

Business Law: CIMA Year One

Unfair Contract Terms

It is generally assumed that when a contract is drawn up, both parties have equal influence in the terms that form the contract. This is not always true, and it is possible that a stronger party will abuse this position. Courts can consider the terms imposed onto the contract and decide whether they are fair.

Exemption clauses

For example, “we are not liable if our computer explodes and injures you”.

These can be problematic when there is an issue with bargaining power. When a business is selling to a consumer, the consumer can normally not alter any exclusion terms. There are therefore moves to reduce unfair terms.

A lighting rig owner hires out equipment to a promoter.
The promoter hires out a hall.

The rig owner states that the hirer is liable for all damage caused by the use of the lights. The hall burns down due to a faulty light. If the exclusion clause stands, the owner of the lights is not liable. Therefore, the promoter needs to take out insurance (which can be very precise).

Without the exclusion clause, both parties need to insure, and the insurance will be very vague. In this case, exclusion clauses are beneficial to both parties – they can lead to lower prices for consumers, and more efficiency.

When deciding if exclusion clauses are fair, there are two approaches: the courts (through incorporation and construction), or legislation (through the Unfair Contract terms Act 1977, and the Unfair Terms in Consumer Contracts Regulations 1999).

Incorporation

The courts must first decide whether the term is actually incorporated into the contract. That is, has proper notice been given?

The term can be incorporated in a number of ways:

- By actual notice: one party is given specific notice by the other of the term being included.
- By signature: if you sign a contract, you are bound by the terms in that contract even if you haven't fully read it.

- By provision of reasonable notice: the courts will consider whether the defendant has done what a reasonable party should have done to draw attention to the exclusion clause. This is different to actual notice; the main problem comes when the clause is introduced too late in a contract.
- By course of dealings: if trade is regular enough the claimant may be thought to “ought to be aware”.

There are exceptions to these general rules.

Curtis v Chemical Cleaning Company and Dyeing Co Ltd (1951)
C took her wedding dress to a dry cleaners; the assistant asked C to sign a document. The assistant stated that there were no exclusion clauses contained in that document, so C does not read it. C signs. The dress is returned to C with a stain, and C sues. The defendant attempted to use the exclusion clause, but C won since she was misled. The clause was not incorporated.

The type of document that exclusion clauses are presented on is important. If the reasonable person is not expected to see the clause (for example, on the back of a receipt), then the clause is not incorporated. Reasonable steps must be taken to show the clause.

Construction or Interpretation

Two cases are useful here:

White v John Warrick and Co (1955)
There was a contract to hire a bicycle; the saddle broke while W was riding the bike. There was an exclusion clause in the contract: “we are not liable for any breach of contract”. This does not cover negligence, however; W sued and won. This is not a good example of a vague clause. Note that the clause may or may not have been incorporated, but did not apply.

Hollier v Rambler Motors (1972)
The contract stated “We are not liable for fire damage to cars whilst on the premises”. H’s car was destroyed by fire whilst in the garage due to carelessness of a mechanic. H sued for breach of contract. The clause does not specify the type of damage – accidental, deliberate, act of God, or negligent – so the judge stated that the clause was not valid.

Interpretation of the clause is entirely at the court’s discretion.

The Unfair Contract terms Act (1977)

The UCTA is largely restricted to business liability. Contracts excluded include those involving land, those for insurance, and those affecting the formation or management of companies.

Exemption clauses can only be included in a written form contract if they are reasonable. It is not possible to use exemption clauses to escape liability in the case of bodily harm or death due to negligence.

Exemption clauses are automatically void if:

- they contain a clause exempting from liability in the case of personal injury or death due to negligence,
- they contain a clause contrary to section 12 of the Sale of Goods Act (regarding the right to sell goods), or
- in the case of consumer sales only, if they contain a clause contrary to section 13, 14(2), 14(3) or 15 of the Sale of Goods Act.

Exemption clauses are void if unreasonable if:

- they contain a clause exempting from any other loss caused by negligence (see *Woodman v Photo Trade Processing*, below),
- in the case of non-consumer sales, if they contain a clause contrary to section 13, 14(2), 14(3) or 15 of the Sale of Goods Act, or
- they contain a clause exempting from any other breach of contract.

Liability for financial loss or loss of property can be excluded if reasonable. Consumers get special protection when buying for private use, as opposed to those buying to sell in the course of business.

The Unfair Contract Terms Act 1977 outlines a test for reasonableness. Under this test, the relative bargaining power of parties must be considered, in conjunction with the points outlined above.

RW Green Ltd v Cade Brothers Farms (1978)

A standard contract was negotiated between the national Association of Seed Potato Merchants and the National Union of Farmers. This standard contract contained two exemption clauses: firstly, the seed grower's liability was limited to the cost of potato seed should it be diseased; and secondly, complaints must be made within three days of delivery. CB sold G some seed, which G planted. It became apparent that the seed carried a virus after two weeks, and the farmer faced heavy losses. The courts decided that the second clause was unreasonable, since it would not be apparent within three days that the seed carried a virus. However, the limit on liability was found to be reasonable.

Woodman v Photo Trade Processing (1981)

W sent wedding photographs to PTP for processing. The film was sent in an envelope which contained, printed on the outside, an exemption clause limiting liability to a replacement film. The film was lost due to *negligence* (it would now be considered as failure to exercise reasonable skill and care under s13 of the Supply of Goods and Services Act 1982). W sued. The court decided that this limitation on liability was (in these circumstances) unreasonable, since it was due to negligence that the film was lost, and the consumer had no choice over the contract. Since this decision, most postal film companies offer a choice of paying extra for insurance. Even with this option, there have been cases where these companies have been held to be acting unreasonably, because the clause has tended to be hidden, in small print on the envelope.

Smith v Bush (1989)

S bought a house on the basis of a valuation carried out by B on behalf of her building society. S had no bargaining power in the transaction. The surveyor included a disclaimer of liability for negligence in his report. After S bought the house, the chimneys collapsed. B attempted to rely on the exemption clause; the House of Lords held that this was unreasonable due to her weak position.

Other Acts

Other statutes also impose restrictions with regard to unfair terms, in particular with respect to exemption clauses.

Under the Misrepresentation Act 1967, any term excluding liability from misrepresentation is void, unless it is proven that the exemption was fair when regarding what parties should have known at the time the contract was made.

Walker v Boyle (1982)

B had attached exemption clauses to the sale of a house, stating “no error, misrepresentation or omission in any preliminary answer concerning the property ... shall annul the sale”. This clause was held to be unreasonable and therefore void.

The Consumer Credit Act 1974 can protect a debtor during a credit period.

The Fair Trading Act 1973 empowers the Department of Trade and Industry to regulate trade.

Criminal liability can also come into play and affect the validity of exclusion clauses.