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# DEFINING YOUR LIABILITY IN ADVANCE:

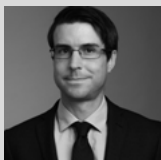
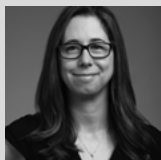
## LIQUIDATED DAMAGES, LIMITATION AND EXCLUSION CLAUSES

### CONTRACT DISPUTES PRACTICAL GUIDES ISSUE 6: JULY 2020

This is the sixth in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

Parties to commercial contracts commonly seek to set some parameters around what will happen in the event of a breach. They may for example agree a fixed sum that is payable on breach, or set a maximum sum for any damages, or exclude liability (or particular categories of liability) altogether.

Such clauses may not always have the effect the parties expect, either because of how they are interpreted by the courts or because they are held to be unenforceable as a result of statute or common law principles.



**James Baily, Sarah Hawes and David Nitek** consider the main types of clause that may be used and the extent to which they will (or will not) be effective, and provide some practical tips for commercial parties.

## TOP TIPS FOR LIQUIDATED DAMAGES, LIMITATION AND EXCLUSION CLAUSES:

- DO ensure it is clear when any liquidated damages clause will apply
- DO consider drafting to avoid the rule on penalties altogether, eg by making payment conditional on performance rather than providing for liquidated damages on breach
- DO try to ensure any entitlement you will have on the counterparty's breach is proportionate to your interest in enforcing performance
- DON'T assume exclusion clauses will always be effective
- DO remember controls on exclusion clauses may apply more broadly than you think, eg to clauses setting time limits for notifying claims
- DO use clear and unambiguous drafting, particularly if you want to exclude negligence
- But DON'T assume broad wording won't be upheld if challenged
- DON'T go further than you need to in excluding liability
- DO remember that loss of profit may be direct loss – simply excluding “indirect” or “consequential” loss may not achieve your aim

## 1. Introduction

When negotiating a contract, commercial parties may wish to agree in advance their respective entitlements in the event of a breach, or a particular type of breach, rather than leaving that to be determined by the general law of damages. This will typically be a “liquidated damages” clause, but it may provide for some other remedy – see section 2 below.

In these circumstances, the law of penalties may come into play to render the term unenforceable, so that the innocent party is left to pursue a remedy for the breach in the usual way – see section 3 below.

Alternatively, rather than agreeing a specific remedy, the parties may wish to agree some restrictions on the innocent party's entitlement to damages. This could be, for example, an exclusion of liability for particular types of breach, or in respect of particular types of loss, or a limit on the aggregate amount of damages that will be payable, or some combination of all of these.

These types of clause are also subject to controls which may mean they cannot be relied on by the party in breach – see sections 4 to 7 below.

“The law of penalties and controls on exclusion clauses are essentially two sides of the same coin: the first aims to protect the party in breach from paying excessive compensation; the second to protect the innocent party from unclear or unreasonable restrictions on its entitlement to compensation.”

## 2. Liquidated damages

Where commercial parties agree a contractual alternative to damages, it will typically be a fixed sum payable as “liquidated damages” in the event of a breach, or a particular type of breach. However, they may provide for some other remedy to take effect, such as a requirement to transfer assets to the innocent party, or perhaps the loss of some contractual entitlement the party in breach would otherwise have enjoyed.

In some cases, there may be a dispute as to whether the clause applies in the circumstances that have arisen. When drafting a liquidated damages clause, it is important to ensure there is no room for doubt as to when it will apply.

In *Triple Point Technology Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 (considered in this [post](#) on our Litigation Notes blog) the Court of Appeal held that a clause providing for liquidated damages for delay did not apply where the contractor failed to complete the contracted work (the installation of a new software system).

The employer under the contract was therefore entitled to recover damages for breach assessed on ordinary principles, rather than liquidated damages.

The Court of Appeal said that the question of whether such a clause applied in these circumstances would depend on the wording of the clause itself. The clause in this case provided for a rate of liquidated damages “per day of delay from the due date for delivery up to the date [the employer] accepts such work”.

