Agenda

- Exclusion and Limitation Clauses
- Common Law Controls
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- Excluding and Limiting Liability
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- Financial Cap on Liability
- Indirect and Consequential Loss
- Entire Agreement Clause
- Warranties and Indemnities
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Exclusion and Limitation Clauses

- Exclusion clauses operate to exclude the rights a party would otherwise possess under a contract or at law for default or other unlawful acts or omissions of the other party.

- Limitation clauses operate to reduce, limit or otherwise qualify in some way the rights of a party.
  - Limiting liability to certain types of losses
  - Financial cap on liability

- Limitation clauses not regarded by courts with same hostility as exclusion clauses.
Common Law Controls

The courts have developed a number of rules, including:

1. **Incorporation**
   - Clause must be incorporated into a contract at the time the contract is made except:
     - Subsequent variation;
     - Previous course of dealings between the parties; or
     - Contractual terms known to be used in certain line of business.

2. **Contra Proferentem**
   - Any ambiguity in a clause will be interpreted strictly contrary to the interests of the party seeking to rely on it.
Statutory Controls

Unfair Contract Terms Act 1977 (UCTA)

• Applies to consumer contracts and business contracts on standard terms.
• Applies to clauses which seek to restrict or exclude liability, except:
  – International supply contracts; and
  – Certain contracts including:
    • insurance contracts;
    • contracts relating to the creation or transfer of
      – an interest in land;
      – rights or interests in intellectual property; and
      – securities or any right or interests in securities.
Statutory Controls

Reasonableness Test

Is the clause “fair and reasonable having regard to the circumstances which were or ought reasonably to have been known to the parties when entering into the contract?”
**Statutory Controls**

**Liability cap**
- Regard will be had to the resources of the party seeking the cap and the practicability of insuring against the risk.

**Additional factors**
- Relative bargaining power of the parties;
- Inducements;
- Injured party’s awareness of the term;
- Likelihood of a condition relating to exclusion or limitation of liability not being met; and
- Whether goods were manufactured, processed or adapted to customer order.
Statutory Controls

Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)

• Prevents businesses which contract with consumers on non-negotiated terms from relying on those terms that are unfair.

• **Fairness test:** in assessing fairness, the following factors must be considered:
  – the nature of the goods or services to which the contract relates;
  – all the circumstances surrounding the conclusion of the contract at that time; and
  – all of the other terms of the contract or of another contract on which it is dependent.

Sale of Goods Act 1979 (SGA)

• Implies a number of important terms into sale of goods contracts (e.g. title and quality)
Cannot exclude liability for:

- fraud and fraudulent misrepresentation or death or personal injury caused by negligence;
- breach of the statutory implied condition in section 12 SGA (good title and no encumbrances);
- death, personal injury or loss of or damage to property caused by defective products;
- fraud and fraudulent misrepresentation.
Excluding and Limiting Liability

Exclusion of liability for:

• negligence (other than where death or personal injury is caused);

• breach of the statutory implied conditions in sections 13, 14 and 15 of the SGA;

• breach of contract; or

• misrepresentation,

subject to the reasonableness test (and, for consumer contracts, the fairness test) - a blanket exclusion clause will have little prospect of satisfying these tests.
Excluding and Limiting Liability

• If excluding liability, courts like to see some other remedy available e.g. right to terminate, replacement goods / services re-performed.

• Exclusion of financial losses so extensive that it left no remedy for the supplier’s breach of contract so entire exclusion clause ineffective.

• Clause must be clear and easy to understand (consider negligence, deliberate breach and fundamental breach)

• Liability in negligence for damage to tangible property is acceptable if up to a specified limit.
Liquidated Damages

- One party commits a breach of contract, other party usually has a right to claim damages.
- Liquidated damages - fixed/ascertainable sum agreed by the parties as damages for a specified breach of a contract.
- Careful! If liquidated damages deemed to be a penalty, they will be unenforceable.
- Two ways:
  - In addition to general contract claims
  - In full and final settlement
Financial Cap on Liability

- Total exclusion of liability is likely to be held to be unreasonable.

- A clause with an cap on liability will have a good chance of being held reasonable depending on the amount of the limit.

- An overall cap on liability and a cap on liquidated damages (either as a set figure or a %) are common:
  - 100% of overall contract value acceptable by the court
  - 125 – 150% of annual contract value
  - 1.5 – 1.75 x annual contract value
  - Genuine pre-estimate of the loss?
Indirect and Consequential Loss

• Parties tend to seek to exclude liability for indirect or consequential losses.

