

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 4 - The Terms of Contract

#### Chapter 15 - Exemption Clauses

#### Section 1. - In General

Generally <sup>1</sup>

#### 15-001

It is a common feature of written contracts (and in particular of those in standard form) that the person tendering the document will seek to absolve himself either wholly or in part from liability under the contract or from liability for a tort connected with the contract, or to qualify or otherwise limit the circumstances in which that liability may arise. Although a total exclusion of liability <sup>2</sup> is today, due to legislative intervention, <sup>3</sup> relatively uncommon, clauses are frequently encountered which seek to exclude or restrict certain obligations or duties undertaken by one of the parties to the contract or the financial consequences of a breach of the contract by that party, the remedies available to the other party in the event of such breach and the time limit within which claims must be made. In other contracts, such as a contract for the supply of services, the supplier may seek to protect himself, his employees and sub-contractors, against liability, for example, for negligence. It can reasonably be argued that, in many commercial contracts where both parties are of equal bargaining power, such exclusion or restriction of liability does no more than apportion the risk between the parties, in respect of which one party will be expected to insure. <sup>4</sup> Very often, however, the party imposing the condition is in an economically superior position and can dictate its own terms to the other. <sup>5</sup> So, while seeking to preserve the integrity of the principle of freedom of contract, <sup>6</sup> the courts have attempted to correct the imbalance by adopting principles of construction which require the party seeking to exclude or restrict his liability to do so in clear and unequivocal terms. <sup>7</sup> Inequality of bargaining power, however, in itself, is not a ground for invalidating such a clause at common law any more than it is a ground for invalidating a contract as a whole. <sup>8</sup>

#### Incorporation of exemption clauses

#### 15-002

The question whether an exemption clause contained in a written document, notice or otherwise has been incorporated as a term of the contract is dealt with in the chapter on Express Terms. <sup>9</sup> The general rule is that the party affected by the clause will be bound if the party tendering the document has done what may reasonably be considered sufficient to give notice of the clause to persons of the class to which he belongs, <sup>10</sup> but this finds an important qualification in the rule according to which a person is bound by their signature of a contractual document even though they did not read its terms and are ignorant of their effect. <sup>11</sup> Moreover, a clause may be incorporated by course of dealing between the parties or because both parties are aware that it is the practice of the particular trade to contract subject to exempting conditions. <sup>12</sup>

#### Types of exemption clause

#### 15-003

⚠ Exemption clauses may broadly be divided into three categories.<sup>13</sup> First, there are clauses which purport to limit or reduce what would otherwise be the defendant's duty, i.e. the substantive obligations to which he would otherwise be subject under the contract, for example, by excluding express or implied terms, by limiting liability to cases of wilful neglect or default, or by binding a buyer of land or goods to accept the property sold subject to "faults", "defects" or "errors of description". Secondly, there are clauses which purport to exclude or restrict the liability which would otherwise attach to a breach of contract, such as the liability to be sued for breach or to be liable in damages, or which take away from the other party the right to treat as repudiated or rescind the agreement. Similarly, an exemption clause can subject a party's liability for breach of contract to an onerous condition, such as a number of days within which the injured party must serve notice of the breach or bring proceedings.<sup>14</sup> ⚠ Thirdly, there are clauses which purport to exclude or restrict the duty of the party in default fully to compensate the other party, for example, by limiting the amount of damages recoverable against him, or by providing a time-limit within which claims must be made. Traditionally, the approach of English judges has in all cases been to ascertain the liability of the defendant apart from the exemption clause, and then to consider whether or not the clause is sufficient to constitute a defence to that liability.<sup>15</sup> It has, however, been argued<sup>16</sup> that such an approach tends to be misleading, at any rate if applied to exemption clauses which fall within the first two categories. These directly limit the substantive contractual content of the promise and circumscribe the liability of the party in default. The whole contract ought therefore initially to be construed together with the exemption clause. There is considerable logical force in this contention and more recent dicta have tended to support it.<sup>17</sup> The task of the courts has been said to be<sup>18</sup>:

"... to look at the event [resulting from the breach], and to ascertain from the words and conduct of the parties which created the contract between them what their presumed intention was as to what should be their legal rights and liabilities either original or substituted upon the occurrence of an event of this kind."

However, the traditional approach was for the most part adopted by the Unfair Contract Terms Act 1977.<sup>19</sup> ⚠

#### Exemption clauses distinguished from other similar clauses

### 15-004

⚠ Agreed or liquidated damages clauses, by which the parties liquidate the damages payable upon breach, are not to be classified as exemption clauses, at least where the liquidated damages provision is a genuine pre-estimate of the loss likely to be suffered in the event of breach.<sup>20</sup> Whereas an agreed damages clause entitles the injured party to recover the sum stipulated without proof of loss, an injured party subject to a limitation clause must prove its actual loss sustained and can recover this loss up to the limitation stipulated<sup>21</sup> ⚠; and an agreed damages clause (unlike a limitation clause) is for the benefit of both the injured party and the party in breach.<sup>22</sup> ⚠ The form of the clause is not decisive of the difference between the two: rather "it is the fact that the clause is expressed as one agreeing a figure [as a pre-estimate of damage], and not as imposing a limit".<sup>23</sup> ⚠ It has also been said that force majeure clauses are not exemption clauses.<sup>24</sup> Likewise ordinary arbitration clauses are "in essence mere machinery"<sup>25</sup> and so distinct from exemption clauses, being governed by separate rules.<sup>26</sup> But it is possible that a clause which bars one party's claim unless arbitration is begun within a specified time may be treated as an exemption clause in so far as it may be construed not to extend to cover a fundamental breach of contract.<sup>27</sup>

#### Legislative control of exemption clauses

### 15-005

❗ In 1969 in *Harbutt's "Plasticine" Ltd v Wayne Tank & Pump Co Ltd* the Court of Appeal had sought to establish that, even where an exemption clause in a contract excluded a party's liability as a matter of construction, a fundamental breach of contract in that party could bring the contract to an end so that the injured party had to treat it as terminated, with the result that the exemption clause ceased to operate.<sup>28</sup> While this so-called doctrine of fundamental breach was inconsistent with earlier House of Lords' authority in the *Suisse Atlantique* case and was later firmly rejected by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*,<sup>29</sup> it reflected a wider concern with the use of contract terms to exclude liability under the contract or in the tort of negligence, particularly where the term formed part of the defendant's standard terms. The problem of exemption clauses was the subject of a series of recommendations by the Law Commissions and their report led to the enactment of the Unfair Contract Terms Act 1977, which subjected exemption clauses and certain related contract terms to control in a number of situations.<sup>30</sup> In addition to this domestic legislation, in 1993 the EEC legislature enacted the Unfair Terms in Consumer Contracts Directive 1993,<sup>31</sup> which was implemented by a standalone set of regulations, the Unfair Terms in Consumer Contracts Regulations, first issued in 1994 and then revoked and replaced in 1999.<sup>32</sup> Unlike the 1977 Act, the 1999 Regulations applied to most contract terms which had not been "individually negotiated" and not merely to exemption clauses, but, also unlike the Act, the 1999 Regulations were restricted to terms of consumer contracts.<sup>33</sup> However, with the coming into force of the Consumer Rights Act 2015, which applies to consumer contracts made on or after October 1, 2015,<sup>34</sup> the legislative arrangements have changed significantly. The 2015 Act creates a series of controls on terms in consumer contracts, distinguishing broadly between terms which exclude or restrict liability under the new statutory terms in "goods contracts", "digital content contracts" and "services contracts" in Pt 1 of the Act<sup>35</sup> and terms or notices which fall within a general framework of controls on the ground of unfairness in Pt 2 of the Act.<sup>36</sup> As a result of these new provisions dedicated to the control of consumer contracts, the 1977 Act is amended so that its provisions apply only to persons other than "consumers" within the meaning of the 2015 Act.<sup>37</sup> The relevant provisions in Pts 1 and 2 of the 2015

Act affecting exemption clauses (and the resultant amendments of the 1977 Act<sup>38</sup> ❗) were brought into force so as to apply to contracts made on or after October 1, 2015, with the exception that Pt 1's provisions governing "services contracts" apply to "consumer transport services" (as specially defined) only if made on or after October 1, 2016.<sup>39</sup> ❗ This chapter will therefore explain the law under the 1977 Act before and after its amendment by the 2015 Act, leaving the law governing "consumer contracts" (both the old law under the 1999 Regulations and the new law under the 2015 Act) to Vol.II, Ch.38 Consumer Contracts.

## Other legislative or common law controls

### 15-006

In addition to these general legislative controls on exemption clauses, this Chapter will also discuss other legislative controls on exemption clauses, some legislation (especially in the context of consumer protection) designating its provisions as being incapable of exclusion by agreement.<sup>40</sup> To these controls will be added a discussion of the exceptions to the general common law position of the binding effect of exemption clauses and of the character and effect of force majeure clauses.<sup>41</sup>




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1. See Lawson, *Exclusion Clauses and Unfair Contract Terms*, 10th edn (2011); Yates, *Exclusion Clauses in Contracts*, 2nd edn (1982); MacDonald, *Exemption Clauses, Penalty Clauses and Unfair Terms*, 2nd edn (2006); Lewison, *The Interpretation of Contracts*, 5th edn (2011), Ch.12.

2. See, for example, *L'Estrange v Graucob* [1934] 2 K.B. 394.

3. By the Unfair Contract Terms Act 1977 (below, para.15-062) and, in the case of contracts with consumers, the Unfair Terms in Consumer Contracts Regulations 1999. As of its coming into force on October 1, 2015 the Consumer Rights Act 2015 Pt 2 revokes the 1999 Regulations and enacts similar controls on unfair terms in consumer contracts as noted below, para.15-064 and explained by Vol.II, paras 38-192 et seq.

4. ! See, e.g. *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573, noted below, para.15-012.
5. See the discussion of this issue in the English and Scottish Law Commission's joint report (2005) Law Com. No.292, Scottish Law Com. No.199.
6. On which generally, see above, paras 1-026 et seq.
7. Below, paras 15-007 et seq.
8. See below, para.15-149.
9. See above, paras 13-002 et seq.
10. *Parker v South Eastern Ry* (1877) 2 C.P.D. 416; *Richardson, Spence & Co v Rowntree* [1894] A.C. 217; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125, HL; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] Build. L.R. 135; *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8.
11. *L'Estrange v Graucob Ltd* [1934] 2 K.B. 394 and see above, para.13-002. Exceptions to this rule are found where the person seeking to rely on the document has misrepresented its significance (*Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 K.B. 805, below, para.15-146); where the doctrine of non est factum applies (on which see above, paras 3-049—3-056) and where the document does not purport to have contractual effect: *Grogan v Robin Meredith Plant Hire Ltd* (1996) 15 Tr.L.R.371, above, para.13-009. It has also been suggested that, even apart from these exceptions, in some "extreme circumstances" signature may not be enough for the incorporation of "particularly onerous or unusual" terms: *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446 at 454 and see cases cited at para.13-002 n.5.
12. See above, paras 13-011, 13-012.
13. *Kenyon, Sons & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 1 W.L.R. 519, 522; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 230. See also *Dawson* (1975) 91 L.Q.R. 380.
14. ! e.g. *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 (contractual time-bar an exclusion clause for the purposes of the principle of strict construction) and see the definition of the "exclusion or restriction" of liability in the Unfair Contract Terms Act 1977 s.13 and Vol.I, para.15-069.
15. *Rutter v Palmer* [1922] 2 K.B. 87, 92.
16. Coote, *Exception Clauses* (1964).
17. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 431; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 851.
18. *Hardwick Game Farm v Suffolk Agricultural Poultry Producers' Association* [1966] 1 W.L.R. 287, 309, 333, 343 (affirmed sub nom. *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31 HL).
19. ! See *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, 664; *Smith v Eric S. Bush and Harris v Wyre Forest DC* [1990] 1 A.C. 831, 857, 873; Coote (1978) 41 M.L.R. 312; Palmer and Yates [1981] C.L.J. 108; White [2016] J.B.L. 373 below, para.15-070.
20. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395, 411, 420, 436. cf. 406. See also below, para.15-024.

21.  *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 395 and 420 (demurrage clause in charterparty). As is explained below, paras 26-178 et seq., the Supreme Court has recently reframed the common law governing penalty clauses so as to reduce the significance of the distinction between “liquidated damages clauses” and penalty clauses, but this does not affect the distinction drawn in the text between agreed damages clauses and limitation clauses.
22.  [1967] 1 A.C. 361 at 420–421.
23.  [1967] 1 A.C. 361 at 436 per Lord Wilberforce.
24. *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136, 143; cf. *Cero Navigation Corp v Jean Lion & Cie* [2000] 1 Lloyd’s Rep. 292, 299. But in practice they may have the same effect and be as strictly construed: see also below, paras 15-152—15-169.
25. *Woolf v Collis Removal Service* [1948] 1 K.B. 11. See also *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 258; *Heyman v Darwins Ltd* [1942] A.C. 356, 373–375, 400. Contrast *SHV Gas Supply & Trading SAS v Naftomav Shipping & Trading Co Inc* [2005] EWHC 2528 (Comm), [2006] 1 Lloyd’s Rep. 162 at [28]. See also Unfair Contract Terms Act 1977 s.13(2); below, para.15-069. But see the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) as amended by SI 2001/1186 and s.89 of the Arbitration Act 1996; Vol.II, paras 32-013 and 38-276, replaced as regards contracts made on or after October 1, 2015 by the Consumer Rights Act 2015 Pt 2, on which see Vol.II, paras 38-334 et seq. at para.38-380.
26. See Vol.II, para.32-195.
27. *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 258; *Ford & Co Ltd v Cie Furness* [1922] 2 K.B. 797; *Smeaton Hanscomb & Co Ltd v Sasson I. Setty Son & Co (No.1)* [1953] 1 W.L.R. 1468.
28. [1970] 1 Q.B. 447.
29. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 844, 847 (which formally overruled *Harbutt’s “Plasticine” Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B. 447). See further below, paras 15-023 et seq.
30. Law Commission, Scottish Law Commission, Second Report on Exemption Clauses, Law Com. No.69, Scot. Law Com. No.39 (1975).
31. Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts [1993] O.J. L95/29.
32. Unfair Terms in Consumer Contracts Regulations 1999 (SI 1994/3159) revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).
33. For the details of the controls put in place by the 1999 Regulations see Vol.II, paras 38-201 et seq.
34. On the Act’s detailed provision on its temporal application see Vol.II, para.38-197.
35. Consumer Rights Act 2015 ss.31, 47 and 57. On these controls see Vol.II, paras 38-492, 38-524 and 38-546 respectively.
36. Consumer Rights Act 2015 Pt 2. On these controls see Vol.II, paras 38-334 et seq.
37. The necessary amendments and deletions of the 1977 Act are effected by s.75 and Sch.4 of the 2015 Act: for the details, see below, paras 15-062 et seq.

- [38.](#)  These are contained in the 2015 Act s.75, Sch.4 paras 2–27; the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.3(c).
- [39.](#)  The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 3–4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2. SI 2015/1630 art.6(4) provides that the Unfair Terms in Consumer Contracts Regulations 1999 continue to have effect in relation to any contract or notice relating to any contract entered into before October 1, 2015 despite their revocation by the 2015 Act Sch.4 para.34.
- [40.](#) See below, paras 15-132 et seq.
- [41.](#) See below, paras 15-146 et seq. and 15-152 et seq. respectively.



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### Volume I - General Principles

#### Part 4 - The Terms of Contract

#### Chapter 15 - Exemption Clauses

#### Section 2. - Principles of Construction

#### General principles

#### 15-007

⚠ In principle exemption clauses are to be construed following the principles applicable to contracts generally,<sup>42</sup> and while there is considerable case-law relating specifically to the construction of exemption clauses and to particular forms of words used by exemption clauses, care needs to be taken in relation to some of the older cases owing to the enactment of the Unfair Contract Terms Act 1977 and of the considerable development of the general approach to construction since the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.<sup>43</sup> First, in very broad terms, the 1977 Act has led the courts to see the Act as the proper basis for controlling exemption clauses in commercial contracts. So, for example, Lord Diplock observed in *Photo Production Ltd v Securicor Transport Ltd* soon after the 1977 Act was passed in the course of rejecting the doctrine of fundamental breach:

“In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is ... wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.”<sup>44</sup> ⚠

Clearly, therefore, the court's clear rejection of the doctrine of fundamental breach requires particular care as regards earlier cases which recognise its existence.<sup>45</sup> Moreover, since the *Investors Compensation Scheme Ltd* case, the courts have adopted a general approach to terms which has tended to move away from “rules of construction” towards “common-sense principles by which any serious utterance would be interpreted in ordinary life”.<sup>46</sup> So, for example, the well-known (and restrictive) principles set out by Lord Morton in *R. v Canada S.S. Lines Ltd*<sup>47</sup> for the determination of the question whether a particular exemption clause extends to liability for negligence should be treated as guidance rather than “a litmus test”, as the role of the court remains to ascertain what the parties intended.<sup>48</sup> ⚠ Nevertheless, even after the *Investors Compensation Scheme Ltd* case, the courts have continued to follow the established approach to the construction of exemption clauses that they are to be construed contra proferentem.<sup>49</sup> ⚠

#### Clear and unambiguous expression

#### 15-008

⚠ Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective.<sup>50</sup>

⚠ The clause must clearly express what its intention is. In *J. Gordon Alison & Co Ltd v Wallsend Shipway and Engineering Co Ltd*,<sup>51</sup> a cylinder was sold by the defendants to the claimants “subject to our usual guarantee clauses”. The clause relied on by the defendants “guaranteed” the purchaser against defects of material or workmanship for six months, but excluded liability for consequential damage. The question arose whether the guarantee clause was applicable to this particular contract, and the Court of Appeal held that it was not: “if a person was under a legal liability and wished to get rid of it he could only do so by using clear words”.<sup>52</sup> Exemption clauses will therefore be construed strictly, and the degree of strictness appropriate to their construction may properly depend upon the extent to which they involve departure from the implied obligations ordinarily accepted by the parties in entering into a contract of a particular kind.<sup>53</sup> ⚠ and whether the clause purports entirely to exclude an obligation or liability or merely to limit the compensation recoverable from the party in default.<sup>54</sup> ⚠ Moreover, a majority of the Supreme Court has recently observed that this strict approach to exemption clauses should also apply to terms:

“where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation.”<sup>55</sup> ⚠

However, as earlier noted, the principles of construction applicable to written contracts<sup>56</sup> apply equally to exemption clauses to ascertain what meaning the words bear.<sup>57</sup> If the clause is expressed clearly and unambiguously, there is no justification for placing upon the language of the clause a strained and artificial meaning so as to avoid the exclusion or restriction of liability contained in it.<sup>58</sup> ⚠ On the other hand, an exemption clause must be construed in the wider context of the contract as a whole, in a way which is consistent with business common sense and does not defeat the commercial object of the contract, and so as to give effect to the presumption that parties do not lightly abandon a remedy for breach of contract afforded them by the general law.<sup>59</sup> In an appropriate case, therefore, the existence of the presumption does not prevent a court from finding, applying “all its tools of linguistic, contextual, purposive and common sense analysis”, that the contract intended to deprive one of the parties of a right at law which he might otherwise have had.<sup>60</sup> ⚠

#### Clause must extend to event

### 15-009

⚠ Each clause must be considered according to its actual wording, but it must clearly extend to the exact contingency or loss which has occurred if it is to protect the party relying on it. Thus in a contract for the sale of goods, a stipulation that the goods are bought “as seen”<sup>61</sup> or the exclusion of liability for “latent defects”<sup>62</sup> will not exclude terms as to quality and fitness for purpose implied by the Sale of Goods Act, the exclusion of warranties will not necessarily exclude conditions,<sup>63</sup> and the exclusion of implied terms will not exclude those which are actually expressed.<sup>64</sup> The exclusion of liability for “consequential loss or damage” will not cover loss which directly and naturally results in the ordinary course of events from the breach, but only loss which is less direct or more remote.<sup>65</sup> ⚠ And a clause which provided that “the goods delivered shall be deemed to be in all respects in accordance with the contract” unless the buyer gave notice to the contrary within 14 days of the arrival of the goods, was held not to apply to a claim for damages for short delivery, i.e. in respect of goods not delivered.<sup>66</sup> A clause in a contract of sale or hire-purchase which merely excludes all conditions and warranties, express or implied, will not necessarily extend to the delivery of goods wholly different from the agreed contract goods.<sup>67</sup> A clause may therefore be too narrow in its terms to cover the obligation or liability which it is sought to exclude or restrict.<sup>68</sup>

#### Inconsistency with main purpose of contract



## 15-010

⚠ Conversely, an exemption clause may be so broad and general in scope that to apply it literally would create an absurdity or defeat the main purpose of the contract into which the parties have entered.<sup>69</sup> It is the duty of the courts to ascertain the meaning of and to give effect to the agreement of the parties.<sup>70</sup> If, therefore, looking at the whole of the contract and the relevant background, its main purpose is clear, the court will be justified in attributing to the clause a construction which is not inconsistent with that purpose.<sup>71</sup> Thus a wide deviation clause in a bill of lading was restrictively construed so as not to cover a deviation by the carrier inconsistent with the contract voyage,<sup>72</sup> and a clause in a bill of lading which provided that “the responsibility of the carrier shall be deemed to cease absolutely after the goods are discharged from the ship” was held not to cover a release of the goods to the consignees without production of the bill, as the bill expressly required the goods to be delivered “unto order or assigns”.<sup>73</sup> Likewise the court will be reluctant<sup>74</sup> to ascribe to an exemption clause a meaning which effectively absolves one party from all duties and liabilities:

“One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party’s stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.”<sup>75</sup>

In *Tor Line AB v Alltrans Group of Canada Ltd*,<sup>76</sup> in a contract of charterparty, shipowners expressly accepted responsibility for delay in delivery of the vessel or for delay during the currency of the charter and for loss or damage to goods on board, if these were caused by unseaworthiness or other personal act or omission or default of the owners or their manager, but stated that they were: “... not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants.” In breach of an express warranty, the ship was not of the dimensions specified in the charter. On the charterers’ claim for financial loss consequent upon the breach of this warranty, the shipowners relied upon the exemption clause. The House of Lords held that the loss was not covered by the clause. One of the reasons put forward by Lord Roskill<sup>77</sup> in his judgment was that, if the clause were to be construed so as to allow a breach of the warranty to be committed or a failure to deliver the vessel at all to take place without financial redress to the charterers:

“... the charter virtually ceases to be a contract for the letting of the vessel and the performance of services by the owners ... and becomes no more than a statement of intent by the owners in return for which the charterers are obliged to pay large sums by way of hire, though if the owners fail to carry out their promises as to description or delivery, are entitled to nothing in lieu.”

He found it difficult to believe that this conclusion would accord with the “true common intention” of the parties. Nevertheless the clause on its true construction may be found to qualify the main purpose of the contract, so that there is no inconsistency,<sup>78</sup> or to define the respective roles of the parties under the contract.<sup>79</sup> And if the clause does not entirely exclude the liability of one party, but merely limits or reduces his liability, it does not render his contractual promises illusory.<sup>80</sup> Further, if in the context of the contract as a whole and of the business relationship between the parties the words of the clause are clear and fairly susceptible of one meaning only, then effect must in any event be given to the clause.<sup>81</sup> And it has been said recently that the principle in *Tor Line A/B v Alltrans Group of Canada Ltd*<sup>82</sup> ⚠ “should be seen as one of last resort” and that there is authority that “it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake” as “[o]nly in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent”.<sup>83</sup> ⚠

### “Four corners” rule

## 15-011

There is some authority for the view that any damage or liability sought to be covered by an exemption clause must fall within the “four corners” of the contract and not outside of it. <sup>84</sup> This principle could be said to derive support from cases which have held an exemption clause to be inapplicable where a carrier deviated without justification from the agreed or usual route, <sup>85</sup> or carried goods above deck in breach of his obligation to carry them under deck, <sup>86</sup> where a bailee stored goods in a place other than that agreed, <sup>87</sup> and where a carrier or bailee in breach of contract parted with possession of the goods to an unauthorised sub-contractor. <sup>88</sup> Such cases, however, may be *sui generis*. <sup>89</sup> They are better explained as cases where the exemption clause in question was, on its true construction, not intended to cover the breach which occurred <sup>90</sup> and not as establishing any general principle that an exemption clause will be construed to extend only to acts of a party or his servants which fall within the four corners of the contract. <sup>91</sup> In any event, the clause itself may redefine a party's obligations with respect to performance <sup>92</sup> or in its terms be construed to cover even a radical departure from the performance contemplated by the contract. <sup>93</sup>

### Construction contra proferentem


## 15-012


⚠ This principle of construction embraces two differing, but closely related, principles. <sup>94</sup> ⚠ First, since the party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, <sup>95</sup> any doubt or ambiguity will be resolved against him and in favour of the other party. <sup>96</sup> For example, in *Nobahar-Cookson v Hut Group Ltd* a clause in a commercial contract provided that the sellers of a company would not be liable for any claim unless the buyer served notice of it within 20 business days “after becoming aware of the matter”. <sup>97</sup> ⚠ The Court of Appeal held that “there remains a principle that an ambiguity” in the meaning of such a clause (which was rightly to be treated as an exclusion clause) “may have to be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity”. <sup>98</sup> ⚠ The Court recognised that the phrase “after becoming aware of the matter” could have three possible meanings, but held that, given that the commercial purpose of the term was to prevent the buyer from keeping claims of which it was aware “up its sleeve”, and assisted by the principle which it had stated, the phrase should be interpreted as referring to an awareness of a claim and not merely an awareness of facts which could give rise to a claim. <sup>99</sup> ⚠ However, the Court of Appeal considered that:



“This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, purposive and common-sense analysis to discern what the clause really means.” <sup>100</sup> ⚠

Rather, the principle is “essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so”. <sup>101</sup> ⚠ It will be seen, therefore, that this aspect of the construction contra proferentem is clearly related to the approach of the courts which requires clear and unambiguous language effectively to exclude liability for breach. <sup>102</sup> ⚠ Secondly, as in the case of any other written document, <sup>103</sup> in situations of ambiguity the words of the document are to be construed more strongly against the party who made the document and who now seeks to rely on them. In *John Lee (Grantham) Ltd v Ry Executive* <sup>104</sup> a railway warehouse was leased by the defendants to the claimants. A clause in the lease exempted the defendants from liability for: “... loss or damage (whether by act or neglect of the company or their servants or agents or not) which but for

the tenancy hereby created would not have arisen". Owing to a fire caused by the negligence of the defendants in allowing a spark to escape from a railway engine, goods in the warehouse were damaged. It was held that the words "which but for the tenancy hereby created would not have arisen" confined the exemption to liabilities created by the relationship of landlord and tenant. Although the clause was capable of a wider construction, it was ambiguous and would be construed more strongly against the defendants. However, while accepting the existence of the contra proferentem rule, the Court of Appeal has recently observed that "[i]n relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role"

<sup>105</sup>  and quoted the judgment of Lord Neuberger M.R. in *K/S Victoria Street v House of Fraser (Stores Management) Ltd* to the effect that:


"rules' of interpretation such as contra proferentem are rarely decisive as to the meaning of any provisions in a commercial contract. The words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision." <sup>106</sup> 

 By contrast, in the case of consumer contracts, the principle of interpretation contra proferentem has been given legislative force as a result of the implementation of the Unfair Terms in Consumer Contracts Directive 1993, <sup>107</sup>  first by the Unfair Terms in Consumer Contracts Regulations 1999 and subsequently by the Consumer Rights Act 2015: these provisions are discussed in Vol.II, Ch.38.

<sup>108</sup> 

## Liability for negligence

### 15-013

 Liability for negligence may be excluded or restricted if words are used which sufficiently indicate that the parties intended, in the context of their agreement, that such should be the case. Where a clause purports merely to limit the compensation payable by one party for loss or damage caused by his negligence, it is enough that the wording of the clause, when read as a whole, clearly and unambiguously has that effect. <sup>109</sup> But since it is inherently improbable that one party to the contract would intend to absolve the other party entirely from the consequences of the latter's own negligence, <sup>110</sup> more exacting standards are applied to clauses which are alleged to exclude altogether liability for negligence. The duty of a court in approaching the consideration of such clauses was summarised in the form of three propositions in the opinion of the Privy Council delivered by Lord Morton in *R. v Canada S.S. Lines Ltd.* <sup>111</sup> These tests, or guidelines, <sup>112</sup> have been subsequently approved and applied both by the Court of Appeal <sup>113</sup> and the House of Lords <sup>114</sup>:

"(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequences of the negligence of his own servants, effect must be given to that provision ... (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens ... (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence' ... The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification ... the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."

However, while approving Lord Morton's statement, it has been pointed out by Lord Bingham <sup>115</sup> that:

"Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The Court's task of ascertaining what the parties intended, in their particular commercial context, remains."

⚠ Moreover, Lord Morton's observations have recently been criticised by the Court of Appeal in that they treat exemption clauses and indemnity clauses "in one single compendious passage", whereas they are more relevant to the latter than the former. <sup>116</sup> ⚠

### Words wide enough to cover negligence

#### 15-014

⚠ To satisfy the first of Lord Morton's tests, there must be a clear and unmistakable reference to negligence or to a synonym for it. <sup>117</sup> In the absence of any such express reference, it is necessary to proceed to the second test. Words such as "at sole risk", <sup>118</sup> "at customers' sole risk", <sup>119</sup> "at owner's risk" <sup>120</sup> and "at their own risk" <sup>121</sup> will normally cover negligence, as will words which clearly indicate an intention to exclude all liability without exception, for example, "no liability whatever" <sup>122</sup> or "under no circumstances" <sup>123</sup> or "all liability", <sup>124</sup> or all liability save that specified in the clause. <sup>125</sup> ⚠ If the defendant merely disclaims liability for "any loss", he may be directing attention to the kinds of losses, and not to their cause or origin; so liability for negligence will not necessarily be excluded. <sup>126</sup> But if he says "however arising" or "any cause whatever", these words can cover losses by negligence. <sup>127</sup> Thus the words "howsoever caused", <sup>128</sup> "from whatever other cause arising", <sup>129</sup> "howsoever arising", <sup>130</sup> "arising from any cause whatsoever", <sup>131</sup> "relieves from all responsibility for any injury, delay, loss or damage, however caused" <sup>132</sup> have been held to be effective. Likewise a clause which excluded liability for any damage "which may arise from or be in any way connected with any act or omission of any person ... employed by [the defendant]" has been held to be wide enough to cover negligence on the part of the defendant's servants. <sup>133</sup> However, the meaning of the clause must be collected from its entire wording, and in construing the clause other parts of the contract which throw light on the meaning to be given to it, and the factual background, are not to be ignored. <sup>134</sup> So, for instance, even such comprehensive words as "any liability ... whatsoever", <sup>135</sup> "howsoever caused", <sup>136</sup> "any loss howsoever arising" <sup>137</sup> and "at charterers' risk" <sup>138</sup> may be limited by their context and thus not extend to the negligence of the defendant which it is sought to exclude. On the other hand, where a clause in a charterparty expressly accepted liability for negligence *only* in certain specified respects, it was held that it necessarily followed that it excluded negligence in all other respects. <sup>139</sup>

### Liable only if negligent

#### 15-015

There is no longer any rule of law that, if the only liability of the proferens is for negligence, the clause *must* be construed so as to cover negligence otherwise it would lack subject matter <sup>140</sup>: the duty of the court is always to construe the wording of the clause in question to see what it means. <sup>141</sup>

### Words applicable only to another ground of liability

#### 15-016

Lord Morton's third test is more problematical. It derives from a principle of construction enunciated by Lord Greene M.R. in *Alderslade v Hendon Laundry Ltd* <sup>142</sup> that:

“Where ... the head of damage [liability for which is sought to be excluded] may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss, occurring through that other cause, to the exclusion of loss arising through negligence.”

To this statement Lord Morton added the qualification that the “other ground” must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it. Even with this important qualification, however, the Court of Appeal has subsequently cautioned against a too literal or over-legalistic approach. <sup>143</sup> In *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd*, May L.J. said <sup>144</sup>:

“In seeking to apply Lord Morton’s third test, we should not ask now whether there is or might be a technical alternative head of legal liability which the relevant exemption clause might cover and, if there is, immediately construe the clause as inapplicable to negligence. We should look at the facts and realities of the situation as they did or must be deemed to have presented themselves to the contracting parties at the time the contract was made, and ask to what potential liabilities the one to the other did the parties apply their minds, or must they be deemed to have done so.”

A number of cases provide examples <sup>145</sup> of the application of this third test: for instance, it has been illustrated <sup>146</sup> by reference to a common carrier whose liability for loss of or damage to the goods carried may be based on a ground, i.e. strict liability, independent of negligence. <sup>147</sup> And, where there were mutual exceptions in a charterparty in certain specified events including “errors of navigation”, one of the reasons advanced for holding that negligent errors of navigation were not covered was that the clause was based on the assumption that a shipowner would be liable without negligence. <sup>148</sup> Lord Morton’s third test was also applied in somewhat different circumstances in *Dorset CC v Southern Felt Roofing Co* <sup>149</sup> where a term in a building contract provided that the employer should bear the risk of “loss or damage in respect of the works by fire, lightning, explosion, aircraft and other aerial devices dropped therefrom”. The Court of Appeal held that the term did not apply to fire caused by the contractor’s negligence since, by the inclusion of events other than fire which might occur without the fault of any human agent, there were risks not fanciful or remote to which the term could relate other than negligence.

## Non-contractual notices





### 15-017

In the absence of a contract, the effect of a notice excluding liability may be to defeat a claimant’s claim for damages for negligence on the basis of *volenti non fit injuria*. <sup>150</sup>

## Indemnity clauses


### 15-018

⚠ It is not unusual to find clauses by which one party does not merely exclude his liability in negligence to the other party but further requires the other party to indemnify him against his liability in negligence to third parties. The law presumes that a party will not readily be granted an indemnity against a loss caused by his own negligence. <sup>151</sup> Nevertheless there is no doubt that a party is entitled to an indemnity against even the consequences of his own negligence if the clause so provides either expressly or by necessary implication. <sup>152</sup> The three tests laid down by Lord Morton in *R. v Canada S.S. Co Ltd* <sup>153</sup> normally apply to indemnity clauses as well as exemption clauses. <sup>154</sup> ⚠ If there is no express reference to negligence, the question is whether the words used are wide enough in their ordinary meaning to cover negligence on the part of the person seeking to be indemnified or his


servants. <sup>155</sup> Even if the words used are wide enough for this purpose, the court must consider whether liability for the loss or damage mentioned in the clause may arise on some ground other than such negligence, which ground is not so fanciful or remote that the parties cannot be supposed to have intended the indemnity to apply to it. <sup>156</sup> In the case of dishonest wrongdoing, “general words will not serve”, as “the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make”. <sup>157</sup>  The scope of the indemnity will therefore depend upon the wording of the particular clause and the intentions of the parties regarding it to be collected from the whole of their agreement. <sup>158</sup>  For this purpose, the Supreme Court has recently applied its general approach to contractual construction to an indemnity clause in a detailed and professionally drafted contract concluded by commercially sophisticated parties, therefore holding that the wording of an “avoidably opaque” clause must be examined in detail in the context of the contract as a whole and taking into account whether the wider factual matrix gives guidance as to which is the better of its possible interpretations. <sup>159</sup>  In this context, the Supreme Court found that the proper interpretation of the indemnity clause (there relating to the circumstances which trigger the indemnity) was “to be found principally in a careful examination of the language which the parties have used”. <sup>160</sup> 

## Deliberate breaches

### 15-019

 It has from time to time been suggested that, if the breach by one party evinces “a deliberate disregard of his bounden obligations”, <sup>161</sup> it will not be covered by an exemption clause. <sup>162</sup> But there is no rule of law to prevent the exclusion or restriction of liability arising from even a deliberate act or omission by one party or his servants if the contract so provides. <sup>163</sup> In the *Suisse Atlantique* case, <sup>164</sup> Lord Wilberforce said <sup>165</sup>:

“Some deliberate breaches ... may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading.) This is not to say that ‘deliberateness’ may not be a relevant factor: depending on what the party in breach ‘deliberately’ intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited.”

It may therefore be relevant to consider whether an exemption clause on its true construction does in fact cover deliberate misconduct <sup>166</sup> or a deliberate non-performance of the contract, <sup>167</sup>  but “to create a special rule for deliberate acts is unnecessary and may lead astray”. <sup>168</sup>

### 15-020

Some clauses, however, while disclaiming liability for loss or damage caused by negligence, accept liability for loss or damage due to “wilful neglect or default”, <sup>169</sup> “wilful misconduct” <sup>170</sup> or “gross negligence”. <sup>171</sup>

## Burden of proof

### 15-021

It is for the party seeking to rely on the exemption clause to show that the clause, on its true construction, covers the obligation or liability which it purports to restrict or exclude. It would also seem that, in general, it is for that party to prove that the claimant’s case is within the clause. <sup>172</sup> If the promise is qualified by an exemption which covers the whole scope of the promise, <sup>173</sup> the claimant must bring himself within the promise as qualified. <sup>174</sup> Further, if there is an exception to the exemption, for example, in the event of wilful neglect or default, <sup>175</sup> then the burden rests upon the claimant to prove that his case falls within the exception. <sup>176</sup> The form is not, however, conclusive, and



the matter is in every case a question of construction of the instrument as a whole.<sup>177</sup> In *Firestone Tyre & Rubber Co Ltd v Vokins & Co Ltd*,<sup>178</sup> where a lightorage clause provided that goods were carried only at owner's risk, excepting loss arising from pilferage and theft whilst in the course of transit, Devlin J. held that the onus was still on the lightermen to prove that the loss did not occur by theft or pilferage.

## 15-022

If the party seeking to rely on the clause makes out a prima facie case that the facts are such as to bring the case within the clause, then it appears that the claimant must disprove it by showing that the loss or damage was occasioned by an act or omission falling outside the clause.<sup>179</sup> However, in *Levison v Patent Steam Carpet Cleaning Co Ltd*,<sup>180</sup> where a clause in a contract of bailment was sufficient to exclude liability for negligence on the part of the bailee but not a "fundamental breach" of the contract, the Court of Appeal held that the onus was on the bailee to show that he was not guilty of a fundamental breach, although the same court had previously decided<sup>181</sup> to the contrary in a case involving a contract of carriage. With the final demise of the doctrine of "fundamental breach",<sup>182</sup> it is suggested that *Levison's* case deserves reconsideration.<sup>183</sup> A bailor may nevertheless be assisted by the rule that it is for a bailee who is sued in respect of the loss of the goods bailed to prove that the loss occurred without his negligence.<sup>184</sup>

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<sup>42.</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846, 851; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385; On the general approach to construction see above, paras 13-041 et seq.


<sup>43.</sup> [1998] 1 W.L.R. 896 on which see above, paras 12-041 et seq. especially at paras 13-043, 13-045, 13-051—13-052 and 13-056.


<sup>44.</sup>  *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 851. See similarly *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154, [2007] 1 C.L.C. 188 at [46]; *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [2014] 1 C.L.C. 353 at [25]–[26]; *Bikam OOD, Central Investment Group SA v Adria Cable Sarl* [2012] EWHC 621 (Comm) unreported at [34]–[36]; *Polypearl Ltd v E.on Energy Solutions Ltd* [2014] EWHC 3045 (QB) at [35]–[36]; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2015] EWHC 3573 (TCC), [2016] B.L.R. 112 at [25]–[28].

<sup>45.</sup> See below, paras 15-023—15-027 in relation to *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447 & *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.

<sup>46.</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912 per Lord Hoffmann, above, para.13-045.

<sup>47.</sup> [1952] A.C. 192, 208 and see below, para.15-013.

<sup>48.</sup>  *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [11] per Lord Bingham, below, para.15-013. cf. the restrictive interpretation of the decision on the construction of a clause disapplying a statutory limitation of liability in *Clarke v Earl of Dunraven and Mount-Earl, The Satanita* [1897] A.C. 59 by the PC in *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG* [2016] UKPC 20 at [49], in part on the basis that the earlier case was decided "at a time when the relevant principles of construction were much less developed than they are today".

<sup>49.</sup>  *The Starsin* [2004] 1 A.C. 715 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2004] 2 All E.R. (Comm) 667 at [12]; *Nobahar-Cookson v Hut Group Ltd* [2016]

*EWCA Civ 128*, [2016] 1 C.L.C. 573, esp. at [12]–[22] but cf. *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] *EWCA Civ 372*, [2016] 2 All E.R. (Comm) 606 at [14] and [19] (“artificial approaches to construction” should not be applied to a contract by which the parties entered “mutual undertakings to accept the risk of consequential loss flowing from each other’s breaches of contract”). And see Peel, *Treitel on The Law of Contract*, 14th edn (2015) para. 7–016.

50.