The court found that the clause was focused specifically on delay between the contractual completion date and when the work was actually completed by the contractor and accepted by the employer. If that never occurred, the liquidated damages clause did not apply.



### 3. Rule on penalties

Where a contractual term provides for some remedy that takes effect on breach, in effect providing a contractual alternative to damages at common law, the term will be unenforceable if it falls foul of the rule on penalties.

The test is whether the clause is out of all proportion to the innocent party's legitimate interest in enforcing the counterparty's obligations under the contract. If so it will be penal and therefore unenforceable. This test was established by the Supreme Court decision in *Makdessi* in 2015 (see summary on page 5). It replaced the traditional test of whether a clause that took effect on breach was a "genuine pre-estimate of loss" and therefore compensatory, or whether it was aimed at deterring a breach and therefore penal.

So, under the new test, a clause may be enforceable even if it does not represent a pre-estimate of loss. However, the question of precisely what will amount to a legitimate interest in enforcing a counterparty's obligations, and whether the remedy provided is out of all proportion to that interest, may be open to debate in many cases.

The Supreme Court in *Makdessi* commented that, in a straightforward damages clause, the innocent party's interest will rarely extend beyond compensation for breach, and so the traditional test (ie is it a genuine pre-estimate of loss) will usually be adequate to determine the validity of the clause. However, the decision also suggests that, where there is a negotiated contract between properly advised parties of comparable bargaining power, the courts are

unlikely to interfere. As the Supreme Court commented, "the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."

A provision may fall outside the rule against penalties altogether if it takes effect only in circumstances which are not a breach of contract, for example a payment which is conditional on performance rather than an entitlement to liquidated damages on breach.

There is some uncertainty as to whether "take or pay" clauses (which provide that the buyer will pay for a certain minimum quantity of product, whether it takes that quantity or not) fall within the scope of the rule. It may come down to the drafting of the clause in question.

Even where a provision takes effect only on breach, the rule against penalties will not be engaged if it is, in substance, a primary obligation rather than a secondary obligation which provides a contractual alternative to damages. This distinction may, however, be less than clear in many cases, particularly as the rule will apply if what appears to be a primary obligation (eg a price adjustment clause) is in substance a disguised punishment for breach.

Although the point is not free from doubt, it may be that a clause will not be susceptible to the rule on penalties where it is triggered by a non-breach event, even if the same clause could potentially have been caught by the rule where it took effect on breach.

The rule is not restricted to clauses requiring payment of money. It will apply to obligations to transfer assets, either for nothing or at an undervalue, and probably also to clauses preventing the party in breach from recovering instalments paid or payable, though this last point is not settled.

Where there is any doubt as to whether the rule on penalties is engaged, the safe course must be to consider the clause carefully to ensure (so far as possible) that it meets the test.

“It may be possible to avoid the application of the rule on penalties altogether with careful drafting, though classification of a term will depend on substance rather than mere form.”

*Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 (see [post](#)) established that a contractual provision will be penal, and therefore unenforceable, if it imposes a detriment on the contract breaker which is out of all proportion to the innocent party's legitimate interest in enforcing the relevant contractual obligation.

*Makdessi* concerned terms of a share purchase and shareholders' agreement. These provided that if the seller was in breach of certain non-compete restrictions, he lost his entitlement to deferred consideration that would otherwise be payable, as well as the benefit of a put option to sell his remaining shares at a price determined by reference to goodwill; instead the buyer had an option to buy his remaining shares at a price which excluded goodwill.

The Supreme Court held that the relevant provisions were not penalties:

- Although the provisions took effect on breach, they were (in the view of at least three of the seven Justices) primary rather than secondary obligations. They were not contractual alternatives to damages but, in essence, price adjustment provisions.
- In any case, the clauses were justified by the buyer's legitimate interest in the observance of the restrictive covenants in order to protect the goodwill of the business. The parties, who were sophisticated commercial people bargaining on equal terms and with expert legal advice, were the best judges of how their proper commercial interests should be reflected in the agreement.

