apply to contracts of insurance or contracts relating to the creation or transfer of an interest in land.

UTCCR

UTCCR only applies to contracts between a business and a consumer. UTCCR does not apply to transactions between a private seller and a private buyer.

UTCCR impose a fairness test on all clauses and does not make any exclusion clauses automatically void. The regulations apply to all unfair terms, not simply to exclusion or limitation clauses.

Under UTCCR, the burden is on the buyer to prove unfairness. A term will be regarded as unfair and contrary to the requirement of good faith if it wasn't individually negotiated and causes imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

If a term is regarded as unfair, that term is to be treated as void, but the rest of the contract remains binding on the parties so long as it is capable of continuing without the offending term.

More law on the way

A Consumer Rights Bill is currently making its way through Parliament. If passed, it will consolidate the consumer protection provisions from both UCTA and UTCCR into a single Act.

Excluding liability to third parties

At common law, a third party cannot rely on an exclusion or limitation clause within a contract between two contracting parties. This is because it is not a party to the contract; there is no privity of contract.

However, there have been some exceptions to this rule. Case law has stated that although a third party might not be able to rely on the existence of an exemption clause between contracting parties, it can be a good reason for denying the existence of a duty of care in cases of physical damage. However, these decisions are not without criticism and should be treated cautiously.

The common law position on third parties relying on exclusion clauses was altered by the Contracts (Rights of Third Parties) Act 1999. This allows a third party to a contract to enforce a term itself if either the contract expressly provides for this, or if the term purports to confer a benefit on the party. However, in both cases the third party, even though it does not have to be in existence when the contract was formed, must be expressly identified in the contract either by name, as a member of a class or by falling within a particular description.

If you only remember 5 things, remember these 5 things

1. If the clause is uncertain and ambiguous, it will be hard to enforce. Be precise and clear.
2. You can't exclude liability for death or personal injury caused by your negligence.
3. You can only exclude liability for other losses caused by your negligence, if reasonable.
4. When dealing with a consumer, your standard terms can't exclude or restrict liability for breach unless reasonable.
5. When dealing with a consumer, any clause can be struck out as unfair if it causes a significant imbalance in the parties' rights and wasn't individually negotiated.

Completely useless fact

The elephant is the only mammal that cannot jump.

...little bits of law

This is one in a series of leaflets published by Lewis Silkin LLP, providing information on a range of legal issues that face our developer clients. Other topics discussed range from boundaries to wildlife.

Professional advice should be obtained before applying the information in this client guide to particular circumstances.

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