! *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 966, 970. See also *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717–718; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846, 850; *Bem Dis a Turk Ticaret S/A TR v International Agri Trade Co Ltd* [1999] 1 Lloyd’s Rep. 729; *How Engineering Services Ltd v Lindner Ceilings Floors Partitions Plc* (1999) 64 Const. L.R. 67, 79; *Cero Navigation Corp v Jean Lion & Cie* [2000] 1 Lloyd’s Rep. 292, 297; *Stent Foundations Ltd v MJ Gleeson Group Plc* [2001] *Build. L.R.* 134; *Amiri Flight Authority v BAE Systems Plc* [2003] *EWCA Civ 1447*, [2003] 2 Lloyd’s Rep. 767 at [25]; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 W.L.R. 215 at [12]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] *EWCA Civ 75*, [2009] 1 Lloyd’s Rep. 461 at [22]–[23]; *Seadrill Management Services Ltd v OAO Gazprom (The “Ekha”)* [2010] EWHC 1530 (Comm), [2010] 1 Lloyd’s Rep. 543 at [184], [217]–[218] (affirmed [2010] *EWCA Civ 691*). But see *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] *EWCA Civ 429*, [2008] 2 Lloyd’s Rep. 216 (imperfect clause enforced); *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), 131 Con. L.R. 63 and *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd’s Rep. 349 (ordinary rules of construction apply); and cf. *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG* [2016] UKPC 20 at [31]–[40] (exclusion of limitation of liability arising by statute and international convention). But see *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] *EWCA Civ 1232*, [2014] 1 W.L.R. 2365 at [38], [59], [70] (“no set-off” clause need not be expressed in terms to qualify the payment obligation) (though the CA was overruled on other grounds in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23, [2016] 2 W.L.R. 1193 at [58]). On the special rules for the interpretation of contract terms (including exemption clauses) in consumer contracts see Vol.II, paras 38–317–38–321 (Unfair Terms in Consumer Contracts Regulations 1999 reg.7) and paras 38–382–38–385 (Consumer Rights Act 2015 s.69).

51. (1927) 43 T.L.R. 323.

52. (1927) 43 T.L.R. 323, 324.

53.




! *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 850. See also *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 482; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] *EWCA Civ 429*, [2008] 2 Lloyd’s Rep. 16 at [20]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] *EWCA Civ 75*, [2009] 1 Lloyd’s Rep. 461 at [23]; *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] *EWCA Civ 1043* at [30].



54.

! *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 966, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 814; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] *EWCA Civ 429*, [2008] 2 Lloyd’s Rep. 216 at [20]–[22]; *McGee Group Ltd v Galliford Try Building Ltd* [2017] EWHC 87 (TCC), [2017] B.T.C. 19 at [22]–[25]. Contrast *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385.


55.

! *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers at Work Ltd)* [2016] UKSC 57, [2017] A.C. 73 at [35] per Lord Toulson J.S.C. (with whom Lord Mance, Lord Sumption and Lord Hodge JJ.S.C. agreed) (exclusion in contract of professional indemnity insurance). cf. Lord Hodge J.S.C. at [7] (with whom Lord Toulson, Lord Mance, and Lord Sumption JJ.S.C. agreed) who considered that the established strict construction of exemption clauses does not apply to “exclusion clauses” limiting the extent of cover in a contract of professional liability insurance.

56. See above, para.13-041.
57. *Sydney City Council v West* (1965) 114 C.L.R. 481; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216 at [20]; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [26].
58.  *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846, 851; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385; *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [19]; *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [28] and [35], above, para.15-005.
59. *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 [2013] 2 Lloyd's Rep. 270 at [28]; and see cf. above, paras 13-059 and 13-065.
60.  *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] EWCA Civ 1043 at [29] quoting Briggs L.J. in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [19].
61. *Cavendish-Woodhouse v Manley* (1984) 82 L.G.R. 376, but see *Dalmare SpA v Union Maritime Ltd* [2012] EWHC 3537 (Comm), [2013] 2 All E.R. 870 at [84] ("as she was" purchase provision in contract for sale of vessel should be read as excluding the right to reject the vessel while leaving the right to claim damages for breach of the terms implied by the Sale of Goods Act 1979 ss.13, 14 unimpaired).
62. *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31.
63. *Baldry v Marshall* [1925] 1 K.B. 260; *Wallis, Son & Wells v Pratt & Haynes* [1911] A.C. 394; *KG Bominflot Bunkergesellschaft für Mineralöle mbH & Co v Petroplus Marketing AG* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442 at [62]. cf. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [29]. See Vol.II, para.44-056.
64. *Andrews Bros Ltd v Singer & Co Ltd* [1934] 1 K.B. 17. See Benjamin's Sale of Goods, 9th edn (2014), paras 13–026 et seq.
65.  *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com. Cas. 204; *Saint Line Ltd v Richardsons Westgarth Ltd* [1940] 2 K.B. 99; *Croudace Construction Ltd v Cawood's Concrete Products Ltd* [1978] 2 Lloyd's Rep. 55; *British Sugar Plc v NEI Power Projects Ltd* (1997) 87 Build. L.R. 42; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387, 402–403; *BHP Petroleum Ltd v British Steel Plc* [1999] 2 Lloyd's Rep. 583, 597–600, [2000] 2 Lloyd's Rep. 277; *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218, 227; *Hotel Services (UK) Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All E.R. (Comm) 750; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] B.L.R. 218; *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232, [2006] 1 Lloyd's Rep. 673; *Ferryways NV v Associated Pontish Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 639 at [84]–[85]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [314]; *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513 at [96]. But the correctness of this conclusion was reserved by Lord Hoffmann in *Caledonia North Sea Ltd v Norton (No.2) Ltd* [2002] UKHL 4, [2002] 1 All E.R. (Comm) 321 at [100]. However, some of these earlier cases may be decided differently today given that the courts are now more willing to recognise that words take their meaning from their context and that the same word or phrase may mean different things in different documents: *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [15]. cf. *Star Polaris LLC v HHIC-PHIL Inc* [2016] EWHC 2941 (Comm), [2017] 1 Lloyd's Rep. 203 at [11]–[18] and [39] (which noted the statement in this paragraph of the Main Work and the doubts expressed in *Caledonia North Sea* and in *Transocean Drilling UK Ltd* and held that in the context of the contract an exclusion of liability for "consequential or special losses, damages or expenses" did not refer losses, etc. falling within the second limb in *Hadley v Baxendale*, but had a wider meaning).

- [66.](#) *Beck & Co v Szymanowski & Co* [1924] A.C. 43.
- [67.](#) See below, paras 15-030—15-031. But contrast *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] A.C. 803; below, para.15-026.
- [68.](#) For further examples, see *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep. 20, 59, 60 (affirmed [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368).
- [69.](#) *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398.
- [70.](#) See above, para.13-074.
- [71.](#) *Glynn v Margetson & Co* [1893] A.C. 351, 357; *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm), [2005] 1 Lloyd's Rep. 382 at [29]; *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177; *Internet Broadcasting Group Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [25], [29], [33]; *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38, [2013] 2 Lloyd's Rep. 270.
- [72.](#) *Leduc v Ward* (1888) 20 Q.B.D. 475; *Glynn v Margetson & Co* [1893] A.C. 351; *Connolly Shaw Ltd v A/S Det Nordenfjeldske D/S* (1934) 49 Ll.L. Rep. 183.
- [73.](#) *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576; *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [2000] 1 Lloyd's Rep. 211, 213, 216, 217; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] 1 Lloyd's Rep. 238 at [85]. Contrast *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213.
- [74.](#) *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 211, 216 ("lean against such a result"). See also *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1 at [313].
- [75.](#) *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 482.
- [76.](#) [1984] 1 W.L.R. 48.
- [77.](#) [1984] 1 W.L.R. 48, 58–59 (with whom all other members of the House of Lords agreed).
- [78.](#) See, e.g. *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] A.C. 149.
- [79.](#) *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54.
- [80.](#) See, e.g. *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] A.C. 964, 971; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79, 92–93; *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924, [2005] 1 Lloyd's Rep. 382; *EU Networks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch); *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177.
- [81.](#) *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79, [93]; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385; *EU Networks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch); *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177 at [112].
- [82.](#)  [1984] 1 W.L.R. 48.
- [83.](#)  *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All



- E.R. (Comm)* 606 at [27] per Moore-Bick L.J. (with whom McFarlane and Briggs L.JJ. agreed) referring to *Great North Eastern Railway Ltd v Avon Insurance Plc* [2001] EWCA Civ 780, [2001] 1 Lloyd's Rep. I.R. 793 (the relevant passages are at [31]).
84. *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192; *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 465, 469; *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353, 376; *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 412, 424, 434; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 85.
85. *London & North Western Ry v Neilson* [1922] 2 A.C. 263, 272; see also below, para.15-032.
86. *Royal Exchange Shipping Co Ltd v Dixon* (1886) 12 App. Cas. 11, 16, 19; *J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1082, 1084, 1085. But *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co* [1989] 2 Lloyd's Rep. 494 (Hague-Visby Rules) was overruled in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 45, [2003] 2 Lloyd's Rep. 1.
87. *Lilley v Doubleday* (1881) 7 Q.B.D. 510; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *Woolf v Collis Removal Service* [1948] 1 K.B. 11; *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 1 W.L.R. 519, 532; see below, para.15-041.
88. *Davies v Collins* [1945] 1 All E.R. 247; *Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd* [1967] 1 W.L.R. 940; see below, para.15-041.
89. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 845. See also *Kenya Railways v Antares Co Pte Ltd* [1987] 1 Lloyd's Rep. 424, 430; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 45 at [15]–[44]; and *The Cap Palos* [1921] P. 458, 468; *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177 at [113]–[116] (towage); and below para.15-032.
90. [1980] A.C. 827. See also *Compania Portoraffi Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310; *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger"* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep. 857 (Hague-Visby Rules).
91. See *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 155, 162 ("collateral" negligence); *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385.
92. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 851.
93. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 (below, para.15-026); *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213.
94.  *Pera Shipping Corp v Petroship SA* [1984] 2 Lloyd's Rep. 363, 365; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 134; *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573, esp. at [14] and [16] (distinguishing "the contra proferentem rule in its classic form", which is "a rule designed to resolve ambiguities against the party who prepared the document", and the principle that, if necessary to resolve ambiguity, [exclusion clauses] should be narrowly construed"); *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [20] (contra proferentem has no role to play where the meaning of the words is clear or where a clause favours both parties equally); *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [52]–[53]. See generally Peel in Burrows and Peel, *Contract Terms* (2007), Ch.4.
95. See below, para.15-021.
96. This appears to be the sense in which the principle was referred to in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 847; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co*

*Ltd* [1983] 1 W.L.R. 964, 969, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 814; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 71 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UK PC 22, [2005] 1 W.L.R. 215 at [12].

97.

❗ [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [5].

98.

❗ [2016] EWCA Civ 128 at [21] per Briggs L.J.

99.

❗ [2016] EWCA Civ 128 at [36] (with whom Hallett L.J. and Moylan J. agreed, though placing greater emphasis on the commercial sense of the resulting decision: [2016] EWCA Civ 128 at [40] and [41]).

100.

❗ *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [19] per Briggs L.J. See similarly *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [57] per Jackson L.J.

101.

❗ *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, [2011] 1 All E.R. (Comm) 1077 at per Moore-Bick L.J. quoted by Briggs L.J. in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 at [19].

102.

❗ On which see Vol.I, para.15-008.

103.

See above, para.13-086.

104.

[1949] 2 All E.R. 581. See also *Webster v Higgin* [1948] 2 All E.R. 127; *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 Q.B. 247; *Billyack v Leyland Construction Co Ltd* [1968] 1 W.L.R. 471; *Adams v Richardson & Starling Ltd* [1969] 1 W.L.R. 1645, 1653; *Pera Shipping Corp v Petroship SA* [1985] 2 Lloyd's Rep. 103; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216 at [22]; *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd* [2010] EWHC 965 (TCC), (2010) 26 Const. L.J. 542.

105.

❗ *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [52] per Jackson L.J. (with whom Moylan and Beatson L.J.J. agreed).

106.

❗ [2011] EWCA Civ 904, [2012] Ch. 497 at [68], quoted at [2017] EWCA Civ 373 at [52].

107.

❗ Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, art.5.

108.

❗ For the 1999 Regulations reg.7 see Vol.II, paras 38-317—38-321; for the Consumer Rights Act 2015 s.69(1) see Vol.II, paras 38-382—38-385.

109.



*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 966, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 814. See also *Continental Illinois National Bank & Trust Co of Chicago v Papanicolaou* [1986] 2 Lloyd's Rep. 441, 444, and *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 76 ("no set-off" clause) and *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446, 452; *BHP Petroleum Ltd v British Steel Plc* [2000] 2 Lloyd's Rep. 277, 285 (time-limit clause). But see *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [63]; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251.

110.


*Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400, 419; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 970; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145, 157 and 162; *Stent Foundations Ltd v Ms Gleeson*



*Group Plc* [2001] *Build. L.R.* 134.


- 111. [1952] A.C. 192, 208. For a criticism of these propositions, see Palmer [1983] L.M.C.L.Q. 557.
- 112. *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 168, 178; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 48–49, 51; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [11], [63], [116]; *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397, [2013] C.P. Rep. 7 at [31]–[35].
- 113. *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42.
- 114. *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- 115. *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [11]. See similarly *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397, [2013] C.P. Rep. 7 at [35].
- 116.  *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [55] and [56] per Jackson L.J. (with whom Moylan and Beatson L.JJ. agreed).
- 117. *Clark v Sir William Arrol & Co Ltd* (1974) S.L.T. 90, 92; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 173; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 47, 51; *Spriggs v Sotheby Parke Bernet & Co* [1986] 1 Lloyd's Rep. 487; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297.
- 118. *Forbes, Abbott & Lennard Ltd v G.W. Ry* (1927) 44 T.L.R. 97; *The Jessmore* [1951] 2 Lloyd's Rep. 512; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 W.L.R. 459; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 W.L.R. 995; *Norwich City Council v Harvey* [1989] 1 W.L.R. 828.
- 119. *Rutter v Palmer* [1922] 2 K.B. 87.
- 120. *Burton & Co v English & Co* (1883) 12 Q.B.D. 218, 223; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69; cf. *Allan Bros and Co v James Bros & Co* (1897) 3 Com. Cas. 10, 12; *Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 K.B. 490, 496; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd* [1991] 2 Lloyd's Rep. 391.
- 121. *Reynolds v Boston Deep Sea Fishing & Ice Co Ltd* (1921) 38 T.L.R. 22, 429; *Pyman S.S. Co v Hull and Barnsley Ry* [1915] 2 K.B. 729. Contrast *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291.
- 122. *Reynolds v Boston Deep Sea Fishing & Ice Co Ltd* (1921) 38 T.L.R. 22; *Gibaud v G.E. Ry* [1921] 2 K.B. 426; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79. See also *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 ("no liability of any nature").
- 123. *Haigh v Royal Mail Steam Packet Co* (1883) 52 L.J.Q.B. 640; *Akerib v Booth* [1960] 1 W.L.R. 454 (reversed on other grounds [1961] 1 W.L.R. 367); *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 Q.B. 495; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846. cf. *Taubman v Pacific Steam Navigation Co* (1872) 26 L.T. 704.
- 124. *BHP Petroleum Ltd v British Steel Plc* [2000] 2 Lloyd's Rep. 277.
- 125.  *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79; *Persimmon Homes Ltd v Ove Arup & Partners*

- Ltd* [2017] EWCA Civ 373 at [60] ("liability for any claim in relation to asbestos is excluded").
- [126.](#) *Price v Union Lighterage Co* [1904] 1 K.B. 412 ("any loss of or damage to goods which can be covered by insurance").
- [127.](#) *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73, 101; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 437; *Rutter v Palmer* [1922] 2 K.B. 87, 94.
- [128.](#) *Austin v Manchester, Sheffield & Lincs Ry* (1852) 10 C.B. 454; *The Stella* [1900] P. 161; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73; *Ashby v Tolhurst* [1937] 2 K.B. 242; *Harris Ltd v Continental Express Ltd*; *White v Blackmore* [1972] 2 Q.B. 651; *Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep. 211, 222; see also *Hunt & Winterbotham (West of England) Ltd v B.R.S. (Parcels) Ltd* [1962] 1 Q.B. 617 ("however sustained").
- [129.](#) *Ashenden v L.B. & S.C. Ry* (1880) 5 Ex. D. 190; *Manchester, Sheffield & Lincs. Ry v Brown* (1883) 8 App. Cas. 703.
- [130.](#) *Pyman S.S. Co v Hull & Barnsley Ry* [1915] 2 K.B. 729; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251. cf. *Bishop v Bonham* [1988] 1 W.L.R. 742.
- [131.](#) *A.E. Farr Ltd v Admiralty* [1953] 1 W.L.R. 965.
- [132.](#) *The Stella* [1900] P. 161.
- [133.](#) *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42. See also *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep. 403 ("act, omission, neglect or default").
- [134.](#) *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 168; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2010] 2 Lloyd's Rep. 467 at [15].
- [135.](#) *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165.
- [136.](#) *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 155.
- [137.](#) *Bishop v Bonham* [1988] 1 W.L.R. 742. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 2 Lloyd's Rep. 145 ("any damage whatsoever").
- [138.](#) *Svensssons Travaruaktiebolag v Cliffe S.S. Co* [1932] 1 K.B. 490, 496; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd* [1991] 2 Lloyd's Rep. 391.
- [139.](#) *Mineralimportexport v Eastern Mediterranean Maritime Ltd* [1980] 2 Lloyd's Rep. 572. But contrast *Tor Line AB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48; *Airline Engineering v Intercon Cattle Meat Unreported*, January 24, 1983 CA; *Caledonia Ltd v Orbit Value Co Europe* [1994] 1 W.L.R. 221, 229 (affirmed [1994] 1 W.L.R. 1515).
- [140.](#) *Alderslade v Hendon Laundry Ltd* [1945] 1 K.B. 189, 192. See also *Rutter v Palmer* [1922] 2 K.B. 87, 92; *Forbes Abbott & Lennard Ltd v G.W. Ry* (1927) 44 T.L.R. 97, 98.
- [141.](#) *Hollier v Rambler Motors (A.M.C.) Ltd* [1972] 2 Q.B. 71, 80 (disapproving *Turner v Civil Service Supply Association* [1926] 1 K.B. 50; *Fagan v Green & Edwards Ltd* [1926] 1 K.B. 102); *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400, 414; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 108; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 49, 51.
- [142.](#) [1945] 1 K.B. 189, 192.
- [143.](#) *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 50, 51.

- [144.](#) [1982] 2 Lloyd's Rep. 42, 50.
- [145.](#) An example often cited is that of *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285; but see *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 46. See also *R. v Canada S.S. Lines Ltd* [1952] A.C. 192, 210; *Re Polemis, Furness, Withy & Co Ltd* [1912] 3 K.B. 560; *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532; *A.M.F. International Ltd v Magnet Bowling Ltd* [1968] 1 W.L.R. 1028; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 174, 179; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 221, 228 (affirmed [1994] 1 W.L.R. 1515); *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297, 301; *Toomey v Eagle Star Insurance Co Ltd (No.2)* [1995] 2 Lloyd's Rep. 88, 92; *Stent Foundations Ltd v M.J. Gleeson Group Plc* [2001] Build. L.R. 134; *Casson v Ostley P.J. Ltd* [2001] EWCA Civ 1013, (2002) 18 Const. L.J. 145; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[368]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2; *Onego Shipping and Chartering BV v JSC Arcadia Shipping* [2010] EWHC 777 (Comm), [2010] 2 Lloyd's Rep. 221. cf. *Try Build Ltd v Blue Star Garages Ltd* (1998) 66 Const. L.R. 90; *HIH Casualty and General Insurance Ltd v North Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [131]–[140]; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- [146.](#) *Rutter v Palmer* [1922] 2 K.B. 87, 90.
- [147.](#) See Vol.II, para.36-014.
- [148.](#) *Seven Seas Transportation Ltd v Pacifico Union Marina Corp* [1982] 2 Lloyd's Rep. 465, 475 (affirmed [1948] 1 Lloyd's Rep. 488). cf. *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA* [1983] 1 Lloyd's Rep. 310, 314.
- [149.](#) (1990) 6 Const. L.J. 37. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145.
- [150.](#) *McCawley Ry v Furness* (1872) L.R. 8 Q.B. 57; *Buckpitt v Oates* [1968] 1 All E.R. 1145; *Bennett v Tugwell* [1971] 2 Q.B. 267; *Birch v Thomas* [1972] 1 W.L.R. 294. But contrast *Burnett v British Waterways Board Ltd* [1973] 1 W.L.R. 700 (employee acting under orders of his employer), s.149(3) of the Road Traffic Act 1988 and s.2(3) of the Unfair Contract Terms Act 1977 (on which see below, para.15-082) or the Consumer Rights Act 2015 s.65(2) (on which see Vol.II, para.38-357).
- [151.](#) *Walters v Whessoe* [1968] 1 W.L.R. 1056, 1057; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 168; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [369]–[370]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2.
- [152.](#) Under the Unfair Contract Terms Act 1977 s.4 a person “dealing as consumer” cannot by reference to a contract term be made to indemnify another person in respect of liability that may be incurred by that other person except to the extent to which the contract term is reasonable (see below, paras 15-081, 15-088) and such an indemnity clause could also fall under the general controls on fairness and transparency in the Unfair Terms in Consumer Contracts Regulations 1999 (see Vol.II, paras 38-201 et seq. especially at para.38-296). However, as explained below, para.15-090) with the coming into force of the relevant provisions of the Consumer Rights Act 2015, the Unfair Contract Terms Act s.4 is deleted, the 1999 Regulations revoked and as a result such an indemnity clause would fall within the general controls on the fairness and transparency put in place by the 2015 Act s.62 and 68, on which see Vol.II, paras 38-334 et seq.
- [153.](#) [1952] A.C. 192, 208; see above, paras 15-013—15-016.
- [154.](#)  *Walters v Whessoe Ltd* [1968] 2 All E.R. 816 (Note), 6 B.L.R. 23; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, HL; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep.

- 387, 396; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[368]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2; *Greenwich Millennium Ltd v Essex Services Plc* [2014] EWCA Civ 960, [2014] 1 W.L.R. 3517 at [94]; *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429 at [10]. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145 (offhire payment clause). But see *Morris v Breaveglen Ltd* [1997] C.L.Y. 937 (clear intention).
155. *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387.
156. *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 174, 179; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 221, 228 (affirmed [1994] 1 W.L.R. 1515); *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297.
157. **!** *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 per Lord Bingham of Cornhill (exemption clause); *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429 at [10] (indemnity clause).
158. **!** See (effective indemnities): *A.E. Farr Ltd v Admiralty* [1953] 1 W.L.R. 965; *Swan Hunter and Wigham Richardson Ltd v France, Fenwick Tyne & Wear Co Ltd (The Albion)* [1953] 1 W.L.R. 1026; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 W.L.R. 459; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Westcott v J.H. Jenner Plasterers and Bovis* [1962] 1 Lloyd's Rep. 309; *Spalding v Tarmac Civil Engineering Ltd* [1967] 1 W.L.R. 1508; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] 1 Q.B. 400; *Blake v Richards & Wallington Industries* (1974) 16 K.I.R. 151; *Comyn Ching & Co (London) v Oriental Tube Co* [1981] Com. L.R. 67; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 W.L.R. 995; *Thompson v T. Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd's Rep. 550; *Nelson v Atlantic Power and Gas* (1995) S.L.T. 46; *Morris v Breaveglen Ltd* [1997] C.L.Y. 937; *Smedvig Ltd v Elf Exploration UK Plc* [1998] 2 Lloyd's Rep. 659; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387; *Great Eastern Shipping Co Ltd v Far East Chartering Ltd* [2011] EWHC 1372 (Comm), [2011] 2 Lloyd's Rep. 309 at [43]; *Greenwich Millennium Ltd v Essex Services Plc* [2014] EWCA Civ 960, [2014] 1 W.L.R. 3517 at [96]; *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429. Contrast (ineffective indemnities) *A.M.F. International Ltd v Magnet Bowling Ltd* [1968] 1 W.L.R. 1028; *Walters v Whessoe Ltd* [1968] 1 W.L.R. 1056; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *C. Davis Metal Producers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *Actis Co Ltd v Sankis S.S. Co Ltd* [1982] 1 Lloyd's Rep. 7; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145; *Dorset CC v Southern Felt Roofing Co* (1990) 6 Const. L.J. 37; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 1515; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297; *Stirling v Norwest* (1997) S.L.T. 974; *Hawkins v Northern Marine Management Ltd* 1998 S.L.T. 1107; *Stent Foundations Ltd v M.J. Gleeson Group Plc* [2001] Build. L.R. 134; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[394]; *Seadrill Management Services Ltd v OAO Gazprom (The "Ekha")* [2010] 1 Lloyd's Rep. 543 at [217]–[218] (affirmed [2010] EWCA Civ 691); *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2.
159. **!** *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 W.L.R. 1095 at [26].
160. **!** *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge J.S.C. (with whom Lord Neuberger of Abbotsbury P.S.C., Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption J.J.S.C. agreed).
161. *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 588.
162. *Alexander v Ry Executive* [1951] 2 K.B. 882; *Swan Hunter and Wigham Richardson Ltd v*



- France Tyne & Wear Co Ltd (The Albion)* [1953] 1 W.L.R. 1026, 1030; *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576; *Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep. 352, 363. For a time it was considered that a "deliberate" breach had to be one which could be attributed to the contracting party personally, and not one imputed vicariously through his employees or agents: *Chartered Bank of India v British India Steam Navigation Ltd* [1909] A.C. 369, as explained in *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 588; *John Carter (Fine Worsteds) Ltd v Harrison Haulage (Leeds) Ltd* [1965] 2 Q.B. 495, but it submitted that this view would no longer be followed. See Guest (1961) 77 L.Q.R. 98, 116. But see *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [23]–[24].
163. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; below, para.15-025; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1052 (Comm), [2004] 2 Lloyd's Rep. 251 at [141]–[152].
164. [1967] 1 A.C. 361; below, para.15-024.
165. [1967] 1 A.C. 361, 435. See also at 394, 414, 415, 429.
166. *Alexander v Ry Executive* [1951] 2 K.B. 882 (but see below, para.15-039 n.246); *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 587; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69.
167.  *The Cap Palos* [1921] P. 458, 471, 472. Contrast *Compania Portoraffi Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310 (Hague-Visby Rules). See also *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177 at [113]–[116]; *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [17]–[19]; *Polyppearl Ltd v Building Research Establishment Ltd Unreported*, July 28, 2016 (Mercantile Ct) at [83] and [88]. But see *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1 at [301].
168. *Suisse Atlantique case* [1967] 1 A.C. 361, 435.
169. On the meaning of this phrase, see *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch. 407; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep. 427; *Bovis International Ltd v Circle Line Partnerships* [1995] N.P.C. 128.
170. On the meaning of this phrase, see *Hoare v G.W. Ry* (1877) 37 L.T. 186; *Lewis v G.W. Ry* (1877) 3 Q.B.D. 195, 206; *Graham v Belfast & Northern Counties Ry Co* [1901] 2 I.R. 13; *Forder v G.W. Ry* [1905] 2 K.B. 532; *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch. 407; *Horabin v B.O.A.C.* [1952] 2 Lloyd's Rep. 450; *Rustenberg Platinum Mines Ltd v SAA* [1977] 1 Lloyd's Rep. 564, 569; *National Semiconductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyd's Rep. 212, 214; *Lacey's Footwear v Bowler International Freight (Wholesale) Ltd* [1997] 2 Lloyd's Rep. 369; *Thomas Cook Group Ltd v Air Malta Co Ltd* [1997] 2 Lloyd's Rep. 399; *Rolls Royce Plc v Heavylift-Volga DNEPR Ltd* [2000] 1 Lloyd's Rep. 653; *Patrick v Royal London Mutual Insurance Socy Ltd* [2006] EWCA Civ 421, [2006] 2 All E.R. (Comm) 344; *Denfleet International Ltd v TNT Global SpA* [2007] EWCA Civ 405, [2007] 2 Lloyd's Rep. 504; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [394]; *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC (TCC) at [206]; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54; *Alpstream AG v Airfinance Sarl* [2013] EWHC 2370 (Comm), [2014] 1 All E.R. (Comm) 441 at [92]–[94]. See also Vol.II, paras 35-035–35-039, 36-131.
171. On the meaning of this phrase, see *Red Sea Tankers Ltd v Papachristidis* [1997] 2 Lloyd's Rep. 547, 586; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54 at [161].
172. *The Glendarroch* [1894] P. 226, 231; *Munro Brice & Co v War Risks Association* [1918] 2 K.B. 78 (reversed on other grounds [1920] 3 K.B. 94); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [2014] 1 C.L.C. 353 at [25]. Contrast *Hurst v Evans* [1917] 1 K.B.

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- [173.](#) See, e.g. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; below, para.15-025.
- [174.](#) *Munro Brice & Co v War Risks Association* [1918] 2 K.B. 78 at 88.
- [175.](#) See above, para.15-020.
- [176.](#) *H.C. Smith Ltd v G.W. Ry* [1922] 1 A.C. 178; *Kenyon Son & Craven Ltd v Baxter Hoare Ltd* [1971] 1 W.L.R. 232; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215; *Sig Bergesen DY. and Co v Mobil Shipping and Transportation Co* [1993] 2 Lloyd's Rep. 453, 462. cf. *Port Swettenham Port Authority v T.W. Wu & Co* [1979] A.C. 580, and n.161, below (bailment).
- [177.](#) *Munro Brice & Co v War Risks Association* [1918] 2 K.B. 78 at 89.
- [178.](#) [1951] 1 Lloyd's Rep. 32, followed in *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 (Comm), [2004] 1 Lloyd's Rep. 521 at [55].
- [179.](#) *The Glendarroch* [1894] P. 226, 231; *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 C.L.R. 142, 168.
- [180.](#) [1978] Q.B. 69. See also *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291; *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 at [64].
- [181.](#) *Hunt & Winterbotham (West of England) Ltd v B.R.S. (Parcels) Ltd* [1962] 1 Q.B. 617.
- [182.](#) See below, para.15-027. *Levison's case* [1978] Q.B. 69 was decided before *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (below, para.15-025) but was not doubted in that case.
- [183.](#) See *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213, 238; contrast *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 (Comm).
- [184.](#) *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73; *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291; *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466; *Houghland v R.B. Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 82; *Port Swettenham Port Authority v T.W. Wu & Co* [1979] A.C. 580; *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570; see Vol.II, paras 33-012, 33-050.



# **Chitty on Contracts 32nd Ed.**

## **Consolidated Mainwork Incorporating Second Supplement**

### **Volume I - General Principles**

#### **Part 4 - The Terms of Contract**

#### **Chapter 15 - Exemption Clauses**

#### **Section 3. - Fundamental Breach**

##### **Supposed rule of law**

##### **15-023**

It was at one time supposed that a party to a contract would be precluded from relying upon an exemption clause contained in it where he had been guilty of a fundamental breach of contract or the breach of a fundamental term. Statements in certain cases <sup>185</sup> tended to encourage the view that there existed a rule of substantive law preventing a party from relying on an exemption clause in situations of fundamental breach or the breach of a fundamental term, regardless of the wording of the clause. It was said that there were certain breaches of contract ("fundamental breaches") which were so totally destructive of the obligations of the party in default that liability for such a breach could in no circumstances be excluded or restricted by means of an exemption clause. Similarly there existed a category of terms ("fundamental terms") which were narrower than a condition of the contract. A fundamental term, so it was said:

"... underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates." <sup>186</sup>

It was part of the "core" of the contract, <sup>187</sup> and "however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term". <sup>188</sup> The two expressions "fundamental breach" and "breach of a fundamental term" were used to some extent interchangeably, <sup>189</sup> but formulated in this way they embodied a rule of law to be applied notwithstanding the agreement of the parties as expressed in the exemption clause.

##### **Suisse Atlantique case**

##### **15-024**

The view that the principle of fundamental breach constituted a rule of law was, however, rejected by Pearson L.J. in *U.G.S. Finance Ltd v National Mortgage Bank of Greece*, where he said <sup>190</sup>:

"As to the question of 'fundamental breach,' I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties.... This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally."

This statement was unanimously approved by the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*.<sup>191</sup> In that case, shipowners sued the charterers of a ship for damages for delays in loading and unloading the chartered vessel. The charterers relied on the usual demurrage clause in the charterparty as establishing the full measure of their liability; but the shipowners contended that this clause did not protect the charterers since the breaches of contract which caused the delays amounted to a fundamental breach of contract. They claimed damages at large. The House of Lords rejected this claim. Their Lordships held:

- (i)  
that the demurrage clause was not an exemption clause but an agreed damages provision<sup>192</sup>;
- (ii)  
that, in any event, since the shipowners had not treated the charter as repudiated, they were still bound by its provisions<sup>193</sup>; and
- (iii)  
that, even if the clause were an exemption clause, it plainly covered the breach alleged, whether or not this was "fundamental" in the sense that it would have entitled the shipowners to be discharged.<sup>194</sup>

Their Lordships were clearly of the opinion that any statement of the principle of fundamental breach as a rule of law could not be supported in principle or in the light of previous authority.<sup>195</sup> So far as the use of the expression "fundamental breach" was concerned, Lord Wilberforce pointed out<sup>196</sup> that it had been used in the cases to denote two quite different things, namely:

- (i)  
a performance totally different from that which the contract contemplated;
- (ii)  
a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse further performance of the contract.

There was no necessary coincidence between these two kinds of (so-called) fundamental breach. After giving a series of examples<sup>197</sup> of how the courts had approached the problem of a fundamental breach in the former sense, he concluded<sup>198</sup>:

"The conception, therefore, of 'fundamental breach' as one which, through ascertainment of the parties' contractual intentions, falls outside an exceptions clause is well recognised and comprehensible."

On the other hand, Lord Reid said<sup>199</sup>:

"General use of the term 'fundamental breach' is of recent origin, and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract."

While, therefore, their Lordships were agreed that the application of an exemption clause to a breach of contract was a matter of construction of the contract, the question whether and to what extent any special rules were applicable to cases of “fundamental breach” (in the sense of “total” as opposed to repudiatory breach), was to some extent left open.

#### **Securicor case**

### **15-025**

Certain statements in the *Suisse Atlantique* case further suggested (perhaps by way of illustration only) that in particular instances of fundamental breach an exemption clause would or would be presumed to be inapplicable. <sup>200</sup> Moreover, in his speech Lord Reid said <sup>201</sup>:

“I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist.”

Lord Reid’s statement was taken up and extended by the Court of Appeal in subsequent cases <sup>202</sup> which held that the protection of an exemption clause ceased to be available to a party guilty of a repudiatory breach if the other party accepted the breach as terminating the contract or if the breach was of such a nature as to render the contract impossible of further performance. This departure was, however, condemned by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*. <sup>203</sup> In that case, the defendants agreed to provide a visiting patrol service to the claimants’ factory at a charge of £8. 15s. a week. The contract contained an exemption clause, the most relevant part of which stated:

“Under no circumstances shall the company [the defendants] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer.”

An employee of the defendants deliberately lit a fire in the factory, and a large part of the premises was burned down. The Court of Appeal held <sup>204</sup> that the defendants, having been employed to safeguard the factory, had committed a fundamental breach of their contract with the claimants and that the exemption clause could not be construed to cover the act of their employee in setting the premises on fire. It was further held that the destruction of the factory brought the contract to an end by rendering further performance impossible so that the defendants could not rely on the exemption clause to protect them from the consequences of the breach. The House of Lords reversed the Court of Appeal’s decision. Their Lordships unanimously rejected the view that a breach of contract by one party, accepted by the other as discharging him from further performance of his obligations under the contract, brought the contract to an end, and, together with it, any exemption clause. <sup>205</sup> The House further reaffirmed <sup>206</sup> the principle that the question whether an exemption clause protected one party to a contract in the event of breach, or in the event of what would (but for the presence of the exemption clause) have been a breach, depended upon the proper construction of the contract. They held that, as a matter of construction, the exemption clause in question clearly relieved the defendants from liability. The defendants had effectively modified their obligation to one of exercising due diligence in their capacity as employers. The clause apportioned the risk between the parties: the risk of arson not being accepted by the defendants having regard to the nature and cost of the services provided and falling on the claimants who could more economically insure against it.

#### **George Mitchell case**

## 15-026

A third leading case is that of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*,<sup>207</sup> where the respondents ordered from the appellants, who were seed merchants, a quantity of Dutch winter white cabbage seeds. The seeds supplied were invoiced as “Finney’s Late Dutch Special”. Owing to errors by the appellants’ suppliers and employees, the seeds were in fact not of this variety but were autumn cabbage seeds. The resulting crop proved to be worthless and had to be ploughed in. In an action by the respondents for wasted expenditure and loss of anticipated profits, the appellants relied on their standard conditions of sale. These provided: first, that in the event of any seeds sold or agreed to be sold not complying with the express terms of the contract of sale, the limit of the appellants’ obligation was to replace the seeds or refund the purchase price; secondly, that the appellants excluded:

“... all liability for any loss or damage arising from use of any seeds ... supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds ... supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid;”

thirdly, that express or implied conditions and warranties not stated in the conditions were excluded. A majority of the Court of Appeal<sup>208</sup> held that, at common law, this wording was insufficient to limit the appellants’ liability. Oliver L.J.<sup>209</sup> considered that the first condition applied only to seeds “sold or agreed to be sold” and so could only relate to goods which were actually the subject matter of the contract between the parties, i.e. winter white cabbage seeds. The second condition was merely a supplement to the first and did not cover a case where what had been supplied was wholly different from what had been ordered. The House of Lords, however, unanimously held that, at common law, the limitation was effective.<sup>210</sup> The second condition, read as a whole, unambiguously limited the appellants’ liability to replacement of the seeds or a refund of the price. The defective seeds were seeds sold and delivered, just as clearly as they were seeds supplied, by the appellants to the respondents. The judgment of Oliver L.J. came, it was said<sup>211</sup>:

“... dangerously near to reintroducing by the back door the doctrine of ‘fundamental breach’ which this House in *Securicor* ... had so forcibly evicted from the front.”

## Conclusion

## 15-027

It is clear that there is now no rule of law by which exemption clauses are rendered ineffective in the face of a “fundamental breach” or the breach of a “fundamental term”. In the *Photo Production* case, Lord Diplock stated<sup>212</sup> that, if the expression “fundamental breach” is to be retained, it should, in the interests of clarity, be confined to the ordinary case of a breach of which the consequences are such as to entitle the innocent party to elect to put an end to all primary obligations of both parties remaining unperformed. No express reference was made by him to the expression “fundamental term”, but the inference is that there exists no category of terms which can be said to be in any sense “fundamental” other than conditions.<sup>213</sup> On this basis, it is submitted that there is no presumption that, in inserting a clause of limitation or exclusion into their contract, the parties are not contemplating its application to a fundamental breach or the breach of a fundamental term.<sup>214</sup> The question is in all cases whether the clause, on its true construction, extends to cover the obligation or liability which it is sought to exclude or restrict.

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- [185.](#) *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 465; *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936, 940, 943; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 587, 588, 589; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 520; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683, 710; *Astley Industrial Trust v Grimley* [1963] 1 W.L.R. 1468, 1470; see also above, para.13-021.
- [186.](#) *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co* [1953] 1 W.L.R. 1468, 1470; see above, para.13-021.
- [187.](#) See *Melville* (1956) 19 M.L.R. 26.
- [188.](#) *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936, 943.
- [189.](#) cf. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 393, 421; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14, 19.
- [190.](#) [1964] 1 Lloyd's Rep. 446, 450. See also *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *The Cap Palos* [1921] P. 458, 470, 472; *L. & N.W. Ry v Neilson* [1922] 2 A.C. 263, 272; *Cunard S.S. Co v Buerger* [1927] A.C. 1, 13; *Frenkel v MacAndrews & Co Ltd* [1929] A.C. 545, 562; *Calico Printers' Association v Barclays Bank* (1931) 36 Com. Cas. 197, 203; *Connolly Shaw v Nordenfieldske S.S. Co* (1934) 50 T.L.R. 418.
- [191.](#) [1967] 1 A.C. 361; see *Treitel* (1966) 29 M.L.R. 546.
- [192.](#) See above, para.15-004.
- [193.](#) [1967] 1 A.C. 361, 395, 407, 413, 426, 437.
- [194.](#) [1967] 1 A.C. 361, 395, 407, 415, 426, 437.
- [195.](#) [1967] 1 A.C. 361, 392, 399, 405, 410, 425, 431–432.
- [196.](#) [1967] 1 A.C. 361, 431.
- [197.](#) [1967] 1 A.C. 361, 432–435.
- [198.](#) [1967] 1 A.C. 361, 434. See also Lord Dilhorne, 393.
- [199.](#) [1967] 1 A.C. 361, 397. See also Lord Hodson, 410; Lord Upjohn, 422.
- [200.](#) See Lord Denning M.R. in *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69; *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 W.L.R. 856, 863.
- [201.](#) [1967] 1 A.C. 361, 398. See also Lord Upjohn, 425.
- [202.](#) *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447. See also *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053; *Eastman Chemical International A.G. v N.M.T. Trading Ltd* [1972] 2 Lloyd's Rep. 25; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14 (where contract affirmed).
- [203.](#) [1980] A.C. 827. See also *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964; *Lifesavers (Australasia) Ltd v Frigmobile Pty Ltd* (1983) 1 N.S.W.R. 431.
- [204.](#) [1978] 1 W.L.R. 856.
- [205.](#) [1980] A.C. 827, 844–845, 847–850, 853. See also s.9(1) of the Unfair Contract Terms Act 1977 (deleted on the coming into force of the Consumer Rights Act 2015 Pt 2: s.75, Sch.4 para.10). An exception may exist in "deviation" cases; see below, para.15-032.