In *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch) (see [post](#)), a side letter to a lease provided that the landlord would accept a lower rent than was set out in the lease, but could terminate the side letter and insist on the higher rent if the claimant breached any terms of the side letter or the lease. The High Court applied *Makdessi* in finding that the provision was an unenforceable penalty.

The court rejected the landlord's argument that the law of penalties was not engaged because the obligation to pay the higher rent was a conditional primary obligation, rather than a secondary obligation that took effect on breach. Given the terms of the side letter, there was no primary obligation to pay rent at the higher rate; the primary obligation was to pay rent at the lower rate, and the obligation to pay at the higher rate was a secondary obligation engaged on breach.

The court found that this secondary obligation was exorbitant or unconscionable compared with the landlord's legitimate interest in enforcing compliance. It was significant that the obligation applied regardless of whether a breach was "one-off, minor, serious or repeated" and without regard to the nature of the obligation broken or its consequences. That had long been recognised as one of the hallmarks of a penalty. It was also relevant that the higher rent was payable in addition to the other remedies the landlord had for the breach, including generous interest and costs provisions.

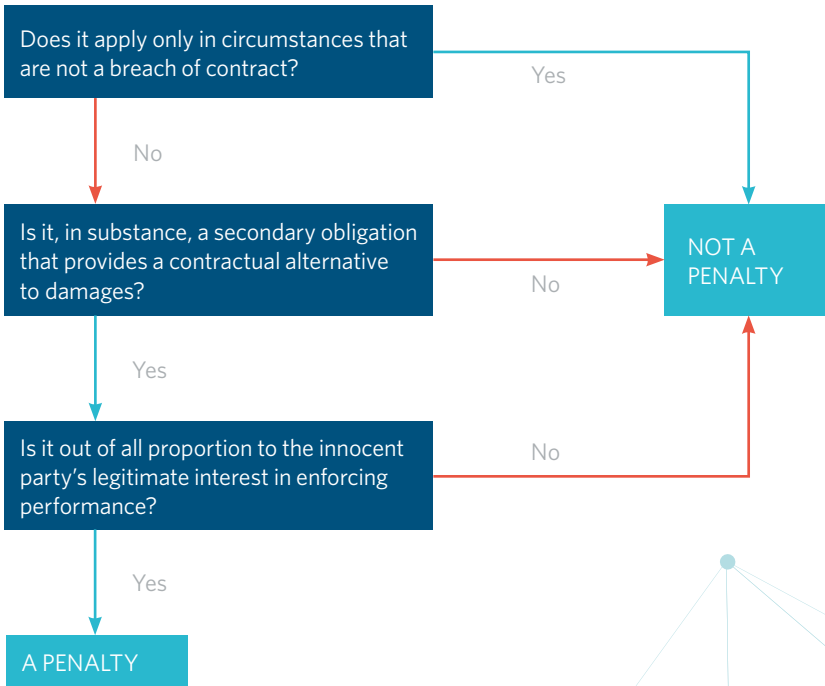
In *Nosworthy v Instinctif Partners Ltd* [2019] UKEAT 0100\_18\_2802 (see [post](#)), the Employment Appeal Tribunal (EAT) held that the rule against penalties did not apply where an employer imposed certain contractual provisions following an employee's resignation, without alleging any breach of contract on the part of the employee.

The clause in question required the employee to resell shares at acquisition cost and to forfeit loan notes. The clause could potentially take effect in two situations: (i) where the employee voluntarily resigned; and (ii) where the employee was (or could have been) dismissed for breach. On the facts, the employee resigned and the employer relied on the clause.

The EAT held that the rule against penalties did not apply as the employer did not allege a breach. It did not consider whether the rule against penalties would have applied if the clause had taken effect in circumstances where the employee was dismissed for breach. It was sufficient that, on the facts, the employer was not alleging a breach.

