3

Commercial clauses relating to limitation or exclusion of liability

3.1 Introduction

The purpose of this chapter is to examine, from a practical perspective, how the draftsman may do his best to ensure that commercial (or boilerplate) clauses intending to limit or exclude liability in a contract will be effective by (a) achieving their objectives and (b) not being open to successful challenge. It is important always to bear in mind that a clause which may be entirely effective in one contract may fail in another because of different subject matter or a materially different factual matrix. Ensuring success is therefore not simply a matter of mechanically copying a model form of a clause but also analysing carefully whether the context in which it is to be used will render it ineffective.

3.2 Exclusion and limitation of liability clauses

Two of the principal tasks of any contract draftsman are:

(a) to limit the instances where possible where his client may be liable for any non-performance, mis-performance or misrepresentation in relation to the contract; and

(b) to limit the amount of damages which may be recovered if there is a proven breach or misrepresentation. Closely allied to the latter may be the deployment of a liquidated damages clause (which will be considered in **Chapter 4**).

The following are the considerations and factors which the draftsman will need to have in mind when drafting or deploying an exclusion or limitation clause. The first section relates to the application of the common law, the second to relevant statutory intervention.

3.3 Common law

3.3.1 *The exclusion must be clearly included within the clause*

The courts will construe an exclusion clause against the party which benefits from it (which will normally be the *proferens* – see **Chapter 2**). It follows that ambiguity will be construed in the same way. Exclusion of warranties may not include

exclusion of conditions – *Lowe* v. *Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA; exclusion of liability for breach of implied terms may not include express terms – *Andrews Bros (Bournemouth) Ltd* v. *Singer & Co Ltd* [1934] 1 KB 17, CA.

An exclusion clause will not usually be construed as excluding what amounts to non-performance or fundamental breach unless the words are unambiguously to that effect. This is a question of construction, not a principle of law – *Suisse Atlantique Société d'Armement Maritime SA* v. *NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 397, [1966] 2 All ER 61 at 70, HL; *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] AC 827 at 845, [1980] 1 All ER 556 at 564, HL. Such a provision would be extraordinary and to have any prospect of being effective would have to be in the most unambiguous terms – see *Stocznia Gdynia SA* v. *Gearbulk Holdings Ltd* [2009] EWCA Civ 75.

3.3.2 *Repugnancy*

Even a tightly drawn exclusion clause may be ineffective if it directly negatives a positive contractual commitment so as to be considered inconsistent or repugnant to it. Exclusion clauses in general terms and conditions may be ineffective if they are inconsistent with terms specific to the parties – *The Brabant* [1967] 1 QB 588, [1966] 1 All ER 961.

3.3.3 *Exclusion of liability for negligence*

Liability for negligence must generally be specifically excluded – *Thomas Witter Ltd* v. *TBP Industries Ltd* [1996] 2 All ER 573. Where the only likely form of liability is that which would arise from negligent performance or non-performance of the contract then this principle may be relaxed – *Spriggs* v. *Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep. 487, CA.

However, the courts have in practice drawn a distinction between clauses which seek to exclude and clauses which seek to limit liability for negligence. In cases of exclusion rather than limitation the following points should inform the draftsman (see especially *Canada Steamship Lines Ltd* v. *R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton):

1. Where the clause expressly exempts the *proferens* from liability for the negligence of his own employees, the clause will be effective. There should be a specific reference to negligence or a word or words of similar meaning.
2. Absent specific reference to negligence (or a synonym thereof) the court must construe the words used to decide whether they encompass negligence on the part of the *proferens*' employees. Words such as 'howsoever caused' – *White* v. *Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA, 'at owner's risk' – *Levison* v. *Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA and 'under no circumstances' – *L Harris (Harella) Ltd* v. *Continental Express Ltd* [1961] 1 Lloyd's Rep. 251, have all been found on the particular facts of each case to be sufficient. Best practice, however, is expressly to include negligence.

3. Even if the words can be construed as applying to negligence the court should go on to consider whether in fact they were intended to apply to some other head of damage – *Canada Steamship Lines Ltd v. R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton.

