

EXCLUSION CLAUSE

An exclusion / exemption clause is a clause which if incorporated in the contract will entitle the party seeking to rely on it to exclude or exempt all the liabilities arising from a breach of contract. (And a limitation clause only seeks to limit the liabilities arising from a breach of contract).

In order for a party to rely on an exclusion clause he has to first show that clause was incorporated as a term of the contract. At common law an exclusion clause can be incorporated in two ways: by advance notice to the other party that the exclusion clause is to be a term of the contract, & by the signature of the party agreeing to be bound by the exclusion clause.

A notice can be given in three ways: *notice by display* (*Olley v. Marlborough Court*); *notice in a document* (*Parker v. South Eastern Railway*, *Chapelton v. Barry Udc*); *notice by a course of dealing* (*Henry Kendall v. William Lillico*).

In the absence of fraud if a party signs the document containing the exclusion clause then it is conclusive evidence that the clause has been incorporated into the contract as a term of the contract (*Parker v. South Eastern Railway*). And it is immaterial that the party signing the document is illiterate or even blind (*L'estrage v. Graucob*).

If the exclusion clause is properly incorporated into the contract it can even exempt a party for a breach of a fundamental term (*Photo Production v. Securicor Transport Ltd*). However, if there is any ambiguity in the clause then the *contra proferentem* rule suggests that the clause will be construed against the interests of the person seeking to rely on it.

Once it is judged that the exclusion clause has been properly incorporated a further question arises as to the validity of the clause under the Unfair Contract Terms Act 1977 (hereinafter UCTA).

The UCTA applies to contract terms & to notices which are non-contractual, & which purport to exclude or restrict liability in tort. It seeks to limit the circumstances in which terms notices restricting or limiting liability may apply, but it does not affect the basis of liability, nor does it apply to any other 'unfair' terms. The Act is concerned to protect primarily the person who deals as a consumer.

Sec. 1(3) of UCTA provides that the Act applies where a party seeks to exclude his business liability.

Sec.12 provides that a party "deals as consumer" if he neither makes the contract in the course of a business nor holds himself out as doing so.

Sec.2 (1): Under s.2 (1) any clause attempting to exclude liability for death or personal injury caused by negligence will be ineffective.

Sec.2 (2): Under s.2 (2) any clause excluding liability for negligently caused loss or damage to property will be ineffective unless it satisfies the test of reasonableness (below).

Sec.3: Under s.3 any contractual liability cannot be excluded by means of an exclusion clause unless the clause satisfies the test of reasonableness.

Sec.6: This section deals with both business & non-business liability. Under this section liability for the breach of any implied term (i.e. breach of s.12 – 15 of the Sale of Goods Act 1979) cannot be excluded unless the clause satisfies the test of reasonableness.

The requirement of reasonableness laid down in s.11 (1) is that the exclusion clause shall have been fair & reasonable 'having regard to the circumstances which were known, or ought reasonably to have been, known to or contemplation of the parties when the contract was made'. Reasonableness has therefore to be judged by reference to the time of contracting. In determining whether a clause is reasonable shall be had to the 'Guidelines' set out in Schedule 2 of the UCTA. These guidelines refer to such matters as the bargaining strength of the parties, & whether the customer had received an inducement to agree to the clause, or whether in accepting it, had an opportunity to enter into a similar contract without having to accept a similar term. In *George Mitchell v. Finney Lock Seeds Ltd.* It was indicated that the courts would also take into account the resources of the parties concerned & availability of insurance to the party seeking to rely on the clause. In *Smith v. Eric S Bush* it was suggested that in deciding whether an exclusion clause met the requirement of reasonableness the matters discussed above should always be taken into account.

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