Drawing up a 'watertight' contract is nearly impossible, especially when it comes to exclusion clauses. Clients need to be made aware of the risks and advised accordingly, says **Jonathan Silverman**

# Effective exclusion in B2B contracts

It has always been a problem for lawyers faced with the client asking one to draw up 'watertight' terms and conditions of business, especially when it comes to exclusion clauses. Trying to explain that it isn't as straightforward as it first appears merely curries favour.

The reality is that the days of being able to freely contract out of liability are long gone, even when dealing with B2B contracts and some recent cases have clarified a number of aspects of which practitioners should be aware.

As a general rule certainly don't let your client try to rely upon implied terms. Courts only reluctantly accept them and then only where both parties can be shown to have undisputedly understood the ramifications.

Don't try hiding exclusion of liability provisions within other clauses hoping the other party will simply miss them; you're unlikely to gain any sympathy from the court. Additionally, don't ignore the opportunity when parties are using 'industry standard' conditions of business to try and improve your client's position by suggesting a separate signed document addressing exclusions and limiting liability making express reference to that memorandum in the main agreement.

Further, consider whether there has been a prior course of dealing between parties which might enable you to bring in terms and conditions previously notified.

Have a look at the decision in *Allen Fabrications v ASD Ltd* [2012] EWHC 2213 (TCC) where as a preliminary issue, the court was asked to decide whether some exclusion clauses in a seller's standard terms and conditions of business were incorporated into a particular contract.

Both parties accepted that there had been no express incorporation of the terms but Allen successfully argued that they were enforceable either because there formed part of a credit facility agreement signed by the parties some years earlier or because of the existence of a long course of dealings between parties.

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Be careful with the drafting because unusual or onerous clauses are unlikely to come within the above exception. However, just because clause contains an exclusion order limits liability does not necessarily make it onerous, which will depend more on the context.

Recognise that if an exclusion or limitation clause comes before a court that the wording will be interpreted strictly and has to be very clear and unambiguous if you hope to rely upon them.

Practitioners need to bear in mind that however cleverly they draft, there is an overarching obligation to stay within The Unfair Contract Terms Act just as much in B2B contracts as in consumer agreements so the perennial problem of reasonableness applies here. For further factors to bear in mind, see the box above. Where the parties are evenly balanced commercially an exclusion clause is likely to be found valid so long as it satisfies the previous test.

## Question time

- What are the strengths of the parties from a bargaining perspective?
- Were the goods made to the customer's specifications?
- Should the customer have known or expected that they would be subject to an exclusion clause, having regard to trade custom prior dealings?

Perhaps surprisingly, the courts also look at whether or not the parties have insurance, as in *Ampleforth v Turner* [2012] EWHC 2137 (TCC). It was held that project managers could not rely upon limitation of liability falls where it was held that they had not exercised reasonable care in project management; it transpired that they had substantial professional indemnity cover which had been to some extent, charged back to the client. Although the subsequent case of *Elvanite v AMEC* [2013] EWHC 1191 (TCC) produced a differing result were an exclusion clause and Liability were found reasonable under UCTA. Finally it's also worth looking at *Avora v Christies* [2012] EWHC 2198 (Ch) where an auction house was able to rely upon its terms and conditions of business where the authenticity of a painting was challenged as a misrepresentation as satisfying the UCTA reasonable test.

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