- [206.](#) [1980] A.C. 827, 845, 850–851, 853.
- [207.](#) [1983] 2 A.C. 803.
- [208.](#) [1983] Q.B. 284 (Oliver and Kerr L.JJ., Lord Denning M.R. dissenting).
- [209.](#) Kerr L.J. (with whom Oliver L.J. agreed) also based his decision on the ground that the clause was not sufficiently unambiguous to exclude liability for negligence: see above, para.15-013.
- [210.](#) But the clause was, however, held unreasonable under the modified s.55 of the Sale of Goods Act 1979, as set out in para.11 of Sch.1 to that Act. See now the Unfair Contract Terms Act 1977; below, para.15-103.
- [211.](#) [1983] 2 A.C. at 813.
- [212.](#) [1980] A.C. 827, 849. See also the *Suisse Atlantique* case [1967] 1 A.C. 361, 397, 410, 422.
- [213.](#) [1980] A.C. 827, 849. See also the *Suisse Atlantique* case [1967] 1 A.C. 361, 422; and above, para.15-024.
- [214.](#) But see Lord Upjohn in the *Suisse Atlantique* case [1967] 1 A.C. 361, 427 and Thomas J. in *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep. 367, 376; *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [33]. But see above, para.15-010.



# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 4 - The Terms of Contract

### Chapter 15 - Exemption Clauses

## Section 4. - Application of Principles of Construction to Particular Contracts

### Generally

#### 15-028

The principles of construction mentioned in the second section of this chapter may now be illustrated in their application to particular contracts. Certain of the cases cited were, however, decided at a time when the principle of “fundamental breach” was to a greater or less extent recognised by the courts. Such cases should probably now be regarded as instances where an exemption clause was, as a matter of construction, held to be inapplicable.

### Contracts of sale of goods: terms about title

#### 15-029

The Unfair Contract Terms Act 1977 <sup>215</sup> invalidates (except in the case of international sales) <sup>216</sup> any term exempting from the terms about title implied by s.12 of the Sale of Goods Act 1979 and, for contracts made on or after October 1, 2015, the Consumer Rights Act 2015 invalidates the exclusion of liability for breach of the statutory terms in consumer sales contracts that the trader has the right to sell the goods. <sup>217</sup> Even at common law, however, it is probable that the courts would be reluctant to hold that an exemption clause, framed in general terms, should be construed so as completely to exclude liability for breach of the implied term on the part of the seller that he has a right to sell the goods, since “the whole object of a sale is to transfer property from one person to another”. <sup>218</sup> They would have to be satisfied that the parties intended the transaction to be merely the sale and purchase of a chance (emptio spei) that the seller might or might not have a good title to the goods sold. <sup>219</sup>

### Sale of goods: terms as to quality, etc

#### 15-030

⚠ For contracts made before October 1, 2015 (when the Consumer Rights Act 2015 came into force) the Unfair Contract Terms Act 1977 Act <sup>220</sup> invalidates the exclusion of the terms as to quality, fitness for purpose, and correspondence with description and sample, implied by ss.13 to 15 of the Sale of Goods Act 1979, if the buyer “deals as consumer” <sup>221</sup> and, in any other case, an exemption clause is enforceable only in so far as it satisfies the requirement of reasonableness. <sup>222</sup> For contracts made on or after October 1, 2015, <sup>223</sup> ⚠ the controls on these terms in the 1977 Act will no longer protect persons “dealing as consumer” and will not apply to “consumer contracts”, <sup>224</sup> but terms in consumer sales contracts which seek to exclude the trader’s liabilities for breach of the statutory terms as to description, quality etc of the goods will not bind the consumer. <sup>225</sup> However, even at common law, if there is a gross disparity between the goods as described in the contract of sale and as delivered, a number of cases have held that an exemption clause, for example, which purports to require the buyer to take the goods “with all faults and imperfections”, or to exclude the seller’s liability for errors

of description, or to take away the buyer's right to reject the goods, may be held not to apply to a failure to supply the contract goods. <sup>226</sup> Even a clause in a comprehensive form which excludes all conditions and warranties, express or implied by common law, statute or otherwise, may possibly not be construed to cover the delivery of goods which are wholly different from those contracted for. <sup>227</sup> However, there is no rule of law to prevent a seller, who—to use a familiar example—has contracted to deliver peas, from excluding or restricting his liability in the event that he delivers beans, <sup>228</sup> or permits him to substitute beans in their place, <sup>229</sup> provided that the clause is sufficiently unambiguous in its terms to admit of this construction.

## Hire purchase

### 15-031

⚠ For contracts made before October 1, 2015 (when the relevant provisions of Consumer Rights Act 2015 came into force), the Unfair Contract Terms Act 1977 <sup>230</sup> makes general provision prohibiting, either absolutely or subject to certain qualifications, exclusion of the terms as to title, quality, fitness for purpose, and correspondence with description or sample implied by ss.8 to 11 of the Supply of Goods (Implied Terms) Act 1973. <sup>231</sup> With the coming into force of the 2015 Act, these controls in the 1977 Act no longer apply to consumer contracts, <sup>232</sup> but terms which seek to exclude a trader's liabilities for breach of the new statutory terms as to the trader's right to sell the goods, and as to the description, quality, etc, of the goods will not bind the consumer. <sup>233</sup> At common law, principles have been applied to hire-purchase transactions which are similar to those applied to contracts of sale. It has been held, for example, that a clause in such terms as:

“... no condition or warranty as to the condition or fitness for any purpose of the goods is given by the owner or implied herein”

will not be construed to extend to the supply of goods which are so defective that what is delivered is totally different from that promised. <sup>234</sup> It is also probable that the courts would not construe a general exemption clause to have so wide an ambit as to negative the implied undertaking on the part of the owner that he has a good title to the goods let on hire, particularly in view of the fact that such terms as “owner” and “option to purchase” appear in the agreement. <sup>235</sup>

## Carriage of goods: deviation

### 15-032

⚠ Contracts for the carriage of goods are controlled only to a limited extent by the Unfair Contract Terms Act 1977. <sup>236</sup> ⚠ At common law, in a contract for the carriage of goods, any unnecessary deviation from the agreed or customary route constitutes a breach of the contract of affreightment. <sup>237</sup> Such a breach entitles the owner to treat himself as discharged, and, unless, with knowledge of the facts, he elects to affirm the transaction, the special terms of the contract (including any exemption clause) which are designed to apply to the contract journey are held to have no application to the deviating journey. <sup>238</sup> So strict is this rule that although the deviation has not been the cause of any loss to the owner's goods and is a mere incident in the voyage, nevertheless, once it has taken place the carrier is no longer entitled to rely on clauses of exemption contained in the contract, unless it can be shown that the loss would have happened in any event. <sup>239</sup> But even if the contract is treated as continuing, exemption clauses will be strictly construed, so that, for example, a disclaimer of liability for loss of or damage to goods “in transit” will not extend to cover a deviation. <sup>240</sup> Deviation cases are, however, sui generis and not to be extended. <sup>241</sup> Moreover, clauses which confer upon the carrier a liberty to deviate will, if clearly expressed, be upheld <sup>242</sup> although they may be so construed as not substantially to defeat the main purpose of the contract voyage. <sup>243</sup>

## Carriage of goods: delay

## 15-033

It is also the duty of the carrier to carry the goods with all reasonable dispatch to their destination. An unreasonable and protracted delay may entitle the charterer or consignor to treat the contract as repudiated.<sup>244</sup> Delay will not necessarily lie outside the scope of an exemption clause,<sup>245</sup> but it will do so where the parties cannot be taken to have agreed that the clause should extend to the period of the delay<sup>246</sup> or to a risk consequent upon the delay which is wholly at variance with the contract of carriage.<sup>247</sup>

### Carriage on deck

## 15-034

Where a carrier of goods by sea undertakes to carry the goods under deck, an exemption clause which excludes or restricts his liability for loss or damage to the goods carried may be held to be inapplicable if the goods are carried on deck.<sup>248</sup> The same might apply if goods carried by land are similarly conveyed in an unauthorised manner.

### Road and seaworthiness

## 15-035

A carrier of goods by land probably does not give any implied warranty, in the sense of an absolute undertaking, that he will provide a roadworthy vehicle or a competent and honest driver or crew.<sup>249</sup> At common law, however, a carrier of goods by sea, in the absence of an express stipulation to the contrary,<sup>250</sup> impliedly undertakes that his ship is seaworthy.<sup>251</sup> Although an undertaking of seaworthiness has been said "to underlie the whole contract of affreightment",<sup>252</sup> its breach will not entitle the shipper to be discharged unless the breach is such as to frustrate the commercial purpose of the contract.<sup>253</sup> Nevertheless, as a matter of construction, exceptions in the charter or bill of lading may not be read as applying to breaches of an obligation to provide a seaworthy ship<sup>254</sup> unless their meaning is clear and unambiguous.<sup>255</sup>

### Misdelivery by carrier

## 15-036

Misdelivery of the goods does not, of itself, prevent the application of an exemption clause in a contract of carriage.<sup>256</sup> But where the main object and intent of the contract is that delivery should be made to a certain person or persons, the clause may be limited and modified to the extent necessary to give effect to that object and intent. In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*<sup>257</sup> goods carried by sea were to be delivered "unto order or his assigns", but the contract provided that the responsibility of the carrier should be deemed to cease absolutely after the goods were discharged from the ship. After the goods were discharged from the ship, the carrier's agent released the goods to the consignees without production of the bill of lading. It was held that the exemption clause could not be construed to apply to a deliberate breach by the carrier of his primary obligation under the contract.

### Bailment: acts inconsistent with bailment

## 15-037

⚠ Contracts of bailment for deposit may be controlled in certain situations by the Unfair Contract Terms Act 1977<sup>258</sup> and, as regards consumer contracts, by the Unfair Terms in Consumer Contracts Regulations 1999 or, for contracts made on or after October 1, 2015, the Consumer Rights Act 2015.

⚠ At common law, any act of a bailee which is basically inconsistent with the terms of the bailment, such as the sale, <sup>260</sup> pledge <sup>261</sup> or offering for sale <sup>262</sup> of the goods bailed, puts an end to the bailment and the immediate right to possession of the goods forthwith reverts in the bailor. <sup>263</sup> It is probable that, in the absence of specific authority to do such acts, a court would hold that they were not within the ambit of an exemption clause which simply limited or excluded the bailee's liability for loss of or damage to the goods bailed. <sup>264</sup>

### Storage in wrong place

#### 15-038

Likewise, under a contract of bailment:

"If the bailee uses a place other than the agreed one for storing the goods, or otherwise exposes the goods to risks quite different from those contemplated by the contract, he cannot rely on clauses in the contract designed to protect him against liability within the four corners of the contract, and has only such protection as is afforded him by the common law." <sup>265</sup>

It should be emphasised, however, that this principle is again one of construction only: the terms of the contract may not require storage in a particular place, and may be otherwise sufficient to exclude liability for negligence, so that the bailee will not be liable. <sup>266</sup>

### Misdelivery by bailee

#### 15-039

Upon termination of the bailment, a bailee is normally under an obligation to return the goods to the bailor or his nominee. If he negligently delivers the goods to a person not entitled to receive them, this will not necessarily preclude him from relying on an exemption clause, which may well be construed to cover the misdelivery in question. In *Hollins v J. Davy Ltd*, <sup>267</sup> the claimant garaged his motorcar at the defendants' garage under a contract which excluded liability for misdelivery. An employee of the defendants honestly, but mistakenly, delivered the car to a person who fraudulently represented that he had the claimant's authority to collect it, and the car was lost. It was held that this act was covered by the exemption clause. On the other hand, in *Alexander v Ry Executive*, <sup>268</sup> where the officials in charge of a railway cloakroom permitted an unauthorised person to break open and remove the baggage of a depositor without the production of the cloakroom ticket, it was held that an exemption clause limiting liability for loss or misdelivery could not be relied upon to protect the railway executive. These cases are not easily distinguishable except on the ground that the former involved an honest, though negligent, error, whereas the latter was concerned with a misdelivery which was known to be unauthorised by the terms of the bailment. <sup>269</sup>

### Theft or deliberate damage


#### 15-040

A clause which is sufficient to exclude or restrict a bailee's liability for negligence may not in its terms be sufficient to exclude or restrict liability for theft by the bailee's servants, or damage by reckless or wilful misconduct. <sup>270</sup>

### Sub-contracting


#### 15-041

The terms of a contract of carriage or bailment may expressly or impliedly permit the carrier or bailee to sub-contract his obligations to a third party. <sup>271</sup> If the contract, on its true construction, does not authorise the carrier or bailee to sub-contract, or limits the persons who may properly be employed as sub-contractors, it would appear that the carrier or bailee will not be protected if he exceeds his authority by an exemption clause which is construed to apply only while the goods are in his possession or control. <sup>272</sup>


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- <sup>215.</sup> 1977 Act s.6(1) and see below, para.15-093; Vol.II, para.44-085.
- <sup>216.</sup> See s.26 of the 1977 Act; below, para.15-122; Vol.II, para.44-125.
- <sup>217.</sup> Consumer Rights Act 2015 s.17(1) and (2); s.31(1)(i) on which see below, para.15-095; Vol.II, paras 38-474—38-475 and 38-492 (which explains that the new provisions extend to certain “goods contracts” which do not count as “sales contracts”).
- <sup>218.</sup> *Rowland v Divall* [1923] 2 K.B. 500, 507. See also *Guest* (1961) 77 L.Q.R. 98, 100. Contrast *Hudson* (1957) 20 M.L.R. 236; (1961) 24 M.L.R. 690; and see Coote, *Exception Clauses* (1964), p.61.
- <sup>219.</sup> *Chapman v Speller* (1850) 14 Q.B. 621; *Eichholz v Bannister* (1864) 17 C.B.(N.S.) 708; *Bagueley v Hawley* (1867) L.R. 2 C.P. 625; *Warmings Used Cars v Tucker* [1956] S.A.S.R. 249. See also s.12(3) of the Sale of Goods Act 1979: Vol.II, para.44-085.
- <sup>220.</sup> 1977 Act s.6(2) on which see below, para.15-093; Vol.II, para.44-117; but see 1977 Act s.26 (international sales).
- <sup>221.</sup> Defined in s.12 of the 1977 Act; below, paras 15-073—15-078; Vol.II, para.44-121.
- <sup>222.</sup> 1977 Act s.6(3). See below, para.15-084; Vol.II, para.44-123.
- <sup>223.</sup>  The relevant provisions of the 2015 Act were brought into force so as to apply to consumer contracts made on or after October 1, 2015: see above, para.15-005 and also below, para.38-335.
- <sup>224.</sup> See below, para.15-064.
- <sup>225.</sup> Consumer Rights Act 2015 ss.9—16, 31(1)(a)–(h) on which see below, para.15-095 and Vol.II, paras 38-462—38-470 and 38-492 (which explains that the new provisions extend to certain “goods contracts” which do not count as “sales contracts”).
- <sup>226.</sup> *Shepherd v Kain* (1821) 5 B. & Ald. 240; *Nichol v Godts* (1854) 10 Exch. 191; *Wieler v Schilizzi* (1856) 17 C.B. 619; *Josling v Kingsford* (1863) 13 C.B.(N.S.) 447; *Azémar v Casella* (1867) L.R. 2 C.P. 677; *Bowes v Shand* (1877) 2 App. Cas. 455, 480; *Gorton v Macintosh* [1883] W.N. 103; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *Wimble v Lillico* (1922) 38 T.L.R. 296; *Munro & Co Ltd v Meyer* [1930] 2 K.B. 312; *Green v Arcos Ltd* (1931) 47 T.L.R. 336; *Wilensko v Fenwick* [1938] 3 All E.R. 429; *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All E.R. 724; *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co (No.1)* [1953] 1 W.L.R. 1468, 1470; *Boshali v Allied Commercial Exporters Ltd* (1961) 105 S.J. 987; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 404, 410, 427, 433; Benjamin's Sale of Goods, 9th edn (2014), paras 13-023 et seq.; Vol.II, para.44-127.
- <sup>227.</sup> *Pinnock Bros v Lewis and Peat* [1923] 1 K.B. 690; *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 K.B. 17, 23; *Suisse Atlantique Société d'Armement Maritime v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 404, 413, 432, 433. Contrast *L'Estrange v Graucob Ltd* [1934] 2 K.B. 394. See also *Beck & Co v Szymanowski & Co* [1924] A.C. 43, 48; *Pollock & Co v Macrae* (1922) S.C.(H.L.) 192; and below, para.15-031 n.211 (hire purchase).



This was said to be “not entirely clear” by Rix L.J. in *KG Bominflot mbH & Co v Petroplus Marketing AG* [2010] EWCA Civ 1145, [2011] 1 Lloyd’s Rep. 442 at [48].

- [228.](#) *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 (although, at 813, Lord Bridge said “[i]n my opinion, this is not a ‘peas and beans’ case at all”).
- [229.](#) See Lord Devlin [1966] C.L.J. at 212.
- [230.](#) s.6 and see below, para.15-093; Vol.II, para.39-390.
- [231.](#) See Vol.II, paras 39-316, 39-382.
- [232.](#) Consumer Rights Act 2015 s.75 Sch.4 paras 8 and 9. Under the 2015 Act, a “goods contract” includes a “hire-purchase agreement” (s.3(2)) and the relevant provisions in ss.9–17 apply equally to all goods contracts, with the exception of s.17 which makes special provision for contracts for the hire of goods: s.17: see below, para.15-095 and Vol.II, paras 38-456, 38-462–38-475.
- [233.](#) Consumer Rights Act 2015 ss.9–16, 31(1)(a)–(h) on which see below, para.15-095 and Vol.II, paras 38-462–38-471.
- [234.](#) *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Charterhouse Credit Ltd v Tolly* [1963] 2 Q.B. 683 (which was overruled in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827); *Unity Finance Ltd v Hammond* (1962) 106 S.J. 327; *Suisse Atlantique* [1967] 1 A.C. 361, 402, 404, 425, 433; *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053; *Guarantee Trust of Jersey v Gardner* (1973) 117 S.J. 564 CA. Contrast *Handley v Marston* (1962) 106 S.J. 327; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584.
- [235.](#) See Vol.II, para.39-318. For the implied undertakings of title at common law, see *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Mercantile Union Guarantee Corp v Wheatley* [1938] 1 K.B. 490; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576.
- [236.](#)  See ss.2, 3 and Sch.1 paras 2, 3. See below, paras 15-081, 15-084, 15-118, 15-119. cf. para.15-123. In principle, for contracts made before October 1, 2015 (when the Consumer Rights Act 2015 came into force), a term in a consumer contract for the carriage of goods falls under the controls of the Unfair Terms in Consumer Contracts Regulations 1999 and therefore is in principle subject to the test of unfairness provided by those Regulations. However, this position finds an exception in the case of terms which reflect “mandatory statutory or regulatory provisions” including “provisions or principles of international conventions to which the Member States or the EU are party” and this is significant in the context of international carriage: see 1999 Regulations reg.1(2), Vol.II, paras 38-214 and 38-218. With the coming into force of the Consumer Rights Act 2015, a term in a consumer contract for the carriage of goods falls under the test of unfairness in s.62 of the 2015 Act unless it falls within the same exception as regards “mandatory statutory or regulatory provisions” etc. provided by s.73 of the 2015 Act: see Vol.II, paras 38-357 and 38-358 et seq. However, the provisions in the 2015 Act relating to the exclusion or restriction of liability in “services contracts” do not apply to certain “consumer transport services” (certain rail passenger services, carriage by air, and sea and inland waterway transport, all as specially defined by the 2015 Order art.2) until October 1, 2016: 2015 Order arts 4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2. See further below, para.38-403.
- [237.](#) *L. & N.W. Ry v Neilson* [1922] 2 A.C. 363 (carriage by land); *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350 (carriage by sea). See also *Rotterdamsche Bank NV v B.O.A.C.* [1953] 1 W.L.R. 493, 502–503 (carriage by air); *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 390, 399, 411, 422, 433; Coote, *Exception Clauses* (1964), p.80. See Vol.II, para.36-036
- [238.](#) See *Davis v Garrett* (1830) 6 Bing. 716; *Leduc v Ward* (1888) 20 Q.B.D. 475; *The Dunbeth*

- [1897] P. 133; *Mallett v G.E. Ry* [1899] 1 Q.B. 309; *J. Thorley Ltd v Orchis S.S. Ltd* [1907] 1 K.B. 660; *Internationale Guano, etc. v Macandreir & Co* [1909] 2 K.B. 360; *Gunyon v S.E. & Chatham Ry Companies' Managing Committee* [1915] 2 K.B. 370; *J. Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* [1916] 2 K.B. 783; *London & N.W. Ry v Neilson* [1922] 2 A.C. 263; *US Shipping Board v Bunge y Born* (1925) 31 Com. Cas. 118; *Cunard S.S. Co Ltd v Buerger* [1927] A.C. 1; *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] A.C. 328; *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350.
239. *Suisse Atlantique* [1967] 1 A.C. 361, 442. cf. *Drew Brown v The Orient Trader* [1973] 2 Lloyd's Rep. 174.
240. *L. & N.W. Ry v Neilson* [1922] 2 A.C. 263, 278.
241. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 845. In *Kenya Railways v Antares Pte Ltd* [1987] 1 Lloyd's Rep. 424, 430 and *State Trading Corp of India v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 289, Lloyd L.J. stated that "they should now be assimilated into the ordinary law of contract", but this would be difficult to achieve while it remains the case that the protection of the clause goes in the absence of affirmation. See Baughen [1991] L.M.C.L.Q. 70. cf. *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep. 1.
242. *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep. 410; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 232.
243. *Leduc v Ward* (1888) 20 Q.B.D. 475; *Glynn v Margetson* [1893] A.C. 351; *Potter v Burrell* [1897] 1 Q.B. 97, 104; *V.O.S. of Moscow v Temple S.S. Co Ltd* (1945) 173 L.T. 373, 376; *Suisse Atlantique* [1967] 1 A.C. 361, 393, 412, 427, 430.
244. *Freeman v Taylor* (1831) 8 Bing. 124; *Scaramanga v Stamp* (1880) 5 C.P.D. 295; *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co* [1924] 1 K.B. 575; *Cunard S.S. Co Ltd v Buerger* [1927] A.C. 1. See Vol.II, para.36-037.
245. *Colverd & Co Ltd v Anglo-Overseas Transport Ltd* [1961] 2 Lloyd's Rep. 352. cf. *Marston Excelsior Ltd v Arbuckle Smith & Co Ltd* [1971] 1 Lloyd's Rep. 70.
246. *The Cap Palos* [1921] P. 458 (towage); *Brandt v Liverpool, Brazil and River Plate S.N. Co* [1924] 1 K.B. 575, 597, 601; *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All E.R. 690; affirmed [1944] 1 All E.R. 381n. But see *Suisse Atlantique* [1967] 1 A.C. 361, 435.
247. *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* [1966] 2 Lloyd's Rep. 347.
248. *Royal Exchange Shipping Co Ltd v Dixon* (1886) 12 App. Cas. 11, 16, 19; *J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1082, 1084, 1085. Contrast *Kenya Railways v Antares Co Pte Ltd* [1987] 1 Lloyd's Rep. 424; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep. 1 (Hague-Visby or Hague Rules).
249. *Readhead v Midland Ry* (1869) L.R. 4 Q.B. 379; *J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 Q.B. 495.
250. Such a stipulation must be expressed in clear words and without ambiguity, or it will be insufficient: *Rathbone v Mclver* [1903] 2 K.B. 378; *Elderslie v Borthwick* [1905] A.C. 93; *Nelson v Nelson* [1908] A.C. 16; *Chartered Bank v British India Steam Navigation Co* [1909] A.C. 369, 375; *The Rossetti* [1972] 2 Lloyd's Rep. 116.
251. But under the Carriage of Goods by Sea Act 1924 Sch. art.III(1), the carrier is only bound to exercise due diligence to make the ship seaworthy. See also s.3 of the 1924 Act.
252. *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 260.

- [253.](#) The Europa [1908] P. 84; *Kish v Taylor* [1912] A.C. 604, 617; *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; see below, para.24-041.
- [254.](#) *Tattersall v National S.S. Co Ltd* (1884) 12 Q.B.D. 297. See also *Steel v State Line S.S. Co* (1877) 3 App. Cas. 72.
- [255.](#) *Kish v Taylor* [1912] A.C. 604; *Bank of Australasia v Clan Line* [1916] 1 K.B. 39; *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 257. *Petrofina SA of Brussels v Compagnie Italiana Trasporto Olii Minerali of Genoa* (1937) 63 T.L.R. 650, 653. But see *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger"* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep. 357 (Hague-Visby Rules).
- [256.](#) *Smackman v General Steam Navigation Co* (1908) 98 L.T. 396; *Chartered Bank v British India Steam Navigation Co* [1909] A.C. 369; *Pringle of Scotland v Continental Express* [1962] 2 Lloyd's Rep. 80; *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138; *Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's Rep. 493. See also *Hollins v J. Davy Ltd* [1963] 1 Q.B. 844 (bailment), and Vol.II, paras 36-029—36-030, 36-040.
- [257.](#) [1959] A.C. 576. See also *Alexander v Railway Executive* [1951] 2 K.B. 882 (bailment); *Sydney City Council v West* (1965) 114 C.L.R. 481; *Suisse Atlantique case* [1967] 1 A.C. 361, 411, 434; *Kanematsu (Hong Kong) Ltd v Eurasia Express Line* [1998] 1 C.L.Y. 4404; *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [2000] 1 Lloyd's Rep. 213, 216, 217; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 at [65]–[68], [85]. cf. *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138; *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* (1989) 86 A.L.R. 375; *Sucre Export SA v Northern Shipping Ltd* [1994] 2 Lloyd's Rep. 266; *Pyramid Sound NV v Briesse Schiffahrts GmbH & Co* [1995] 2 Lloyd's Rep. 144.
- [258.](#) 1977 Act ss.2, 3; see below, paras 15-081, 15-084.
- [259.](#)  On which see below, paras 15-083 and 15-087 and Vol.II, paras 38-201 et seq. and 38-334 et seq. On the qualifications on the general temporal application of the relevant provisions of the 2015 Act, see above, para.15-005.
- [260.](#) *Fenn v Bittleston* (1851) 7 Exch. 152.
- [261.](#) *Nyberg v Handelaar* [1892] 2 Q.B. 202.
- [262.](#) *North Central Wagon and Finance Co v Graham* [1950] 2 K.B. 7.
- [263.](#) See Vol.II, paras 33-014, 33-023, 33-034, 33-042, 33-052, 33-080.
- [264.](#) *North Central Wagon and Finance Co v Graham* [1950] 2 K.B. 7, 15; *Alexander v Ry Executive* [1941] 2 K.B. 882, 889; *Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd* [1967] 1 W.L.R. 940, 946.
- [265.](#) *Suisse Atlantique case* [1967] 1 A.C. 361, 412. See also at 392, 424, 434, and *Lilley v Doubleday* (1881) 7 Q.B.D. 510; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192; *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 465; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177, 184; Coote, *Exception Clauses* (1964), p.99.
- [266.](#) *Harris v G.W. Ry* (1876) 1 Q.B.D. 515; *Gibaud v G.E. Ry* [1921] 2 K.B. 426; *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 1 W.L.R. 519.
- [267.](#) [1963] 1 Q.B. 844. See also *Ashby v Tolhurst* [1937] 2 K.B. 242; *B.G. Transport Service Ltd v Marston Motor Co Ltd* [1970] 1 Lloyd's Rep. 371.
- [268.](#) [1951] 2 K.B. 882. See also *Tozer Kemsley & Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 C.L.R. 384; *Sze Hai Tong Bank Ltd v Rambler Cycle*

*Co Ltd* [1959] A.C. 576 (carriage); *Sydney CC v West* (1965) 114 C.L.R. 481; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69.

[269.](#) In *Suisse Atlantique* case [1967] 1 A.C. 361, 435, Lord Wilberforce rejects the view that there is a separate category of “deliberate breaches” (see above, para.15-019) and explains *Alexander v Ry Executive* [1951] 2 K.B. 882 as a case of “total departure” from what was contractually contemplated. cf. *J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 Q.B. 495.

[270.](#) *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69.

[271.](#) See below, para.15-057, Vol.II, para.33-026.

[272.](#) *Davies v Collins* [1945] 1 All E.R. 247; *Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd* [1967] 1 W.L.R. 940; *The Berkshire* [1974] 1 Lloyd’s Rep. 185.

**Chitty on Contracts 32nd Ed.**  
**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 4 - The Terms of Contract**  
**Chapter 15 - Exemption Clauses**  
**Section 5. - Exemption Clauses and Third Parties**

**Application to third parties**

**15-042**

It not infrequently happens that one of the parties to a contract seeks to extend the burden of its exempting provisions to persons who are not in any direct contractual relationship with him, or endeavours to confer the benefit of those provisions on persons outside the contract, e.g. to his employees, agents or sub-contractors. At common law, the general rule is that the doctrine of privity of contract <sup>273</sup> prevents the application of an exemption clause to third parties, although this general rule is subject to a number of exceptions or qualifications. <sup>274</sup> The common law rule has, however, been fundamentally affected by the Contracts (Rights of Third Parties) Act 1999. <sup>275</sup> Exemption clauses are unequivocally brought within the purview of the Act. <sup>276</sup> In any case involving the application of an exemption clause to a third party it will therefore be necessary to consider whether and, if so, to what extent the common law rule has been altered by this statute.

**The general common law rule: burden**

**15-043**


At common law, two persons cannot by contract impose the burden of an exemption clause on one who is not a party to that contract. <sup>277</sup> In *Haseldine v C.A. Daw & Son Ltd*, <sup>278</sup> the owners of a block of flats by contract employed the defendants to maintain a lift in the premises. This contract purported to exempt the defendants from liability for accidents due to their negligence. <sup>279</sup> A third party was injured owing to the negligent repair of the lift by the defendants. It was held that the defendants were not protected against an action in tort by the third party.

**Effect of the 1999 Act: burden**

**15-044**

⚠ The Contracts (Rights of Third Parties) Act 1999 does not alter the common law rule. But where, by virtue of the provisions of the Act, a contract confers upon a third party a “positive” right to enforce a contractual term, that right may be affected by an exemption clause in the contract which excludes or limits the liability of one of the parties for breach of that term. <sup>280</sup> Suppose that A (the promisor) enters into a contract with B (the promisee) which contains a term under which A is to render certain services to C (a third party), but the contract also contains an exemption clause which effectively excludes or limits the liability of A to B for breach of the term. If A fails to perform the services or fails to perform them satisfactorily, the exemption clause will be available as a defence to A in any proceedings brought by C under the Act to enforce his right to those services. The reason is that the Act provides that, where (in reliance on the Act) <sup>281</sup> proceedings for enforcement of a term are brought by a third party, the promisor is to have available to him by way of defence any matter that arises from or in connection with the contract and is relevant to the term, and would have been available to him by way of defence if the proceedings had been brought by the promisee. <sup>282</sup> The question, however, arises



whether A can rely on the exemption clause as against C if, by statute, it would not have been available as a defence to A if the proceedings had been brought by B (for example, because it is caught by s.3 of the Unfair Contract Terms Act 1977 <sup>283</sup> and is unreasonable). Under the 1977 Act, the position appears to be as follows. A cannot rely on an exemption clause which seeks to exclude A's business liability for negligence (whether contractual or in tort) causing death or personal injuries nor on a non-contractual notice which seeks to exclude A's liability in tort for negligence in respect of death or personal injuries. <sup>284</sup> On the other hand, as regards other loss or damage, A can rely on the exemption clause where C is claiming damages for breach of a *contractual* duty to take reasonable care, as s.7(2) of the 1999 Act provides that s.2(2) of the 1977 Act "shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract". However, this statutory disapplication applies only to a claim by C brought under s.1 of the 1999 Act, that is, to enforce a term of the contract and therefore does not cover any claim by C brought in tort for negligence. <sup>285</sup> As a result, in the latter case, an exemption clause in the contract *may* operate as a non-contractual notice (if it is brought reasonably to the attention of C), but if it were able to do so, it could then fall within the controls of s.2(2) of the 1977 Act. <sup>286</sup> On the other hand, if C is seeking to rely against A on a liability arising under the contract between A and B other than for negligence, it would seem that this would not be caught by the controls on exemption clauses provided by s.3 of the 1977 Act (subject to their own conditions) as s.3 applies only "as between contracting parties" and protects only persons dealing on the other's written standard terms or dealing as consumer. <sup>287</sup> Finally, with the coming into force of the Consumer Rights Act 2015 for contracts made on or after October 1, 2015, s.2 of the 1977 Act will no longer apply to terms in consumer contracts nor to "consumer notices" which are instead governed by Pt.2 of the 2015 Act. <sup>288</sup>  For this purpose, s.65 of the 2015 Act applies a bar on the exclusion or restriction on liability in a trader of its liability for death or personal injury resulting from negligence following the model in s.2(1) of the 1977 Act <sup>289</sup> and it is submitted that this bar will equally apply so as to prevent a trader (A) party to a contract from excluding its liabilities against either B or C, whether these liabilities arise for breach of the contract's duties to take reasonable care or for negligence in tort. Secondly, under s.62 of the 2015 Act any attempted exclusion by the trader of its liabilities for negligence for damage or loss other than personal injuries or death (whether by a term in a consumer contract or a "consumer notice") is subject to a test of fairness, failing which the term or notice does not bind the consumer. <sup>290</sup> While this broadly follows s.2(2) of the 1977 Act, the 2015 Act does not amend the 1999 Act so as to include a disapplication provision similar to s.7(2) of the 1999 Act's disapplication of s.2(2) of the 1977 Act. It is clear that the controls of the 2015 Act applicable to "consumer notices" will apply so as to prevent a trader (A) from excluding its liabilities in tort by notice, in a similar way to the position under s.2(2) of the 1977 Act. In the case of the trader's *contractual* liabilities (whether for negligence or otherwise), it would appear that these would not be caught by the control on unfair contract terms in s.62 of the 2015 Act as the latter's effect is that the unfair term does not bind the consumer, meaning, the consumer party to the contract with the trader. <sup>291</sup> As a result, this control does not on its own terms seek to benefit a third party, whether or not that third party is a consumer. <sup>292</sup>

### The general common law rule: benefit

#### 15-045

At common law, two persons cannot by contract confer the benefit of an exemption clause on one who is not a party to that contract. <sup>293</sup> Thus it was held that an employee of the London Passenger Transport Board, who was sued by a passenger for damages in negligence, was not protected by the terms of a pass given to the passenger by the Board which expressly purported to exempt the employees of the Board from all liability <sup>294</sup>; that the master and boatswain of a ship, who were sued by a passenger alleged to have been injured by their negligence, were not protected by a clause inserted in the passenger's ticket by their employers <sup>295</sup>; that stevedores, who had negligently damaged a drum of chemicals while handling it, were not protected by a clause in the bill of lading which exempted the carriers of the goods from liability in excess of a certain pecuniary limit <sup>296</sup>; and that a licensor of technology and know-how was not protected by a clause in a contract between its licensee and the person to whom the technology and know-how was transferred. <sup>297</sup>

### Effect of the 1999 Act: benefit

## 15-046

The Contracts (Rights of Third Parties) Act 1999 enables a third party, subject to certain conditions, to take advantage of an exemption clause inserted in a contract for his benefit. The provisions of the Act are dealt with more fully in Ch.18 of this work. <sup>298</sup> Section 1 of the Act sets out the circumstances in which a person who is not a party to a contract (a “third party”) may in his own right enforce a term of a contract if the contract expressly provides that he may <sup>299</sup> or if the term purports to confer a benefit on him. <sup>300</sup> The Act makes it clear that it applies so as to enable a third party to avail himself of an exclusion or limitation clause as well as to enforce “positive” rights such as the right to payment of money or to the performance of some other obligation. <sup>301</sup> However, the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into. <sup>302</sup> So, for example, if A (the promisor) enters into a contract with B (the promisee) by which A agrees that B’s sub-contractors may avail themselves of a term of the contract which excludes or limits the liability of B to A, and A seeks to hold C, a sub-contractor of B, liable, C may rely on the term as a defence notwithstanding that there is no privity of contract between himself and A. However, s.3(6) of the Act provides:

“Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.”

On a literal reading, this appears to provide that C is able to rely on the exemption clause only if he could have done so had he been party to the contract, but the Law Commissions’ understanding of an almost identical form of words in the draft Bill was broader, as they considered that the phrase “the third party can rely on the exclusion ... clause to the extent that he could have done so had he been a party to the contract” should be understood to “include matters that affect the validity of the exclusion clause as between the contracting parties as well as matters affecting validity or enforceability that relate only to the third party”. <sup>303</sup> The difference between the two interpretations may matter where an exemption clause stipulated as being for the benefit of C could fall within legislative controls which distinguish between the exclusion of liability in a person depending on whether or not they act in the course of business. So, certainly, where B and C both act in the course of business, then under s.3(6) of the 1999 Act the controls on their exclusions of liability under, for example, s.3 of the Unfair Contract Terms Act 1977 would not differ as between them. <sup>304</sup> Moreover, in the (perhaps unlikely) situation where B does not contract in the course of business, but C does so contract, then, on either reading of s.3(6), C could rely on the exemption clause only to the extent to which s.3’s requirement of reasonableness were satisfied since C “may not” enforce the term “if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract” and he could not have done on the literal (and narrower) reading unless it was reasonable. On the other hand, where B contracts in the course of a business but C does not, then on the literal reading, C *could* rely on the term without the need for it to satisfy the test of reasonableness in s.3 of the 1977 Act, as s.3 applies only to “business liability” and if C had been party to the contract, s.3 would not have applied to his liability; whereas on the Law Commissions’ understanding of the wording of s.3(6), C could not rely on the clause any more than could B, as B’s inability to rely on the term would affect C’s position.

### Contracts excluded from the 1999 Act

## 15-047

Certain types of contract are excluded (wholly or partly) from the application of the 1999 Act. <sup>305</sup> In particular these contracts include contracts for the carriage of goods by sea <sup>306</sup> and contracts for the carriage of goods by rail or road, or for the carriage of cargo by air, which are subject to the rules of the appropriate international transport convention. <sup>307</sup> However, it is expressly provided that a third party may in reliance on s.2 of the Act avail himself of an exclusion or limitation of liability in such a contract. <sup>308</sup>

## Common law exceptions preserved

### 15-048

Section 7(1) of the 1999 Act specifically provides that the right conferred on a third party by s.1 “does not affect any right or remedy of a third party that exists or is available apart from this Act”.<sup>309</sup> The provisions of the Act supplement and are in addition to the exceptions to the privity of contract doctrine at common law. If, therefore, apart from the Act, a person could be bound by or take the benefit of an exemption clause in a contract to which he is not a party, then the situation remains unaffected by the Act. In most cases, where a third party claims to be entitled to the benefit of an exemption clause, he will rely on s.1 of the 1999 Act. But where the requirements of that section are not satisfied, for example, where the person claiming the benefit of the clause is not identified or not sufficiently identified in the contract, he can still fall back on a common law exception (if any is applicable) to the privity rule. Also, if it is sought to establish that a person is bound by an exemption clause in a contract to which he is not a party, this can be done only by reference to an exception to the privity rule at common law since the Act does not generally provide for the burden of an exemption clause to be imposed on third parties. It is therefore necessary to consider what exceptions exist to the doctrine of privity of contract apart from the Act.

## Vicarious immunity

### 15-049

The proposition was at one time advanced that, at common law, where a contract contained an exemption clause, any employee or agent who acted under the contract could claim the same exemption as attached to the liability of his employer or principal.<sup>310</sup> This concept of “vicarious immunity” was, however, rejected by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*<sup>311</sup> where it was held that no such principle existed in English law so far as exemption clauses were concerned.

## Agency

### 15-050

At common law a third party may be able to take the benefit of an exemption clause by showing that the party imposing the exemption clause was acting as agent in the transaction so as to bring the third party into a direct contractual relationship with the claimant.<sup>312</sup> This device was first employed in the nineteenth century in relation to railways. It frequently happened that passengers or goods might be transported over a network of independent railway companies before reaching their destination. The question arose whether the exemption clauses inserted in the contract of carriage with the contracting company could be made to extend to the others with whom there seemed to be no direct contractual relationship. The courts held that the contracting company should be treated either as agent for the passenger or consignor to contract with the other companies<sup>313</sup> or as their agent to contract with him.<sup>314</sup> In more modern times clauses are frequently encountered in standard form contracts whereby one contracting party, e.g. a carrier,<sup>315</sup> repairer<sup>316</sup> or building contractor<sup>317</sup> purports to contract on behalf of his employees, agents and the independent contractors employed by him, and to extend to such employees, agents and independent contractors protection from liability. Such clauses are—at least in the context of carriage of goods by sea—usually referred to as “Himalaya clauses”.<sup>318</sup> In *Scruttons Ltd v Midland Silicones Ltd*<sup>319</sup> the House of Lords left open the question whether, at common law, stevedores could be protected by an exemption clause contained in a contract of carriage to which they were not a party if the carrier contracted as agent on their behalf. Lord Reid said<sup>320</sup>:

“I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit

liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.”

## 15-051

These four conditions were held to have been satisfied in *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)*.<sup>321</sup> In that case, the Judicial Committee of the Privy Council, by a majority, held that a stevedore, who had negligently damaged goods in the course of unloading, was protected by a clause in a bill of lading which contained appropriate words exempting him from liability and which was stated to have been made by the carrier acting as agent on his behalf. An action against him by the shipper therefore failed. The Board considered that:

“... the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the [stevedore], made through the carrier as agent. This became a full contract when the [stevedore] performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the [stevedore] should have the benefit of the exemptions and limitations contained in the bill of lading.”<sup>322</sup>

This reasoning is, however, somewhat artificial, and the courts of certain Commonwealth jurisdictions initially showed a reluctance to follow the *Eurymedon* case or a readiness to find grounds for distinguishing it.<sup>323</sup> But it has subsequently been endorsed and justified on grounds of policy: that established commercial practice now requires the stevedore, in normal circumstances, to enjoy the benefit of contractual provisions in the bill of lading.<sup>324</sup> In *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)*,<sup>325</sup> after goods had been unloaded from a ship and placed in a shed on the wharf under the stevedore's control, a servant of the stevedore negligently delivered the goods to thieves without production of the bill of lading. The High Court of Australia held that the stevedore was not protected by a clause in substantially the same form as that considered in the *Eurymedon* case, since he was no longer acting on behalf of the carrier under the bill of lading. The carrier's responsibilities and immunities under the bill of lading had ceased when the goods were discharged from the ship. On appeal, the Judicial Committee again held that the stevedore was protected on the ground that, whereas the carrier's responsibility as a carrier terminated as soon as the goods left the ship's tackle, his responsibility as bailee under the bill of lading continued until the consignee took delivery of the goods. During this period, both the carrier and the stevedore were entitled to the protection conferred by the bill.