3.3.4 *Exclusions cannot be inconsistent with the purpose of the contract*

One of the most difficult matters to consider in drawing an exclusion clause in a commercial contract is whether the effect of the exclusion would be to remove any obligation on the part of the *proferens* to perform the contract or alternatively to render a performance which is consistent with the purpose of the contract. The draftsman needs to stand back and ask himself whether he is in effect attempting to put his client in a position where his client will escape liability for non- or mis-performance to such an extent that the purpose of the contract could be defeated with impunity. Is he, for example, endeavouring to create a situation in a service contract where his client need not deliver the service envisaged by the contract? The issue is one of construction, not law. A court will simply not construe an exclusion clause so as to give it the effect of defeating the purpose of the contract – *Tor Line AB v. Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103 at 111, [1984] 1 WLR 48 at 58, HL, per Lord Roskill. This can have the effect of depriving the clause of any effect. For example, suppose a party agreed to provide a fleet of buses but instead delivered a fleet of lorries. It is unlikely that a court would construe any exclusion clause, however widely or tightly drawn, as enabling him to escape liability for in effect failing to render any performance envisaged by the contract. Comparison can be made with a clause which exempts the party from liability for late delivery or even for loss of the goods due to negligence (as opposed to deliberate action/inaction by the promisor).

In drafting an exclusion clause intended to be very wide in its application it is not sufficient simply to use a well-tried precedent. Regard has to be had to the context. For example, a clause excluding liability for late delivery might not be inconsistent with the purpose of a sale of goods contract but might be wholly inconsistent with a specific contract to ensure that a particular item is delivered by a certain date for which a high premium has been paid.

It is also difficult to exclude liability for deliberate breaches because a court will be reluctant to construe an exclusion clause so as to include a party's deliberate non- or mis-performance. It is not inconceivable that the parties could so decide but the court would need the most clear and explicit language to accept it and in reality it is improbable that any party would knowingly agree to such a term – see, for example, *Internet Broadcasting Corpn* v. *MAR LLC* (trading as MARHedge) [2009] 2 Lloyd's Rep. 295.

If a clause purports to exempt a party from liability for repudiatory breach by enabling some terms to continue in force, then a court will require that clause to be in the most unambiguous terms – see *Stocznia Gdynia SA* v. *Gearbulk Holdings Ltd* [2009] EWCA Civ 75.

3.4 *Statutory intervention*

Given the scope of this publication statutory intervention in respect of consumer contracts is, strictly speaking, outside of its ambit. Much of the statutory intervention in non-consumer contracts is in respect of very specialist areas which, again, this volume does not claim to encompass. There are, however, various remaining interventions which are of more general application. Those which are most likely to be engaged are those emanating from the Unfair Contract Terms Act (UCTA) 1977.

3.4.1 *The Unfair Contract Terms Act 1977*

UCTA 1977 has limited application to commercial contracts.

(i) *International supply of goods contracts*

UCTA 1977 does not apply to an international supply of goods contract, i.e. one which has the following characteristics (s.26(3)):

(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and
(b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).

A contract falls within (a) and (b) above only if either (s.26(4)):

(a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or
(b) the acts constituting the offer and acceptance have been done in the territories of different States; or
(c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

(ii) *Domestic commercial contracts or international ones not involving the supply of goods*

UCTA 1977 has broader application in the case of domestic contracts.

Regarding exclusion or limitation of liability for negligence, UCTA 1977 is concerned only with acts or omissions in the course of business – s.1(3). There can be no exclusion or limitation of liability for death or personal injury. Any exclusion clause should therefore be expressly qualified by excepting those two possible outcomes – s.2(1).

There can be no exclusion for breach of the warranty as to title, etc. – ss.6 and 7.

UCTA 1977 requires that any clause excluding or limiting liability for negligence must satisfy a test of reasonableness – s.2(2).

Regarding exclusion of liability for non-performance or substantially different performance, UCTA 1977, s.3 provides that:

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term –

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled –

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

It follows that in the case of written commercial agreements s.3 is likely to be engaged.

There are special provisions dealing with hire purchase and sale contracts (and other contracts where title passes – ss.6 and 7).

In drafting exclusion clauses in domestic commercial contracts, therefore, it is essential that the draftsman has a good understanding of the safe parameters of reasonableness.

The test is defined in UCTA 1977, s.11:

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 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.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

...

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to –

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

Schedule 2 to UCTA 1977, which applies to hire purchase, sale of goods and other contracts where title to goods passes, sets out various factors to which particular regard must be had:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) 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;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

It is important to bear in mind that the list is not intended to be exhaustive. The test is heavily evidence based and so previous decisions will not always provide effective guidance.