### Decision tree: is it a penalty?

A ready reckoner to help determine whether a contractual provision may be a penalty and therefore unenforceable



## 4. Exclusion clauses

An exclusion clause is, in essence, any provision which excludes or restricts a party's liability, whether entirely or for particular types of breach or in respect of particular types of loss. In this briefing we focus on exclusion of liability for breach of contract. Clauses excluding liability in respect of pre-contractual statements were considered in issue 3 of this series "[Pre-contractual statements: When can they come back to bite you?](#)"

As well as the obvious types of clause, which exclude the relevant liability entirely or limit it to a fixed sum, other provisions may fall within the category of exclusion clauses and be subject to the same controls (see box below right). These include provisions making the liability subject to restrictive conditions, such as mandatory time limits for notifying claims, or restricting rules of evidence or procedure, such as providing that acceptance of goods will be conclusive evidence that they comply with the contract.

In principle, parties are free to agree in advance how any liability will be allocated between them. In practice, however, exclusion clauses may fail to protect the party in breach for any one of a number of reasons.

As with any contract term, the clause must be properly incorporated into the contract; this will not be an issue where there is a formal written agreement. There is also a well-established common law rule that liability for a party's own fraud cannot be excluded.

Assuming the clause is properly incorporated and does not seek to exclude liability for fraud,

the question of whether the clause is effective will depend on two key factors:

- Interpretation: Whether the clause, as properly interpreted, covers the breach and the type of loss in question – see sections 5 and 6 below.
- Statutory controls: Whether the clause is subject to statutory controls under the Unfair Contract Terms Act 1977. These may render an exclusion clause in a business to business contract either unenforceable or subject to a requirement of "reasonableness" – see section 7 below. (Consumer contracts are subject to the Consumer Rights Act 2015, which is not considered further here.)

If the clause is not effective, the party in breach will have unrestricted liability, subject only to common law rules on causation and loss (such as remoteness and mitigation).

Unfair Contract Terms Act 1977 - s.13:

- To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents –
  - making the liability or its enforcement subject to restrictive or onerous conditions;
  - 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;
  - excluding or restricting rules of evidence or procedure...



## 5. Interpretation

The court's aim in interpreting a contract term is to determine the meaning it would convey to a reasonable person with all the background knowledge available to the parties at the time the contract was made. As well as the words used and the relevant background, the court will take into account how the clause fits within the contract as a whole and considerations of commercial common sense.

Recent judgments in the higher courts emphasise that contractual interpretation is a unitary exercise, in which an analysis of the language used and consideration of the commercial implications are both tools the courts should use to ascertain objective meaning. The appropriate weight to be given to each tool will vary depending on the circumstances, including the contract's nature, formality and quality of drafting. (For more detail on the court's approach to contractual interpretation generally, see issue 2 of this series of contract disputes practical guides "[What does your contract mean? How the courts interpret contracts](#)".)

**"As with many things, the key is to use clear and unambiguous drafting."**

In interpreting exclusion clauses, the courts have historically applied various principles or tools of construction which tend toward a narrow interpretation, including the following:

- **Contra proferentem rule:** The clause should be construed against the party that has put it forward and/or is seeking to rely on it.

- **Canada Steamship guidelines:** In essence these guidelines, from the Privy Council decision in *Canada Steamship Lines v The King* [1952] AC 192, require clear words to exclude liability for negligent wrongdoing. Even if the words used are wide enough to cover negligence, they will not be interpreted that way unless there is no other head of damage that the clause might realistically have been intended to cover.
- **No remedy:** The courts have tended to construe exclusion clauses narrowly where otherwise the effect would be to exclude all liability for non-performance.

In recent years, however, the courts have tended to cast doubt on the extent to which these principles remain applicable, at least where the clause is clear and unambiguous.

In general terms, where there is ambiguity in an exclusion clause, the court will tend to give it a narrow construction. However, under the modern approach to contractual interpretation, this is not due to the application of a specific rule or principle of construction. It is because the parties will not lightly be taken to have intended to cut down their contractual entitlements unless that is clear from the words used.