## 15-052

“Himalaya clauses” have therefore attained a degree of general acceptance.<sup>326</sup> The technical nature of the *Eurymedon* principle is, however, “all too apparent”.<sup>327</sup> In some cases, the courts have rejected its application on the ground that they were compelled to do so by established principles of the law of contract or of agency. Thus, the benefit of an exemption clause has been held not to extend to a third party because the contract did not make it clear that the third party was intended to be protected or that the contracting party contracted as agent for the third party as well as on his own behalf,<sup>328</sup> or because there was no act of the third party which could be identified as constituting acceptance of the offer made to him through the agent,<sup>329</sup> or because no agency could be established since the third party was at all relevant times unascertained,<sup>330</sup> or because the negligence of the third party in respect of which exemption was sought was collateral and not related to the performance of his duties under the contract.<sup>331</sup> Since the enactment of the Contracts (Rights of Third Parties) Act 1999 a third party is more likely now to rely simply and directly on the provisions of the Act than on the *Eurymedon* principle and so will be absolved from having to establish the more esoteric requirements, e.g.

authority and consideration, <sup>332</sup> of that principle.

## Trust

### 15-053

Exemption clauses are sometimes found which provide that a party contracts, for the purpose of the clause, as trustee on behalf of third parties, e.g. associated companies, or his employees or sub-contractors. It has been doubted whether a trust of the benefit of an exemption clause would be effective, <sup>333</sup> but it is possible that such a trust would be upheld at common law (the contracting party acting as a bare trustee) provided that the identity of the beneficiaries of the trust was sufficiently certain.

## Agreement not to sue, etc

### 15-054

An exemption clause which purports to negative the liability of a third party to a contract cannot be construed as a promise not to sue that third party. <sup>334</sup> However, the contract may contain an express or implied provision whereby one party promises the other that he will not institute legal proceedings against a third party, e.g. any employee or sub-contractor of the promisee. <sup>335</sup> In such a situation, the third party cannot, at common law, rely on the promise as a defence to an action brought against him. But the promisee could, if he has a sufficient interest in the enforcement of the promise, apply for an order or claim a declaration that the action be stayed or dismissed. <sup>336</sup>

## No voluntary assumption of risk

### 15-055

An exemption clause which purports to protect a third party cannot ordinarily be construed as a voluntary assumption of risk by the promisor. <sup>337</sup>

## Occupier's liability

### 15-056

The Occupiers' Liability Act 1957 <sup>338</sup> provides that where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provisions of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty. This rule applies to regulate the obligations (qua occupier) of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and to the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors. <sup>339</sup>

## Bailment <sup>340</sup>

### 15-057

A carrier, warehouseman or other bailee of goods may sub-contract to another performance of the contract between himself and the bailor and for that purpose deliver possession of the goods to the sub-contractor as subbailee. If the sub-bailee has sufficient notice that the original bailor is interested in the goods, then he is under a duty to the original bailor, as well as to the bailee, to use reasonable



care to safeguard the goods while in his possession and he will be liable to the original bailor if the goods are lost or damaged <sup>341</sup> through his negligence notwithstanding the absence of any contract between them. <sup>342</sup> Since the sub-bailee is not a party to the contract between the bailee and the original bailor, he cannot rely upon an exemption clause contained in that contract, <sup>343</sup> unless the bailee contracted as agent on his behalf. <sup>344</sup> Nor, in principle, will the original bailor be bound by an exemption clause contained in the sub-contract between the bailee and sub-bailee to which the original bailor is not a party, <sup>345</sup> unless the bailee entered into the sub-contract as his agent. <sup>346</sup> However, it has been held that the original bailor is bound by the terms of the sub-bailment if he has expressly or impliedly consented to the bailee making a sub-bailment containing those terms: the original bailor cannot, despite the lack of any contractual relationship, disregard those terms against the sub-bailee. <sup>347</sup> Thus an exemption clause contained in the sub-contract which excludes or restricts the liability of the sub-bailee may protect the sub-bailee in an action against him by the original bailor. This principle was taken one step further, by Donaldson J. in *Johnson Matthey & Co Ltd v Constantine Terminals Ltd*, <sup>348</sup> who stated that the original bailor might be bound by an exemption clause in the sub-contract irrespective of whether the bailee was authorised to sub-bail the goods on terms to the subbailee. But the Judicial Committee of the Privy Council has subsequently held <sup>349</sup> that the sub-bailee can invoke the terms of a sub-bailment under which he receives the goods from the bailee as qualifying or otherwise affecting his responsibility to the original bailor only if the original bailor consented to them.

## 15-058

On the other hand, the courts have been reluctant to extend these principles to cases where the relationship between the claimant and the defendant who seeks to rely on the exemption clause is not one of bailor and bailee or sub-bailee. <sup>350</sup> So, for example, if it is agreed between the buyer and seller of goods that the seller will enter into a contract for the carriage of the goods to the buyer and for that purpose will bail the goods to a carrier on terms, then, if the goods are lost or damaged by the negligence of the carrier, the buyer will not be bound by an exemption clause contained in the contract of carriage to which he is not a party <sup>351</sup> unless, in view of the nature and terms of the sales contract, the seller is taken to have bailed the goods to the carrier on behalf of the buyer so that the carrier is in possession of the goods as his bailee or sub-bailee. <sup>352</sup> In the absence of any such relationship between them, the carrier will have to establish an implied or collateral contract between himself and the buyer <sup>353</sup> or that the seller's rights of suit under the contract of carriage have been transferred to and vested in the buyer <sup>354</sup> or that he has attorned to the buyer by acknowledging that he holds the goods as bailee for the buyer on the terms of the contract of carriage. <sup>355</sup>

## Building and construction contracts

## 15-059

Where a contractor is employed to carry out building or construction works or works of repair, it may be agreed or understood that the contractor ("the main contractor") will engage a sub-contractor or sub-contractors to execute part of the works. Since there is normally no privity of contract between the employer and the sub-contractors, any action brought by the employer against a sub-contractor in respect of loss or damage caused to him by the sub-contractor must be brought in tort for negligence. As a general rule, no such action will lie in respect of defects in the works which the sub-contractor is engaged to carry out. <sup>356</sup> But the employer is entitled to claim against a sub-contractor damages in tort for negligence if the sub-contractor negligently causes physical damage to the existing structure or to property other than the thing supplied by him. <sup>357</sup> The question, however, arises whether, in such an action, the sub-contractor can rely on an exemption clause contained in: (a) the main contract between the employer and the main contractor; or (b) his own sub-contract with the main contractor. The initial contractual arrangements between the employer, the main contractor and the sub-contractor may be such as to give rise to a contract between the employer and the sub-contractor. <sup>358</sup> But, even if no such direct contractual relationship exists between them, the subcontractor may nevertheless be entitled to rely upon an exemption clause contained in the main contract between the employer and the main contractor. This may be justified either on the ground that the duty in tort owed by the subcontractor to the employer is negated or qualified by the clause, <sup>359</sup> or on the ground that, if the clause places a risk in whole or in part on the employer, the circumstances show that the sub-contractor contracted with the main contractor on a like basis. <sup>360</sup>

## 15-060

Whether the sub-contractor is also entitled to rely upon an exemption clause in his sub-contract with the main contractor is more problematical. Prima facie the employer would not be bound by a clause in a contract to which he was not a party.<sup>361</sup> But, again, the contractual arrangements between the employer, main contractor and sub-contractor may be such as to show that the employer knew of and consented to the clause as, for example, where the sub-contractor is a nominated sub-contractor and the employer is aware of and accepts the terms on which the sub-contractor agrees to carry out the works. In such a case it is submitted that the employer could be held to be bound by the exemption clause.<sup>362</sup>

### Effect of the 1999 Act

## 15-061

The common law exceptions referred to above in relation to bailment and building and construction contracts operate independently of and are not affected by the limitations contained in the Contracts (Rights of Third Parties) Act 1999.<sup>363</sup> In particular, for example, where a sub-bailee or sub-contractor seeks the protection of an exemption clause in a contract to which he is not a party, he does not have to show that he is identified in the contract as the beneficiary of the clause by name, class, or description as he would in a case where he relies on s.1 of the 1999 Act.

<sup>273.</sup> See above, para.4-037, below, Ch.18.

<sup>274.</sup> See below, para.15-048.

<sup>275.</sup> The 1999 Act applies to contracts made after May 11, 2000; s.10(2).

<sup>276.</sup> 1999 Act s.1(b).

<sup>277.</sup> *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785, 817. See also the cases cited in paras 15-059, 15-060, below (building contracts) and paras 15-057—15-058, below (carriage of goods and bailment). Contrast *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402, which was said in *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446, 471 to be supportable only on the ground of an implied contract between the party seeking to rely on the exemption and the third party: see also *The Kapetan Markos (No.2)* [1987] 2 Lloyd's Rep. 321, 331.

<sup>278.</sup> [1941] 2 K.B. 343. Contrast *Fosbrooke-Hobbes v Airwork Ltd* [1937] 1 All E.R. 108, which is explicable (if at all) only on the ground that the contracting party contracted as agent for his guests; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450, 461 (agency for wife).

<sup>279.</sup> [1941] 2 K.B. 343, 379.

<sup>280.</sup> See below, paras 18-090 et seq.

<sup>281.</sup> 1999 Act s.1; see below, para.15-046.

<sup>282.</sup> 1999 Act s.3(2).

<sup>283.</sup> Below, para.15-084.

<sup>284.</sup> This follows from the control on contract terms and non-contractual notices in s.2(1) of the 1977 Act, which is not qualified or dis-applied by the 1999 Act. This reflects a choice of policy: Law Com. No.242, 1996, para.13.12 and see below, para.18-123.

- [285.](#) Law Com. No.242, 1996, para.13.12.
- [286.](#) If this analysis is correct, then it would appear that the (non-contractual) notice should be assessed for its reasonableness as against C rather than as against B.
- [287.](#) See 1999 Act ss.1(4), 7(4) and see Law Com. No.242, 1996, para.13.10.
- [288.](#) **!** 2015 Act s.61 defines “consumer contract” and “consumer notice” for these purposes: see below, para.15-064 and Vol.II, paras 38-334 et seq. especially at 38-355 and 38-356. The disapplication of s.2 will take effect by the insertion of a new s.2(4) into the 1977 Act: 2015 Act s.75, Sch.4 para.4. On the qualifications on the date of the coming into force of the relevant provisions of the 2015 Act in the case of “consumer transport services” see above, para.15-005.
- [289.](#) In particular, the scope of the controls imposed by s.65 is restricted by s.66: see below, para.15-086 and Vol.II, para.38-377.
- [290.](#) 2015 Act s.62 and see Vol.II, paras 38-358—38-369 (terms) and 38-374 and 38-375 (notices).
- [291.](#) 2015 Act s.62(1).
- [292.](#) A similar result was foreseen by the Law Commissions Law Com. No.242 1996 para.13.10, point (x) in relation to the Unfair Terms in Consumer Contracts Regulations 1994.
- [293.](#) Contrast *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 D.L.R. (4th) 261 (Supreme Court of Canada); noted (1993) 109 L.Q.R. 349; (1993) 56 M.L.R. 722.
- [294.](#) *Cosgrove v Horsfall* (1945) 62 T.L.R. 140. See also *Genys v Matthews* [1966] 1 W.L.R. 758, and below, para.15-055; cf. *Gore v Van der Lann* [1967] 2 Q.B. 31.
- [295.](#) *Adler v Dickson* [1955] 1 Q.B. 158.
- [296.](#) *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446. See also *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd’s Rep. 346; *Krawill Machinery Corp v Robert C. Head & Co Ltd* [1959] 1 Lloyd’s Rep. 305; *Canadian General Electric Co Ltd v The “Lake Bosomtwe”* [1970] 2 Lloyd’s Rep. 80; *Herrick v Leonard and Dingley Ltd* [1975] 2 N.Z.L.R. 566; *The Suleyman Stalskiy* [1976] 2 Lloyd’s Rep. 609; *Lummus v East African Harbours Corp* [1978] 1 Lloyd’s Rep. 317; *Circle Sales & Import Ltd v The Tarantel* [1978] 1 F.C. 269 (Canada); *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd’s Rep. 155. Contrast *Cabot Corp v John W. McGrath Corp* [1971] 2 Lloyd’s Rep. 351; *The Mormaclynx* [1971] 2 Lloyd’s Rep. 476; *Cable & Montanari Inc v American Export Isbrandtsen Lines Ltd* [1968] 1 Lloyd’s Rep. 260 (affirmed 386 F. 2d 839; (1967) cert. denied (1968) 390 U.S. 1013);
- [297.](#) *Deepak Fertilisers and Petrochemicals Corp v ICI* [1998] 2 Lloyd’s Rep. 139, 163, [1999] 1 Lloyd’s Rep. 387. *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154; *Tessler Bros (B.C.) Ltd v Itaipacific Line and Matson Terminals Inc* [1975] 1 Lloyd’s Rep. 210; *Eisen und Metall A.G. v Ceres Stevedoring Co Ltd* [1977] 1 Lloyd’s Rep. 665; *Miles International Corp v Federal Commerce & Navigation Co* [1978] 1 Lloyd’s Rep. 285; *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 W.L.R. 138; *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd’s Rep. 333; *The Pioneer Container* [1994] 2 A.C. 324; *The Mahkutai* [1996] A.C. 650, 664–665; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 (see also the principles relating to sub-bailments discussed below, para.15-057). See now art.IV bis (2) of the Hague-Visby Rules contained in the Schedule to the Carriage of Goods by Sea Act 1971.
- [298.](#) Below, paras 18-090—18-125.
- [299.](#) s.1(1)(a).
- [300.](#) s.1(1)(b), subject to s.1(2) (contrary intention).

- [301.](#) s.1(6).
- [302.](#) s.1(3), see below, para.18-097.
- [303.](#) Law Com. No.242 1996 para.10.22.
- [304.](#) Similarly, where A is a consumer within the meaning of the 1999 Regulations or the Consumer Rights Act 2015, then C will be able to benefit from an exclusion of liability in B only to the extent that he could have done if he (C) had been party to the contract and this would depend on whether he was acting in the course of business: on the controls on terms (including exemption clauses) in the 1999 Regulations and the 2015 Act see Vol.II, paras 38-201 et seq. and 38-334 respectively.
- [305.](#) 1999 Act s.6; see below, paras 18-116—18-118.
- [306.](#) Defined in s.6(6) and (7) of the 1999 Act. See Benjamin's Sale of Goods, 9th edn (2014), Ch.18.
- [307.](#) Defined in s.6(8) of the 1999 Act.
- [308.](#) 1999 Act s.6(5).
- [309.](#) See below, para.18-119.
- [310.](#) *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522, 534, 548, 565; *Mersey Shipping and Transport Co Ltd v Rea Ltd* (1925) 21 L.L. Rep. 375, 378; *Gilbert Stokes and Kerr Proprietary Ltd v Dalgety & Co Ltd* (1948) 81 L.L. Rep. 337; *Waters Trading Co Ltd v Dalgety & Co Ltd* [1951] 2 Lloyd's Rep. 385.
- [311.](#) [1962] A.C. 446.
- [312.](#) *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522, 534; *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446, 474, 480.
- [313.](#) *Hall v N.E. Ry* (1875) L.R. 10 Q.B. 437, 442.
- [314.](#) *Hall v N.E. Ry* (1875) L.R. 10 Q.B. 437, 443; *Barrett v G.N. Ry* (1904) 20 T.L.R. 175.
- [315.](#) See Vol.II, para.36-046.
- [316.](#) *Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep. 211, 217.
- [317.](#) *Southern Water Authority v Carey* [1985] 2 All E.R. 1077.
- [318.](#) After the name of the cruise liner in *Adler v Dickson* [1955] 1 Q.B. 158.
- [319.](#) [1962] A.C. 446.
- [320.](#) [1962] A.C. 446, 474.
- [321.](#) [1975] A.C. 154 (noted (1974) 90 L.Q.R. 301).
- [322.](#) *The Eurymedon* [1975] A.C. 154, 167–168; cf. *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [163], [197].
- [323.](#) *Herrick v Leonard and Dingley Ltd* [1975] 2 N.Z.L.R. 566; *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609; *Lummus v East African Harbours Corp* [1978] 1 Lloyd's Rep. 317; *Circle Sales and Import Ltd v The Tarantel* [1978] 1 F.C. 269 (Canada). See Palmer and Rose (1976) 39 M.L.R. 466.

- [324.](#) *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 143. See also *The Mahkutai* [1996] A.C. 650, 664; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [56].
- [325.](#) [1979] 1 Lloyd's Rep. 298, [1981] 1 W.L.R. 138. See also Reynolds (1979) 95 L.Q.R. 183; Reynolds (1980) 96 L.Q.R. 506; Coote [1981] C.L.J. 13; Clarke [1981] C.L.J. 17; Rose (1981) 44 M.L.R. 336, and the cases cited in the latter half of n.273 para.15-045, above.
- [326.](#) *The Mahkutai* [1996] A.C. 650, 664–665; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715; *The Borvigilant* [2003] EWCA Civ 935 at [34], [51], [93], [140]–[162], [192], [2003] 2 Lloyd's Rep. 520.
- [327.](#) *The Mahkutai* [1996] A.C. 650, 664.
- [328.](#) *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep. 578, 585; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715; cf. *The Borvigilant* [2003] EWCA Civ 935 at [17], [18], [33].
- [329.](#) *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 154.
- [330.](#) *Southern Water Authority v Carey* [1985] 2 All E.R. 1077. See also *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609.
- [331.](#) *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 154. cf. *Lotus Cars Ltd v Southampton Cargo Handling Plc* [2000] 2 Lloyd's Rep. 532, 543.
- [332.](#) See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [149], [163], [197].
- [333.](#) *Southern Water Authority v Carey*, above. See also *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1971] 2 Lloyd's Rep. 389, 408 (at first instance); *Deepak Fertilisers and Petrochemicals Corp v ICI* [1998] 2 Lloyd's Rep. 139, 163, [1999] 1 Lloyd's Rep. 387, and below, para.18-088.
- [334.](#) *Gore v Van der Lann* [1967] 2 Q.B. 31; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [24], [55], [100], [145], [195].
- [335.](#) Such a clause is not subject to ss.2 or 10 of the Unfair Contract Terms Act 1977 (below, para.15-081 and 15-128): *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438. On the other hand, where A (a consumer) in a consumer contract with B (a trader) agrees not to sue C (a third party, for example, a manufacturer) then the term in which this agreement is contained may fall within the controls on unfair terms in consumer contracts in the Unfair Terms in Consumer Contracts Regulations 1999 or those provided by the Consumer Rights Act 2015 Pt 2 subject, in either case, to their respective conditions: on these controls see Vol.II, para.38-201 et seq. and 38-334 respectively.
- [336.](#) *Snelling v John G. Snelling Ltd* [1973] Q.B. 87; *Nippon Yusen Kaisha v International Import and Export Co Ltd* [1978] 1 Lloyd's Rep. 206; *European Asian Bank A.G. v Punjab & Sind Bank* [1982] 2 Lloyd's Rep. 356, 359; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387, 400–402; *Whitesea Shipping and Trading Corp v El Paso Rio Clara Ltda (the "Marielle Bolten")* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep. 648. cf. *Gore v Van der Lann* [1967] 2 Q.B. 31; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438. See below, para.18-072.
- [337.](#) *Cosgrove v Horsfall* (1945) 62 T.L.R. 140; *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1975] A.C. 154, 168, 173, 182; Unfair Contract Terms Act 1977 s.2(3); Consumer Rights Act 2015 s.65(2). But see above, para.15-017. Compare also *Norwich City Council v Harvey* [1989] 1 W.L.R. 828, see below, paras 15-059 and 15-060.



338. s.3(1).
339. 1957 Act s.1(3).
340. See Vol.II, paras 33-026—33-031 (bailment); para.36-046 (carriage). Palmer, *Bailment*, 2nd edn (1991), pp.1295, 1631; Palmer and Murdoch (1983) 46 M.L.R. 73; Palmer [1989] L.M.C.L.Q. 466; Adams and Brownsword (1990) 10 L.S. 12; Swadling [1993] L.M.C.L.Q. 9; Reynolds (1995) 111 L.Q.R., 8; Palmer and McKendrick, *Interests in Goods*, 2nd edn (1998).
341. Contrast *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep. 239; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep. 410, 416; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311.
342. *Meux v G.E. Ry* [1895] 2 Q.B. 387; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716; *Learoyd Bros & Co v Pope and Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep. 142; *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396; *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 W.L.R. 1262; *James Buchanan & Co Ltd v Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep. 535; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 406; *C. Davis Metal Brokers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215, 220; *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570; *China Pacific SA v Food Corp of India* [1982] A.C. 939, 957; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.) (No.2)* [1987] 2 Lloyd's Rep. 321, 332, 340; *The Pioneer Container* [1994] 2 A.C. 324, 341; *Spectra International Plc v HayesOak Ltd* [1997] 1 Lloyd's Rep. 153, [1998] 1 Lloyd's Rep. 162; *Lotus Cars v Southampton Cargo Handling Plc* [2000] 2 Lloyd's Rep. 532; *East Westcorp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 at [25]; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [132]–[138]; cf. *Targe Towing Ltd v Marine Blast Ltd* [2004] EWCA Civ 346, [2004] 1 Lloyd's Rep. 721 at [28].
343. *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396.
344. *The Mahkutai* [1996] A.C. 650, 667–668. See above, para.15-050.
345. *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Learoyd Bros & Co v Pope and Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep. 142; *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396; *C. Davis Metal Brokers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422.
346. *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 731, 741; and see above, para.15-050 n.291. cf. *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570.
347. *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522, 564; *The Kite* (1933) 46 Ll.L. Rep. 83; *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 729–730, 741; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215, 220; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.) (No.2)* [1987] 2 Lloyd's Rep. 321, 332, 340; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, 405; *Dresser (UK) Ltd v Falcongate Freight Management Ltd* [1992] Q.B. 502, 511; *The Pioneer Container* [1994] 2 A.C. 324; *Spectra International Plc v HayesOak Ltd* [1997] 1 Lloyd's Rep. 153, [1998] 1 Lloyd's Rep. 162; *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep. 48; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [132]–[138]; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] 2 Lloyd's Rep. 172 at [53]–[66]; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 at [30].
348. [1976] 2 Lloyd's Rep. 215. See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 168; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc*

(*The Captain Gregos*) [1990] 2 Lloyd's Rep. 395, 406; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311, 327. Donaldson J. (at 222) left open the question whether a sub-bailee who himself damages the goods would also be able to rely upon the terms of the subcontract.

- 349. *The Pioneer Container* [1994] 2 A.C. 324.
- 350. *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79, 98; *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 818; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, at 404, 405; *The Mahkutai* [1996] A.C. 650.
- 351. *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 818; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, 405.
- 352. *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.) (No.2)* [1987] 2 Lloyd's Rep. 321; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [36]–[41], [64], [89], [92], [139]; *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 at [47]; Benjamin's Sale of Goods, 9th edn (2014), paras 18–091, 18–189–18–190.
- 353. *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395 (BP claim). See also the "*Brandt v Liverpool*" contract (*Brandt v Liverpool etc. Steam Navigation Co* [1924] 1 K.B. 575) and Benjamin's Sale of Goods, 9th edn (2014) at paras 18–179–18–188. cf. *Borealis AB v Stargas Ltd (The Berge Sisar)* [2002] 2 A.C. 205.
- 354. By statute under the Bills of Lading Act 1855 or (now) under the Carriage of Goods by Sea Act 1992 (see Benjamin's Sale of Goods at paras 18–142–18–162).
- 355. *Cremer v General Carriers SA* [1974] 1 W.L.R. 341; and see Vol.II, para.33-030. Contrast *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311; *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep. 48. See Benjamin's Sale of Goods at para.18–092.
- 356. *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177; *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] Q.B. 71; *Murphy v Brentwood DC* [1991] 1 A.C. 398; *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 A.C. 499; *Warner v Basildon Development Corp* (1991) 7 Const. L.J. 146; *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 598. See also *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206. Contrast *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520 (which must now be regarded as an exceptional, if not heretical, case) and Vol.II, paras 37-092, 37-173–37-177.
- 357. *Norwich City Council v Harvey* [1989] 1 W.L.R. 828; *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 598. For the problem of "complex structures", see *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, and *Murphy v Brentwood DC* [1991] 1 A.C. 398.
- 358. *Welsh Health Technical Services Organisation v Haden Young* (1987) 37 Build. L.R. 130.
- 359. *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, 546; *Southern Water Authority v Duvivier* [1984] C.I.L.L. 90; *Southern Water Authority v Carey* [1985] 2 All E.R. 1077; *Welsh Health Technical Services Organisation v Haden Young* (1987) 37 Build. L.R. 130; *Norwich CC v Harvey* [1989] 1 W.L.R. 828; *Pacific Associates Inc v Baxter* [1990] 1 Q.B. 993, 1022, 1033, 1038. Contrast *National Trust v Haden Young Ltd* (1995) 72 Build. L.R. 1; *Precis (521) Plc v William Mercer Ltd* [2005] EWCA Civ 114, [2005] P.N.L.R. 28.
- 360. *Norwich City Council v Harvey* [1989] 1 W.L.R. 828. cf. *National Trust v Haden Young Ltd* (1995) 72 Build. L.R. 1.

- [361.](#) *Rumbelows Ltd v AMK* [1980] 19 *Build. L.R.* 33; *Twins Transport Ltd v Patrick and Brocklehurst* (1983) 25 *Build. L.R.* 65. See also *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 817; *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 782, 785; Vol.II, paras 37-173—37-177.
- [362.](#) *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 729; *Rumbelows Ltd v AMK* [1980] 19 *Build. L.R.* 33, 49. See also *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, 534; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507, 525.
- [363.](#) s.1; see above, para.15-046.

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**(i) - Overview**

**The Unfair Contract Terms Act as enacted**

**15-062**

As enacted, the Unfair Contract Terms Act 1977 (the “1977 Act”) <sup>364</sup> derived substantially from recommendations made by the Law Commission and the Scottish Law Commission in their Second Report on Exemption Clauses. <sup>365</sup> Very broadly, the Act subjected exemption clauses and certain related clauses, <sup>366</sup> and non-contractual notices disclaiming liability to a series of controls, some of these controls rendering a contract term or notice ineffective without more, some rendering them ineffective only having failed a test of reasonableness. While generally restricted to exclusion clauses and notices seeking to exclude or to limit “business liability”, <sup>367</sup> the Act protected a range of persons, sometimes protecting persons generally (as in the case of exclusions of business liability for negligence causing death or personal injury <sup>368</sup>), sometimes protecting persons generally subject to the condition that they dealt “on the other’s written standard terms of business” (thereby including other traders), <sup>369</sup> and sometimes protecting persons “dealing as consumer” (which was held to include a business in certain circumstances). <sup>370</sup>

**First implementation of the European Directive on Unfair Terms in Consumer Contracts 1993**

**15-063**

This directive requires the UK to subject most contract terms in consumer contracts that have not been “individually negotiated” to a test of fairness and, in the case of written terms, to a requirement of transparency. <sup>371</sup> As a result, there was clearly considerable substantive overlap between the existing legislative controls in the 1977 Act and the new controls required by the 1993 Directive. Despite this overlap, the UK implemented the 1993 Directive by standalone statutory instrument, first in 1994, and then by the Unfair Terms in Consumer Contracts Regulations 1999 (the “1999 Regulations”). The complexity which these distinct but overlapping sets of legislative controls attracted criticism and recommendations for legislative reform by the Law Commissions. <sup>372</sup> Their proposals recommended the creation of a unified legislative regime for the control of unfair terms in consumer contracts, putting together the controls provided by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999; preserving the protection given by the Unfair Contract Terms Act 1977 in business contracts; and extending existing protection against unfair contract terms for consumers to small businesses.

**Consumer Rights Act 2015**

**15-064**

❗ However, the legislative strategy adopted by the Consumer Rights Act 2015 (the “2015 Act”) differs considerably from that recommended by the Law Commissions. Instead of placing the legislative controls of the 1977 Act and the 1999 Regulations in a single Act, the 2015 Act instead creates a new, dedicated regime for the control of unfair terms in consumer contracts and unfair “consumer notices” as well as making special provision for the control of the exclusion or limitation of liabilities arising under a series of new statutory terms “treated as included” in consumer “goods contracts”, “digital content contracts” and “services contracts”.<sup>373</sup> These new controls set out by the 2015 Act are discussed by Vol.II, Ch.38 of the present work.<sup>374</sup> ❗ However, apart from revoking the 1999 Regulations, the correlative of this new set of controls for the benefit of consumers is that the 2015 Act amended the 1977 Act so that it no longer applies for the benefit of “consumers” (as the 2015 Act defines them<sup>375</sup>) and, in so doing, abolishes the protections provided by the 1977 Act for those “dealing as consumer”.<sup>376</sup> As a result, on the coming into force of the 2015 Act, there are two principle legislative controls on unfair contract terms and notices: the general regime in the 1977 Act controlling exemption clauses and closely related terms; and the consumer regime in the 2015 Act controlling a much wider range of contract terms, and combining (with some changes) the controls earlier provided by the 1999 Regulations and special treatments of certain categories of exemption clause similar to those previously provided by the 1977 Act.

#### The arrangement of this section: “old law” and “new law” under the 1977 Act

### 15-065

As earlier noted, the controls on unfair terms in consumer contracts in the 1999 Regulations and the 2015 Act’s new controls on unfair terms are both discussed in Vol.II, Ch.38 of the present work in the context of other legislation governing consumer contracts. This section will discuss the 1977 Act, explaining the law (the “old law”) as it is immediately before the coming into force of the relevant provisions of the 2015 Act and will also set out (as the “new law”) in relation to each element of the 1977 Act how the law will change on the coming into force of the 2015 Act. Where a proposition relating to the 1977 Act remains accurate both before and after the coming into force of the 2015 Act, then it is stated without further qualification.

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<sup>364.</sup> See Thompson, *Unfair Contract Terms Act 1977*; Rogers and Clarke, *The Unfair Contract Terms Act 1977*; Lawson, *Exclusion Clauses and Unfair Contract Terms*, 11th edn (2014); Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.7–050; Benjamin’s *Sale of Goods*, 9th edn (2014), paras 13–064 et seq.; Coote (1978) 41 M.L.R. 312; Adams (1978) 41 M.L.R. 703; Sealy [1978] C.L.J. 15; Reynolds [1978] L.M.C.L.Q. 201; Palmer and Yates [1981] C.L.J. 108; Adams and Brownsword (1988) 104 L.Q.R. 94; Peel (1993) 56 M.L.R. 98; Brown and Chandler (1993) 109 L.Q.R. 41; Adams (1994) 57 M.L.R. 960.

<sup>365.</sup> Law Com. No.69, Scot. Law Com. No.39 (1975). Pt I of the Act applies only to England and Wales and Northern Ireland; Pt II applies only to Scotland; and Pt III applies to the whole of the United Kingdom.

<sup>366.</sup> The main provisions apply to contract terms which “exclude or restrict liability” as defined by s.13: s.2, 3(2)(a); s.6 and s.7: below, paras 15-069—15-071. However, s.3(2)(b) applies to clauses which do not fall within exclusions or restrictions of liability as so defined; s.4 applies to indemnity clauses; and s.10 applies to a contract term “prejudicing or taking away rights”: see below, paras 15-070, 15-088 and 15-128 respectively. Moreover, s.2 of the Act also applies to the exclusion of liability by “a notice given to persons generally or to particular persons”: below, para.15-081.

<sup>367.</sup> 1977 Act s.1(3) (noting the exception stated in s.6(4)) on these see below, paras 15-072 and 15-093.

<sup>368.</sup> 1977 Act s.2 (below, para.15-081). See also s.6(1), 7(3A) and (4) below, paras



15-093—15-094.


[369.](#) 1977 Act s.3(1) below, para.15-085.

[370.](#) 1977 Act s.3(1), below, para.15-085; s.4 (below, para.15-088); s.6(2) (below, para.15-093), s.7(2) (below, para.15-094). On the interpretation of “dealing as consumer” see below, paras 15-073—15-078.

[371.](#) On the details of these controls, see Vol.II, paras 38-199 et seq.

[372.](#) Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199, 2005).

[373.](#) 2015 Act ss.31, 47 and 57 and Pt 2.

[374.](#)  The relevant provisions of Pts 1 and 2 of the 2015 Act came into force (with certain qualifications in relation to “consumer transport services”) on October 1, 2015, on which see above, para.15-005 and below, para.38-335.

[375.](#) 2015 Act s.2(3)–(6); s.76(2) on which see Vol.II, paras 38-353—38-354 and the discussion at paras 38-030 et seq.

[376.](#) 2015 Act s.75, Sch.4 paras 5(2), 6–7, 8(3), 9(3) and 12.

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**Scope of the 1977 Act**

**15-066**

The title of the Act was always somewhat misleading. In the first place, the control imposed by the Act is not limited to contract terms, but extends to non-contractual notices which exclude or restrict liability in tort. <sup>377</sup> Secondly, as earlier noted, the Act does not seek to control unfair contract terms generally, but applies, for the most part, <sup>378</sup> only to terms that purport to exclude or restrict liability, that is to say, to exemption clauses. The Act does not, in general, affect the basis of liability, <sup>379</sup> so that the first inquiry must normally be whether or not the person seeking to rely on the terms is in fact under any obligation or liability, for example, for breach of contract or negligence, apart from the term. <sup>380</sup> Further, the Act does not affect the preliminary issues as to whether the alleged term is in fact a term of the contract, <sup>381</sup> and, if it is, whether on its true construction it applies to the obligation or liability which it purports to exclude or restrict. <sup>382</sup>

**Pattern of control**

**15-067**

The control exercised by the 1977 Act over exemption clauses in contracts is complex in nature and by no means comprehensive. There are three broad divisions of control. First, control over contract terms or notices which exclude or restrict liability for "negligence". <sup>383</sup> Secondly, control over contract terms <sup>384</sup> which exclude or restrict liability for breach of certain terms implied by statute or the common law in contracts of sale of goods, <sup>385</sup> hire purchase <sup>386</sup> and in other contracts for the supply of goods. <sup>387</sup> Thirdly, a more general control in limited circumstances over contract terms which exclude or restrict liability for breach of contract <sup>388</sup> or which purport to entitle one of the parties to render a contractual performance substantially different from that reasonably expected of him or to render no performance at all. <sup>389</sup> However, the provisions of the Act may overlap, so that, in any given situation, it may be necessary to consider whether more than one section is relevant. Further, certain very important contracts are excepted, either wholly or subject to qualifications, from the operation of the Act. <sup>390</sup>

**Types of control**

**15-068**

If the contract term or notice is subject to the control of the Act, that control may assume one of two forms: the exclusion or restriction of liability may be rendered absolutely ineffective, <sup>391</sup> or it may be effective only in so far as the term satisfies the requirement of reasonableness. <sup>392</sup>

## Varieties of exemption clause

### 15-069

Subject to certain exceptions, <sup>393</sup> the 1977 Act applies only to contract terms which “exclude or restrict” liability. In considering whether a contract term has this effect, the court is concerned with the substance and not the form of the provision. <sup>394</sup> Moreover, by s.13(1), the meaning of these words is extended so as also to prevent:

“(a)

making the liability or its enforcement subject to restrictive or onerous conditions” (as, for example, in the case of terms which require a party to make a claim within a certain time-limit or to commence proceedings within a shorter time-limit than the normal limitation period) <sup>395</sup>;

(b)

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” (as, for example, in the case of terms which preclude a party from relying on or enforcing a right of set-off <sup>396</sup> or which take away or limit his right to reject defective goods, or require him to pay the expenses of redelivery on rejection);


(c)

excluding or restricting rules of evidence or procedure” (as, for example, terms which state that acceptance of goods or services shall be conclusive evidence that they are in conformity with the contract).” <sup>397</sup>

It would seem probable, however, that a genuine liquidated damages clause would not be subject to the Act, <sup>398</sup> and it is specifically provided that an agreement in writing to submit present or future differences to arbitration is not to be treated under Pt I of the Act as excluding or restricting any liability. <sup>399</sup>

### 15-070

⚠ Certain sections <sup>400</sup> further prevent “excluding or restricting liability by reference to terms which exclude or restrict the relevant obligation or duty”. <sup>401</sup> ⚠ The purpose of this provision appears to be <sup>402</sup> to bring within the control of the 1977 Act terms, for example, which state that the seller gives no undertaking with respect to the quality or fitness for purpose of the goods sold or which state that a surveyor accepts no responsibility with respect to the accuracy of a valuation report supplied by him. <sup>403</sup> Exemption clauses of this nature do not purport to exclude or restrict *liability* for breach of an obligation or duty, but purport to exclude the relevant obligation (e.g. the conditions implied by s.14 of the Sale of Goods Act 1979) or duty (e.g. to use reasonable care and skill in carrying out the valuation). It may be difficult, however, to differentiate between contractual provisions which exclude or restrict the relevant obligation or duty, and those which define the scope of the obligation or which specify the duties of the parties. For example, a seller of kitchen utensils may expressly state that they are suitable to be used only on electric cookers and not with gas, <sup>404</sup> or a surveyor may stipulate that he undertakes to carry out a valuation of the property and not a full structural survey. <sup>405</sup> Further, there may be difficulty in distinguishing between provisions which exclude or restrict the relevant obligation or duty, and those which prevent it from arising, such as a clause limiting the ostensible

authority of an agent to give undertakings <sup>406</sup> or an “entire agreement” clause. <sup>407</sup> In *Smith v Eric S. Bush*, <sup>408</sup> a case concerning the common law duty to take reasonable care and a non-contractual notice disclaiming liability, Lord Griffiths read the relevant provisions of the Act as introducing a “but for” test, that is to say, whether the duty would exist “but for” the notice excluding liability. But it is submitted that this test could not always be satisfactorily applied to contract terms which, in effect, limit the extent of the obligation or duty which one party owes to the other or which even prevent the accrual of the obligation or duty in particular situations. <sup>409</sup> 

## 15-071

It has, however, been stated that the Act:

“... is normally regarded as being aimed at exemption clauses in the strict sense, that is to say, clauses in a contract which aim to cut down prospective liability arising in the course of performance of the contract in which the exemption clause is contained,” <sup>410</sup>

and not to liability already accrued. <sup>411</sup>

### “Business liability”

## 15-072

The 1977 Act is concerned, for the most part, <sup>412</sup> with terms that exclude or restrict “business liability”, that is:

“liability for breach of obligations or duties arising—

(a)

from things done or to be done by a person in the course of a business (whether his own business or another’s); or

(b)

from the occupation of premises used for business purposes of the occupier;

and references to liability are to be read accordingly but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.” <sup>413</sup>

“Business” is not defined by the Act, except to the extent that it is stated to include a profession and the activities of any government department or local or public authority. <sup>414</sup> The words “in the course of a business” appear to require that the thing done or to be done is an integral part of the business carried on or that there is a sufficient degree of regularity about the type of transaction in question. <sup>415</sup> The words “whether his own business or another’s” presumably cover the activities of an agent in the course of his principal’s business. Finally, it will be seen that the final part of the definition (starting “but liability of an occupier”) makes special provision in respect of an occupier’s liability towards “a person obtaining access to the premises for recreational or educational purposes”. <sup>416</sup>

## The old law: “Dealing as consumer”

### 15-073

Under the “old law” provided by the 1977 Act as enacted, <sup>417</sup> a distinction is drawn between cases where a party to a contract “*deals as consumer*” in relation to another party, and cases where he does not so deal.

### 15-074

In order that a party should have dealt as consumer, two conditions must be satisfied. <sup>418</sup> First, he must neither make the contract in the course of a business <sup>419</sup> nor hold himself out as doing so. <sup>420</sup> Secondly, the other party must make the contract in the course of a business. <sup>421</sup> In *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd*, <sup>422</sup> it was held that a freight forwarding and shipping agency company had dealt as consumer when it entered into a conditional sale agreement with a finance company for the purchase of a motor car for personal and business use by one of its directors, on the ground that, to be in the course of a business, the transaction must be an integral part of the business carried on or, if only incidental to it, be of a type regularly entered into. It was further stated <sup>423</sup> that the company had not “held itself out” as making the contract in the course of a business by submitting a finance application in the corporate name, giving the nature of the company's business, the number of years trading and the number of employees, and giving the names and addresses of the directors.

