Know your limits: can you rely on your exclusion clause?

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A recent Supreme Court judgment is the latest in a spate of decisions that address the often problematic area of exclusion and limitation of liability clauses. In this insight, we highlight three practical questions that you should be asking of your clauses.

1. Have you done enough to bring the clause to the other party's attention?

If you typically contract on your standard terms and conditions, that might seem the natural place for provisions that exclude or limit your liability, but if the other party has not seen them, can you be sure that those clauses form part of the contract?

For your standard terms to be incorporated into the contract, it is not necessary that the party receiving the offer has read them, but you must have taken reasonable steps to bring those terms to the other party's attention. In *Phoenix v Henley*, Phoenix had provided a hard copy quote on which its T&Cs were printed on the reverse. Phoenix then sent a proposal by email that was stated to be subject to T&Cs "overleaf", which were attached as a separate file to that email. A subsequent proposal, which was accepted, used the same reference to T&Cs, but no terms were attached to the email.

The court found that this was enough for the T&Cs to have been incorporated – although the location of an onerous exclusion clause amongst Phoenix's standard terms was still relevant in considering whether it could rely on that clause (as discussed below).

The more onerous the exclusion clause you are seeking to rely on, the more that needs to be done to bring it to the other party's attention. In *Green v Betfred*, an apparent glitch in an online betting game gave increasingly better odds to customers who continued to play for long periods. When a Mr Green attempted to claim over £1.7 million in winnings, Betfred refused to pay out, relying on clauses in its standard terms that sought to exclude liability in the event of a "defect" or "malfunction".

As is typical for online consumer services, users were required to acknowledge their acceptance of the terms and conditions by clicking a button on signing up for an account with Betfred. The judge considered the presentation and signposting of clauses within Betfred's T&Cs, finding that: "The unhelpful, often iterative presentation in closely typed lower-case or numerous paragraphs of capital letters meant that the relevant clauses were buried in other materials." Although it was not fanciful to expect Mr Green to access the T&Cs, it was unreasonable to have expected him to find and note the importance of the exclusion clauses that Betfred relied upon.

The judge, helpfully, stressed that there was no issue with acceptance of the contract by this "click-wrap" mechanism,

nor that it would be possible to incorporate exclusion or limitation of liability clauses, even such as those that Betfred sought to rely on. But more would need to be done to bring those clauses to the consumer's attention. In this case, therefore, the clauses did not form part of the contract – so Mr Green was entitled to his £1.7 million payout.

2. Is the clause reasonable? Is it fair?

Another factor to consider if you are trading on your standard terms is that any exclusion or limitation of liability clause will need to satisfy the statutory test for reasonableness under the Unfair Contract Terms Act 1977(UCTA).

This was also an issue in *Phoenix*, with the court ultimately finding that although the relevant exclusion clause had been incorporated into the contract, it did not satisfy the UCTA reasonableness criteria, so could not be relied on. The clause in question purported to exclude all liability under warranty if the buyer had not paid in full by the date of completion. The judge considered the clause "potentially exorbitant in that the consequences of the slightest delay or deduction might bar all rights of redress against the Claimant relating to the quality of the goods supplied." The condition of the clause was also difficult to comply with as it was difficult to be certain in advance when completion would take place.

One of the other factors to consider in assessing UCTA reasonableness is whether the customer knew or ought reasonably to have known of the existence and extent of the exclusion clause. This is a different test to that for the term to be incorporated, but it raises similar considerations as to the steps that were taken to bring the clause, and its effects, to the other party's attention. Here, the judge found that: "This apparently unusual clause is tucked away in the undergrowth of the Standard Terms and Conditions without any particular highlighting of the consequences of even the slightest delay in payment."

Taking each of these factors into consideration, the clause did not meet the standard for reasonableness under UCTA.

If you are trading with consumers, your terms will also be subject to the Consumer Rights Act 2015, which requires that the terms are transparent and fair. This was another ground considered in *Betfred*. For similar reasons to the findings on incorporation, the court found that the "opaque and difficult" drafting and lack of explanation or signposting meant that the exclusion clauses would have failed the statutory test for fairness and transparency, even if they had been incorporated into the contract.

3. What exactly are you trying to exclude liability for?

Where you are not trading on standard terms, so statutory requirements of fairness and reasonableness do not apply, it is possible to exclude a wide range of potential liabilities. The courts have been prepared to uphold clauses that even seek to exclude liability for deliberate breaches of contract, but clear wording will be needed to achieve this.

In *Acerus v Recipharm*, the court found that the language of the clause – which excluded any claim for loss of profit – was clear, but so too was its context. The judge considered that if the words were given their natural meaning in isolation, this would produce the commercially "remarkable" outcome that the supplier could walk away from their obligations with impunity. However, the relevant clause was within a section of the contract dealing with liabilities to third parties, which suggested that this clause was intended only to limit those liabilities. It was also legitimate for the court, as part of the "unitary exercise" of construing the clause, to take into account the commercial realities of the clause. Again, this suggested that the parties would have intended the exclusion to apply only to third party liabilities. The judge therefore found that the clause had that more limited effect.

The question in the Supreme Court case of *Triple Point v PTT* was whether a claim for breach of contractual duties of reasonable skill and care would fall within a contractual liability cap that was stated to cover claims for "negligence" (among other things). PTT argued that the reference to negligence was instead meant to apply only to a claim for the separate tort of failing to use due care where a relevant duty was owed.

The court found that negligence in this context included contract claims, which were therefore subject to the liability cap. This was because, as a matter of English law, the word "negligence" covers both the tort and breaches of contractual obligations to exercise skill and care. The wording of the clause capped Triple Point's liabilities "under the Contract".

The first instance and Court of Appeal judges had found that the cap could not have applied to breaches of contract, since in a contract that was wholly or substantially for services, this would leave little outside that cap. The majority of the Supreme Court disagreed with this analysis, drawing a distinction between the obligations under the contract to provide services – which were subject to duties of skill and care, and therefore to the cap – and the obligations to provide deliverables, which were strict contractual requirements and therefore outside the cap.

Drafting tips

Liability caps and exclusion clauses are an essential tool for allocating risks that might otherwise far outstrip the value of the contract. Depending on your bargaining position, you may be able to impose draconian conditions, caps or carve-outs that would leave little potential liability. But if those clauses are buried in standard terms in a way that means the other party is unlikely to read or understand them, you may end up losing that protection entirely.

Consider including your terms in the same document that the other party signs – which in a business-to-business context will also help to avoid a 'battle of the forms' scenario where the other party is seeking to impose their own standard terms. The more unusual or onerous, or outside the commercial norm, the more you will need to do to bring the clause to the other party's attention. If you are trading with consumers, draft and design your terms so that they can be easily accessed and understood, with the most important or unusual terms given particular prominence.

If the clauses are subject to negotiation, avoid the temptation of 'creative ambiguity'. If you are looking to avoid liability for deliberate breaches, or include liquidated damages within an overall liability cap, use plain wording to that effect. The more confident you are that the other party has understood and accepted that allocation of risk, the better the chance that you will be able not only to convince a court of its meaning, but to avoid unnecessary litigation altogether.

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