**"Exclusion clauses can provide important contractual protection in the event of a breach, but their scope is frequently the subject of disputes and they may not always have the desired effect."**

In *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 (see [post](#)) a business sale agreement excluded liability unless the buyer served notice of the relevant claim on the sellers within 20 business days after becoming “aware of the matter”. There was a dispute as to whether this meant aware of the facts giving rise to the claim (wide construction) or aware that there was a proper basis for the claim (narrow construction).

The Court of Appeal confirmed the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed. This is because parties are not lightly to be taken to have intended to cut down the remedies the law provides for breach of important contractual obligations. This principle is of similar effect to the “*contra proferentem*” rule but, the court said, it has nothing to do with which party has put forward the clause or is seeking to rely on it.

This principle is not now regarded as a presumption or “special rule” that justifies giving a strained meaning to an exclusion clause, nor is it to be applied mechanistically. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause means, but if ambiguity remains then a narrower construction should be adopted.

Applying this approach, the court held the clause in this case was ambiguous and adopted the narrow construction.

In *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372 the High Court found that “spread costs”, or additional overheads incurred as a result of the breach, did not fall within the exclusion of consequential loss, as defined in the contract. It construed the clause *contra proferentem* and applied a presumption that contracting parties do not intend to abandon any remedies for breach unless clear words are used.

The Court of Appeal held that the judge was wrong to invoke the *contra proferentem* principle. First, it had no part to play where the meaning of the words is clear. Second, it did not apply where the clause was mutual, especially where the parties were of equal bargaining power.

Further, any presumption against giving up the right to claim damages for breach must, the court said, give way to the language of the contract.

The court also did not accept the argument that a broad interpretation of consequential loss would rob the contract of any meaningful obligations. Such a principle should be seen as one of last resort and should only apply where the effect of the clause would be to relieve a party from all liability for any breach. The court did not accept that was the case here. In any event, if it was clear the parties had agreed to exclude all liability, it was difficult to see why the court should not give effect to that agreement.

In *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 (see [post](#)), the claimant developers brought a claim against the defendant engineers alleging that they had negligently failed to identify and report on asbestos on their development site. The defendant relied on exclusion clauses in the development contract and associated warranties (with identical wording).

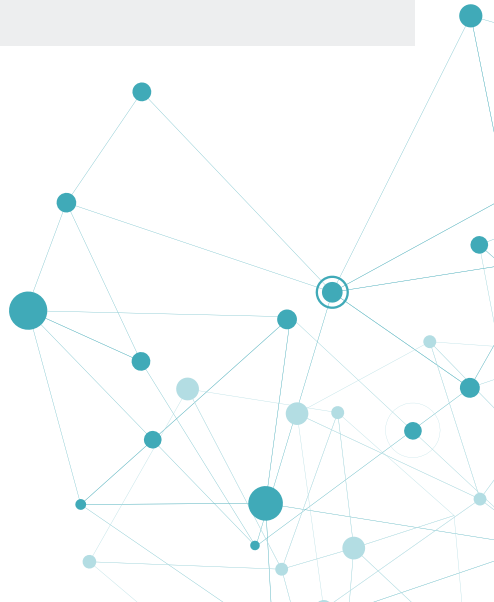
Each of the clauses was found in a section of the relevant contract headed “Professional indemnity insurance”, which provided that the defendant would maintain insurance of not less than £5 million per event. The clauses stated that the defendant’s liability for pollution and contamination would be limited to £5 million in the aggregate and that: “Liability for any claim in relation to asbestos is excluded.”

The Court of Appeal found that the exclusion clauses were effective to exclude liability.

It rejected an argument that they should be interpreted as covering only liability for causing pollution or contamination, or the spread of asbestos, rather than a failure to identify it. This was based on the clear wording of the clause and commercial common sense.

The court rejected the claimants’ argument based on the *contra proferentem* rule, which it said had a very limited role in relation to commercial contracts negotiated between parties of equal bargaining power. In this case, the court said, the meaning of the clauses was clear, and the *contra proferentem* rule had no impact. The *Canada Steamship* guidelines were also of little assistance, being more relevant to indemnity clauses than exemption clauses. In any event, there was no non-negligent ground of claim relating to asbestos that the parties might realistically have had in mind in agreeing the clause.