### 15-075

In addition, in the case of a contract governed by the law of sale of goods or hire-purchase, or by s.7 of the Act (other contracts under which the ownership or possession of goods passes), <sup>424</sup> a third requirement must be satisfied <sup>425</sup>: the goods passing under or in pursuance of the contract must be of a type ordinarily supplied for private use or consumption. <sup>426</sup> This requirement does not, however, apply if the buyer or person to whom the goods are supplied is an individual. <sup>427</sup>

## Auction sales

### 15-076

On a sale by auction or by competitive tender a buyer who is not an individual is not in any circumstances to be regarded as dealing as consumer. If the buyer is an individual, then he is not to be regarded as dealing as consumer where the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person. <sup>428</sup>

## Agency

### 15-077

The application of the concept of “dealing as consumer” is unclear where a private person (the principal) makes a contract through a commercial or professional agent. Under the ordinary principles of agency, <sup>429</sup> if the agency is disclosed, <sup>430</sup> then, whether or not the principal is named, it is the principal who is a party to and makes the contract, and not the agent. The private principal does not therefore “make the contract in the course of a business” even though the agent, when entering into the contract on his behalf, acts in the course of a business. <sup>431</sup> So, for example, if a private seller sells goods through a commercial agent to a private buyer, the buyer does not deal as consumer, because the seller does not make the contract in the course of a business. And if a private buyer buys goods through a commercial agent, he may still be held to have dealt as a consumer as he does not make the contract in the course of a business, unless it could be said that, by employing a commercial agent to act for him, he has “held himself out” as making the contract in the course of a business.



## Burden of proof as to dealing as consumer

### 15-078

It is for those claiming that a party does not deal as consumer to show that he does not. <sup>432</sup>

## The new law: “dealing as consumer” deleted from the 1977 Act

### 15-079

⚠ With the coming into force of the Consumer Rights Act 2015 for contracts made on or after October 1, 2015, the concept of “dealing as consumer” is deleted from the 1977 Act and instead the 2015 Act’s own controls for the benefit of “consumers” may apply. <sup>433</sup> ⚠ One aspect of this change is that under the 2015 Act a “consumer” is restricted to an “individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”. <sup>434</sup> This definition represents (arguably) an expansion of the protection earlier provided by the 1999 Regulations for “consumers” in that it explicitly includes persons acting *mainly* for non-business purposes, but the deletion of “dealing as consumer” from the 1977 Act represents an overall narrowing of the category of persons protected from unfair terms, as “consumer” does not include (as can the concept of a person “dealing as consumer” <sup>435</sup>) incorporated persons nor individuals who conclude a contract which does not form an integral part of their business that they carry on or, if only incidental to it, is not of a type regularly entered into by them. <sup>436</sup>

<sup>377</sup>. 1977 Act s.2.

<sup>378</sup>. But see ss.3(2)(b), 4 and 10 of the 1977 Act.

<sup>379</sup>. But see ss.3(2)(b), 4 of the 1977 Act.

<sup>380</sup>. See above, para.15-003; below, para.15-070.

<sup>381</sup>. 1977 Act s.11(2) and above, para.13-002.

<sup>382</sup>. 1977 Act s.11(2) and above, paras 15-007 et seq.

<sup>383</sup>. 1977 Act ss.2, 5; below, paras 15-081—15-082, 15-091. See also s.4; below, para.15-088.

<sup>384</sup>. Whether in the same or in another contract between the same parties. cf. 1977 Act s.10 below, para.15-128.

<sup>385</sup>. 1977 Act s.6; see below, para.15-093; Vol.II, paras 44-085, 44-17.

<sup>386</sup>. 1977 Act s.6; see below, para.15-093; Vol.II, para.39-384.

<sup>387</sup>. 1977 Act s.7; see below, para.15-094.

<sup>388</sup>. 1977 Act s.3(1), (2)(a) and see below, paras 15-085—15-086. See also s.4; below, para.15-088.

<sup>389</sup>. 1977 Act s.3(1), (2)(b) and see below, paras 15-085—15-086.

<sup>390</sup>. See below, paras 15-116—15-124.

<sup>391</sup>. 1977 Act ss.2(1), 6(1) and 7(3A). Until the coming into force of the 2015 Act, there are further

examples in s.6(2) and 7(2) (these provisions are deleted by the 2015 Act).

[392.](#) See below, para.15-096.

[393.](#) 1977 Act ss.3(2)(b) and s.10. Until the coming into force of the 2015 Act, there is a further example in s.4 of the 1977 Act (this being deleted by the 2015 Act).

[394.](#) *Cremdean Properties Ltd v Nash* (1977) 244 E.G. 547, 551; *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, 666; *Johnstone v Bloomsbury HA* [1992] Q.B. 333, 346; *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [68].

[395.](#) *BHP Petroleum Ltd v British Steel Plc* [1999] 2 Lloyd's Rep. 586, 592 (affirmed [2002] 2 Lloyd's Rep. 277); *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18.


[396.](#) *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600; *Fastframe Ltd v Lochinski Unreported*, March 3, 1993 CA (noted (1994) 57 M.L.R. 960); *Esso Petroleum Co Ltd v Milton* [1997] 1 W.L.R. 938; *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] C.L.Y. 906; *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep. 498; *WRM Group Ltd v Wood* [1998] C.L.C. 189; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1.

[397.](#) See *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574; *United Trust Bank Ltd v Dohil* [2011] EWHC 3302 (QB), [2012] 2 All E.R. (Comm) 765 (statement of account to be binding and conclusive against guarantor in the absence of manifest error): see below, para.15-102.

[398.](#) See above, para.15-004 n.18. But see Law Com. No.69, Scot. Law Com. No.39, 1975, para.166.

[399.](#) 1977 Act s.13(2); *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40. But see Arbitration Act 1996 ss.89–92; Vol.II, para.32-013.

[400.](#) 1977 Act ss.2 and 5–7 only.

[401.](#)  1977 Act s.13(1). The contention has been put forward that clauses which “exclude” the relevant obligation or duty ipso facto limit the obligation or duty, or prevent its accrual: see Coote, *Exception Clauses* (1964); Coote [1970] C.L.J. 221; Coote (1977) 40 M.L.R. 31; Coote (1978) 41 M.L.R. 312; Palmer and Yates [1981] C.L.J. 108; White (2016) J.B.L. 373 and above, para.15-003.

[402.](#) For a different view as to its purpose, see *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 605.

[403.](#) *Smith v Eric S. Bush* and *Harris v Wyre Forest DC* [1990] 1 A.C. 831.

[404.](#) See Macleod (1981) 97 L.Q.R. 550.


[405.](#) *Gibbs v Arnold Son & Hockley* (1989) 45 E.G. 156. cf. *Roberts v J. Hampson & Co* [1990] 1 W.L.R. 94.

[406.](#) See *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 1 W.L.R. 1335; *Collins v Howell-Jones* (1981) 259 E.G. 331; *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 E.G.L.R. 196, 200 (misrepresentation); above, para.7-149.

[407.](#) *McGrath v Shah* (1989) 57 P. & C.R. 452; *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573; *E.A. Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029; *South West Water Services Ltd v International Computers Ltd* [1999] Build. L.R. 420, 424; *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611, 614; *Watford Electronics Ltd v Sanderson CFL Ltd*

[2001] EWCA Civ 317, [2001] Build. L.R. 143, 155; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [42] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86); *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1; see above paras 7-144, 7-150—7-151 and 13-107. But see Vol.II, para.38-291.

408. [1990] 1 A.C. 831, 857. See also *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659.

409.  *Hurley v Dyke* [1979] R.T.R. 265 HL (tort) (but see 281, 282); *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [67]–[70] (affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [98]. Contrast *Harris v Wyre Forest DC* [1990] 1 A.C. 831 (reversing the decision of the Court of Appeal [1988] Q.B. 835) (tort); *Cremdean Properties Ltd v Nash* (1977) 244 E.G. 547; *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 (misrepresentation); *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [139]–[146] and see above, para.7-149; *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch) at [112]–[119] (permission to appeal on other grounds: [2015] EWCA Civ 986); *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [97]–[111] (appeal pending) (on “basis clauses” stipulating that defendants were not providing advice in relation to interest rate “swap agreements”); *Hughes v Hall* [1981] R.T.R. 430; *Macdonald* (1992) 12 L.S. 277.

410. *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53, 65.

411. See also s.10, below, para.15-128.

412. Except s.6 (implied terms in contracts of sale of goods and hire-purchase).

413. 1977 Act s.1(3) (as amended by the Occupiers Liability Act 1984 s.2).

414. s.14. A business need not necessarily be carried on with a view to profit: see *Roles v Miller* (1884) 27 Ch. D. 71, 88; *Town Investments Ltd v Department of Environment* [1978] A.C. 359. Contrast *Smith v Anderson* (1880) 15 Ch. D. 247, 258.

415. *Haverling LBC v Stevenson* [1970] 1 W.L.R. 1375; *Davies v Sumner* [1984] 1 W.L.R. 1301; *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349.

416. For discussion of exclusions of liability by an occupier see Clerk and Lindsell on Torts 21st edn (2014) paras 12–50 et seq.

417. Above, para.15-065.

418. s.12(1)(a), (b).

419. See above, para.15-072 n.391.

420. e.g. by producing a trade card or asking for a trade discount in appropriate circumstances. But cf., below, n.399.

421. See above, para.15-072, and *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, 336.

422. [1988] 1 W.L.R. 321. See also *Rasbora Ltd v J.C.L. Marine Ltd* [1977] 1 Lloyd's Rep. 645 (private buyer of boat substitutes a company owned and controlled by him); *Peter Symmons & Co v Cook* (1981) 131 New L.J. 758 (partnership of surveyors purchase Rolls-Royce from car dealer); *Feldaroll Foundry Plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747 (company purchases car for use of managing director). Contrast *St Alban's City and District Council v*

*International Computers Ltd* [1996] 4 All E.R. 481, 490; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349.

[423.](#) [1988] 1 W.L.R. 321, 328–329.

[424.](#) See below, para.15-094.

[425.](#) 1977 Act s.12(1)(c).

[426.](#) cf. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [122] (light aircraft). See Vol.II, para.44-121.

[427.](#) 1977 Act s.12(1A) (inserted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.14(2)).


[428.](#) 1977 Act s.12(2) (substituted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.14(3)).

[429.](#) See Vol.II, Ch.31.

[430.](#) cf. the position where the agency is not disclosed (the “undisclosed principal”): see Vol.II, para.31-063.

[431.](#) Contrast Sale of Goods Act 1979 s.14(5). While s.14(5) itself survives the bringing into force of the 2015 Act, s.14 generally will no longer apply to the consumer contracts governed by Ch.2 of Pt 1 of the 2015 Act: 2015 Act s.60, Sch.1 para.13.

[432.](#) 1977 Act s.12(3).

[433.](#)  2015 Act s.75 Sch.4 paras 5–9, 11 and 13 and see above, para.15-065 and Vol.II, paras 38-334 et seq. On the qualifications on the date of the coming into force of the relevant provisions of the 2015 Act in the case of “consumer transport services” see above, para.15-005.

[434.](#) 2015 Act s.2(3) and see Vol.II, paras 38-353—38-354.

[435.](#) Above, paras 15-073 et seq.

[436.](#) cf. *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, above, para.15-074.

**Chitty on Contracts 32nd Ed.**  
**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 4 - The Terms of Contract**  
**Chapter 15 - Exemption Clauses**  
**Section 6. - Legislative Control of Exemption Clauses**  
**(a) - Unfair Contract Terms Act 1977**  
**(iii) - The Controls Provided by the 1977 Act**

**Introduction**

**15-080**

The 1977 Act puts in place a series of distinct controls on the validity of contract terms and, in the case of negligence liability, notices and the following paragraphs will discuss these in turn. However, it is important to note that the provisions which set out these controls are themselves subject to significant qualifications in the case of international supply contracts, <sup>437</sup> contracts where the law applicable is English law only by choice of the parties, <sup>438</sup> and a range of types of contract as set out in Sch.1 of the Act. <sup>439</sup> Moreover, contract terms which are authorised or required by statute or international convention are excluded from the Act's controls <sup>440</sup> and those which are incorporated or approved by a competent authority are taken as satisfying the requirement of reasonableness. <sup>441</sup> These qualifications are discussed later in this section. <sup>442</sup>

**Negligence liability: the old law**

**15-081**

Section 2 of the 1977 Act restricts the power of a person to exempt themselves from business liability for negligence whether by reference to a term of a contract or by reference to a "notice given to persons generally or to particular persons". For this purpose "negligence" is defined <sup>443</sup> to mean the breach:

- "(a)  
of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of a contract;
- (b)  
of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty); and
- (c)  
of the common duty of care imposed by the Occupier's Liability Act 1957 ..." <sup>444</sup>



It will be seen, therefore, that “negligence” may be contractual or tortious. Section 2 itself distinguishes between two types of damage. In the case death or personal injury <sup>445</sup> resulting from negligence, any purported exclusion or restriction of a person’s business liability is wholly ineffective without any assessment of its reasonableness. <sup>446</sup> In the case of other loss or damage, a person cannot so exclude or restrict their business liability, except insofar as the term or notice satisfies the requirement of reasonableness. <sup>447</sup> The words of s.2 are wide enough to include a term which purports to transfer from one contracting party to the other responsibility for injury or damage caused to the latter by negligence on the part of an employee of the former. <sup>448</sup> They do not extend to a term by which one party requires the other to indemnify him against injury or damage caused to third parties by his own negligence or that of his employees, <sup>449</sup> nor to a covenant not to sue a third party. <sup>450</sup>

### Assumption of risk

#### 15-082

Section 2(3) of the 1977 Act provides that, where a contract term or notice <sup>451</sup> purports to exclude or restrict liability for negligence a person’s agreement to it or awareness of it is not of itself to be taken as indicating his voluntary acceptance of the risk. <sup>452</sup>

### Negligence liability: the new law

#### 15-083

⚠ With the coming into force of the Consumer Rights Act 2015 (for contracts made on or after October 1, 2015), <sup>453</sup> ⚠ s.2 of the 1977 does not apply to a term in a “consumer contract” nor to a “consumer notice” within the meanings of these expressions in the 2015 Act, <sup>454</sup> but refers the reader to the provisions governing the fairness of these terms or notices provided by the 2015 Act. <sup>455</sup>

### Liability arising in contract: the old law

#### 15-084

⚠ Section 3 of the Act applies generally to liability arising in contract and (unlike certain later sections) is not limited to contracts of a particular type. However, the section applies as between contracting parties only where one of them deals:

(i)



as consumer <sup>456</sup>; or


(ii)



on the other’s written standard terms of business,

and in either case the liability which it is sought to exclude is a business liability. <sup>457</sup> The expression ... “deals on the other’s written standard terms of business” is not defined or explained by the Act, <sup>458</sup> but it would seem probable that “standard terms of business” would embrace the standard terms of a third party, e.g. a trade association, incorporated into the contract by reference or by course of dealing. <sup>459</sup>

⚠ The requirement that the term is part of the other party’s standard terms of business has been held

to mean that “it has to be shown that that other party habitually uses those terms of business” and it is not enough that a model form has, on the particular occasion, been used. <sup>460</sup>  Since, in any event, no two contracts are likely to be completely identical, but will at least differ as to subject matter and price, the question arises whether variations or omissions from or additions to standard terms thereby render them “non-standard” and, if they do not, whether all the terms then become standard terms. Where negotiations have taken place around standard terms before the contract is made, and amendments agreed, it is a question of fact whether one party can be said to have dealt on those standard terms. <sup>461</sup>  If it is alleged that an ostensibly “one-off” contract is in fact the other’s written standard terms of business, extensive disclosure may be involved to determine the terms on which contracts have been concluded with others. The burden of proving that he dealt on the others written standard terms of business appears to rest on the party who alleges that s.3 applies. <sup>462</sup> In *African Export-Import Bank v Shebah Exploration and Production Co Ltd* Longmore L.J. observed that for this purpose:

“it is relevant to enquire whether there have been more than insubstantial variations to the terms which may otherwise have been habitually used by the other party to the transaction. If there have been substantial variations, it is unlikely to be the case that the party relying on the Act will have discharged the burden on him to show that the contract has been made ‘on the other’s written standard terms of business’.” <sup>463</sup> 

 Where there is “substantial negotiation” (including the proposed amendment of the draft contract) this may be enough to demonstrate that the terms ultimately agreed were not standard business terms even though the particular term was not itself affected: “[t]here is ... no requirement that negotiations must relate to the exclusion terms of the contract, if the Act is not to apply”. <sup>464</sup> 

## 15-085

In cases falling within s.3, as against the party dealing as consumer or on the other’s written standard terms of business, the other party (“the *proferens*”) cannot by reference to any contract term, <sup>465</sup> except in so far as the term satisfies the requirement of reasonableness, do either of two things:

“(a)

when himself in breach of contract, exclude or restrict any liability of his in respect of breach[ <sup>466</sup>]; or

(b)

claim to be entitled:

(i)

to render a contractual performance substantially different from that which was reasonably expected of him[ <sup>467</sup>]; or

(ii)

in respect of the whole or part of his contractual obligations to render no performance at all.” <sup>468</sup>

It would appear to be the intention of (b) that it should apply where there is no breach of contract at all, but where the obligation as to performance has been limited or qualified. <sup>469</sup> An example may be of a shipowner who agrees on written standard terms to provide a cruise to a travel agent for a party of tourists on a particular vessel on a particular route, but claims to be entitled to change the vessel by reference to a contract term. <sup>470</sup> A further example in a commercial contract might be that of a force majeure clause <sup>471</sup> by reference to which a seller of goods claims to be entitled to suspend or postpone delivery of the goods, or to deliver substitute goods, or to cancel the contract, upon the happening of events beyond his control. The argument could, however, be advanced <sup>472</sup> that the effect of clauses such as those mentioned is to define the scope of the obligation of the *proferens* with respect to performance: the contract must be read together with and subject to the clause. <sup>473</sup> The other party could not therefore reasonably expect that the *proferens* would render a contractual performance other than that as qualified by the clause, nor would there be any contractual obligation in respect of which the *proferens* would be claiming to render no performance at all. However, it is submitted that a sensible meaning can in most cases only be given to paragraph (b) if one assumes that the contractual performance and contractual obligation referred to is the performance required and the obligation imposed by the contract apart from the contract term relied on. <sup>474</sup> For this purpose, the contractual performance reasonably expected of a party may, in appropriate cases be determined by the content of representations made by that party in precontract negotiations. <sup>475</sup> On the other hand, where on its true construction a contract term provides for performance to a certain level by the *proferens*, the other party cannot claim that that very term entitles the *proferens* to render a contractual performance substantially different from that which he reasonably expected. For example, in *Hodges v Aegis Defence Services (BVI) Ltd* a contractor providing security services in Iraq engaged the services of an individual and their contract contained a term under which the contractor agreed to take out insurance for a sum of \$200,000 payable on that individual's death. <sup>476</sup> After the individual died during service, insurance monies were paid over a period in excess of that figure, but his widow (as principal nominee of the benefit of the insurance) claimed that the term required payment of \$200,000 as a minimum lump sum and, secondly, that any term which gave the insured less than such a minimum lump sum fell within s.3(2)(b)(i) and was unreasonable. <sup>477</sup> However, Longmore L.J. (in the majority) held, first, that on its proper construction the term did not require such a lump sum and, secondly, this meant that the contractor did not claim by reference to that term to be entitled to render a contractual performance substantially different from that which was expected of it under the contract. <sup>478</sup>

## 15-086

Nevertheless it seems unlikely that a contract term entitling one party to terminate the contract in the event of a material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness. <sup>479</sup> Nor, it is submitted, would that provision extend to a contract term which entitled one party, not to alter the performance expected of himself, but to alter the performance required of the other party (e.g. a term by which a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery, or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan). <sup>480</sup> A term of a contract of employment relating to the requirements for payment of a discretionary bonus has been held not to fall within s.3. <sup>481</sup>

### Liability arising in contract: the new law

## 15-087

🚨 With the coming into force of the Consumer Rights Act 2015 for contracts made on or after October 1, 2015, <sup>482</sup> 🚨 the reference in s.3 of the 1977 Act to a person “dealing as consumer” is deleted and s.3(3) (as inserted by the 2015 Act) provides that s.3 does not apply to a term in a consumer contract, referring the reader to s.62 of the 2015 Act which provides special controls for this purpose. <sup>483</sup>

Otherwise, s.3 remains as enacted.

### Indemnity clauses: the old law

#### 15-088

A contract may stipulate that, if one party incurs liability (usually to third parties) as the result of the performance of the contract, he shall be entitled to be indemnified by the other party against the liability. <sup>484</sup> Section 4 of the 1977 Act provides that a person dealing as consumer <sup>485</sup> cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence <sup>486</sup> or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness. <sup>487</sup> This provision applies whether the liability in question:

“(a)

is directly that of the person to be indemnified or is incurred by him vicariously; or

(b)

is to the person dealing as consumer or someone else.” <sup>488</sup>

The liability against which indemnity is sought must be a business liability. <sup>489</sup> An example would be a term in a contract for the hire of a motorcar which required the hirer to indemnify the car hire company against third-party claims arising out of the hirer's use of the car.

#### 15-089

Indemnities given by persons who do not deal as consumer are not affected by s.4. Although s.2 of the 1977 Act inhibits the exclusion or restriction of liability for negligence, <sup>490</sup> nothing in that section will render ineffective a term of a contract by which one party requires the other (who does not deal as consumer) to indemnify him against his liability in negligence to third parties. <sup>491</sup>

### Indemnity clauses: the new law

#### 15-090

⚠ With the coming into force of the Consumer Rights Act 2015 for contracts made on or after October 1, 2015, <sup>492</sup> ⚠ s.4 of the 1977 Act is deleted. <sup>493</sup> However, an indemnity clause in a consumer contract as understood by the 2015 Act is subject to the test of unfairness and the requirement for transparency which the 2015 Act itself puts in place. <sup>494</sup>

### “Guarantee” of consumer goods: the old law <sup>495</sup>

#### 15-091

Section 5 of the 1977 Act renders absolutely ineffective the exclusion or restriction of business liability <sup>496</sup> for loss or damage resulting from the negligence <sup>497</sup> of a manufacturer or distributor of goods <sup>498</sup> by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods <sup>499</sup> (such as is often provided by, for example, manufacturers of electrical equipment). But the goods must be of a type ordinarily supplied for private use or consumption, <sup>500</sup> and the loss or damage

must arise from the goods proving defective while “in consumer use”, that is, when a person is using them, or has them in possession for use, otherwise than exclusively for the purposes of business. <sup>501</sup> This section does not apply as between parties to a contract under or in pursuance of which possession or ownership of the goods passed. <sup>502</sup>

#### **“Guarantee” of consumer goods: the new law**

### **15-092**

With the coming into force of the Consumer Rights Act 2015, for contracts made on or after October 1, 2015, <sup>503</sup> s.5 of the 1977 Act is deleted. <sup>504</sup> The Law Commissions saw s.5 as unnecessary given the controls provided by s.2(1) of the 1977 Act and by the Consumer Protection Act 1987. <sup>505</sup> The 2015 Act itself makes equivalent provision to s.2 of the 1977 Act so as to control the exclusion of business liabilities for negligence whether contained in a contract term or notice. <sup>506</sup>

#### **Sale and hire purchase: the old law**

### **15-093**

Section 6 of the 1977 Act <sup>507</sup> limits the ability of a seller of goods, or of the owner of goods let under a hire-purchase agreement, to exclude or restrict his liability in respect of breach of the terms implied by ss.12 to 15 of the Sale of Goods Act 1979 <sup>508</sup> or ss.8 to 11 of the Supply of Goods (Implied Terms) Act 1973. <sup>509</sup> For this purpose, s.6 distinguishes between the various implied terms. Contract terms purporting to exclude the seller's or (in the case of hire-purchase) owner's liability for breach of the statutory implied terms as to title and right to sell the goods, are ineffective without any assessment of their reasonableness. <sup>510</sup> By contrast, in the case of purported exclusions of the statutory implied terms as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose, <sup>511</sup> s.6 distinguishes between the case where the other party (the buyer or hirer) deals as consumer <sup>512</sup> (where the exclusion is wholly ineffective) and where the other party does not so deal (where the exclusion is subject to the test of reasonableness). <sup>513</sup> The liabilities referred to in s.6 are not confined to business liabilities, <sup>514</sup> but they are confined to those which arise from breach of the statutory *implied* undertakings.

#### **Miscellaneous contracts under which goods pass: the old law**

### **15-094**

Section 7 of the 1977 Act is concerned with contract terms which exclude or restrict business liability for breach of an implied obligation in a contract “where the possession or ownership of the goods passes under or in pursuance of” the contract (other than a contract governed by the law of sale of goods or hire-purchase). <sup>515</sup> Examples of such contracts are contracts for the hire of goods or for work and materials. The obligation in the contract must be one which arises “by implication of law from the nature of the contract”. <sup>516</sup> In most cases, the obligations to be implied in such contracts are those set out in ss.2 to 5 and 7 to 10 of the Supply of Goods and Services Act 1982. <sup>517</sup> First, s.7 of the 1977 Act provides that liability for breach of the obligations as to title, etc., arising under s.2 of the 1982 Act (such as in contracts for work and materials) cannot be excluded or restricted by reference to any contract term, <sup>518</sup> but in the case of other contracts in this category (e.g. contracts for the hire of goods) terms excluding or restricting liability in respect of the right to transfer ownership of the goods or give possession, or the assurance of quiet possession to a person taking goods in pursuance of the contract, are subject to the test of reasonableness. <sup>519</sup> Secondly, as against a person dealing as consumer, s.7 renders wholly ineffective a contract term which purports to exclude or restrict any liability in so far as it arises in respect of the goods’ correspondence with description or sample, or their quality or fitness for any particular purpose. <sup>520</sup> Thirdly, as against a person dealing otherwise than as consumer, such a liability can be excluded or restricted by reference to any contract term, but only in so far as the term satisfies the test of reasonableness. <sup>521</sup>



## Sale, hire purchase, and miscellaneous contracts under which goods pass: the new law

### 15-095

The Consumer Rights Act 2015, for contracts made on or after October 1, 2015, deletes from ss.6 and 7 of the 1977 Act provisions governing persons “dealing as consumer” and dis-applies the general provisions left in place from “consumer contracts”. <sup>522</sup> As a result, s.6 as amended renders wholly ineffective exclusions of the statutory implied terms as to title in contracts of sale of goods and hire purchase, and subjects to the reasonableness test exclusions of the statutory terms as to description or sample, quality or particular purpose. <sup>523</sup> Section 7 as amended applies to the same range of contracts as before as regards its controls on “contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract,” and continues to distinguish as regards exclusions of liability in respect of title or right to transfer the goods etc. between liability arising from the statutory implied term in s.2 of the 1982 Act (which are rendered wholly ineffective) and other cases (which are subject to the requirement of reasonableness). <sup>524</sup> As regards terms in consumer contracts, the 2015 Act Pt 1 makes new provision for the various “goods contracts” to which it applies by creating a series of new statutory terms (including as to satisfactory quality, fitness for particular purpose, description, and the trader’s right to supply the goods), and subjecting any purported exclusion or restriction of liability arising for breach of these terms to its own controls. <sup>525</sup> This new law is discussed in Vol.II, Ch.38. <sup>526</sup>

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<sup>437.</sup> 1977 Act s.29 below, para.15-122.

<sup>438.</sup> 1977 Act s.27(1) below, para.15-125.

<sup>439.</sup> See below, paras 15-116—15-121.

<sup>440.</sup> 1977 Act s.29(1) below, para.15-123.

<sup>441.</sup> 1977 Act s.29(2) below, para.15-124.

<sup>442.</sup> See preceding notes.

<sup>443.</sup> 1977 Act s.1(1). This definition applies also to the use of “negligence” in s.4 and 5 of the 1977 Act: below, para.15-088 and 15-091.

<sup>444.</sup> 1977 Act s.1(1). An example of (c) may be found in *Monarch Airlines Ltd v London Luton Airports Ltd* [1998] 1 Lloyd’s Rep. 403.

<sup>445.</sup> Defined in s.14.

<sup>446.</sup> 1977 Act s.2(1).

<sup>447.</sup> 1977 Act s.2(2). See also s.2(3) (voluntary acceptance of risk). On the test of reasonableness see 1977 Act s.11, below, paras 15-096 et seq.

<sup>448.</sup> *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659. See also *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd’s Rep. 434.

<sup>449.</sup> *Thompson v T. Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd’s Rep. 550.


<sup>450.</sup> *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd’s Rep. 438; see above, para.15-054.

<sup>451.</sup> See above, para.15-066.

<sup>452.</sup> But see above, para.15-017 and cf. *Johnstone v Bloomsbury H.A.* [1992] Q.B. 333, 343, 346.

- [453.](#) **!**Above, para.15-064. On the qualifications on the date of the coming into force of the relevant provisions of the 2015 Act in the case of “consumer transport services” see above, para.15-005.
- [454.](#) 2015 Act s.75, Sch.4 para.4 inserting s.2(4) into the 1977 Act.
- [455.](#) 2015 Act s.62 and 65 on which see Vol.II, paras 38-334 et seq. The 2015 Act ss.67 and 68 also make requirements as to the transparency of terms of consumer contracts and consumer notices: see Vol.II, paras 38-382—38-385 to which s.2(4) of the 1977 Act does not refer.
- [456.](#) On “dealing as consumer” see 1977 Act s.12 and above, paras 15-074—15-078.
- [457.](#) On “business liability” see 1977 Act s.1(3) and above, para.15-072.
- [458.](#) But see *McCrone v Boots Farm Sales* 1981 S.L.T. 103 (on s.17 of the 1977 Act in Scotland) and *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd’s Rep. 434, at 438.
- [459.](#) **!**See the example of use of the RIBA Form of engagement in *British Fermentation Products Ltd v Compare Reavell Ltd* [1999] 2 All E.R. (Comm) 389 at [46] (H.H.J. Bowsher QC), expressly approved in *African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845 at [20] (Longmore L.J.).
- [460.](#) **!***African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845 at [20] per Longmore L.J. (with whom Henderson L.J. agreed).
- [461.](#) **!**cf. *St Alban’s City and District Council v International Computers Ltd* [1996] 4 All E.R. 481, 490–491, with *Salvage Association v Cap Financial Services* [1995] F.S.R. 654. See also *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 Build. L.R. 115, 131; *South West Water Services Ltd v International Computers Ltd* [1999] Build. L.R. 420; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218; *Hadley Design Associates Ltd v Westminster CC* [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1; *Ferryways NV v Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd’s Rep. 639 at [92]; *University of Wales v London College of Business Ltd* [2015] EWHC 1280 (QB) at [91]–[95]; *Commercial Management (Investments) Ltd v Mitchell Design & Construct Ltd* [2016] EWHC 76 (TCC) at [61]–[73] (A’s standard terms incorporated only to the extent to which B’s terms did not prevail over them, term held still one of A’s “written standard terms of business”); *Britton* (2006) 22 Const. L.J. 23.
- [462.](#) *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1.
- [463.](#) **!**[2017] EWCA Civ 845 at [25] per Longmore L.J. (with whom Henderson L.J. agreed), approving dicta in *McCrone v Boots Farm Sales* [1981] S.L.T. 103 at 105; *Hadley Design Associates v Westminster City Council* [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1 at [78].
- [464.](#) **!**[2017] EWCA Civ 845 at [36] per Longmore L.J.
- [465.](#) Whether in the same or in another contract between the same parties. cf. 1977 Act s.10, below, para.15-128.
- [466.](#) See *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Const. L.R. 46; *St Alban’s City and District Council v International Computers Ltd* [1996] 4 All E.R. 481.
- [467.](#) i.e. at the time the contract was made: *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd’s Rep. 570, 612. See *Timeload Ltd v British Telecommunications Plc* [1995] E.M.L.R. 459.
- [468.](#) 1977 Act s.3(2)(a) and (b).

- [469.](#) *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 611–612; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [50]. See also Law Commission, Scottish Law Commission, Exemption Clauses (1975) Law Com. No.69, Scot. Law Com. No.39, paras 143–146.
- [470.](#) cf. *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd* [1967] 2 Lloyd's Rep. 61, given by the Law Commissions in Law Com. No.69, Scot. Law Com. No.39, para.146 as an example of the sort of term which it intended should be included under its proposed controls which were similar to s.3(2)(b). cf. the special provisions controlling the variation of package holiday contracts by the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) on which see Vol.II, para.38-133.
- [471.](#) See below, paras 15-152 et seq.
- [472.](#) Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.12–022.
- [473.](#) See above, para.15-003.
- [474.](#) *Zockoll Group Ltd v Mercury Communications Ltd (No.2)* [1998] I.T.C.L.R. 104. See above, para.15-003.
- [475.](#) *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC 2733 (TCC), [2003] 1 All E.R. (Comm) 465; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [50].
- [476.](#) [2014] EWCA Civ 1449.
- [477.](#) [2014] EWCA Civ 1449 at [5] and [6].
- [478.](#) [2014] EWCA Civ 1449 at [52] (Longmore L.J.). McCombe L.J. agreed with Longmore L.J. both as a matter of the construction of the term and its effectiveness, but as regards the latter on the ground that the term in question was reasonable under the 1977 Act: [2014] EWCA Civ 1449 at [33]–[34]. Vos L.J. dissented on the issue of construction and did not find it necessary to consider the effect of s.3(2)(b): [2014] EWCA Civ 1449 at [43]–[45].
- [479.](#) But see *Timeload Ltd v British Telecommunications Plc* [1995] E.M.L.R. 459 (termination not limited to cases where there was a good reason) and below, para.15-105. cf. *Hadley Design Associates Ltd v Westminster CC* [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1 (one month's termination clause in architects' contract not unreasonable). On termination clauses generally see Whittaker in Burrows and Peel, *Contract Terms* (2007), Ch.13 especially at pp 263–267.
- [480.](#) *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685, at [76]–[77] (pet. dis. [2002] 1 W.L.R. 2303). But such a term in a consumer contract might be unfair and not binding on the consumer under the Unfair Terms in Consumer Contracts Regulations 1999, Vol.II, paras 38-201 et seq.
- [481.](#) *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] I.R.L.R. 132.
- [482.](#)  Above, para.15-064. On the qualifications on the date of the coming into force of the relevant provisions of the 2015 Act in the case of "consumer transport services" see above, para.15-005.
- [483.](#) 2015 Act s.75, Sch.4 para.5. On the Act's controls see Vol.II, paras 38-334 et seq. The Act also makes requirements as to the transparency of terms of consumer contracts: see Vol.II, paras 38-382–38-385.
- [484.](#) See above, para.15-018.
- [485.](#) See above, para.15-073.
- [486.](#) See above, para.15-081.

- [487.](#) 1977 Act s.4(1).
- [488.](#) 1977 Act s.4(2).
- [489.](#) 1977 Act s.1(3); see above, para.15-072.
- [490.](#) See above, para.15-081.
- [491.](#) *Thompson v Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd's Rep. 550.
- [492.](#)  Above, para.15-064. On the qualifications on the date of the coming into force of the relevant provisions of the 2015 Act in the case of "consumer transport services" see above, para.15-005.
- [493.](#) 2015 Act s.75, Sch.4 para.6.
- [494.](#) 2015 Act ss.62, 67-68 on which see Vol.II, paras 38-334 et seq.
- [495.](#) See further on the binding character of consumer guarantees Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15 on which see Vol.II, para.38-428. With the coming into force of the 2015 Act, these regulations are revoked and their provision governing consumer guarantees replaced by 2015 Act s.30 on which see Vol.II, para.38-491.
- [496.](#) See above, para.15-072.
- [497.](#) See above, para.15-067.
- [498.](#) Defined by 1977 Act s.14 referring to the Sale of Goods Act 1979.
- [499.](#) Defined in 1977 Act s.5(2)(b).
- [500.](#) cf. above, para.15-075 concerning 1977 Act s.12(1)(c).
- [501.](#) s.5(2)(a).
- [502.](#) s.5(2), e.g. as between buyer and seller.
- [503.](#) Above, para.15-064.
- [504.](#) 2015 Act s.75, Sch.4 para.7.
- [505.](#) Unfair Terms in Contracts (2005) Law Com No.292, Scot Law Com No.199 para.3.48. Under the Consumer Protection Act 1987 a manufacturer, EU importer or distributor of a product may be liable for death or personal injuries and for damage to property where "of a description of property ordinarily intended for private use, occupation or consumption" and was "intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption" subject to a threshold of £275: 1987 Act s.5(3) and (4). These liabilities are subject to a proof that the claimant's damage was caused by a defect in a product which the manufacturer, etc. supplied: 1987 Act s.2-4. They are incapable of exclusion by contract term or notice: 1987 Act s.7. See further Vol.II, paras 44-449 et seq.
- [506.](#) These are contained in 2015 Act ss.65-66 (personal injuries or death) and s.62 (the general controls which govern exclusions of other loss or damage) on which see Vol.II, paras 38-377 and 38-358 et seq. respectively.
- [507.](#) As amended by s.63 of and Sch.3 to the Sale of Goods Act 1979.
- [508.](#) See Vol.II, paras 44-085, 44-117 et seq.

- [509.](#) See Vol.II, paras 39-382 and 39-390—39-391.
- [510.](#) 1977 Act s.6(1). On these statutory implied terms see Vol.II, 0paras 39-316—39-318 (hire purchase) and Vol.II, paras 44-075—44-085 (sale of goods).
- [511.](#) Sale of Goods Act 1979 s.13–15 (sale of goods); Supply of Goods (Implied Terms) Act 1973 ss.9–11.
- [512.](#) On which see 1977 Act s.12 and above, para.15-073.
- [513.](#) 1977 Act s.6(2) and (3) respectively. On the test of reasonableness see 1977 Act s.11 and below, paras 15-096 et seq.
- [514.](#) 1977 s.6(4). See above, para.15-072.
- [515.](#) Also excluded are goods passing on redemption of trading stamps: s.7(5).
- [516.](#) See above, paras 14-034—14-035.
- [517.](#) 1982 Act ss.2-5 which formally apply to contracts under which one person transfers or agrees to transfer to another the property in goods, other than a contract of sale of goods, a hire-purchase agreement, a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed or a contract intended to operation by way of mortgage, pledge, charge or other security: s.1(1)–(2). The provisions in the 1982 Act governing bailment for hire are contained in ss.6–10. See Vol.II, paras 33-071, 44-026.
- [518.](#) 1977 Act s.7(3A), inserted by s.17(2) of the Supply of Goods and Services Act 1982.
- [519.](#) 1977 Act s.7(4) (as amended).
- [520.](#) s.7(2). See Vol.II, para.33-078.
- [521.](#) s.7(3). See *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Const. L.R. 46; *Danka Rentals Ltd v XI Software Ltd* (1998) 17 Tr.L.R. 74.
- [522.](#) 2015 Act s.75, Sch.4 para.8 and 9 and see above para.15-064.
- [523.](#) 1977 Act s.6(1) and 1(A) (as inserted by the 2015 Act). Section 6(2) and (3) are deleted.
- [524.](#) 1977 Act s.7(1) and 1(A) (as inserted by the 2015 Act); 7(4). Section 7(2) and (3) are deleted and cf. above, para.15-094.
- [525.](#) The definitions of “goods contracts” are provided by the 2015 Act ss.5–8; the statutory terms etc. are set out by ss.9–17; and the controls on exemption clauses in s.31.
- [526.](#) See especially Vol.II, paras 38-446 et seq. especially at 38-458—38-476 and 38-492.

**Chitty on Contracts 32nd Ed.**  
**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 4 - The Terms of Contract**  
**Chapter 15 - Exemption Clauses**  
**Section 6. - Legislative Control of Exemption Clauses**  
**(a) - Unfair Contract Terms Act 1977**  
**(iv) - Test of Reasonableness**

**Test of reasonableness**

**15-096**


Except in those instances where the 1977 Act renders absolutely ineffective exclusion or restriction of liability, the contract terms controlled by the Act are subject to the requirement of reasonableness. In relation to a contract term, under s.11 of the Act the requirement of reasonableness for the purposes of the Act (and of s.3 of the Misrepresentation Act 1967) is that:

“... the term shall have been a fair and reasonable one to be included 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.” <sup>527</sup>.

The time for determining the reasonableness of the term is the time at which the contract was made. That determination is therefore not affected by the nature or seriousness of the loss or damage caused, or the way in which the term is in fact operated or relied on, <sup>528</sup> except to the extent to which such events were or ought reasonably to have been in the contemplation of the parties at that time. Further, it would appear that circumstances known only to the party seeking to allege that the term is reasonable, for example, the experimental nature of the product or the fact that it had been purchased from a foreign supplier subject to an effective exclusion of liability of his part, <sup>529</sup> are irrelevant if they were not known, and could not reasonably have been known, to the other party at the time the contract was made. <sup>530</sup> The Consumer Rights Act 2015 does not amend s.11 of the 1977 Act nor the guidelines which Sch.2 lays down for its application in certain cases, though it does affect the situations in which the test of reasonableness applies, as earlier explained. <sup>531</sup>

**Guidelines**

**15-097**


 The test of reasonableness set out by s.11(1) of the 1977 Act is a very broad one, but s.1(4) of the Act specifically provides that:

“In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.”



This exclusion therefore clearly applies to the assessment of terms or notices under the test of reasonableness in s.11. More positively, s.11(2) of the Act refers to five guidelines laid down in Sch.2 <sup>532</sup> and regard is to be had to these in determining whether a contract term satisfies the requirement of reasonableness. <sup>533</sup> The guidelines are only made expressly applicable for the purposes of s.6 (sale of goods and hire-purchase) and s.7 (other contracts for the supply of goods), but they are frequently regarded as being of general application. <sup>534</sup> The guidelines are:


(a)

the strength of the bargaining positions of the parties relative to each other, taking account (among other things) alternative means by which the customer's requirements could have been met <sup>535</sup> ;


(b)

whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term <sup>536</sup>;

(c)

whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any course of dealing between the parties) <sup>537</sup> ;

(d)

where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable <sup>538</sup> ;

(e)

whether the goods were manufactured, processed or adapted to the special order of the customer. <sup>539</sup>


#### Further factors

### 15-098

The guidelines set out in Sch.2 to the Act are not, however, exhaustive and in *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* <sup>540</sup> Potter L.J. identified no less than seven further factors going to the question of reasonableness which, in his view, had been regarded as relevant by the courts in previous cases. This list is obviously not a closed one.



