

Exclusion and Limitation Clauses

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| Definition | Limitation clauses – a term in a contract that sets an upper limit on liability for breach of contract. | | |
| | Exclusion clauses are a term in a contract that exclude or limit liability for a breach of the contract | | |
| Exclusion Clauses | Is the term incorporated into the contract (1) | Where a party has signed a written agreement s/he is bound by that agreement | L'Estrange v Graucob (1934) |
| | Is the term incorporated in the contract (2) | Whether exclusion clauses are only incorporated into a contract requires the party subject to the clause to know of the clause at the time the contract was made | Olley v Marlborough Court Hotel (1949) |
| | Is the term incorporated into the contract – the ticket cases | The combination of notices, tickets and other documents may make it difficult for someone trying to rely on an exclusion clause to prove that it was brought to the attention of the other party | Chapelton v Barry UDC (1940) Thompson v LMS Railway (1930) Thornton v Shoe Lane Parking Ltd (1971) |
| | Is the term incorporated into the contract (3) | Is the term incorporated as a result of previous dealings of the parties? | McCutcheon v David MacBrayne Ltd (1964) |
| | The contra proferentem rule | Definition – where there is doubt about the meaning of a term in a contract, the words will be construed against the person who put them in the contract. The contra proferentem principle is an approach to be used only where the term is both one sided and ambiguous | Transocean Drilling UK Ltd v Providence Resources plc (2016) Persimmon Homes Ltd v Ove Arup and Partners Ltd (2017) Oliver Nobahar-Cookson v The Hut Group (2016) |
| Statutory Control of Exclusion Clauses | Unfair Terms Contract Act 1977 | S.2(1) a person cannot exclude liability for death or personal injury caused by negligence | |
| | | S.6(1) the implied condition as to title (Sale of Goods Act 1979 and s.7 of the Supply of Goods and Services Act 1982) cannot be excluded | |
| | | S.3 imposes a reasonable test to contracts where one party is subject to the other's standard written terms of business. Guidelines as to what is reasonable is contained on s.11 and schedule 2 of the Act. These are guidelines and it is ultimately up to the judge to decide what is reasonable. s.11(5) requires the person who inserts the clause to show that it is reasonable in all circumstances. | Warren v Truprint Ltd (1986) |
| | | There are three tests for reasonableness | Smith v Eric S Bush (1990) |
| | | | Watford Electronics Ltd v Sanderson CFL Ltd (2001) |
| | | S.11 (4) specifically equates to limitation clauses. There are two set criteria: <ul style="list-style-type: none"> The resources which the D could expect to be available for meeting his or her liability How far it was open to the D to cover him – or herself by insurance against any successful claim | George Mitchell Ltd v Finney Lock Seeds Ltd (1983) |
| Consumer Rights Act 2015 | S.31 – Prohibits a term excluding or limiting liability, for the supply of services under the following sections of the Act with respect to the sale of goods: s.9 – Goods to be of satisfactory quality s.10 – goods to be fit for purpose s.11 Goods to be as described s.14 Goods to match the model seen or examined s.15 installation as part of conformity of the goods with the contract | | |
| | S.57 Prohibits a term excluding or limiting liability for the supply of services under the following sections of the act s.49 – Service to be performed with reasonable skill and care s.59 – Information about the or service to be binding s.51 – reasonable price s.52 – reasonable time | | |
| | S.65 – prohibits exclusion or restriction of liability for death or personal injury resulting from negligence General fairness of terms s.62 – requirement for all consumer contracts and notices to be fair The act defines unfair as those which put the consumer at a disadvantage by limiting the consumer's rights disproportionately increasing his/her obligations as compared to the trader's rights and obligations. The courts should take into account the circumstances existing when the term was agreed, other terms of the contract and nature of the subject matter of the contract. The fairness test is also supplements by a 'grey list' of terms, this is a non-exhaustive list of terms that may be unfair. In particular, terms relating to the main subject matter of the contract or term that set the price are not subject to the fairness test if they are both. <ul style="list-style-type: none"> Transparent – in plain and intelligible language and, if in writing legible and Prominent – brought to the consumer's attention in such as a way that the average consumer would be aware of the term Written terms in consumer notices must also be transparent. So this could be in any communication or announcement, as long as it is reasonable to assume it can be seen by the consumer. | | |