“The safest course is to assume you will need clear and specific words to exclude your own liability, but at the same time not to assume broad wording will fail to protect your counterparty.”



## 6. Consequential loss

Traditionally, the courts have interpreted “indirect” or “consequential” loss in a way that does not necessarily capture the meaning those words would normally convey to commercial parties. According to the case law:

- **Direct losses** are those which fall within the first limb of the classic test for recoverable loss in contract, as set out in *Hadley v Baxendale* (1854) 9 Ex 341, namely those losses which arise naturally from the breach.
- **Indirect or consequential losses** are those which do not arise naturally but rather from some special circumstance that the defaulting party was aware of at the time of the contract.

So in other words, the contrast is between those losses a reasonable person might expect would result from the breach in the ordinary course, and those which would not be expected unless special circumstances are known. A good example is loss of profits. Parties might assume that loss of profits resulting from a breach of contract (for example, a delay by a supplier) will be consequential loss. But in fact, in many cases, loss of profits will count as direct loss because it is loss which a reasonable person would expect to arise naturally from the breach.

In *Transocean* (referred to above), however, the Court of Appeal commented that it is questionable whether this traditional approach to construction of the term “consequential loss” would be taken today, when the courts are more willing to recognise that words take their meaning from their particular context.

In *Star Polaris LLC v HHIC-PHIL INC* [2016] EWHC 2941 (Comm) (see [post](#)), a ship-building contract guaranteed the vessel for 12 months against particular types of defect. The ship builder would make the necessary repairs or replacements at its shipyard or, subject to certain conditions, the repair work could be carried out elsewhere and it would reimburse the cost. Removal of the vessel to the place of repair was to be at the buyer’s risk and expense. The ship builder would have no liability for “any consequential or special losses, damages or expenses unless otherwise stated herein.”

The vessel suffered a serious engine failure and was towed to a dockyard for repairs.

The Commercial Court held that any claims beyond the cost of repair of physical damage were excluded. It rejected the buyer’s argument that “consequential or special losses” should be interpreted to refer to losses falling within the second limb of *Hadley v Baxendale*.

The clause had to be considered in the light of the contract as a whole, which included a deliberate distinction between defects and damage on the one hand, and consequential damage on the other. In those circumstances the word “consequential” had to mean damage which followed as a result of physical damage, namely additional financial loss other than the cost of repair and replacement.

In *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) (see [post](#)), the defendant agreed to provide logistics and distribution services to the claimants, including storage of their stock of home entertainment media at the defendant's warehouse. The claimant's stock was damaged by break-ins and arson attacks during the London riots of 2011, due to the defendant's negligence. The claimant claimed for loss of profits and business interruption losses.

The defendant sought to limit its liability by reference to a clause which provided that neither party would be liable "for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business".

The judge considered a number of cases which have interpreted the distinction between "direct" and "indirect or consequential" losses as corresponding with the two limbs of *Hadley v Baxendale*, so that an exclusion for "indirect or consequential" losses is not effective to exclude losses naturally arising from the breach. The judge accepted that any general understanding of the meaning of "indirect or consequential loss" must not override the true construction of the clause when read in the context of the agreement and the factual matrix.