#### Limits on amount

### 15-099

 Exemption clauses in contracts frequently limit the liability in damages of one party to a fixed or

determinable sum. Section 11(4) provides:

“Where by reference to a contract term ... a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above <sup>541</sup> in the case of contract terms) to—(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and (b) how far it was open to him to cover himself by insurance.”

This provision was clearly designed to provide some alleviation to the small business, and to professional persons, who may not have the resources available to meet unlimited liability or who may not be able to obtain insurance or who may be exposed to claims in excess of the sums for which insurance cover can be obtained. <sup>542</sup>  But it might in some circumstances be construed to operate against those enterprises with such resources or which are able to insure. <sup>543</sup>  It seems probable that the words “a specified sum of money” would embrace a determinable sum, e.g. the contract price. But it is more questionable whether (b) covers the situation where insurance cover can be obtained, but only on terms which are uneconomic in relation to the margin of profit achieved. <sup>544</sup>

### Burden of proof

#### 15-100

The onus of proving that it was fair and reasonable to incorporate a term in a contract lies on the party so contending. <sup>545</sup> It is therefore unnecessary for a claimant to indicate in his statement of case that he intends to challenge the reasonableness of a term in a contract relied on by the defendant. <sup>546</sup>

### Judicial application of the reasonableness test <sup>547</sup>

#### 15-101

There is a large body of reported cases which illustrate in general terms the way in which the courts may approach the test of reasonableness contained in the Act. However, they are of limited value as precedents since the position of the parties and the circumstances surrounding the transaction, and the precise wording of the clause in question, will necessarily differ in each particular situation. Moreover, with the coming into force of the Consumer Rights Act 2015, it should be borne in mind that some cases decided under the earlier law in relation to persons dealing as consumer would fall under the controls provided by the 2015 Act for “consumers”, while other cases so decided would remain under the 1977 Act though no longer subject to its earlier controls provided for persons dealing as consumer. <sup>548</sup>

### Decisions under earlier legislation

#### 15-102

A small number of decisions were reported with respect to the reasonableness test contained in s.55 of the Sale of Goods Act 1893 <sup>549</sup> (repealed in 1979) or s.3 of the Misrepresentation Act 1967 (amended in its wording by s.8 of the Unfair Contract Terms Act 1977), both of which sections however required the court to determine whether it would be fair and reasonable to allow *reliance* on the term, and not whether it was fair and reasonable to incorporate the term having regard to the circumstances at the time the contract was made. <sup>550</sup> In *Rasbora Ltd v J.C.L. Marine Ltd* <sup>551</sup> it was held (obiter) <sup>552</sup> that it was not fair and reasonable to allow a boatbuilder to rely on a term excluding all liability (other than a warranty to replace defective parts) when the boat was wholly destroyed by a fire, due to defective electrical installations, on the day following its acceptance by the buyer. In *R.W. Green Ltd v Cade Bros Farms* <sup>553</sup> a term in a contract for the bulk sale of seed potatoes providing a

short time-limit for complaints in respect of latent defects could not be relied on by the seller when the potatoes were infected with a virus; but reliance on a term limiting the liability of the seller to the contract price was allowed, as the term had been in use for many years with the approval of negotiating committees acting on behalf of both buyers and sellers. And in *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* <sup>554</sup> the Court of Appeal by a majority <sup>555</sup> held that it would not have been fair and reasonable to allow reliance on a term in a contract for the hire of barges which provided that acceptance was to be conclusive evidence that the barges were fit for their intended use, even if the clause had been apt (which it was not) to cover a misrepresentation by the owners of the barges as to their deadweight capacity. Lord Denning M.R., however, considered that both the clause itself and reliance on it was fair and reasonable, since the parties were of equal bargaining power, the term was contained in negotiated drafts and it was a familiar term in charterparties and other commercial contracts, such as structural and engineering contracts.

## 15-103

In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* <sup>556</sup> the appellant seed merchants, by their standard conditions of sale, limited their liability in respect of seeds that did not comply with the contract of sale to replacement of the seeds or refund of the price, but otherwise excluded all liability for loss or damage arising from the use of seeds supplied by them apart from such replacement or refund. The respondents, who were farmers, purchased from them for £201 a quantity of winter white cabbage seeds. The seeds in fact supplied were autumn cabbage seed; the crop failed; and the respondents claimed damages in excess of £60,000. The House of Lords held that it would not be fair or reasonable to allow the appellants to rely on the limitation of liability. Lord Bridge said that, in having regard to the various matters to which the relevant statutory provision directs attention <sup>557</sup>:

“... the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down.” <sup>558</sup>

In the instant case, although a similar limitation of liability had for long been embodied without protest in the terms of the trade between seedsmen and farmers, <sup>559</sup> the practice was to negotiate settlements of farmers' claims for damages in excess of the price of the seeds if it was thought that the claims were genuine and justified. This indicated that reliance on the limitation would not be fair or reasonable. Two further facts weighted the scale in favour of the respondents: the error was due to the negligence of the appellants' organisation, and seedsmen could insure <sup>560</sup> against the risk of crop failure resulting from the supply of the wrong variety of seeds without materially increasing the price of seeds.

## Reasonableness under Unfair Contract Terms Act 1977

## 15-104

As regards the test of reasonableness in the 1977 Act itself, in *Walker v Boyle*, <sup>561</sup> where a vendor in response to preliminary inquiries represented that she was unaware of any boundary dispute connected with the property, although she ought to have known that there was such a dispute, it was held that condition 17 of the National Conditions of Sale, even with a statement that “accuracy is not guaranteed, and [the replies] do not obviate the need to make appropriate searches, inquiries and inspections”, did not meet the test of reasonableness required by s.11 of the Act. <sup>562</sup> In *Stag Line Ltd v Tyne Shiprepair Group Ltd* <sup>563</sup> a term in a ship-repairing contract excluding liability on the part of the repairer for consequential economic loss was held to be reasonable, but not a condition that the shipowner should have no remedy unless he returned the vessel to the repairer's yard for repair, or to such other place as the repairer should direct. In *Phillips Products Ltd v Hyland* <sup>564</sup> the Court of Appeal held unreasonable in the circumstances <sup>565</sup> a term in a contract for the hire of an excavator and driver which provided that the driver was to be regarded as an employee of the hirer who alone was to be responsible for all claims arising in connection with the operation of the plant by the driver. In *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* <sup>566</sup> a term in a contract for the supply of piping which excluded all liability of the seller unless notified of complaints within three months of delivery

was held unreasonable. In *Smith v Eric Bush* <sup>567</sup> a non-contractual notice in a report by a building society surveyor disclaiming all liability for negligence in conducting the survey of a modest dwelling-house was held to be unreasonable in view of the fact that the report would be relied on by an intending purchaser of the property. In *Charlotte Thirty Ltd v Croker Ltd* <sup>568</sup> the court held unreasonable a term in a contract to design and build an industrial plant which exonerated the contractor from all liability except as provided in a six-month warranty to replace defective components if these were returned carriage paid to the contractor for adjudication. And in *Stewart Gill Ltd v Horatio Myer & Co Ltd* <sup>569</sup> a term in a contract for the supply and installation of a conveyor system, which provided that the purchaser was not to be entitled to withhold payment of any sum due to the supplier under the contract by reason of “any payment, credit, set-off ... or for any other reason whatsoever”, failed to satisfy the requirement of reasonableness.

## 15-105

In *St Alban's City and DC v International Computers Ltd* <sup>570</sup> a term in a computer software contract made with a local authority limited the liability of the supplier to £100,000, and in *Salvage Association v Cap Financial Services* <sup>571</sup> a term in a computer accounting contract limited the liability of the supplier to £25,000. Both were held to be unreasonable. In *Edmund Murray Ltd v BSP International Foundations Ltd* <sup>572</sup> the court held unreasonable a term in a contract for the sale of a drilling rig with detailed requirements for performance, which purported to exclude liability on the part of the seller for breach of both express and implied obligations, and in *AEG (UK) Ltd v Logic Resource Ltd* <sup>573</sup> a term in a contract for the sale of radar equipment which excluded all warranties and conditions implied by the Sale of Goods Act 1979 was held to be unreasonable despite the giving of an express warranty that the equipment was free of defects caused by faulty materials or bad workmanship. Also in *Timeload Ltd v British Telecommunications Plc* <sup>574</sup> the Court of Appeal held unreasonable a term in BT's standard terms and conditions which permitted BT to terminate the contract on one month's notice since the term was not limited to cases where there was a good reason for the termination. In *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd* <sup>575</sup> terms in a contract for the supply of a software package which excluded all terms relating to performance, quality, fitness for purpose etc. to the fullest extent permitted by law were held unreasonable despite a warranty that the program provided would in all material respects provide the facilities and functions set out in the operating documents (which were not supplied when the contract was signed). In *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* a term in a project management contract which provided, in favour of the project managers, a liability cap of approximately £111,000 was held to be unreasonable because the contract imposed on them an obligation to take out professional indemnity insurance to a level of £10 million. <sup>576</sup>

## 15-106

In *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* <sup>577</sup> the defendants undertook to carry medical equipment belonging to the claimants to be exhibited at an overseas exhibition and to ensure full insurance cover for the exhibits. The Court of Appeal refused to disturb the finding of the trial judge that a term which purported to limit the liability of the defendants to £600 in the event that occurred, namely a breach by the defendants of their contractual duty to insure the goods, was unreasonable. In *Pegler Ltd v Wang (UK) Ltd*, <sup>578</sup> terms in a contract for the supply of computer hardware and software excluding liability for indirect, special and consequential loss and imposing a two-year contractual limit for claims were held unreasonable because the supplier “had so misrepresented what [it] was selling that breaches of contract were not unlikely” and because the customer had no choice but to accept them. In *Britvic Soft Drinks Ltd v Messer UK Ltd* <sup>579</sup> the Court of Appeal held that clauses in a contract for the sale of bulk carbon dioxide to be used by the buyer for the carbonation of drinks, which purported to exclude the terms as to satisfactory quality and fitness for purpose implied by the Sale of Goods Act 1979, were unreasonable, and in *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* <sup>580</sup> it held that a clause in a similar contract, which operated as a blanket exclusion of liability on the part of the seller for any loss or damage (with certain exceptions) sustained by the buyer, was likewise unreasonable.

## 15-107

On the other hand, in *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd*, <sup>581</sup> where a finance company purchased a motorcar from a dealer and agreed to sell it under a conditional sale

agreement to a commercial company, Dillon L.J. expressed the opinion (obiter) <sup>582</sup> that a clause in the conditional sale agreement which excluded all conditions and warranties, express or implied, as to merchantability or fitness for purpose was in the circumstances reasonable, since the director who entered into the agreement on behalf of the buyer company was a man of commercial experience and the finance company never had possession of or inspected the car. <sup>583</sup> In *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority*, <sup>584</sup> where a machine sub-bailed to a port authority was damaged in the course of loading, Steyn J. held reasonable a clause disclaiming responsibility for damage other than that arising from the proven negligence of the authority and a clause limiting the liability of the authority to a sum of £800 per tonne. <sup>585</sup> In *Sonicare International Ltd v East Anglia Freight Terminal Ltd* <sup>586</sup> a term in the National Association of Warehouse Keepers' conditions limiting liability to £100 per tonne was similarly held reasonable in the circumstances of that case. A "no set-off" clause in the standard conditions of the British International Freight Association (freight forwarders) was upheld as reasonable in *Schenkers Ltd v Overland Shoes Ltd*, <sup>587</sup> and "no set-off" clauses in loan and financial agreements have also been upheld. <sup>588</sup> A term in a freight forwarders' contract excluding all liability unless suit was brought within nine months was likewise adjudged reasonable. <sup>589</sup> In *Robinson v PE Jones (Contractors) Ltd* <sup>590</sup> the Court of Appeal held reasonable a clause in an NHBC agreement between a builder and a homeowner excluding tortious liability for a defect causing economic loss.

## 15-108

Clauses limiting the amount of damages recoverable have been upheld as reasonable in *Moore v Yakeley Associates Ltd*, <sup>591</sup> where a term in the Royal Institute of British Architects' Standard Form limited the liability of an architect to £250,000, and in *Britvic Soft Drinks Ltd v Messer UK Ltd* <sup>592</sup> where there was a term in a contract for the sale of bulk carbon dioxide limiting the liability of the seller in respect of direct physical damage to property, and losses arising directly therefrom, whether through negligence or otherwise, to £500,000. <sup>593</sup> In *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* <sup>594</sup> a clause in the BIFA (freight forwarders) contract limiting the damages recoverable in respect of loss by theft of mobile telephones (valued at £2m) to approximately £25,000 was upheld as reasonable and in *Sterling Hydraulics Ltd v Dichtomatik Ltd* <sup>595</sup> a clause in a contract for trailer parts which restricted the seller's liability for defects to the value of the goods was likewise held to be reasonable. In *Regus (UK) Ltd v Epcot Solutions Ltd* <sup>596</sup> terms in a contract for the hire of serviced office accommodation were held reasonable which excluded liability for consequential loss and which limited liability to 125 per cent of fees or £50,000.

## 15-109

In *Thames Tideway Properties Ltd v Serfaty & Partners* <sup>597</sup> terms in a contract for the handling of cargoes of waste paper which provided that goods handled would be at the sole risk of the customer and that the handling company should not be liable for any damage to the goods unless such damage was proved by the customer to have been caused by the neglect or default of the company or its employees were held to be reasonable. In *British Fermentation Products Ltd v Compair Reavell Ltd* <sup>598</sup> the court held reasonable a term in a contract for the supply of machinery which provided that the supplier undertook to repair or replace machinery which proved to be defective within 12 months of delivery if it was returned to him at his expense but stipulated that this was: "... in lieu of any warranty or condition implied by law as to the quality or fitness for any particular purpose of the goods."

## 15-110

A number of cases have emphasised the importance of upholding the agreed contract terms where experienced businessmen are involved and the parties are of equal bargaining power in terms of size and resources. In *Photo Productions Ltd v Securicor Transport Ltd* <sup>599</sup> (a case which did not involve consideration of any provision of the 1977 Act) Lord Wilberforce stated that, in commercial matters generally, when the parties were not of unequal bargaining power, and when risks were to be borne by insurance, Parliament's intention in the Act seemed to be one of "leaving the parties free to apportion the risks as they think fit ... and respecting their decisions". <sup>600</sup>

## 15-111

This was the approach adopted in *Monarch Airlines Ltd v London Luton Airport Ltd* <sup>601</sup> where a term in

a contract between an airline and an airport operator excluded liability for damage to an aircraft caused by any act, omission, neglect or default on the part of the latter, except if done with intent to cause damage or recklessly with knowledge that damage would probably result. It was held that this term was reasonable on the ground that it was generally accepted in the market, its meaning was clear and both parties could make insurance arrangements on the basis of the term. It was also the approach adopted in *Watford Electronics Ltd v Sanderson CFL Ltd* <sup>602</sup> where the Court of Appeal, reversing the decision of the trial judge, held reasonable a term in a contract for the supply of a bespoke integrated software system which excluded the liability of either party for indirect and consequential losses, whether arising from negligence or otherwise, and limited the liability of the supplier to the amount of the contract price. Chadwick L.J. said:

“Where experienced businessmen representing substantial companies of equal bargaining power negotiated an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judges of the commercial fairness of the agreement which they have made; including the fairness of each of the terms of that agreement.”

## Powers of the court

### 15-112

⚠ Although the 1977 Act uses the words “except in so far as the term satisfies the requirement of reasonableness”, <sup>603</sup> it is the term as a whole that has to be reasonable and not merely some part of it. <sup>604</sup> Thus if the term as a whole is unreasonable, a party cannot be heard to say that the part of the term on which he relies is reasonable. <sup>605</sup> ⚠ However, where a single provision in a contract consists of several sub-clauses or sentences, it may be difficult to identify what is “the term” for the purposes of the Act. <sup>606</sup> ⚠

### 15-113

There is little doubt that the court’s powers under the Act are limited to declaring the term either to be reasonable or unreasonable. The court could not rewrite the term by (say) increasing the amount specified in a limitation of liability clause to a sum which it considered to be fair and reasonable. <sup>607</sup> Nor, it seems, could the court sever words which made the term unreasonable so as to render the term reasonable or limit the application of an unreasonable clause so as to produce a reasonable result. <sup>608</sup>

### 15-114

⚠ If a single term purports to exclude or restrict liability which by the Act cannot in any circumstances be excluded or restricted (for example, liability for death and personal injury resulting from negligence) and also liability which can be excluded or restricted subject to the test of reasonableness (for example, liability in negligence for other loss or damage), the term, while being ineffective to exclude or restrict the former liability, may nevertheless be upheld as reasonable in respect of the restriction or exclusion of the latter liability. <sup>609</sup> ⚠ But it could be argued that the term as a whole is rendered unreasonable by purporting to exclude or restrict the former liability as well as the latter.

## Appeals


### 15-115

A decision by the judge of first instance as to whether the term was a fair and reasonable one to be



included cannot accurately be described as an exercise of discretion. Nevertheless, since it involves the balancing of various considerations, Lord Bridge has said <sup>610</sup>:

“... in my view ... when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.”

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- <sup>527.</sup> s.11(1). Contrast s.11(3) (notices) and *First National Bank Plc v Loxley* [1996] E.G.C.S. 174
- <sup>528.</sup> *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 612. See also *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [420]–[421].
- <sup>529.</sup> See below, para.15-122.
- <sup>530.</sup> See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218 (availability of insurance may be relevant, but actual insurance position at time irrelevant); para.15–099 n.515, below.
- <sup>531.</sup> See above, paras 15-083, 15-087 and 15-090.
- <sup>532.</sup> The guidelines are similar to those formerly set out in s.55(5) of the Sale of Goods Act 1893 as inserted by s.4 of the Supply of Goods (Implied Terms) Act 1973, and repealed on the enactment of the Sale of Goods Act 1979.
- <sup>533.</sup> See Vol.II, paras 44-122 et seq.
- <sup>534.</sup> *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434, 438–439; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 608. See also *Singer Co (UK) Ltd v Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686 (affirmed [1996] 4 All E.R. 481); *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 at [15]; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465 at [67]; *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629; *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* [2012] EWHC 2137 (TCC), [2012] T.C.L.R. 8 at [199].
- <sup>535.</sup>  See *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep. 498; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 57; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [159]; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [407]–[409]; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007]

*Build. L.R.* 135; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [105]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136; *Rohlig UK Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349; *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [152]–[153]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [91], [92]; *West v Ian Finlay & Associates* [2014] EWCA Civ 316, [2014] B.L.R. 324. In *Denholm Fishselling Ltd v Anderson* (1991) S.L.T. (Sh. Ct.) 24, it was held that there was no preponderance of bargaining power where buyers might not be able to purchase except on similar standard conditions but nevertheless had a choice of suppliers. cf. *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [116] (appeal pending) (equal bargaining power evidenced by party threatening to go elsewhere); *Polypearl Ltd v Building Research Establishment Ltd Unreported*, July 28, 2016 (Mercantile Ct) at [105]; *Halsall v Champion Consulting Ltd* [2017] EWHC 1079 (QB) at [297].

536. *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 at [410]; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [105]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 Lloyd's Rep. 1; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136.

537. **!** See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Const. L.R. 46; *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 625; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 at [411]; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [106]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 Lloyd's Rep. 1; *Rohlig UK Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349; *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [152]–[153]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [91], [92]; *West v Ian Finlay & Associates* [2014] EWCA Civ 316, [2014] B.L.R. 324 at [67]–[68]; *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) at [90]; *Polypearl Ltd v Building Research Establishment Ltd Unreported*, July 28, 2016 (Mercantile Ct) at [105].


538. **!** See *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep. 211; *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1985) 2 Const. L.R. 109; *Sargant v CIT (England) (t/a Citalia)* [1994] C.L.Y. 566; *Knight Machinery (Holdings) v Rennie* 1995 S.L.T. 166; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Commercial Management (Investments) Ltd v Mitchell Design & Construct Ltd* [2016] EWHC 76 (TCC) at [86]–[88].


539. It is uncertain whether the existence of this factor would operate against or in favour of the

customer, but it is submitted that it should operate against the customer and in favour of the supplier. But see *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Const. L.R. 1. cf. *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [132]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75].

540. [1999] 2 Lloyd's Rep. 273, 276–277. See also *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [412]–[413]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75].

541. See above, para.15-097.

542.  The statement in the text was approved by *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [76] and [80]–[87].

543.  The availability of insurance may be a relevant consideration in applying the test of reasonableness under s.11(1): see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 817 (below, para.15-103); *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1985) 2 Const. L.R. 109; *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, 666–668; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *Smith v Eric Bush* [1990] 1 A.C. 831, 858; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1990] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang* [2000] Build. L.R. 218; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [159]; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm) at [415]–[416]. But the actual insurance position of the parties at the time is normally irrelevant: *Flamar Interoccean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434; cf. *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686 (affirmed [1996] 4 All E.R. 481); *Salvage Association v Cap Financial Services* [1995] F.S.R. 654; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 1710 (TCC), [2007] Build. L.R. 13; *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* [2012] EWHC 2137 (TCC), [2012] T.C.L.R. 8 at [201]; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [76].

544. cf. *Smith v Eric Bush* [1990] 1 A.C. 831, 858 (cost); *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] Build. L.R. 135.

545. 1977 Act s.11(5). See *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265, 278; *Shah v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB), [2013] 1 All E.R. (Comm) 72 at [223]–[224].

546. *Sheffield v Pickfords Ltd* [1997] C.L.C. 648.

547. See *Adams and Brownsword* (1988) 104 L.Q.R. 94; *Brown and Chandler* (1993) 109 L.Q.R. 41; *Adams* (1994) 57 M.L.R. 960.

548. This is notably the case as regards the controls provided by s.3 of the 1977 Act owing to the differences between persons “dealing as consumer” under the 1977 Act (before the coming into force of the 2015 Act) and “consumers” within the meaning of the 2015 Act: see above, paras 15-084–15-087.

549. Inserted by s.4 of the Supply of Goods (Implied Terms) Act 1973.

550. But see *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574, 594.

551. [1977] 1 Lloyd's Rep. 645.



552. The sale was held to be a consumer sale: see above, para.15-073 n.399.

- [553.](#) [1978] 1 Lloyd's Rep. 602.
- [554.](#) [1978] Q.B. 574; see above, para.7-075.
- [555.](#) Bridge and Shaw L.JJ. (but giving no reasons).
- [556.](#) [1983] 2 A.C. 803; see above, para.15-026.
- [557.](#) Sale of Goods Act 1979 s.55 (as amended) or s.11 of the Unfair Contract Terms Act 1977.
- [558.](#) [1983] 2 A.C. 803, 816.
- [559.](#) But never negotiated by representative bodies.
- [560.](#) See above, para.15-099 n.515.
- [561.](#) [1982] 1 W.L.R. 495. See also *Southwestern General Property Co Ltd v Marton* (1982) 263 E.G. 1090 and above, para.7-152 n.673; *Cleaver v Schyde Investments Ltd* [2011] EWCA Civ 929 (cl.7 of the Standard Conditions of Sale, 4th edn). cf. *Lloyd v Browning* [2013] EWCA Civ 1637, [2014] 1 P. & C.R. 11 at [33]-[36], [42] (cl.8 of Standard Conditions of Sale, 4th edn, held reasonable in context) and see above para.7-150 ("no-reliance" clauses).
- [562.](#) For the purposes of s.3 of the Misrepresentation Act 1967 (as amended).
- [563.](#) [1984] 2 Lloyd's Rep. 211.
- [564.](#) [1987] 1 W.L.R. 659. But contrast *Thompson v Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649.
- [565.](#) The contract was on a "take it or leave it" basis, and the hirer had no control over the way the driver would do the work.
- [566.](#) (1985) 2 Const. L.R. 109. See also *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8 (defects to be reported within one week of delivery). Contrast *Expo Fabrics (UK) Ltd v Naughty Clothing* [2003] EWCA Civ 1165 (textiles: 20-day time limit held reasonable).
- [567.](#) [1990] 1 A.C. 831; see also *Harris v Wyre Forest DC* at [1990] 1 A.C. 831; *Davies v Idris Parry* (1988) 20 E.G. 92, 21 E.G. 74; *Beaton v Nationwide Anglia Building Society* (1991) 31 E.G. 218.
- [568.](#) (1990) 24 Const. L.R. 46. But see Vol.II, para.37-086 (construction contracts).
- [569.](#) [1992] Q.B. 600. See also *Fastframe Ltd v Lochinski* Unreported March 3, 1993 CA (noted (1994) 57 M.L.R. 960); *Esso Petroleum Co Ltd v Milton* [1997] 1 W.L.R. 938, 948, 954. But see the cases cited in para.15-107, nn.559, 560.
- [570.](#) [1995] F.S.R. 686 (affirmed [1996] 4 All E.R. 481).
- [571.](#) [1995] F.S.R. 654.
- [572.](#) (1994) 33 Const. L.R. 1.
- [573.](#) [1996] C.L.C. 265. Contrast *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]-[92].
- [574.](#) [1995] E.M.L.R. 459. Contrast *Zockoll Group Ltd v Mercury Communications Ltd* [1998] I.T.C.L.R. 104.
- [575.](#) [2010] EWHC 965 (TCC), (2010) 26 Const. L.J. 542.



- [576.](#) [2012] EWHC 2137 (TCC), [2012] T.C.L.R. 8 at [201].
- [577.](#) [1999] 2 Lloyd's Rep. 273.
- [578.](#) [2000] Build. L.R. 248.
- [579.](#) [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368. See also *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [418].
- [580.](#) [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379.
- [581.](#) [1988] 1 W.L.R. 321. See also *W. Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr.L.R. 146, QBD.
- [582.](#) [1988] 1 W.L.R. 321, 331–332. The company was held to be “dealing as consumer”: see above, para.15-074.
- [583.](#) See also *Abbey National Business Equipment Leasing Ltd v Dora Ife* [2003] C.L.Y. 723 (hire). But the fact that the finance company had not seen the goods was considered insufficient in *Sovereign Finance Ltd v Silver Crest Furniture* [1997] C.C.L.R. 76 (hire purchase) following *Purnell Secretarial Services v Lease Management Services* [1994] C.C.L.R. 127 (hire).
- [584.](#) [1988] 2 Lloyd's Rep. 164.
- [585.](#) This figure was below that of the Hague-Visby Rules (£1,210), the CMR convention (£5,195) and the Warsaw Convention (£10,050) at the relevant time.
- [586.](#) [1997] 2 Lloyd's Rep. 48.
- [587.](#) [1998] 1 Lloyd's Rep. 498. See also *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *SKNL (UK) Ltd v Toll Global Forwarding* [2012] EWHC 4252 (Comm), [2013] 2 Lloyd's Rep. 115 at [27]–[28]; *University of Wales v London College of Business Ltd* [2015] EWHC 1280 (QB) at [98].
- [588.](#) *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] C.L.Y. 906; *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66; *WRM Group Ltd v Wood* [1998] C.L.C. 189; *United Trust Bank Ltd v Dohil* [2011] EWHC 3302 (QB), [2012] 2 All E.R. (Comm) 765 at [19].
- [589.](#) *Granville Oil Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 450; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161.
- [590.](#) [2011] EWCA Civ 9, [2011] B.L.R. 206. See also *McCullagh v Lane Fox and Partners Ltd* (1996) 49 Con. L.R. 124, [1996] 1 E.G.L.R. 35.
- [591.](#) (1999) 62 Const. L.R. 76 (affirmed [2000] C.L.Y. 810).
- [592.](#) [2002] 1 Lloyd's Rep. 20, see also *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 Lloyd's Rep. 62 (both decisions by Tomlinson J.). The point was not in issue in either case on appeal [2002] EWCA Civ 548, [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 368, [2002] 2 Lloyd's Rep. 379.
- [593.](#) cf. the special treatment of limitations (as opposed to exclusions) of the trader's liability in consumer contracts for services under s.57 of the Consumer Rights Act 2015 on which see Vol.II, para.38-546.
- [594.](#) [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251.
- [595.](#) [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8 (but not a provision that defects were to be

reported within one week of delivery).

- [596.](#) [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586.
- [597.](#) [1999] 2 Lloyd's Rep. 110.
- [598.](#) (1999) 66 Const. L.R. 1.
- [599.](#) [1980] A.C. 827.
- [600.](#) [1980] A.C. 827, 843 (applied in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [52]–[54]).
- [601.](#) [1998] 1 Lloyd's Rep. 403.
- [602.](#) [2001] EWCA Civ 317, [2001] Build. L.R. 143 at [63]. See also *Salvage Association v CAP Financial Services* [1995] F.S.R. 654, 676; *E.A. Grumstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029 at [29]; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC 2733, [2003] 1 All E.R. (Comm) 465 at [63]; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 at [31]; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [158]; *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1793 (Comm) at [604]; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [100]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [321]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136; *Rohlig UK Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm), 1161; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54; *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1. cf. *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [404], [422]–[426]; *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [152]–[153]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [91], [92].
- [603.](#) Or, in ss.6(3), 7(3), “only in so far as”.
- [604.](#) *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 608; *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2009] EWHC 1919 (TCC) at [131]. cf. *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; above, para.15-096.
- [605.](#)  *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 607. But see *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 75; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 at [26]; *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC); *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586 at [44]; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [70].
- [606.](#)  e.g. *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd* Unreported, November 20, 1991 CA, (contrasting views of Staughton and Nourse L.JJ. as to whether a clause should be treated as one or more “terms” for the purposes of the Act); *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [71] (though expressly obiter).
- [607.](#) See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 816 (on the wording of s.55 of the Sale of Goods Act 1979 (as amended)).
- [608.](#) *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600. But see *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC) at [137]; *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586, where the contrary view was expressed.



609.

! *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd Unreported*, November 20, 1991 CA, (under issue B(viii)), quoting with approval the view then tentatively expressed by the equivalent paragraph to para.15-114 in 26th edn, 1989; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [66]–[70] (distinguishing the issue of the “excision” of part of a term wholly ineffective under the 1977 Act and the issue considered in *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600 where it was held that a party had to show that the whole of a term was reasonable and not merely that part of a term on which it wished to rely).

610.

*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 810. See also *Edmund Murray Ltd v BSP International Foundations Ltd* (1994) 33 Const. L.R. 1; *St Alban's City and District Council v International Computers Ltd* [1996] 4 All E.R. 481, 491; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 276; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368 at [19]; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 2 Lloyd's Rep. 549, [2002] 2 Lloyd's Rep. 379 at [20]; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Cleaver v Schyde Investments Ltd* [2011] EWCA Civ 929 at [31]; *Hodges v Aegis Defence Services (BVI) Ltd* [2014] EWCA Civ 1449 at [33]–[34]. cf. *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 (first instance decision reversed).

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 4 - The Terms of Contract

#### Chapter 15 - Exemption Clauses

#### Section 6. - Legislative Control of Exemption Clauses

#### (a) - Unfair Contract Terms Act 1977

#### (v) - Exclusions From the Scope of the 1977 Act or Some of its Provisions

##### Specific exceptions

##### 15-116

⚠ Some or all of the provisions of the 1977 Act do not apply in the case of contracts of certain types or as regards certain contract terms, as explained in the following paragraphs. Before the coming into force of the 2015 Act, terms excluded in this way from the application of the 1977 Act could nonetheless be subject to the controls applicable to *consumer* contracts provided by the Unfair Terms in Consumer Contracts Regulations 1999, subject to their satisfying the conditions for the application of those controls. <sup>611</sup> On its coming into force, the 2015 Act replaces the 1999 Regulations with its own controls on unfair terms in consumer contracts and, for the most part, does not replicate the qualifications previously set out by the 1977 Act. <sup>612</sup> More generally, the limited impact of the Consumer Rights Act 2015 <sup>613</sup> ⚠ directly on the wording of these exclusions in the 1977 will be noted.

##### Schedule 1 <sup>614</sup>

##### 15-117

By para.1 of Sch.1 to the Act, s.2 (negligence liability), s.3 (liability arising in contract) and (before its deletion by the Consumer Rights Act 2015 <sup>615</sup>) s.4 (unreasonable indemnity clauses) do not extend to:

(a)

any contract of insurance (including a contract to pay an annuity on human life) <sup>616</sup>;

(b)

any contract so far as it relates to the creation or transfer of an interest in land, <sup>617</sup> or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise <sup>618</sup>;

(c)

any contract so far as it relates to the creation of a right or interest in any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property,

or relates to the termination of any such right or interest <sup>619</sup>;

(d)

any contract so far as it relates:

(i)

to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership); or

(ii)

to its constitution or the rights or obligations of its corporators or members;

(e)

any contract so far as it relates to the creation or transfer of any right or interest in securities. <sup>620</sup>

## 15-118

⚠ Paragraph 2 of Sch.1 of the 1977 Act lists three contracts:

(a)

any contract of marine salvage or towage;

(b)

any charterparty of a ship or hovercraft; and

(c)

any contract for the carriage of goods by ship <sup>621</sup> or hovercraft. <sup>622</sup>

These contracts (if made before October 1, 2015, when the relevant provisions of Consumer Rights Act 2015 came into force) <sup>623</sup> ⚠ are subject to s.2(1) (exclusion or restriction of liability for death or personal injury resulting from negligence), but otherwise s.2 (negligence liability), s.3 (liability arising in contract), s.4 (unreasonable indemnity clauses) and s.7 (miscellaneous contracts under which goods pass) do not extend to any such contract except in favour of a person dealing as consumer. After the coming into force of the 2015 Act, the position remains the same, except that references to s.4 on unreasonable indemnity clauses are deleted as is s.4 itself <sup>624</sup> and that there is no longer any exception provided for persons dealing as consumer, as this category is no longer used by the 1977 Act. <sup>625</sup> Instead, under the 2015 Act, terms in consumer contracts of the types listed by para.2 of Sch.1 of the 1977 Act are subject to the controls on unfair contract terms which the 2015 Act provides. <sup>626</sup>

## 15-119

⚠ Paragraph 3 of Sch.1 deals with the situation where goods are carried by ship <sup>627</sup> or hovercraft <sup>628</sup> in pursuance of a contract which either:

- (a) specifies that as the means of carriage over part of the journey to be covered; or
- (b) makes provision as to the means of carriage and does not exclude that means.

With such a situation under a contract made before October 1, 2015 (when the Consumer Rights Act 2015 came into force), <sup>629</sup> ⚠ s.2(2) (exclusion or restriction of liability for loss or damage resulting from negligence other than death or personal injury), s.3 (liability arising in contract) and s.4 (unreasonable indemnity clauses) do not, except in favour of a person dealing as consumer, extend to the contract as it operates for and in relation to the carriage of goods by that means. With the relevant provisions of coming into force of the 2015 Act, the position remains the same, with the same exceptions as apply in relation to the contracts in para.2 of Sch.1, that is, references to s.4 on unreasonable indemnity clauses are deleted <sup>630</sup> and there is no longer any exception provided for persons dealing as consumer. <sup>631</sup> Similarly, under the 2015 Act, terms in consumer contracts of the types listed by para.3 of Sch.1 of the 1977 Act are subject to the controls on unfair contract terms which the 2015 Act provides. <sup>632</sup>

## 15-120

By para.4 of Sch.1 s.2(1) and (2) (negligence liability) do not extend to a contract of employment, except in favour of the employee. <sup>633</sup>

## 15-121

By para.5 of Sch.1 s.2(1) (exclusion or restriction of liability for death or personal injury resulting from negligence) does not affect the validity of any discharge and indemnity given by a person, on or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting that disease. <sup>634</sup>

### International supply contracts

## 15-122

⚠ By s.26 of the 1977 Act, the limits imposed by the Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an international supply contract (as defined in subss.(3) and (4) of that section), <sup>635</sup> nor are the terms of such a contract subject to any requirement of reasonableness under s.3 (liability arising in contract) or (for contracts made before October 1, 2015 (when the Consumer Rights Act 2015 came into force) s.4 (unreasonable indemnity clauses). <sup>636</sup> ⚠ With the coming into force of the 2015 Act, the 1977 Act no longer applies to consumer contracts, which are instead subject to the controls in the 2015 Act and these apply equally to international supply contracts. <sup>637</sup>

### Contractual provisions authorised or required by statute or international agreement

## 15-123

❗ By s.29(1), nothing in the 1977 Act removes or restricts the effect of, or prevents reliance upon, any contractual provision which:

(a)

is authorised or required by the express terms or necessary implication of an enactment<sup>638</sup>; or

(b)

being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.

This subsection covers (inter alia), provisions in statutes and international conventions relating to the carriage of goods by sea<sup>639</sup> and of passengers, goods and luggage by land and air.<sup>640</sup> It is unaffected by the Consumer Rights Act 2015,<sup>641</sup> but the specific temporary provision made by the 1977 Act in respect of the Athens Convention 1974 on the carriage of passengers and their luggage by sea<sup>642</sup> is deleted by the Consumer Rights Act 2015.<sup>643</sup> ❗

#### **Contractual provisions approved by a competent authority**

### **15-124**

By s.29(2) a contract term is to be taken for the purposes of the Act as satisfying the requirement of reasonableness if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority<sup>644</sup> acting in the exercise of any statutory<sup>645</sup> jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.<sup>646</sup> These provisions are unaffected by the Consumer Rights Act 2015.




#### **Choice of English law clauses**

### **15-125**



❗ Commercial contracts are frequently made subject to English law by choice of the parties even though having no substantial connection with England and Wales.<sup>647</sup> Section 27(1) of the 1977 Act<sup>648</sup> provides that, where the law applicable to a contract is the law of any part of the UK<sup>649</sup> only by choice of the parties (and apart from that choice would be the law of some country outside the UK) ss.2 to 7 of the Act do not operate as part of the law applicable to the contract,<sup>650</sup> unless the term expressing this choice appears to the court, arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the 1977 Act.<sup>651</sup> For contracts made before October 1, 2015 (when the relevant provisions of the Consumer Rights Act 2015 came into force)<sup>652</sup> ❗, the exclusion set out by s.27(1) does not apply where one of the parties dealt as consumer and was then habitually resident in the UK, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf<sup>653</sup>; but with its coming into force, this qualification is deleted,<sup>654</sup> reflecting the fact that the 1977 Act no longer makes special provision for persons dealing as consumer<sup>655</sup> nor applies to the terms of “consumer contracts” (which are instead governed by the 2015 Act). There is, however, no provision in the 2015 Act equivalent to s.27(1).<sup>656</sup>

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<sup>611</sup>. See Vol.II, paras 38-201 et seq.


- [612.](#) An exception is found in relation to the invalidity of contract terms excluding or limiting a trader's liability for negligence without any assessment of its fairness: s.66(1) and (2) of the 2015 Act reflecting the 1977 Act Sch.1 paras 1(a) and (b) and 4; Vol.II, para.38-377. On the 2015 Act, provisions on unfair contract terms and notices generally, see Vol.II, paras 38-334 et seq.
- [613.](#)  Above, para.15-064. The Act generally applies to contracts made on or after October 1, 2015.
- [614.](#) 1977 Act s.1(2).
- [615.](#) 2015 Act s.75, Sch.4 para.26.
- [616.](#) cf. s.66(1)(a) of the 2015 Act: see Vol.II, para.38-377.
- [617.](#) cf. s.66(1)(b) of the 2015 Act: see Vol.II, para.38-377.
- [618.](#) *Electricity Supply Nominees Ltd v IAF Group Ltd* [1993] 1 W.L.R. 1059 (no-set-off clause in lease); *Cheltenham and Gloucester B.S. v Ebbage* [1994] C.L.Y. 3292 (mortgage); *Star Rider Ltd v Innpreneur Pub Co* [1998] 1 E.G.L.R. 53 (no-set-off clause in draft lease); *Unchained Growth III Plc v Granby Village (Manchester) Management Co Ltd* [2000] 1 W.L.R. 739 (no-set-off clause in lease). cf. the position under the Unfair Terms in Consumer Contracts Regulations 1999 and Pt 2 of the 2015 Act: Vol.II, paras 38-203—38-204 and 38-355.
- [619.](#) cf. *Salvage Association v Cap Financial Services* [1995] F.S.R. 654. cf. the position under the Unfair Terms in Consumer Contracts Regulations 1999 and Pt 2 of the 2015 Act: see the reference in n.589.
- [620.](#) *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002.
- [621.](#) See Carriage of Goods by Sea Act 1971; Merchant Shipping Act 1981. But see also below, para.15-119.
- [622.](#) See Hovercraft (Civil Liability) Order 1971 (SI 1971/720) made under s.1 of the Hovercraft Act 1968. But see also below, para.15-119.
- [623.](#)  Above, para.15-064. The general date of the coming into force of the 2015 Act on October 1, 2015 has an exception as regards “consumer transport services” (as specially defined) in relation to which the relevant provisions of the 2015 Act come into force only for contracts made on or after October 1, 2016: the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2. This applies to the amendments to Sch.1 of the 1977 Act: SI 2015/1630 art.4(c) referring, inter alia, to the 2015 Act Sch.4 paras 26 and 27.
- [624.](#) Above, para.15-090.
- [625.](#) Above, para.15-079. The amendments to the 1977 Act Sch.1 para.2 are provided by the 2015 Act s.75, Sch.4 para.26(4).
- [626.](#) 2015 Act Pt 2 on which see Vol.II, paras 38-334 et seq.
- [627.](#) See n.592 (above).
- [628.](#) See n.593 (above).
- [629.](#)  Above, para.15-064. For the special position of “consumer transport services” see above, para.15-118 n.594.