In summary, there is a statutory requirement in contracts not involving the international supply of goods that:

(a) if the exclusion clause is in the *proferens*' written terms there is a requirement that any term restricting or excluding liability for negligence satisfies the test of reasonableness;
(b) clauses seeking to limit or exclude liability for substantial non- or mis-performance are subject to a test of reasonableness;
(c) in contracts involving hire purchase or the transfer of title in goods there is a requirement that any exclusion of liability relating to fitness for purpose, conformity with description, etc. under the Supply of Goods (Implied Terms) Act 1973 and the Sale of Goods Act 1979 be reasonable;
(d) no exclusion clause will be effective to avoid liability for breach of title, etc.

The draftsman should also bear in mind that UCTA 1977, s.13 precludes various devices which might otherwise be employed to prevent its full effect:

(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also 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;

and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

3.4.2 *Other statutory interventions*

The Misrepresentation Act 1967, s.3 requires any clause attempting to exclude or limit liability for misrepresentation to be subject to a test of reasonableness.

Contracts relating to the carriage o
legislation. Detailed consideration of

3.5 *Force majeure*

Although not strictly an exclusion o
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[1978] 2 Lloyd's Rep. 109, HL.

CLAUSE 3A Exclusion and l

3.1. Neither Party shall be liable to the oth
including loss of reputation, profit or goo
misdescription, breach of contract, bre
fraudulent) however caused.

3.2. Nothing in these Conditions shall l
damages for personal injury or death occa
the other Party, its employees or agents.

3.3. The liability of X (and of any sub
Agreement for the provision of the Servic
breach of statutory duty or otherwise
professional negligence insurance cover o
a refund of that part of the Fee for the Se
Agreement. The relevant Fee for the purpo
the particular Services in respect of which

3.4. X shall not be liable to Y for any inc
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goodwill, turnover or any other loss arisi
its obligations in connection with this Agr
ment, breach of duty, negligence or any oth

Nothing in this Clause [...] shall limit or
or death.

CLAUSE 3B *Force majeure*

3.1. X shall not have any liability to Y
performance of this Agreement which is th
control of X. Where so affected in its perfo
as is reasonably possible.

3.2. In this Clause [...] *force majeure* in
war and terrorist action, state action, i
non-availability of raw materials, compon
unavoidable accident, fire, flood, earthqu
physical disasters.

Contracts relating to the carriage of goods by sea and air are subject to specific legislation. Detailed consideration of these is beyond the scope of this publication.

3.5 *Force majeure*

Although not strictly an exclusion or limitation of liability clause a *force majeure* provision may be effective if performance of a contract is rendered impossible because of an unavoidable event such as enemy action, an act of state or an act of God. If the draftsman includes a notice provision then there must be strict adherence to it – *Bremer Handelsgesellschaft mbH* v. *Vanden Avenne-Izegem* PVBA [1978] 2 Lloyd's Rep. 109, HL.

CLAUSE 3A Exclusion and limitation of liability

3.A.1. Neither Party shall be liable to the other for any economic, consequential or other losses including loss of reputation, profit or goodwill whether resulting from misrepresentation, misdescription, breach of contract, breach of duty or other act or omission (unless fraudulent) however caused.

3.A.2. Nothing in these Conditions shall limit the right of either Party to seek to recover damages for personal injury or death occasioned by breach of contract or breach of duty by the other Party, its employees or agents.

or

3.A.1. The liability of X (and of any sub-contractor) under or in connection with this Agreement for the provision of the Services whether arising in contract, tort, negligence, breach of statutory duty or otherwise howsoever shall not exceed [the amount of professional negligence insurance cover carried by X which shall not be less than £[...] *or* a refund of that part of the Fee for the Services which has been paid by Y to X under this Agreement. The relevant Fee for the purpose of this Clause [...] will be that which relates to the particular Services in respect of which a successful claim is brought by Y].

3.A.2. X shall not be liable to Y for any indirect, consequential or economic loss including but not limited to damage, costs or expenses of any description, loss of profit, business, goodwill, turnover or any other loss arising from its performance or non-performance of its obligations in connection with this Agreement whether arising from breach of contract, tort, breach of duty, negligence or any other cause of action.

Nothing in this Clause [...] shall limit or remove X's liability for causing personal injury or death.

CLAUSE 3B *Force majeure*

3.B.1. X shall not have any liability to Y for any delay, omission, failure or inadequate performance of this Agreement which is the result of circumstances beyond the reasonable control of X. Where so affected in its performance of this Agreement it will notify Y as soon as is reasonably possible.

3.B.2. In this Clause [...] *force majeure* includes but is not limited to civil commotion, war and terrorist action, state action, industrial action whether lawful or otherwise, non-availability of raw materials, components and labour at commercially viable prices, unavoidable accident, fire, flood, earthquake, subsidence, epidemic and other natural or physical disasters.