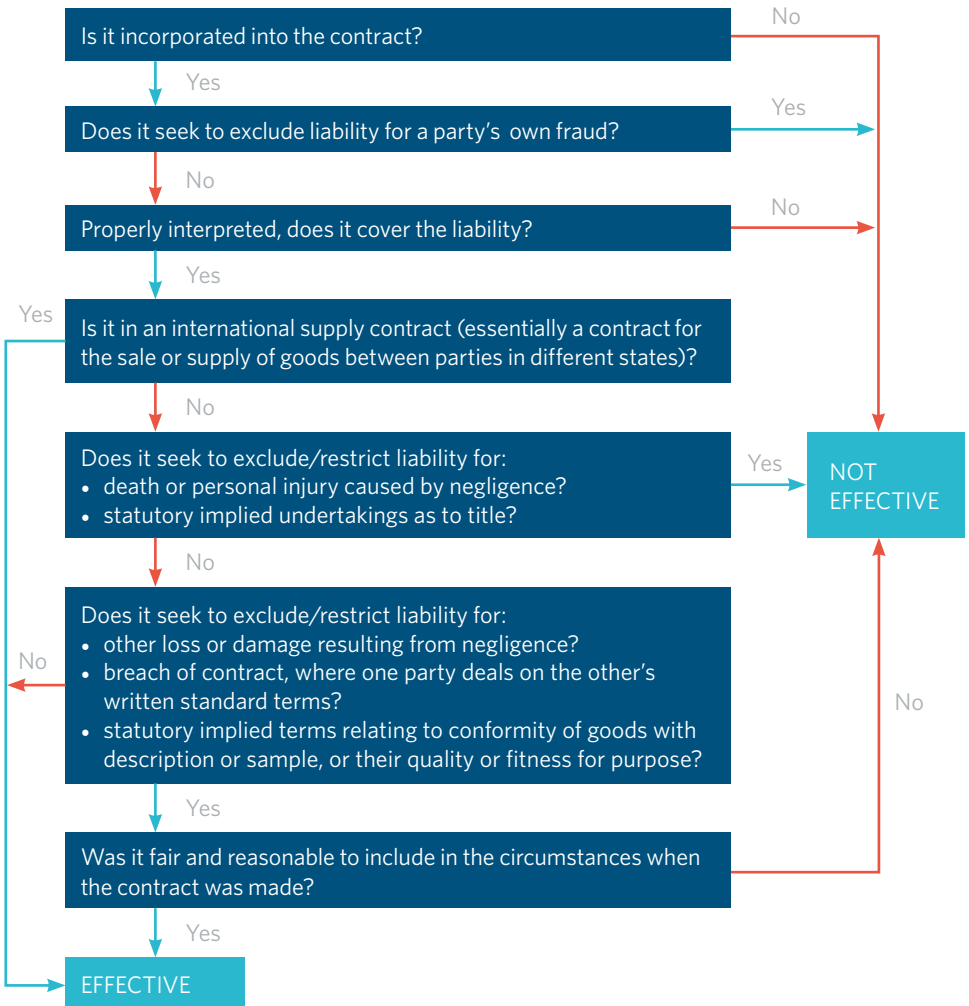
On the facts the judge held that the claimant's loss of profits and business interruption losses did not fall into the natural and ordinary meaning of "indirect or consequential loss", nor did they fit with the second limb of *Hadley v Baxendale*. They were a direct and natural result of the fire, and so did not fall within the scope of the exclusion.

"Simply excluding 'indirect or consequential' loss may not have the desired effect. Think about what categories of loss might result from a breach and tailor your drafting."



### Decision tree: is your exclusion clause effective?

A ready reckoner to help determine whether a contractual exclusion or limitation clause in a business to business contract is likely to be effective



Note: Consumer contracts are subject to statutory controls under the Consumer Rights Act 2015, which is not considered further in this guide.

## 7. Unfair Contract Terms Act 1977 (UCTA)

As noted above, even where an exclusion clause is interpreted to cover the breach and the liability in question, it may be ineffective as a result of UCTA. UCTA does not, however, apply to international supply contracts, as defined in the Act; in essence, these are contracts for the sale or supply of goods between parties in different states. Where UCTA applies:

- Any attempt to exclude or restrict liability for the following will be void:
  - death or personal injury resulting from negligence (defined to include breach of any duty to take reasonable care or exercise reasonable skill)
  - statutory implied undertakings as to title
- Any attempt to exclude or restrict liability for the following will be effective only to the extent that it satisfies the test of “reasonableness” under section 11(1):
  - other loss or damage (ie other than death/ personal injury) resulting from negligence
  - breach of contract, where one party deals on the other’s written standard terms of business (and similarly, any claim to be entitled to perform the contract in a substantially different manner from that which was reasonably expected, or not perform the contract at all, is subject to the test of reasonableness)
  - statutory implied terms relating to conformity of goods with description or sample, or their quality or fitness for purpose

Where a term is subject to the test of reasonableness, it will be effective only if it was fair and reasonable to include the term, 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.