- [630.](#) Above, para.15-118.
- [631.](#) Above, para.15-119. The amendments to the 1977 Act Sch.1 para.3 are provided by the 2015 Act s.75, Sch.4 para.26(5).
- [632.](#) 2015 Act ss.62 and 68–69 on which see Vol.II, paras 38-334 et seq.
- [633.](#) See *Johnstone v Bloomsbury H.A.* [1992] Q.B. 333. This exclusion from the 1977 Act is not affected by the Consumer Rights Act 2015.
- [634.](#) This exclusion from the 1977 Act is also not affected by the Consumer Rights Act 2015.
- [635.](#) See Vol.II, para.44-125.
- [636.](#)  On the coming into force of the 2015 Act, s.4 of the 1977 Act is deleted: above, paras 15-064 and 15-090. As regards “consumer transport services” the deletion of the reference to s.4 of the 1977 Act applies only to contracts made on or after October 1, 2016: SI 2015/1630 arts 4(c) and 6(2) (as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2) referring to the 2015 Act Sch.4 para.23.
- [637.](#) As recommended by the Law Commission and Scottish Law Commission Unfair Terms in Consumer (2005), Law Com No.292, Scot Law Com No.199 Pt 7, especially para.7.6, and see Vol.II, para.38-386.
- [638.](#) Defined by the 1977 Act s.29(3).
- [639.](#) Carriage of Goods by Sea Act 1971; Merchant Shipping Act 1981. See below para.15-134.
- [640.](#) See below, paras 15-133, 15-135, and Vol.II, Chs 35 and 36.
- [641.](#) cf. the exclusion from the scope of the controls on terms in consumer contracts by s.73 of the 2015 Act on which see Vol.II, para.38-357.
- [642.](#) 1977 Act s.28. The Merchant Shipping Act 1995 Sch.6 provides that the Athens Convention 1974, as amended by the 1976 protocol, is to have the force of law in the United Kingdom. See also SI 1998/2917.
- [643.](#)  2015 Act s.75 Sch. 4, para.25. This amendment generally comes into force as regards contracts made on or after October 1, 2015, but this finds an exception as regards “consumer transport services” where the relevant date is October 1, 2016: SI 2015/1630 arts 3(g), 4(c) and 6(2) (as amended by SI 2016/484 art.2) referring to the 2015 Act Sch.4 para.25.
- [644.](#) Defined in s.29(3).
- [645.](#) Defined in s.29(3).
- [646.](#) cf. *Timeload Ltd v British Telecommunications Plc* [1995] E.M.L.R. 459 (“approval” by Director General of Fair Trading not in exercise of statutory function).
- [647.](#) On the general rules governing choice of applicable law see below, paras 30-046 et seq. and 30-169 et seq.
- [648.](#) As amended by s.5 of and Sch.4 to the Contracts (Applicable Law) Act 1990.
- [649.](#) “United Kingdom” does not include the Channel Islands or the Isle of Man: Interpretation Act 1978 s.5 and Sch.1.
- [650.](#) See below, para.30-067 n.320, and *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd*

[1997] C.L.Y. 906; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [98]–[108]. cf. *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [435].

[651.](#) 1977 Act s.27(2)(a).

[652.](#)  The changes noted in the text apply to “consumer transport services” where made on or after October 1, 2016: SI 2015/1630 arts 4(c) and 6(2) (as amended by SI 2016/484 art.2) referring to the 2015 Act Sch.4 para.24.

[653.](#) 1977 Act s.27(2)(b).

[654.](#) 2015 Act s.75, Sch.4 para.24.

[655.](#) Above, para.15-079.

[656.](#) See Vol.II, para.38-386.

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**(vi) - Incidental Matters**

**Effect of breach: the old law**

**15-126**

Under s.9 of the 1977 Act, a term that is required to satisfy the test of reasonableness, and does so, may be given effect to notwithstanding that the contract has been terminated either by breach or by the innocent party electing to treat it as repudiated <sup>657</sup>; and the affirmation of the contract does not of itself exclude the requirement of reasonableness. <sup>658</sup> It would also seem that a term which is rendered wholly ineffective in some respect by the Act is not rendered effective by the fact that the innocent party has affirmed the contract.


**Effect of breach: the new law**

**15-127**

The Law Commissions noted that s.9 of the 1977 Act had originally been inserted so as to ensure that the doctrine of fundamental breach would not prevent a valid clause applying, and that this is no longer necessary as the doctrine of fundamental breach had been abolished by the House of Lords. <sup>659</sup> Following this view, the Consumer Rights Act 2015 deletes s.9. <sup>660</sup>


**Anti-avoidance provisions**

**15-128**

 Certain anti-avoidance provisions are contained in the Act. Section 10 provides:

“A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another’s liability which this Part of this Act prevents that other from excluding or restricting.”

The purpose of this provision has been said to be to prevent rights arising in favour of A under a contract between A and B from being affected by the terms of a secondary contract between A and C which take away or inhibit the exercise of those rights, <sup>661</sup> as, for example, where a term in a contract between a manufacturer of goods and a person purports to affect the rights of that person as buyer under the Sale of Goods Act against the retailer from whom he purchases the goods. <sup>662</sup> The scope of

the section is, however, enigmatic. It employs the words “prejudicing or taking away rights” instead of the usual “excludes or restricts liability”. The extended interpretation of the latter phrase <sup>663</sup> therefore does not apply. Also the reference to “the enforcement of another’s *liability*” would preclude the application of s.10 to a case where the terms of the secondary contract purported to entitle a party to another contract to render a performance substantially different from that reasonably expected of him, or to render no performance at all. <sup>664</sup> It has been held that the section does not apply to the compromise or waiver of an existing contractual claim, e.g. to the release by a person of rights which have accrued to him as the result of the breach of another contract to which he is a party. <sup>665</sup> 

## Choice of law

### 15-129

Section 27(2) further prevents evasion of the Act by choice of a foreign law. This provision is considered in Ch.30 on the Conflict of Laws. <sup>666</sup>

<sup>657.</sup> 1977 Act s.9(1). See also above, para.15-025.

<sup>658.</sup> 1977 Act s.9(2).

<sup>659.</sup> Law Commission, Scottish Law Commission, *Unfair Terms in Contracts* (Law Com. No.292, Scot Law Com. No.199 (2005) para.6.37. On the doctrine of fundamental breach and its rejection by the House of Lords see above, paras 15-023—15-027.

<sup>660.</sup> 2015 Act s.75, Sch.4 para.10.

<sup>661.</sup> *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53.

<sup>662.</sup> See s.55(3), (4) of the Sale of Goods Act 1893, inserted by s.4 of the Supply of Goods (Implied Terms) Act 1973, and repealed by the Unfair Contract Terms Act 1977 s.31(4) and Sch.4. But in *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd’s Rep. 439, Parker J. held that s.10 had no application to a covenant not to sue a third party (see above, para.15-054) in tort.

<sup>663.</sup> s.13; see above, para.15-069.

<sup>664.</sup> s.3(2)(b); above, para.15-084 (there being no breach of contract).

<sup>665.</sup>  *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53 (noted (1992) 55 M.L.R. 866); *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch) at [273]–[275]. See also Sch.1 para.5.

<sup>666.</sup> See below, paras 30-008, 30-067. cf. *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm).

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**(b) - Misrepresentation Act 1967**

**Liability for misrepresentation: the old law**

**15-130**

⚠ For contracts made before October 1, 2015 (when the relevant provisions of the Consumer Rights Act 2015 came into force), <sup>667</sup> s.3 of the Misrepresentation Act 1967, as substituted by s.8 of the Unfair Contract Terms Act 1977, provides that, if a contract contains a term which would exclude or restrict:

(a)

any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b)

any remedy available to another party to the contract by reason of such a misrepresentation;

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in s.11(1) of the 1977 Act; and it is for those claiming that the term satisfies the requirement of reasonableness to show that it does. The implications of this section have been discussed in a previous chapter <sup>668</sup> and it is clear that it applies to a term which excludes or restricts any liability or remedy in respect of misrepresentations <sup>669</sup> ⚠ which have not become terms of the contract. It seems equally clear that it does not apply to a term which excludes or restricts any liability or remedy in respect of a breach of the terms of a contract, whether statements or promises, if those terms were never communicated as representations before the contract was made. It is, however, probable that s.3 will apply so as to inhibit the exclusion or restriction of the right to rescind a contract where a misrepresentation, first made independently, is subsequently incorporated as a contractual term. <sup>670</sup> But, in so far as a term excludes or restricts any liability or remedy based on an alleged breach of contract, its validity has to be tested by reference to the different scheme in the 1977 Act. <sup>671</sup>

**Liability for misrepresentation: the new law**

**15-131**


⚠ With the coming into force of the relevant provisions of the Consumer Rights Act 2015 on October 1, 2015, <sup>672</sup> ⚠ s.3 of the Misrepresentation Act 1967 no longer applies to a term in a consumer

contract within the meaning of Pt.2 of the 2015 Act. <sup>673</sup> Instead, such a term will be subject to the general test of unfairness and the requirement for transparency provided by the 2015 Act. <sup>674</sup>

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<sup>667</sup>. Above, para.15-064.

<sup>668</sup>. See above, para.7-146.

<sup>669</sup>.  See below, para.15-131, n.642.

<sup>670</sup>. See s.1(a) of the 1967 Act (and s.2(2)).

<sup>671</sup>. *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 75.

<sup>672</sup>.  Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 3I and 6(1) and (4); the relevant provisions of the 2015 Act are ss.61–76 and Sch.4 para.1. For contracts made before October 1, 2015 see Vol.II, para.38-334.

<sup>673</sup>. 2015 Act s.75, Sch.4, para.1 inserting new Misrepresentation Act 1967 s.3(2).

<sup>674</sup>. 2015 Act ss. 62, 68–69 on which see Vol.II, paras 38-334 et seq.



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**Further legislation**

**15-132**

In addition to the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967, certain other statutes and statutory instruments currently regulate the effectiveness of exemption clauses.

**Carriage by road or rail** [675](#)

**15-133**

The Public Passenger Vehicles Act 1981 invalidates a provision contained in a contract for the conveyance of a passenger in a public service vehicle which purports to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of such liability. [676](#) The Carriage of Goods by Road Act 1965 [677](#) regulates the international carriage of goods, by road. The International Transport Conventions Act 1983 gives the force of law to the Convention concerning International Carriage by Rail (COTIF), [678](#) as modified by the Vilnius protocol, [679](#) which regulates the international carriage of passengers and their luggage, [680](#) and the international carriage of goods, [681](#) by rail. Each of these "international" instruments contains provisions prohibiting contracting out.

**Carriage by sea**

**15-134**

The Carriage of Goods by Sea Act 1971, [682](#) which gives effect to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels in 1924 (the Hague Rules), as amended by the Protocol signed at Brussels in 1968 (the Hague-Visby Rules) imposes certain duties and obligations upon a carrier who enters into a contract for the carriage of goods by sea to which the Act applies, and invalidates any clause which relieves the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in those duties or obligations, or which lessens such liability otherwise than as provided in the Act. [683](#) The Athens Convention of 1974, and the 1976 Protocol thereto, regulates the carriage of passengers and their luggage by sea [684](#) and in effect invalidates any contractual provision which seeks to reduce the liability of the carrier contrary to the terms of the Convention. [685](#)

**Carriage by air** [686](#)

**15-135**

The Warsaw Convention (as supplemented and amended) regulates the liability of a carrier by air in respect of the international carriage of goods, passengers and passengers' luggage. It is given statutory force by the Carriage by Air Act 1961, which was amended by the Carriage by Air (Supplementary Provisions) Act 1962 and by the Carriage by Air and Road Act 1979, <sup>687</sup> and applies with modifications to non-international carriage by the Carriage by Air Acts (Application of Provisions) Order 2004. <sup>688</sup> The Convention imposes certain liabilities on the carrier which cannot be excluded or limited by special contract; but, under its provisions, the carrier is prima facie relieved from liability in excess of certain stated pecuniary limits.

## **Insurance**

### **15-136**

The Road Traffic Act 1988, s.148, invalidates certain limitations on cover and conditions precedent to liability in connection with claims in respect of third-party risks under a compulsory policy of insurance, although these do not affect the position between the insurance company and the insured himself. <sup>689</sup> Moreover, the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015 make important new provision governing the assured's duties in respect of disclosure and representation and provide widely against the parties "contracting-out" from the scheme of rules so established. <sup>690</sup>

## **Defective premises**

### **15-137**

The Defective Premises Act 1972, s.6(3), provides that any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of the Act, <sup>691</sup> or any liability arising by virtue of any such provision, is to be void.

## **Employment and services**

### **15-138**

The Law Reform (Personal Injuries) Act 1948 s.1(3), invalidates any provision contained in a contract of employment or apprenticeship, or in any agreement collateral thereto, in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him. Restrictions on contracting out are also found in the Employment Rights Act 1996 <sup>692</sup> and in the Equality Act 2010. <sup>693</sup>

## **Solicitors**

### **15-139**

The Solicitors Act 1974 regulates the enforcement of agreements between solicitor and client as to remuneration for non-contentious <sup>694</sup> and contentious <sup>695</sup> business, and provides for the determination by the court of the fairness and reasonableness of any such agreement. <sup>696</sup> A provision in an agreement with respect to contentious business that a solicitor shall not be liable for his negligence or that of any employee of his, is void if the client is a natural person who, in entering that agreement, is acting for purposes which are outside his trade, business or profession, and a provision in such an agreement that the solicitor shall be relieved from any responsibility to which he would otherwise be subject as a solicitor, is declared to be void by the Act. <sup>697</sup>

## **Finance**

## 15-140

⚠ Any provision of the trust deed of an authorised unit trust scheme is void in so far as it would have the effect of exempting the manager or trustee from liability for any failure to exercise due care and diligence in a discharge of his functions in respect of the scheme. <sup>698</sup> The provisions of the Payment Services Directive, <sup>699</sup> as implemented by the Payment Services Regulations 2009 <sup>700</sup> are for the most part <sup>701</sup> mandatory. <sup>702</sup> ⚠

### Commodities

## 15-141

The warranty of fitness of animal feeding stuffs implied by the Agriculture Act 1970 has effect notwithstanding any contract or notice to the contrary. <sup>703</sup> Likewise the warranties arising from the statutory statements which are required to be given by that Act in relation to fertilisers and feeding stuffs, <sup>704</sup> and by regulations made under the Plant Varieties and Seeds Act 1964 in relation to seeds, <sup>705</sup> cannot be excluded.

### Consumer protection legislation on unfair contract terms

## 15-142

⚠ As earlier noted, for contracts made before October 1, 2015 (when the relevant provisions of the Consumer Rights Act 2015 came into force), <sup>706</sup> ⚠ the Unfair Terms in Consumer Contracts Regulations 1999 <sup>707</sup> provide a general requirement of fairness for most of the terms which have not been “individually negotiated” by the parties in consumer contracts and these terms clearly include exemption clauses. <sup>708</sup> With the coming into force of the Consumer Rights Act 2015, the 1999 Regulations are revoked and the 2015 Act itself provides a general scheme for the control of unfair terms in consumer contracts which combines most of the features of the general scheme in the 1999 Regulations and some of the special features until that point provided by the Unfair Contract Terms Act 1977 (which will itself no longer apply to the terms of consumer contracts). This new law is also discussed in Vol.II Ch.38. <sup>709</sup> As is also there explained, the 2015 Act creates a series of new statutory terms treated as included in “goods contracts”, “digital content contracts” and “services contracts” whose exclusion by agreement is generally excluded by the Act. <sup>710</sup>

### Mandatory character of much consumer protection legislation

## 15-143

⚠ Many legislative provisions setting out rights or other protections for consumers are expressly mandatory in the sense that they may not be excluded or limited by the agreement of the contracting parties, much of this legislation reflecting EU directives which so require. As a result, the liability of a person by virtue of Pt I of the Consumer Protection Act 1987 to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, cannot be limited by any contract term, by any notice or by any other provision. <sup>711</sup> The terms implied by the Package Travel, Package Holidays and Package Tours Regulations 1992 <sup>712</sup> and the strict liability to the consumer imposed by reg.15 of those Regulations, are mandatory, <sup>713</sup> ⚠ as are the protections for consumers in relation to timeshare and other “holiday accommodation contracts” provided by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. <sup>714</sup> The Electronic Commerce (EC Directive) Regulations 2002 impose a series of information duties on providers of information society services in relation to contracts concluded by electronic means for the benefit of all “recipients” of the service, and these may be excluded by agreement only where the parties are not consumers. <sup>715</sup> While the Consumer Contracts (Information, Cancellation and

Additional Charges) Regulations 2013 do not expressly make the duties of information and rights of cancellation in offpremises contracts, distance contracts and other protections for consumers which they create incapable of exclusion by the agreement, the EU directive which they implement expressly so provides and this argues for their mandatory character by way of the principle of conforming interpretation. <sup>716</sup>

## Consumer Credit Act 1974

### 15-144

The Consumer Credit Act 1974 generally forbids “contracting-out” of its provisions and renders a contract term void if, and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in this Act or in any regulation made under this Act. <sup>717</sup> Moreover, under s.140A of the Consumer Credit Act 1974 <sup>718</sup> the court may make an order under s.140B (which confers on the court wide powers to give directions to the parties and to set aside or to alter contractual terms) in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is “unfair”. <sup>719</sup>

## Interest on commercial debts

### 15-145

By s.8 of the Late Payment of Commercial Debts (Interest) Act 1998 <sup>720</sup> any contract terms are void to the extent that they purport to exclude the right to statutory interest conferred by the Act in relation to a debt for goods or services supplied, unless there is a substantial contractual remedy for late payment of the debt. <sup>721</sup> The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy. <sup>722</sup> Further, any contract terms are void to the extent that they purport to confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt, unless the overall remedy for late payment of the debt is a substantial remedy. <sup>723</sup> The meaning of “substantial remedy” is set out in s.9 of the Act. It requires (inter alia) an assessment whether or not it would be fair and reasonable to allow the remedy to be relied on to oust (or as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt. <sup>724</sup> An injunction may in certain circumstances be applied for to restrain the use of an offending term. <sup>725</sup>


<sup>675</sup>. See below, Vol.II, Ch.36.

<sup>676</sup>. s.29 and see Vol.II, para.38-063. As from August 19, 2013, s.29 does not apply to anything governed by Regulation (EU) No.181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No.2006/2004 [2011] O.J. L55/1, art.6 of which provides that the obligations which it contains cannot be excluded by the contract of transport. See also s.149 of the Road Traffic Act 1988 (agreements between user and passenger) and (passengers by rail) EC Regulation 1371/2007 [2007] O.J. L315/3 and the Rail Passengers Rights and Obligations Regulations 2010 (SI 2010/1504).



<sup>677</sup>. Implementing the CMR (as amended by the Carriage by Air and Road Act 1979: see SI 1980/1966). See Vol.II, para.36-118.

<sup>678</sup>. Cmnd. 8535. See Vol.II, paras 36-079—36-081.

<sup>679</sup>. Implemented by the Railways (Convention on International Carriage by Rail) Regulations 2005 (SI 2005/2092).

- [680.](#) Appendix A (CIV).
- [681.](#) Appendix B (CIM).
- [682.](#) See the Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 (SI 1977/981).
- [683.](#) art.III r.8; *The Hollandia* [1983] 1 A.C. 565. But see *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49, [2005] 1 W.L.R. 1363 (transfer of responsibility); *Yuzhny Zavod Metall Profil LLC v Eems Beheerder BV* [2013] 2 Lloyd's Rep.487 .
- [684.](#) See Merchant Shipping Act 1995 s.183 and Sch.6; SI 1987/670, SI 1998/2917. See *R. G. Mayor v P. & O. Ferries Ltd* [1990] 2 Lloyd's Rep. 144. See also the 2002 Protocol to the Convention and SIs 2014/1355, 2014/1438, & 2014/1361.
- [685.](#) Athens Convention art.18.
- [686.](#) See below, Vol.II, Ch.35.
- [687.](#) See also SI 1998/1751, SI 1999/1312, SI 2002/263, SI 2004/1418, SI 2004/1899, SI 2004/1974, 2005/975, 2006/3303, 2009/3018; European Parliament and Council Regulations 889/2002, 261/2004, 875/2004; Vol.II, paras 35-022—35-072.
- [688.](#) SI 2004/1899. See also EC Regulation 889/2002. See Vol.II, para.35-018.
- [689.](#) See Vol.II, para.42-123. See also s.149.
- [690.](#) See Vol.II, paras 42-046, 42-060.
- [691.](#) See above, para.14-018, Vol.II, para.37-083.
- [692.](#) s.203. See Vol.II, Ch.40. See also Trade Union and Labour Relations (Consolidation) Act 1992 s.288; National Minimum Wage Act 1998 s.49; Employment Relations Act 1999 s.14.
- [693.](#) ss.142–146.
- [694.](#) Solicitors Act 1974 ss.56–58.
- [695.](#) Solicitors Act 1974 ss.59–66.
- [696.](#) Solicitors Act 1974 ss.57(5), 61(2) (as amended).
- [697.](#) Solicitors Act 1974 s.60(5), (6), inserted by the Legal Services Act 2007 Sch.16 para.56(c).
- [698.](#) Financial Services and Markets Act 2000 s.253. “Authorised unit trust scheme” is defined in s.237.
- [699.](#) Directive 2007/64/EC of the European Parliament and the Council on payment services in the internal market [2007] O.J. L319/1.
- [700.](#) SI 2009/209; see Vol.II, paras 34-223, 39-510.
- [701.](#) cf. SI 2009/209 regs 33(3), 35(2), 51(3), 53(2) and (3).
- [702.](#)  With general effect from January 13, 2018 the substantive provisions of the Payment Services Regulations 2009 are revoked and replaced by the Payment Services Regulations 2017 (SI 2017/752) which implement in the UK Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] O.J. L337/35 (“Second Payment Services Directive”). The 2017 Regulations reg.137

provides that “a payment service provider may not agree with a payment service user that it will not comply with any provision of these Regulations unless—(a) such agreement is permitted by these Regulations, or (b) such agreement provides for terms which are more favourable to the payment service user than the relevant provisions of these Regulations”. Provisions in the 2017 Regulations allowing the exclusion of certain of their requirements include regs 40(7), 42(2)(b) and (c), 63(5) and 65(2).

- [703.](#) Agriculture Act 1970 s.72(3).
- [704.](#) Agriculture Act 1970 s.68(6).
- [705.](#) Plant Varieties and Seeds Act 1964 ss.16, 17.
- [706.](#)  Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 3(c), (g) and 6(4). On which see above, para.15-064.
- [707.](#) SI 1999/2083, as amended: see Vol.II, paras 38-201 et seq.
- [708.](#) 1999 Regulations reg.5 and see the examples in Sch.2 para.1(a) and (b).
- [709.](#) Vol.II, paras 38-334 et seq. The detailed effects of the amendments of the 1977 Act made by the 2015 are explained earlier in the present chapter at paras 15-064, 15-066 et seq.
- [710.](#) The provisions in Pt 1 of the 2015 Act relating to the exclusion of liability are found in ss.31, 47 and 57, on which see Vol.II, paras 38-492 (goods contracts), 38-524 (digital content contracts) and 38-545 (services contracts) (which each explain the exceptions to this general rule rendering exemptions or limitations of liability not binding on the consumer). The new statutory terms and their significance are discussed in Vol.II, paras 38-458 et seq. (goods contracts), 38-504 et seq. (digital content contracts) and 38-530 et seq. (services contracts).
- [711.](#) Consumer Protection Act 1987 s.7.
- [712.](#) SI 1992/3288 on which see Vol.II, paras 38-132—38-135.
- [713.](#)  SI 1992/3288 reg.15(5); and cf. Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours[1990] O.J. L158/59 art.5(2). Regulation 5(3) and (4) provide exceptions to this position as regards cases where international conventions governing the relevant services (where the limitations in those conventions apply) and as regards damage other than personal injury (where a term limiting compensation is effective as long as not unreasonable). The 1990 Directive is repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1, art.23 of which provides for the “imperative nature” of its provisions. See further Vol.II, para.38-134.
- [714.](#) SI 2010/2960 reg.19; Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts art.12 and see Vol.II, para.38-141.
- [715.](#) Electronic Commerce Regulations 2002 reg.9(1) and (2) reflecting Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) [2000] O.J. L 178/17 arts 10 and 11 on which see Vol.II, para.38-144.
- [716.](#) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 SI 2013/3134; Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.25 on which see Vol.II, paras 38-057 et seq. especially at 38-062. cf. Financial Services (Distance Marketing) Regulations 2004 SI 2004/2095 reg.16(1) on which see Vol.II, para.38-131. cf. the position as regard the new rights to redress created for consumers in respect of certain categories of unfair commercial practices by amendments in 2014 to the Consumer Protection from Unfair Trading



Regulations (SI 2008/1277) as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870), where a term seeking to exclude these rights is subject to the general regime controlling terms in consumer contracts provided by the Unfair Terms in Consumer Contracts Regulations 1999 or Pt 2 of the Consumer Rights Act 2015: see Vol.II, para.38-191.

- [717.](#) Consumer Credit Act 1974 s.173.
- [718.](#) Inserted by ss.19–22 of the Consumer Credit Act 2006.
- [719.](#) See Vol.II, paras 39-212—39-229. cf. *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [276]–[290].
- [720.](#) As considerably amended: see below, paras 26-232 et seq.
- [721.](#) Late Payment of Commercial Debts (Interest) Act 1998 ("1998 Act") s.8(1).
- [722.](#) 1998 Act s.8(3).
- [723.](#) 1998 Act s.8(4).
- [724.](#) 1998 Act s.9(1)(b).
- [725.](#) Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674).

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## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 4 - The Terms of Contract

#### Chapter 15 - Exemption Clauses

#### Section 7 - Common Law Qualifications

##### Misrepresentations as to effect of exemption clause

##### 15-146

A party who misrepresents, whether fraudulently or otherwise, the terms or effect of an exemption clause inserted by him in a contract will not be permitted to rely on it in the face of his misrepresentation. In *Curtis v Chemical Cleaning and Dyeing Co* <sup>726</sup> the claimant took a dress to the defendants' shop to be cleaned. She was asked to sign a receipt which contained a clause exempting the defendants from all liability for damage to the articles cleaned. When the claimant asked why she was required to sign the receipt, the defendants' employee replied that it merely covered risks such as damage to the beads and sequins on the dress. The dress was returned to the claimant badly stained. It was held that the defendants were not protected since their employee had represented the effect of the exemption clause to be narrower than was, in fact, the case. If the misrepresentation gives rise to a fundamental mistake as to the character of the document, non est factum may also be pleaded. <sup>727</sup>

##### Acknowledgments

##### 15-147

⚠ Clauses are often inserted in standard form agreements whereby one party "acknowledges and agrees" that he has "not been induced to enter into the contract by any representation of the other party", or that he has "examined the goods", or that he has "not made known to the other party expressly or by implication the purpose for which the goods are required". In *Lowe v Lombank Ltd* <sup>728</sup> the Court of Appeal held that such a clause can only give rise to an estoppel, preventing the party making the acknowledgment from asserting the contrary, and cannot operate as a positive contractual obligation. Diplock J. said:


"To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future." <sup>729</sup>

In the particular case, which concerned an acknowledgment by a hirer under a hire-purchase agreement, <sup>730</sup> the court found that none of the requirements for an estoppel by representation was satisfied, and so no estoppel arose. It has, however, more recently been said that:

"... there is no reason in principle why parties should not agree that a certain state of affairs should form the basis for the transaction whether it be the case or not"

and that, in such an event:

“... neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as those aspects of the relationship to which their agreement was directed.” <sup>731</sup>

The contract itself then gives rise to an estoppel. <sup>732</sup> This analysis was followed in a number of cases at first instance <sup>733</sup> and it has subsequently been endorsed by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*. <sup>734</sup>  As a result, provided that an acknowledgement clause is appropriately drafted as an agreement or contract, it can be effective by virtue of a contractual estoppel and it is unnecessary to show, as suggested in *Lowe v Lombank*, that the requirements for estoppel by representation have been satisfied. <sup>735</sup> Further, the Court of Appeal stated that the words of Diplock J. quoted above:

“... are not binding authority for the far-reaching proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it was not the case and both parties knew it was not.” <sup>736</sup>

#### **Collateral warranties and guarantees**

### **15-148**

A party who would otherwise be entitled to rely on an exemption clause will not be permitted to do so if he gives an express oral warranty which runs counter to the tenor of the written exemption. <sup>737</sup> A warranty given before the agreement is entered into may also be enforced as a collateral contract the consideration of which is the entering into of the written agreement. <sup>738</sup> Thus in *Webster v Higgin* <sup>739</sup> an oral warranty as to the present condition of a car was enforced as a collateral contract in return for which a contract of hire-purchase, which contained exempting provisions, was signed. Where goods are sold or otherwise supplied to a consumer <sup>740</sup> which are offered with a consumer guarantee, the guarantee takes effect as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising. <sup>741</sup> This obligation cannot be negated by an exemption clause in the contract of sale or supply.

#### **Unreasonable provisions**

### **15-149**

It has been stated on a number of occasions that a clause which excludes or restricts liability should not be given effect if it is unreasonable, or if it would be unreasonable to apply it in the circumstances of the case, at least in contracts in standard form where there is inequality of bargaining power. <sup>742</sup> But it would seem that, except in those situations expressly provided for in the Unfair Contract Terms Act 1977 or (in respect of consumer contracts) by the Unfair Terms in Consumer Contracts Regulations 1999 <sup>743</sup> or the Consumer Rights Act 2015, <sup>744</sup> it is not open to a court to strike down an exemption clause merely on the ground that it is in substance unreasonable or unfair. <sup>745</sup> However, a strong plea for a wider approach, based on a principle of good faith in contracts <sup>746</sup> was made by Brooke L.J. in *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* <sup>747</sup> when he said that he preferred to ask whether it was in all the circumstances fair to hold a party bound by the condition in question rather than:

“... to have resort to interpretative devices of almost Byzantine sophistication to arrive at

a result that the words of a contract do not mean what, on the face of it, they clearly do mean.”

## Fraud

### 15-150

No exemption clause can protect a person from liability for his own fraud<sup>748</sup> or require the other party to assume what he knows to be false.<sup>749</sup> But it is uncertain whether, there is any rule of law, based on public policy, which would prevent the exclusion by a principal of liability for fraud on the part of his agent acting as such.<sup>750</sup> It is, however, clear that any such exclusion would have to be expressed in clear and unmistakable terms on the face of the contract so as to leave the other party in no doubt that fraud was covered.<sup>751</sup>

## Rights of set-off

### 15-151

There is no longer any rule of law to prevent a party, by contract, from agreeing to exclude rights of set-off, whether legal or equitable.<sup>752</sup> Since it is a remedy only which is excluded, it seems that a clause excluding rights of set-off may extend to preventing set-off even in cases of fraud.<sup>753</sup>

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<sup>726.</sup> [1951] 1 K.B. 805. See also *Jaques v Lloyd D. George & Partners Ltd* [1968] 1 W.L.R. 625; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177, 183–184, 186; *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Const. L.R. 46; *Lloyds Bank Plc v Waterhouse* [1993] 2 F.L.R. 97; cf. *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [47]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [105].

<sup>727.</sup> See above, paras 3-049—3-056.

<sup>728.</sup> [1960] 1 W.L.R. 196. See also *China Shipbuilding Corp v Nippon Yusen Kaisha* [2000] 1 Lloyd's Rep. 367, 373; *Watford Electronics Ltd v Sanderson Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143 at [40]; *EA Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029.

<sup>729.</sup> [1960] 1 W.L.R. 196, 204.

<sup>730.</sup> See Vol.II, para.39-393.

<sup>731.</sup> *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [56] per Moore-Bick L.J.

<sup>732.</sup> [2006] EWCA Civ 386 citing *Colchester BC v Smith* [1991] Ch. 448, affirmed [1992] Ch. 421.

<sup>733.</sup> *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397 at [465]; *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1793 (Comm) at [537]–[569] (Gloster J.); *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [36] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [87]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [230].

- [734.](#) **!** [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [169]. See also *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701; *Olympic Airlines SA v ACG Acquisition XX LLC* [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep. 658 at [49]–[54]; *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch) at [112]–[119] (permission to appeal on other grounds: [2015] EWCA Civ 986); *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB), at [97]–[111] (appeal pending) (on “basis clauses” stipulating that defendants were not providing advice in relation to interest rate “swap agreements”).
- [735.](#) Nor is it necessary to show that the requirements of estoppel by convention (see above, para.4-108) have been satisfied, in particular, that it would be unconscionable for a party to resile from the assumed state of facts: *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [177].
- [736.](#) [2010] EWCA Civ 1221 at [155] per Aikins L.J.
- [737.](#) *Couchman v Hill* [1947] K.B. 554; *Harling v Eddy* [1951] 2 K.B. 739; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177. See also *J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078.
- [738.](#) See above, paras 13-004, 13-033.
- [739.](#) [1948] 2 All E.R. 127.
- [740.](#) Defined in the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.2.
- [741.](#) Sale and Supply of Goods to Consumer Regulations (SI 2002/3045) reg.15 on which see Vol.II, paras 38-428—38-429. With the coming into force of the Consumer Rights Act 2015 (on which see above, para.15-064) the 2002 Regulations are revoked and reg.15 is replaced by s.30 of the 2015 Act, on which see Vol.II, para.38-491.
- [742.](#) *Van Toll v S.E. Ry* (1862) 12 C.B.(N.S.) 75, 88; *Parker v S.E. Ry* (1877) 2 C.P.D. 416, 428; *Watkins v Rymill* (1883) 10 Q.B.D. 178, 179; *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41, 56; *John Lee & Sons (Grantham) Ltd v Railway Executive* [1949] 2 All E.R. 581, 584; *Gillespie v Roy Bowles Transport Ltd* [1973] Q.B. 400, 416; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 79; *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 W.L.R. 856, 865 (reversed [1980] A.C. 827).
- [743.](#) See Vol.II, paras 38-201 et seq.
- [744.](#) See Vol.II, paras 38-334 et seq.
- [745.](#) *Grand Trunk Ry of Canada v Robinson* [1915] A.C. 740, 747; *Ludditt v Ginger Coote Airways Ltd* [1947] A.C. 233, 242; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848. But see above, para.13-015 (notice of particularly onerous or unusual terms). See generally *Tiplady* (1983) 46 M.L.R. 601.
- [746.](#) But cf. above, paras 1-039 et seq.
- [747.](#) [1997] 2 Lloyd's Rep. 369, 385 (making reference to the judgment of Bingham L.J. in *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1989] 1 Q.B. 433, 439 (above, para.13-015)).
- [748.](#) *S. Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, 353, 362; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [16], [76], [98]; *Granville Oil & Chemicals Ltd v Davis Turner & Co* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 at [15]. See also *Kollerich & Cie. SA v State Trading Corp of India* [1980] 2 Lloyd's Rep. 32 (false certificates). Contrast *Tullis v Jackson* [1892] 3 Ch. 441 (criticised in *Czarnikow v Roth, Schmidt & Co* [1922] 2 K.B. 478, 488); *Compania Portoraffi Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310 (Hague-Visby Rules); *Armitage v Nurse* [1998] Ch. 241;

*Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13 (trustees).

[749.](#) *Re Banister* (1879) 12 Ch. D. 131.

[750.](#) *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [14]–[17], [76]–[82], [118]–[126]. See Handley (2003) 119 L.Q.R. 537.

[751.](#) [2003] UKHL 6.

[752.](#) *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 Q.B. 514; *Coca-Cola Financial Corp v Finsal International Ltd* [1998] Q.B. 43; *Re Kaupthing Singer and Friedlander Ltd* [2009] EWHC 740 (Ch), [2009] 2 Lloyd's Rep. 154, [2010] EWCA Civ 518. cf. above, para.15-107.

[753.](#) *Society of Lloyds v Leighs* [1997] C.L.C. 1398; *Skipskreditfereningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 74–75.



# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 4 - The Terms of Contract

#### Chapter 15 - Exemption Clauses

#### Section 8 - Force Majeure Clauses

#### Force majeure clauses <sup>754</sup>

#### 15-152

The expression “force majeure clause” is normally used to describe a contractual term by which one (or both) of the parties is entitled to cancel the contract <sup>755</sup> or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control. Such clauses may assume a variety of forms, and a term “the usual force majeure clauses to apply” has been held void for uncertainty. <sup>756</sup> Force majeure clauses have been said not to be exemption clauses, <sup>757</sup> although it is difficult to draw any clear line of demarcation between the two types of clause, <sup>758</sup> since the effect of each may be to relieve a contracting party of an obligation or liability to which he would otherwise be subject, and force majeure clauses may nevertheless be affected by the Unfair Contract Terms Act 1977. <sup>759</sup>

#### 15-153

Frequently a number of events are specified and then followed by the words “or any other causes beyond our control”. Such general words in a commercial document are prima facie to be construed as having their natural and larger meaning and are not limited to events ejusdem generis with those previously enumerated. <sup>760</sup> They should be interpreted to include matters with which that party was expected to be concerned. <sup>761</sup> Moreover, the words “beyond our control” will normally be construed to refer, not only to the unspecified cases, but also to the specific events. <sup>762</sup> Clauses which excuse performance in general terms may be construed as force majeure clauses. Thus a clause in a contract of sale which provides that the date of delivery is approximate only, and that the seller is not to be responsible for any delay or non-delivery, does not confer upon him an absolute discretion whether to deliver or not and so render the contract nugatory, but only to excuse him if non-delivery is due to a cause outside his control. <sup>763</sup> In the absence of a clear indication to the contrary, <sup>764</sup> a force majeure clause will not be construed to cover events brought about by a party’s negligence or wilful default, even though a specified event would in other contexts not be limited to an event occurring without negligence. <sup>765</sup>

#### 15-154

A force majeure clause which is prefaced by such words as “while every effort will be made to carry out this contract” will be rendered nugatory unless the party relying on it has in fact made reasonable efforts to ensure that the contract is performed. <sup>766</sup> A force majeure clause that refers to acts or events “beyond the reasonable control of either party” probably applies only to acts or events beyond the reasonable control of that party or any party to whom the contractual performance of that party’s obligation has been delegated by that party. <sup>767</sup>

#### Burden of proof

## 15-155

⚠ It is for a party relying upon a force majeure clause to prove the facts bringing the case within the clause. <sup>768</sup> He must therefore prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed (as the case may be) <sup>769</sup> from performing the contract by reason of that event. <sup>770</sup> ⚠ He must further prove <sup>771</sup>:

(i)

that his non-performance was due to circumstances beyond his control; and

(ii)

that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences.

However, in *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* <sup>772</sup> where the clause in question referred to “unavoidable hindrances”, Kerr J. stated that a party would be debarred from relying upon such a clause if the existence of facts which show that the clause was bound to operate should reasonably have been known to that party prior to the conclusion of the contract, and would have been expected by the other party to be so known. But subsequently in *Channel Island Ferries Ltd v Sealink United Kingdom Ltd*, <sup>773</sup> Parker L.J. expressed doubts <sup>774</sup> whether, because of pre-contract improvidence, a party would be disabled from relying on a force majeure clause, even if such clause would otherwise have applied; there was no principle of law that a party who entered into a contract could not rely on its terms because he was improvident in entering into it. It may, nevertheless, be argued that the parties to a contract cannot reasonably have intended that one party should be entitled to rely on a force majeure clause which, as the result of facts known to him at the time of entering into the contract, he could reasonably foresee would inevitably come into operation and so affect the performance expected of him by the other party. <sup>775</sup> However, it has been held that there is no justification for limiting the ordinary meaning of words in a force majeure clause to events or states of fact not in existence at the date of the contract or to those which are unpredictable at the time it was made. <sup>776</sup>

### “Prevented” clauses

## 15-156

⚠ Where one party seeks to invoke the protection of a clause which states that he is to be relieved of liability if he is “prevented” from carrying out his obligations under the contract or is “unable” to do so, he must show that performance has become physically or legally impossible, and not merely more difficult or unprofitable. <sup>777</sup> It is not sufficient, for example in a contract of sale of goods, for the seller to show that his intended supplier is unable to supply the goods if he can obtain goods of the contract description from another supplier. <sup>778</sup> But the word “prevented” has always to be interpreted in the context of the particular contract. Thus where the intended method of performance is prohibited by government embargo, but a party is nevertheless able to perform in an alternative manner, it is a question of construction of the clause, and of fact, whether his performance has been effectively “prevented” by the embargo. <sup>779</sup> ⚠ In particular, CIF sellers in a “circle” or “string” have in some cases been held entitled to rely on a clause of this nature when they or some shipper higher up the “string” were prevented by government embargo from shipping the goods, even though they could have attempted to purchase substitute goods afloat, on the ground that such an attempt would in the circumstances have been impractical and commercially unreasonable. <sup>780</sup> Once a party has discharged the burden of proving that performance has been prevented by the relevant event, he need not normally prove that he could have performed but for the occurrence of the event. <sup>781</sup> An independent state trading organisation may be able to establish that it has been prevented from

delivering by “government intervention beyond its control” if an export embargo is imposed by its own government. <sup>782</sup> But, where it is alleged that performance has been prevented by refusal of a licence, the party required to obtain the licence may be obliged to show that he has made reasonable efforts to obtain the licence or that a licence would inevitably have been refused <sup>783</sup>; and, if an embargo is not absolute, but subject to certain exceptions, a seller may be obliged to show that he has no goods of the contract description available to him within the “loopholes” to which the embargo is subject. <sup>784</sup>

## 15-157

❗ Even though the word “prevented” is not used in the clause, it may be so construed. <sup>785</sup> ❗ If the clause provides that one party is to be “excused” or “not to be responsible” upon the occurrence of certain events or any other causes beyond his control, he must show that he has been prevented from fulfilling the contract by one of the specified events or some other cause beyond his control. <sup>786</sup> It has been held that a clause in the form “unforeseen contingencies excepted” will only be effective if performance has become impossible. <sup>787</sup>

### “Hindered”

## 15-158

A wider scope is, however, given to the word “hindered” <sup>788</sup> and Lord Loreburn said <sup>789</sup>

“... to place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his contracts in order to fulfil one surely hinders delivery.”