• *Hadley v Baxendale* identified two types of losses that arise as a result of a breach of contract:
  – losses that arise naturally as a result of the breach (i.e. direct loss); and
  – losses that are in the contemplation of both parties, at the time they made the contract, as the probable result of a breach (i.e. indirect loss).

• Generally accepted that it is only possible to exclude liability for those losses that fall within the second limb (indirect loss) and do not arise naturally in the ordinary course of events.
Indirect and Consequential Loss

• Claims for loss of profit, while commonly regarded as indirect or consequential loss, will often be regarded as direct loss.

• In drafting such exclusion clauses, may want to list those categories of loss that are regarded as consequential/indirect.

• Alternative approach is to provide that:

  “Neither party will be liable to the other party for any indirect or consequential loss or damage, (whether in contract, delict/tort (including negligence) or otherwise)”

  It is then up to the court to decide which losses are recoverable.
GB Gas Holdings Ltd v Accenture (UK) Ltd and others [2010] Civ 912

• Contract between Accenture and Centrica for new British Gas customer billing system.

• Liability excluded for indirect loss suffered by either party as contract excluded liability for "any losses, damages, costs or expenses whatsoever to the extent that these are indirect or consequential or punitive"

• Alleged breach of warranty by Accenture so Centrica claimed for damages which included compensation paid to its customers and stationary and correspondence costs resulting from updating customers on the management of particular incidents.

• Accenture argued that these were indirect losses and therefore irrecoverable.
GB Gas Holdings Ltd v Accenture (UK) Ltd and others
[2010] EWCA Civ 912

- High Court judge deemed all loss to be direct and therefore recoverable.
- Court of Appeal agreed with the High Court decision and found that customer compensation (£8m), gas distribution charges (£18.7m), additional borrowing charges (£2m) and various customer service charges were direct losses and therefore recoverable.
- Court's interpretation on rules of remoteness may be deciding factor on whether loss is direct or indirect.
- Best practice:
  1. Identify commercial concerns; and
  2. Specifically exclude particular heads of loss (specifically or by categorising "direct" and "indirect" loss) or include a list of losses that can be recovered on breach.
Entire Agreement Clause

• Purpose = to make it clear that the document in which it appears (together with any other documents specified in the clause) constitute(s) the whole agreement between the parties.

• Usually takes the form of:
  • Entire agreement statement;
  • Exclusion of liability for misrepresentation;
    – Non-reliance statement
    – Express exclusion of liability
    – Restriction of remedies
  subject to reasonableness test under UCTA.
Warranties and Indemnities

**Warranty**
- Assurance/promise in a contract about past/present facts or future state of affairs.
- Breach does not allow the contract to be terminated.

**Indemnity**
- Undertaking by one party to meet the specific liability of another party.
- May be perceived to arise in various circumstances
  - Where liability is transferred from one party to another
  - To reinforce existing potential liability
  - To reverse liability (for liability already incurred)
Warranties and Indemnities

Key differences

1. Actual breach v loss suffered

2. Reasonably foreseeable loss v loss indemnified

3. Mitigation of loss
Drafting Tips

• A total exclusion of liability for consequential and indirect loss or financial loss is likely to be unreasonable.
  – A clause with a cap on such liability may be reasonable depending on the level of the cap (genuine pre-estimate of loss).

• Either:
  – Exclude particular heads of loss (specifically or by categorising certain losses as direct and indirect).
  – Include a list of losses that can be recovered.

• Consider the availability of insurance for the risk in question?

• Draft in the form of a series of sub-clauses (if one is unreasonable it may be severed from the rest).
Drafting Tips

Entire agreement clauses:

- ensure all documents containing agreed terms are covered.
- ensure a non-reliance statement is included as a minimum and any statement or representation to be relied on is incorporated as an express warranty.
- ensure what is and is not being included and any remedies that are unavailable are clearly stated.
- ensure it is reasonable and does not exclude liability for fraudulent misrepresentation.
Drafting Tips

• Disclose against warranties

• Indemnities
  – ensure any exclusions under a general liability clause (e.g. indirect and consequential loss) apply to the indemnities.
  – ensure any liability cap applies to all liabilities and not just to the indemnities.
  – include an express obligation to mitigate loss.
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