In assessing reasonableness, the court must have regard to the factors set out in schedule 2 to the Act. Probably the most important of these is the relative strengths of the parties’ bargaining positions. Other factors in schedule 2 include whether the customer received some inducement to agree to the term, or could have avoided the term by contracting with a different party, and whether the customer knew or should have known of the existence and the extent of the term. The ability of each party to insure against the excluded loss is also often highly relevant.

It used to be thought that a term would be unreasonable if it did not include an express carve-out for fraud. That may no longer be necessary in light of the House of Lords decision in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6. However, it remains common practice, and it may be advisable given current uncertainties regarding the relevance of traditional principles in the interpretation of exclusion clauses.

It is generally advisable for different elements of an exclusion clause to be separated into sub-clauses, rather than using a single all-embracing clause. Where that is done, it may be possible for an unreasonable element of the clause to be severed from the clause leaving the other “reasonable” parts intact.

“Negotiating an exclusion clause requires a balancing act between, on the one hand, a desire to exclude liability to the greatest extent possible and, on the other, ensuring you stay on the right side of the line as to what is reasonable.”

In *Saint Gobain Building Distribution v Hillmead Joinery* [2015] EWHC B7 (TCC), the court considered whether the seller’s standard terms and conditions satisfied the statutory test of reasonableness.

The contract was for the sale of laminate sheets to be used in bonded panels in Primark’s stores. The seller’s standard terms included a wide-ranging exclusion clause which purported to (in broad summary): exclude implied terms as to satisfactory quality/fitness of purpose; exclude any liability if the buyer did not inspect the goods on delivery and report complaints to enable the seller to inspect the goods before they were used; confine the buyer’s remedy to replacement of the goods or limit liability to the invoice price; and exclude any liability for consequential loss.

The court held that none of these provisions met the statutory test of reasonableness under UCTA. Relevant factors included that the seller was in a significantly stronger bargaining position than the buyer, there was no attempt to negotiate the relevant terms, they purported to exclude **all** liability if the buyer failed to inspect the goods for defects before using them, and at the time of the contract the parties knew that any direct loss to the buyer would be greater than the cost of replacement (ie because the laminate sheets were going to be fabricated into bonded panels).



*In Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371 (see [post](#)), the defendant contracted to install a fire suppressant system in the claimant's frozen food factory. A fire broke out in the factory 10 years later, and the claimant's insurers sought to recover losses of around £6.6 million for property damage and business interruption on the basis that the system was defective.

The defendant's terms and conditions stated: "We exclude all liability, loss, damages or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided...."

Both the High Court and the Court of Appeal found that the clause satisfied the reasonableness test under UCTA. Amongst other factors, the parties were of broadly equal bargaining power and the claimant could have found a supplier who was prepared to contract on a less stringent basis.

The Court of Appeal referred to a number of authorities which stress the courts' reluctance to interfere with contractual provisions agreed between parties of equal strength and bargaining power, as well as the importance of insurance as a factor going to reasonableness.

In this case, insurance was a critical factor in favour of the defendant, both because the claimant was best placed to put in place the necessary insurance, and because the clause expressly stated that the defendant could provide insurance to cover the relevant risks for an extra cost.

The court also rejected the claimant's submission that the clause should be considered unreasonable because the defendant was seeking to avoid its core obligation of providing a proper fire suppression system. The contract had to be looked at as a whole; the supply of the system could not be looked at in isolation from the terms on which the defendant was prepared to supply and install it.

"In assessing whether an exclusion clause is reasonable, a key factor will often be whether or not the contracting parties were of equal bargaining power. If so, the court will be much less inclined to interfere."

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David helps clients in a variety of sectors including transport and energy. He has advised on disputes arising out of some of the UK's largest infrastructure projects.

David's practice has a particular focus on the Middle East, and he also has extensive experience of major projects in a number of jurisdictions across Europe and Asia.

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