Where, due to executive restrictions following a strike, charterers could not load unless they dislocated their businesses and broke other contracts, loading was “hindered”. <sup>790</sup> A contract of sale of goods which contemplates the carriage of goods by sea may be hindered by the shortage of ships due to enemy action and an increased risk with resultant rise in freight rates. <sup>791</sup> Normally, however, a mere rise in price rendering the contract more expensive to perform will not constitute “hindrance”. <sup>792</sup> The words “impeded”, “impaired” and “interfered with” may, in context, be construed as equivalent to “hindered”.

### “Delayed”

## 15-159

If provision is made for an extension of time for performance if “performance” is delayed by circumstances beyond a party’s control, the word “delayed” is not necessarily to be treated as equivalent to “prevented” <sup>793</sup> and circumstances which merely hinder performance may fall within the provision. <sup>794</sup>

### Other expressions

## 15-160

Other, wider expressions may, however, be used, e.g. “rendered uneconomic”

### Specified events

## 15-161

The following words and phrases have been the subject of consideration by the courts: Act of God, <sup>795</sup> storm tempest or flood, <sup>796</sup> fire, <sup>797</sup> perils and dangers or accidents of the sea, <sup>798</sup> war, <sup>799</sup> warlike operations, <sup>800</sup> civil war, <sup>801</sup> riot, <sup>802</sup> civil commotion, <sup>803</sup> strikes, <sup>804</sup> acts of the Queen's enemies, <sup>805</sup> and prohibition of export. <sup>806</sup> However, expressions used in the context of one type of contract, for example, a policy of insurance or a charterparty, may not necessarily be appropriate in the context of another, such as a contract of sale of goods. Moreover, even if the circumstances do not fall precisely within the meaning of a particular specified event, they may still be operative by virtue of the addition of more general words in the clause.

### “Force majeure”

## 15-162

⚠ Sometimes the actual expression “force majeure” is employed. Force majeure is not a term of art in English law, <sup>807</sup> ⚠ although it is well known in continental legal systems, for example that of France.

<sup>808</sup> ⚠ The meaning of force majeure may nevertheless be ascertained by reference. Thus the incorporation into a contract of sale of the Force Majeure (Exemption) Clause of the International Chamber of Commerce <sup>809</sup> will mean that a party is not liable for failure to perform any of his obligations in so far as he proves:

(1)

that the failure was due to an impediment beyond his control; and

(2)

that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and

(3)

that he could not reasonably have avoided or overcome it or at least its effects.

## 15-163

It has rightly been observed that the concept of force majeure in English law is wider than that of “Act of God” or vis major, <sup>810</sup> as these latter expressions appear to denote events due to natural causes, without any human intervention. <sup>811</sup> In *Lebeaupin v Crispin & Co* <sup>812</sup> McCardie J. reviewed the previous authorities on force majeure, and it now seems that war, <sup>813</sup> strikes, <sup>814</sup> legislative or administrative interference, for example, an embargo, <sup>815</sup> the refusal of a licence, <sup>816</sup> or seizure, <sup>817</sup> abnormal storm or tempest, <sup>818</sup> flooding which inhibits shipment from river ports, <sup>819</sup> interruption of the supply by rail of raw material, <sup>820</sup> and even the accidental breakdown of machinery <sup>821</sup> can amount to force majeure, <sup>822</sup> but not “bad weather, football matches or a funeral”, <sup>823</sup> a failure of performance due to the provision of insufficient financial resources <sup>824</sup> or to a miscalculation, <sup>825</sup> a rise in cost or expense, <sup>826</sup> the failure by a third party <sup>827</sup> or by the other party <sup>828</sup> to fulfil his contract, or any act, negligence, omission or default on the part of the party seeking to be excused. <sup>829</sup> The words “force majeure” are, however, rarely unqualified. The type of circumstance envisaged by the parties will often be set out, so that those circumstances may apply to limit, extend or explain the meaning of “force majeure”. <sup>830</sup> Further the clause may refer to performance being “prevented”, “hindered” or “delayed” by force majeure. <sup>831</sup> The expression must therefore be construed with regard to the words which precede and follow it and also with regard to the nature and general terms of the contract. <sup>832</sup>

## 15-164

⚠ If the reference to force majeure is indeed unqualified, e.g. “subject to force majeure” or “force majeure excepted”, then it is submitted that, in English law, performance of the relevant obligation must have been prevented by an event of force majeure and not merely hindered or rendered more onerous. <sup>833</sup> However, there does not appear to be any requirement that the circumstances alleged to constitute force majeure should be unforeseeable, <sup>834</sup> ⚠ although the party seeking to be excused still bears the burden of proving that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences. <sup>835</sup>

### Conditions precedent

## 15-165

A clause excusing performance, or permitting one party to postpone or suspend performance, may provide that certain procedures are to be followed or notices given to the other party within a stipulated period of time before he is entitled to rely on the clause. Such measures may be a condition precedent on which the availability of the protection provided by the clause depends, <sup>836</sup> or merely an intermediate term, <sup>837</sup> the non-fulfilment of which does not necessarily deprive him of his right to rely on the clause. <sup>838</sup> The other party may also be held to have waived, or to be estopped from asserting, noncompliance with the measures set out in the clause. <sup>839</sup>

### Insufficiency of goods

## 15-166

A supplier of goods may as a result of an event of force majeure have insufficient goods of the contract description to meet all his existing contracts, but nevertheless have at his disposal enough goods to satisfy one or more of those contracts. In such a case he may be entitled to rely upon an appropriately worded force majeure clause as an excuse for non-performance of those contracts which are unfulfilled, even though the clause refers to his being “prevented” from delivering the goods and not merely to his being “hindered” from doing so. <sup>840</sup> If he has a number of existing contracts to fulfil, but cannot fulfil all of them, he can rely upon force majeure as to the others. <sup>841</sup> He may allocate the available goods in any way which the trade would consider proper and reasonable, whether this is pro rata, <sup>842</sup> or in chronological order, or on some other basis. <sup>843</sup> But he cannot make any allocation to those of his customers to whom he has a non-legal moral commitment <sup>844</sup>; nor would it be reasonable to allocate supplies to new contracts in order to take advantage of a resultant rise in price. <sup>845</sup>

### Unfair Contract Terms Act 1977

## 15-167

Clauses of the types mentioned above may attract the application of s.3 of the Unfair Contract Terms Act 1977. <sup>846</sup> It seems unlikely that a clause which merely permits one party to suspend, postpone or cancel performance upon the happening of events beyond his control would, in a commercial contract, be held to be unreasonable, <sup>847</sup> although there are possibly circumstances where such a clause would be so held, for example, in an exclusive dealing agreement, if the seller was entitled to suspend delivery in such events, but the buyer was nevertheless not entitled, during the suspension, to purchase supplies from elsewhere.

### Consumer contracts

## 15-168

Under the Unfair Terms in Consumer Contracts Regulations 1999 most of the terms in a consumer contract are subject to a test of unfairness, subject to the condition that they have not been “individually negotiated” and, if they fail this test, are not binding on the consumer.<sup>848</sup> Written contract terms are subject to the requirement that they are drafted in plain, intelligible language and, if they are not, this is relevant to their fairness and requires any resulting ambiguity to be interpreted against the trader.<sup>849</sup> For this purpose, it is likely that the term “force majeure” is itself not plain and intelligible to the average consumer.<sup>850</sup> Moreover, even if a force majeure clause were drafted in plain and intelligible writing, it may be unfair, for example, where it required the consumer to accept a suspension of performance or delayed or substitute performance without giving him the opportunity to cancel the contract, or which deny him a full refund in the event of cancellation of the contract by the seller or supplier upon the occurrence an supervening event specified.<sup>851</sup> For contracts made on or after October 1, 2015, the Consumer Rights Act 2015 revokes and replaces the 1999 Regulations general scheme of control of terms in consumers contracts, though with some significant changes including that the test of fairness is no longer subject to a requirement that the term was not “individually negotiated”.<sup>852</sup> Force majeure clauses (even if not so-called and set out in plain and intelligible language) remain liable to be assessed on the ground of their substantive unfairness as under the new law.<sup>853</sup>

## Distance Selling Regulations 2000

### 15-169

Under reg.19(7) of the Consumer Protection (Distance Selling) Regulations 2000, in the case of a contract concerning goods which is concluded between a supplier and a consumer by means of distance communication where the supplier is unable to supply the goods ordered by the consumer within the time limited by the contract or the Regulations, he may provide substitute goods of equivalent quality and price, subject to certain conditions.<sup>854</sup> This provision reflected the exercise of an option in the UK (and other Member States) under the Distance Contracts Directive.<sup>855</sup> However, the Consumer Rights Directive 2011<sup>856</sup> repealed and replaced most of the provisions of the Distance Contracts Directive,<sup>857</sup> but did not retain this option for Member States and as a result the UK regulations which implement the Consumer Rights Directive (and replace the 2000 Regulations) do not make equivalent provision to reg.19(7) of the 2000 Regulations.<sup>858</sup>

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<sup>754.</sup> See Treitel, *Frustration and Force Majeure*, 3rd edn (2014); McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995); Benjamin's Sale of Goods, 9th edn (2014), para.8-088; Lewison, *The Interpretation of Contracts*, 5th edn (2011), Ch.13.

<sup>755.</sup> The contract may even be cancelled automatically: *Continental Grain Export Corp v S.T.M. Grain Ltd* [1979] 2 Lloyd's Rep. 460; *Bremer Handelsgesellschaft mbH v Finagrain SA* [1981] 2 Lloyd's Rep. 259; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep. 342.

<sup>756.</sup> *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280. But such a term could refer to clauses usual in a particular trade.


<sup>757.</sup> *Fairclough, Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136, 143. See also *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 230–231; *The Super Servant Two* [1990] 1 Lloyd's Rep. 1, 7, 12. cf. *Cero Navigation Corp v Jean Lion & Cie* [2000] 1 Lloyd's Rep. 292, 299.

<sup>758.</sup> See Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.12-022.

<sup>759.</sup> See below, para.15-167. See also Benjamin's Sale of Goods, 9th edn (2014), para.8-088.

<sup>760.</sup> *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240, 245–246; *P. J. Vander Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep. 240; *Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep. 276, 281 (affirmed [1988] 2 Lloyd's Rep. 416). See also



- Anderson v Anderson* [1895] 1 Q.B. 749, 753; *Larsen v Sylvester* [1908] A.C. 295. Contrast *Thorman v Dowgate S.S. Co* [1910] 1 K.B. 410; *Jenkins v Watford* (1918) 87 L.J.K.B. 136; *Sonat Offshore SA v Amerada Development Ltd* [1988] 1 Lloyd's Rep. 145, 149, 158, 163.
- [761.](#) *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [44]; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep. 619 at [31].
- [762.](#) *Frontier International Shipping Corp v Swissmarine Corp Inc* [2004] EWHC 8 (Comm), [2005] 1 Lloyd's Rep. 390 at [11], [27]–[28].
- [763.](#) *Barnett v Ira L. and A.C. Berk Pty Ltd* (1952) 52 S.R. (N.S.W.) 268. See also *Hartwells of Oxford Ltd v B.M.T.A.* [1951] Ch. 50; *Monkland v Jack Barclay Ltd* [1951] 2 K.B. 252. cf. *Emeraldian Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 (Comm), [2011] 1 Lloyd's Rep. 301 (exceptions to laytime in charterparty).
- [764.](#) *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403, 406.
- [765.](#) *Fyffes Group Ltd v Reefer Express Lines Pty Ltd* [1996] 2 Lloyd's Rep. 171, 196; *Sonat Offshore SA v Amerada Hess Developments Ltd* [1988] 1 Lloyd's Rep. 145; *The Super Servant Two* [1990] 1 Lloyd's Rep. 1; *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All E.R. (Comm) 992 at [34].
- [766.](#) *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419.
- [767.](#) *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All E.R. (Comm) 992 at [33].
- [768.](#) *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep. 323, 327; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] 1 Lloyd's Rep. 1 at [54]; *Tandrin Aviation Holdings Ltd v Aero Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [48].
- [769.](#) See below, paras 15-156, 15-158, 15-159.
- [770.](#)  *P. J. Van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep. 240, 242; *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 416, 423, 425; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 114; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 59; *André & Cie SA v Etablissements Michel Blanc et Fils* [1979] 2 Lloyd's Rep. 427; *Continental Grain Export Corp v S.T.M. Grain Ltd* [1979] 2 Lloyd's Rep. 460; *Toeffer v Schwarze* [1980] 1 Lloyd's Rep. 385; *Thomas P. Gonzalez Corp v Millers Mühle, Müller GmbH* [1980] 1 Lloyd's Rep. 445; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co Ltd* [1981] 1 Lloyd's Rep. 345; *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304; *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 W.L.R. 404, 409; *Agrokor AG v Tradigrain SA* [2000] 1 Lloyd's Rep. 497, 500; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep. 619 at [18], [32]; *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm), [2013] 1 Lloyd's Rep. 621 at [33], affirmed [2013] EWCA Civ 1628 at [22]; (the application of the "prohibition clause" was not in issue before the SC [2015] UKSC 43, [2015] Bus. L.R. 987). *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All E.R.(Comm) 992 at [31].
- [771.](#) *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *Channel Island Ferries Ltd v Sealink (UK) Ltd* [1988] 1 Lloyd's Rep. 323, 327, 328; *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 W.L.R. 404, 409; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.2)* [2003] EWCA Civ 1031, [2003] 2 Lloyd's Rep. 635 at [32].
- [772.](#) [1973] 1 W.L.R. 210, 224–227. See also *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 K.B. 774, 779; *Taylor v Lewis Ltd* (1927) 28 Ll.L. Rep. 329, 332; *Safadi v Western Assurance*

Co (1933) 46 L.I.L. Rep. 140, 143. cf. *Steamship "Induna" Co Ltd v British Phosphate Commissioners* [1949] 2 K.B. 430, 436.

773. [1988] 1 Lloyd's Rep. 323.

774. [1988] 1 Lloyd's Rep. 323, 328, with whose judgment Caulfield L.J. agreed. But see the more qualified statements (at 328–329) of Ralph Gibson L.J. See also *Reardon Smith Line Ltd v Ministry of Agriculture* [1960] 1 Q.B. 493–495, [1962] 1 Q.B. 42, 83, 107, 128 (this point did not arise in the House of Lords [1963] A.C. 691).


775. See also the Force Majeure (Exemption) Clause of the I.C.C. (below, para.15-162). But see *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 W.L.R. 404, 408 (where it was pointed out that this proposition was untested). cf. *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All E.R. (Comm) 992 at [31]–[32].

776. *Navrom v Callitis Ship Management SA* [1988] 2 Lloyd's Rep. 416, 420. See also *R. Pagnan & Fratelli v Finagrain Compagnie Commerciale Agricole et Financière SA* [1986] 2 Lloyd's Rep. 395, 401; *SHV Gas Supply & Trading SAS v Naftomar Shipping and Trading Co Ltd Inc* [2005] EWHC 2528 (Comm), [2006] 1 Lloyd's Rep. 163 at [29].

777. *Blythe & Co v Richards Turpin & Co* (1916) 114 L.T. 753; *Tennants (Lancashire) Ltd v C.S. Wilson & Co Ltd* [1917] A.C. 495; *Re Comptoir Commercial Anversois and Power Son & Co* [1920] 1 K.B. 168; *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497; *Ross T. Smyth & Co (Liverpool) Ltd v W.N. Lindsay Ltd* [1953] 2 Lloyd's Rep. 378; *Fairclough, Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136, 143, 144; *Tsakiroglou & Co v Noble Thorl GmbH* [1962] A.C. 93; *Warinco A.G. v Fritz Mauthner* [1978] 1 Lloyd's Rep. 151; *Exportelisa SA v Giuseppe & Figli Soc. Coll.* [1978] 1 Lloyd's Rep. 433; *Huilerie l'Abeille v Société des Huileries du Niger* [1978] 2 Lloyd's Rep. 203; *Channel Islands Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep. 323, 327; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep. 441 at [50]; *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [49]; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep. 619 at [29], [32].

778. *Joseph Pyke & Son (Liverpool) Ltd v Richard Cornelius & Co* [1955] 2 Lloyd's Rep. 747; *Fairclough Dodd & Jones Ltd v J. H. Vantol Ltd* [1957] 1 W.L.R. 136, 146; *Koninklijke Bunge v Cie Commerciale d'Importation* [1973] 2 Lloyd's Rep. 44; *P. J. van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep. 240; *Exportelisa SA v Giuseppe & Figli Soc. Coll.* [1978] 1 Lloyd's Rep. 433; *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 W.L.R. 404.

779.  *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 416; *Warinco A.G. v Fritz Mauthner* [1978] 1 Lloyd's Rep. 151; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221; *Avimex SA v Dewulf & Cie.* [1979] 2 Lloyd's Rep. 57; *André et Cie. SA v Etablissements Michel Blanc et Fils* [1979] 2 Lloyd's Rep. 427; *Bunge SA v Deutsche Conti Handelsgesellschaft mbH* [1979] 2 Lloyd's Rep. 455; *Continental Grain Export Corp v S.T.M. Grain* [1979] 2 Lloyd's Rep. 460; *Toepfer v Schwarze* [1980] 1 Lloyd's Rep. 385; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd's Rep. 207; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co Ltd* [1981] 1 Lloyd's Rep. 344; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1981] 1 Lloyd's Rep. 292; *Cook Industries Inc v Meunerie Liegeois SA* [1981] 1 Lloyd's Rep. 359; *Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep. 385; *Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft* [1982] 1 Lloyd's Rep. 599; *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep. 269; *Bremer Handelsgesellschaft mbH v Bunge Corp* [1983] 1 Lloyd's Rep. 476; *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304; *Deutsche Conti-Handelsgesellschaft mbH v Bremer Handelsgesellschaft mbH* [1984] 1 Lloyd's Rep. 447; *Cook Industries v Tradax Export SA* [1985] 2 Lloyd's Rep. 454; *Bremer Handelsgesellschaft v Westzucker GmbH (No.3)* [1989] 1 Lloyd's Rep. 582. cf. *Koninklijke Bunge v Compagnie Continentale d'Importation* [1973] 2 Lloyd's Rep. 44; *Tradax Export SA v Carapelli SpA* [1977] 2 Lloyd's Rep. 157; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2

- Lloyd's Rep.* 109; *Sociedad Iberica de Molturacion SA v Tradax Export SA* [1978] 2 *Lloyd's Rep.* 545; *Bunge SA v Kruse* [1979] 1 *Lloyd's Rep.* 279 (affirmed [1980] 2 *Lloyd's Rep.* 142); *André et Cie SA v Tradax Export SA* [1983] 1 *Lloyd's Rep.* 254; *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm), [2013] 1 *Lloyd's Rep.* 621 at [33], affirmed [2013] EWCA Civ 1628 at [22] (causal connection must be shown) (the application of the "prohibition clause" was not in issue before the SC [2015] UKSC 43, [2015] *Bus. L.R.* 987). See McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn, Ch.15 (Bridge); Treitel, *Frustration and Force Majeure*, 3rd edn (2014) para.12-038.
780. *Tradax Export SA v André et Cie* [1976] 1 *Lloyd's Rep.* 416, 423; *Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109, 115; *Continental Grain Export Corp v S.T.M. Grain* [1979] 2 *Lloyd's Rep.* 460, 473; *Cook Industries Inc v Tradax Export SA* [1983] 1 *Lloyd's Rep.* 327 (affirmed [1985] 2 *Lloyd's Rep.* 454). See Benjamin's *Sale of Goods*, 9th edn (2014) at para.18-393.
781. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109, 114, 121; *Bremer Handelsgesellschaft mbH v C. Mackprang Jnr* [1980] 1 *Lloyd's Rep.* 210 (affirmed [1981] 1 *Lloyd's Rep.* 292); *Continental Grain Export Corp v S.T.M. Grain* [1979] 2 *Lloyd's Rep.* 460. cf. *Tradax Export SA v André et Cie* [1976] 1 *Lloyd's Rep.* 416; *Toepfer v Schwarze* [1977] 2 *Lloyd's Rep.* 330 (affirmed [1980] 1 *Lloyd's Rep.* 385); *André et Cie SA v Etablissements Michel Blanc et Fils* [1979] 2 *Lloyd's Rep.* 427.
782. *C. Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] A.C. 351. cf. *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 *Lloyd's Rep.* 171; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.2)* [2003] EWCA Civ 1031, [2003] 2 *Lloyd's Rep.* 635.
783. *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 K.B. 679; *Brauer & Co (G.B.) Ltd v James Clarke (Brush Materials) Ltd* [1952] 2 All E.R. 497; *Malik Co v Central European Trading Agency Ltd* [1974] 2 *Lloyd's Rep.* 279; *Provimi Hellas A.E. v Warinco A.G.* [1978] 1 *Lloyd's Rep.* 67, 373; *Overseas Buyers Ltd v Granadex* [1980] 2 *Lloyd's Rep.* 608.
784. *Tradax Export SA v André et Cie* [1976] 1 *Lloyd's Rep.* 416; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 *Lloyd's Rep.* 221; *André et Cie SA v Etablissements Michel Blanc et Fils* [1979] 2 *Lloyd's Rep.* 427; *Avimex SA v Dewulf & Cie.* [1979] 2 *Lloyd's Rep.* 57; *Bunge SA v Deutsche Conti Handelsgesellschaft mbH* [1979] 2 *Lloyd's Rep.* 455; *Overseas Buyers Ltd v Granadex* [1980] 2 *Lloyd's Rep.* 608; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co Ltd* [1981] 1 *Lloyd's Rep.* 344; *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No.2)* [1981] 2 *Lloyd's Rep.* 130; *Cook Industries Ltd v Tradax Export SA* [1985] 2 *Lloyd's Rep.* 454. cf. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109.
785.  *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 *Lloyd's Rep.* 323, 327; *Seagrain LLC v Glencore Grain BV* [2013] EWCA Civ 1627, [2014] 1 All E.R. (Comm) 540 at [31]–[38]; *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm), [2013] 1 *Lloyd's Rep.* 621 at [33], affirmed [2013] EWCA Civ 1628 at [22] ("restricting export") (the application of the "prohibition clause" was not in issue before the SC [2015] UKSC 43, [2015] *Bus. L.R.* 987).
786. *P. J. van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 *Lloyd's Rep.* 240. See also *Hong Guan & Co Ltd v R. Jumabhoy & Sons Ltd* [1960] A.C. 684 ("subject to").
787. *George Wills & Sons Ltd v R.S. Cunningham Son & Co Ltd* [1924] 2 K.B. 220. cf. *Ashmore & Son v C.S. Cox & Co* [1899] 1 Q.B. 436.
788. *Crawford & Rowat v Wilson Sons & Co* (1896) 12 T.L.R. 170; *S. Instone & Co Ltd v Speedy Marshall & Co* (1915) 114 L.T. 370; *Phosphate Mining Co v Rankin Gilmour & Co* (1915) 21 Com. Cas. 248. See also *Navrom v Callitis Ship Management SA* [1988] 2 *Lloyd's Rep.* 416 ("hindrances").
789. *Tennants (Lancashire) Ltd v C.S. Wilson & Co Ltd* [1917] A.C. 495, 510.

- [790.](#) *Reardon Smith Line Ltd v Ministry of Agriculture* [1962] 1 Q.B. 42 (reversed in part [1963] A.C. 691).
- [791.](#) *Peter Dixon & Sons Ltd v Henderson Craig & Co* [1919] 2 K.B. 778.
- [792.](#) *Tennants (Lancashire) Ltd v C.S. Wilson & Co Ltd* [1917] A.C. 495.
- [793.](#) *Fairclough Dodd & Sons Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136.
- [794.](#) *Re Lockie and Craggs* (1901) 86 L.T. 388. But see also *Matsoukis v Priestman & Co* [1915] 1 K.B. 681; *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 578; *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 416; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221; *Avimex SA v Dewulf & Cie.* [1979] 2 Lloyd's Rep. 57; McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (2004) Ch.15.
- [795.](#) *Nugent v Smith* (1876) 1 C.P.D. 423, 437, 438, 441, 444; *Nichols v Marsland* (1876) 2 Ex. D. 1; *Greenock Corp v Caledonian Ry* [1917] A.C. 556.
- [796.](#) *Oddy v Phoenix Assurance Co Ltd* [1966] 1 Lloyd's Rep. 134; *S. & M. Hotels Ltd v Legal & General Assurance Socy. Ltd* [1972] 1 Lloyd's Rep. 157; *Young v Sun Alliance Ltd* [1977] 1 W.L.R. 104.
- [797.](#) *Thames and Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co* (1887) 12 App. Cas. 484; *The Diamond* [1906] P. 282; *Tempus Shipping v Louis Dreyfus* [1930] 1 K.B. 699.
- [798.](#) *Thames and Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co* (1887) 12 App. Cas. 484; *The Xantho* (1886) L.R. 11 P.D. 170, 503; *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App. Cas. 518; *The Glendaroch* [1894] P. 226; *E.D. Sassoon & Co v Western Assurance Co* [1912] A.C. 561; *Grant Smith & Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1920] A.C. 162; *P. Samuel & Co Ltd v Dumas* [1924] All E.R. Rep. 66; *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] A.C. 55; *Goodfellow Lumber Sales v Verrault* [1971] 1 Lloyd's Rep. 185; *The Super Servant Two* [1990] 1 Lloyd's Rep. 1; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd* [1999] 1 Lloyd's Rep. 512.
- [799.](#) *Curtis v Mathews* [1919] 1 K.B. 425; *Pesquieras v Beer* (1949) 82 Ll.L. Rep. 501, 514; *Kawasaki Kisen Kabushiki Kaisha v Banham S.S. Co Ltd* (No.2) [1939] 2 K.B. 544. See McKendrick (ed.) at Ch.8.
- [800.](#) *Clan Line Steamers Ltd v Liverpool and London War Risks Insurance Association Ltd* [1943] K.B. 209, 221. cf. *Pan American World Airways Inc v Aetna Casualty and Surety Co* [1974] 1 Lloyd's Rep. 207 (affirmed [1975] 1 Lloyd's Rep. 77). See McKendrick at Ch.8.
- [801.](#) *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep. 406.
- [802.](#) *London and Lancashire Fire Insurance Ltd v Bolands Ltd* [1924] A.C. 836.
- [803.](#) *Langsdale v Mason* (1780) 2 Marshall, 2nd edn, 791, 794.
- [804.](#) *Re Richardsons & Samuel* [1898] 1 Q.B. 261, 267, 268; *Williams v Naamlooze* (1915) 21 Com. Cas. 253, 257; *Seeberg v Russian Wood Agency* (1934) 50 Ll.L. Rep. 146; *Reardon Smith Line Ltd v Ministry of Agriculture* [1960] 1 Q.B. 439 (affirmed [1962] 1 Q.B. 42. This point did not arise in the House of Lords [1963] A.C. 691); *J. Vermaazs Scheepvaartbedrijf NV v Association Technique de l'Importation Charbonnière* [1966] 1 Lloyd's Rep. 582; *Tramp Shipping Corp v Greenwich Marine Inc* [1975] 1 W.L.R. 1042; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *Channel Island Ferries Ltd v Sealink (UK) Ltd* [1987] 1 Lloyd's Rep. 559, [1988] 1 Lloyd's Rep. 323. See McKendrick at Ch.6.
- [805.](#) *Russell v Niemann* (1864) 17 C.B.N.S. 163. cf. *Spence v Chadwick* (1847) 10 Q.B. 5.




- [806.](#) The number of cases is voluminous. See Benjamin's Sale of Goods, 9th edn (2014) paras 18-381 et seq.; McKendrick at Ch.15; Treitel at Ch.12.
- [807.](#) **!** *Hackney BC v Doré* [1922] 1 K.B. 431, 437; *Re Podair Trading Ltd* [1949] 2 K.B. 277, 286; *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep. 16, 28; *Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep. 276, 281, 282 (affirmed [1988] 2 Lloyd's Rep. 416); *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [43]. cf. the Payment Services Regulations 2017 (SI 2017/752) (in force generally January 13, 2018) reg.96 ("Force majeure") which provides that: "(1) A person is not liable for any contravention of a requirement imposed on it by or under this Part [of the Regulations] where the contravention is due to abnormal and unforeseeable circumstances beyond the person's control, the consequences of which would have been unavoidable despite all efforts to the contrary; (2) A payment service provider is not liable for any contravention of a requirement imposed on it by or under this Part where the contravention is due to the obligations of the payment service provider under other provisions of EU or national law". Regulation 96 implements in UK law Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] O.J. L337/35 ("Second Payment Services Directive") art.93 (which is, however, entitled "abnormal and unforeseeable circumstances" rather than "force majeure").
- [808.](#) **!** In the French Civil Code "cause étrangère which cannot be imputed" to the debtor of a contractual obligation (which is equated to force majeure) appears as an excuse for contractual nonperformance: art.1147–1148. For a modern treatment of the French position see Malaurie, Aynès and Stoffel-Munck, *Les obligations*, 6th edn (2013) para.952 et seq. See also *Jacobs v Crédit Lyonnais* (1884) 12 Q.B.D. 589; *Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep. 276, 281, 282, for differences between French and English law. The French Civil Code as promulgated did not define cause étrangère or force majeure but its provisions on general contract law were revised (with effect from October 1, 2016) and the new art.1218 al.1 (as enacted by Ordonnance No.2016-131 of February 10, 2016) provides that: "[i]n contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor" (trans. Cartwright, Fauvarque-Cosson and Whittaker).
- [809.](#) (2003) I.C.C. Publication No.650. See also in much the same terms Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) prepared by the Study Group for a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2010) art.III-304 Excuse due to an impediment.
- [810.](#) *Matsoukis v Priestman & Co* [1915] 1 K.B. 681, 686; *Lebeaupin v Crispin & Co* [1920] 2 K.B. 714, 719.
- [811.](#) *Nugent v Smith* (1876) 1 C.P.D. 423, 427, 431, 444.
- [812.](#) [1920] 2 K.B. 714.
- [813.](#) *Zinc Corp v Hirsch* [1916] 1 K.B. 541, 544. cf. at 549.
- [814.](#) *Matsoukis v Priestman & Co* [1915] 1 K.B. 681; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106; cf. *Hackney BC v Doré* [1922] 1 K.B. 431; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419.
- [815.](#) *Lebeaupin v Crispin & Co* [1920] 2 K.B. 714, 270; *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 109. cf. *Re Podair Trading Ltd* [1949] 2 K.B. 277.
- [816.](#) *Walton (Grain) Ltd v British Italian Trading Co* [1959] 1 Lloyd's Rep. 223; *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep. 560. But see *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497, 501; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All E.R. 565.

- [817.](#) *Yrazu v Astral Shipping Co* (1904) 20 T.L.R. 153, 154–155; *The Turul* [1919] A.C. 515.
- [818.](#) *Lebeaupin v Crispin & Co* [1920] 2 K.B. 714, 720.
- [819.](#) *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 118; *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 109; *Bunge GmbH v Alfred C. Toepfer* [1978] 1 Lloyd's Rep. 506; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57.
- [820.](#) cf. *Intertradax SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep. 509.
- [821.](#) *Matsoukis v Priestman & Co* [1915] 1 K.B. 681; *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep. 16, 28. Sed quaere cf. *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145, 158.
- [822.](#) See also *Yrazu v Astral Shipping Co* (1904) 20 T.L.R. 153, 154–155 (casualty to ship or cargo).
- [823.](#) *Matsoukis v Priestman & Co* [1915] 1 K.B. 681, 687.
- [824.](#) *The Concadoro* [1916] 2 A.C. 199.
- [825.](#) *Yrazu v Astral Shipping Co* (1904) 20 T.L.R. 153. See also *Atlantic Paper Stock Ltd v St Anne Nackawic Pulp and Paper Co Ltd* (1975) 56 D.L.R. (3d) 409 (lack of business sense).
- [826.](#) *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497. See also *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [40]–[41] (downturn in financial markets).
- [827.](#) *Lebeaupin v Crispin* [1920] 2 K.B. 714. See also *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep. 16 (failure of Conference to provide vessel). cf. *John Batt & Co (London) Ltd v Brooker, Dore & Co Ltd* (1942) 72 Ll.L. Rep. 149; *Coastal (Bermuda) Petroleum Co Ltd v VTT Vulcan Petroleum SA (No.2)* [1996] 2 Lloyd's Rep. 383. See also (frustration) *CII Group Inc v Transclear SA* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526.
- [828.](#) But see *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep. 619 at [32].
- [829.](#) *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] A.C. 1, 6; *Hong Guan & Co Ltd v R. Jumabhoy & Sons Ltd* [1960] A.C. 684, 700; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145; *The Super Servant Two* [1990] 1 Lloyd's Rep. 1, 5–8, 11–13.
- [830.](#) *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145, 158.
- [831.](#) See above, paras 15-156, 15-158, 15-159.
- [832.](#) *Lebeaupin v Crispin & Co* [1920] 2 K.B. 174, 702; *Re Podair Trading Ltd* [1949] 2 K.B. 277, 286; see also *Matsoukis v Priestman & Co* [1915] 1 K.B. 681 (excepted only the cause of force majeure and/or strikes); *Dixon & Sons v Henderson Craig & Co* [1919] 2 K.B. 778 (hindered or prevented by force majeure); *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497 (prevented by force majeure); *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136 (prohibition of export or any other cause comprehended by force majeure); *Hong Guan & Co Ltd v R. Jumabhoy & Sons Ltd* [1960] A.C. 684 (subject to force majeure and shipment); *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] A.C. 93 (force majeure preventing shipment); *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 118 (delay in shipment occasioned by any cause comprehended in the term force majeure); similarly, *Tradax Export SA v André et Cie* [1976] 1 Lloyd's Rep. 109, *Bunge GmbH v Alfred C. Toepfer* [1978] 1 Lloyd's Rep. 506, *Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep. 109, *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57; *Marifortuna Naviera SA v Govt. of Ceylon* [1970] 1 Lloyd's Rep. 247 ("force majeure excepted"); *Huilerie l'Abeille v Société des Huileries du Niger* [1978] 2 Lloyd's Rep. 203 ("strikes ... or any



other cause comprehended by the term force majeure”); *The Super Servant Two* [1990] 1 *Lloyd's Rep.* 1 (“force majeure, ... perils or danger and accidents of the sea”).

833. But, in the context of European Regulations, the European Court of Justice has sometimes held that the expression force majeure is not limited to cases where performance is impossible, but extends to unusual circumstances, outside the control of the person concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice: see *Internationale Handelsgesellschaft v Einfuhr-und-Vorratsstelle* [1970] E.C.R. 1125; *De Jong Verenigde v V.I.B.* [1985] E.C.R. 2061. Contrast *Schwarzwaldmilch v Einfuhr-und-Vorratsstelle für Fette* (4/68) [1968] E.C.R. 377; *Valsabbia v EC Commission* [1980] E.C.R. 907. These cases are discussed in McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn, Ch.17.

834.  *Navrom v Callitsis Ship Management SA* [1987] 2 *Lloyd's Rep.* 276, 281, 282, and see above, para.15-155. Contrast Council Directive 90/314 on package travel, package holidays and package tours [1993] O.J. L158/59, art.4(6), which defines force majeure as “unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised”: see the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288, as amended) regs 13(3)(b), 15(2)(c)(i); *Charlson v Warner* [2000] C.L.Y. 4043 (CtY Ct). The 1990 Directive is repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1, which does not use the expression “force majeure” but instead refers to “unavoidable and extraordinary circumstances”, which art.3(12) defines as “a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken”. In addition, art.14(3)(b) of the 2015 Directive provides that the organiser does not have to pay the traveller compensation in respect of “non-conformity” of the package where he proves, inter alia, that this is “attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable”. See also EC Regulation 261/2004 and *Wallentin-Hermann v Alitalia Linee Aeree Italiane SpA* (C-549/07) [2008] E.C.R. I-11061, *Nelson v Deutsche Lufthansa AG* (C-581/10; C-629/10) of October 23, 2012 at para.80.

835. See above, para.15-155.

836. *Tradax Export SA v André et Cie* [1976] 1 *Lloyd's Rep.* 416; *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 *Lloyd's Rep.* 508; *Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 *Lloyd's Rep.* 499; *Toepfer v Schwarze* [1977] 2 *Lloyd's Rep.* 380 (affirmed [1980] 1 *Lloyd's Rep.* 385); *Bunge GmbH v CCV Landbouwbelaag G.A.* [1978] 1 *Lloyd's Rep.* 217; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109; *Intertradax SA v Lesieur Tourteaux SARL* [1978] 2 *Lloyd's Rep.* 509; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 *Lloyd's Rep.* 221; *Bunge GmbH v Alfred C. Toepfer* [1979] 1 *Lloyd's Rep.* 554; *Johnson Matthey Bankers Ltd v State Trading Corp of India* [1984] 1 *Lloyd's Rep.* 427; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No.3) [1989] 1 *Lloyd's Rep.* 582; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] 1 *Lloyd's Rep.* 1, [2003] EWCA Civ 1031, [2003] 2 *Lloyd's Rep.* 635 at [34]. cf. *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 *W.L.R.* 404 (certificate required only to attest to occurrence of force majeure event).

837. See above, para.13-034.

838. *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109, 113. See also *Bunge SA v Kruse* [1979] 1 *Lloyd's Rep.* 279 (affirmed [1980] 2 *Lloyd's Rep.* 142); *SHV Gas Supply and Trading SAS v Naftomar Shipping and Trading Co Ltd Inc* [2005] EWHC 2528 (Comm), [2006] 1 *Lloyd's Rep.* 163 at [39]; cf. *Tradax Export SA v André et Cie* [1976] 1 *Lloyd's Rep.* 416. See Benjamin's *Sale of Goods*, 9th edn (2014) at para.18-405.

839. *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109; *Bremer Handelsgesellschaft mbH v C. Mackprang Jnr* [1979] 1 *Lloyd's Rep.* 221 (waiver or estoppel). Contrast *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 *Lloyd's Rep.* 508; *Berg*

- & Son Ltd v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep. 499; Toepfer v Schwarze [1977] 2 Lloyd's Rep. 380 (affirmed [1980] 1 Lloyd's Rep. 385); Avimex SA v Dewulf & Cie [1979] 2 Lloyd's Rep. 57; Bunge SA v Kruse [1979] 1 Lloyd's Rep. 279; Bremer Handelsgesellschaft mbH v C. Mackprang Jnr [1981] 1 Lloyd's Rep. 292; Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co Ltd [1981] 1 Lloyd's Rep. 345; Tradax Export SA v Cook Industries Inc [1981] 1 Lloyd's Rep. 236 (affirmed [1982] 1 Lloyd's Rep. 385); Bremer Handelsgesellschaft mbH v Finagrains SA [1981] 2 Lloyd's Rep. 259; Bunge SA v Compagnie Européenne des Cereales [1982] 1 Lloyd's Rep. 306; Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft E.G. [1982] 1 Lloyd's Rep. 599; Bremer Handelsgesellschaft mbH v Bunge Corp [1983] 1 Lloyd's Rep. 476; Bremer Handelsgesellschaft mbH v Deutsche-Conti Handelsgesellschaft mbH [1983] 1 Lloyd's Rep. 689; (no waiver or estoppel). See also *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57; *Bunge SA v Kruse* [1980] 2 Lloyd's Rep. 142; *André et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep. 463. See Benjamin's Sale of Goods, 9th edn (2014), paras 18-370, 18-406; Treitel, *Frustration and Force Majeure*, 3rd edn (2014) para.12-050.
- [840.](#) *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep. 269, 280–281, 291–294. See also *Westfälische Central-Genossenschaft GmbH v Seabright Chemicals Ltd Unreported 1979* (Robert Goff J.) cited [1983] 1 Lloyd's Rep. 269, 291–294.
- [841.](#) *Tennants (Lancashire) Ltd v C.S. Wilson & Co Ltd* [1917] A.C. 508, 511–512; *Pool Shipping v London Coal Co of Gibraltar* [1939] 2 All E.R. 432; *Tradax Export SA v André et Cie. SA* [1976] 1 Lloyd's Rep. 416, 423; *Kawasaki Steel Corp v Sardol SpA* [1977] 2 Lloyd's Rep. 552, 555; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 115; *Intertradex SA v Lesieur Tourteaux SARL* [1978] 2 Lloyd's Rep. 509, 513; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 2 Lloyd's Rep. 221, 224; *Bremer Handelsgesellschaft v Continental Grain Co* [1983] 1 Lloyd's Rep. 269.
- [842.](#) For “pro-rating”, see American Uniform Commercial Code ss.2-615(b), (c); Benjamin's Sale of Goods, 9th edn (2014) at paras 6-054, 8-103, 18-401; Hudson (1968) 31 M.L.R. 535, (1978) 123 S.J. 137.
- [843.](#) *Intertradex SA v Lesieur Tourteaux SARL* [1978] 2 Lloyd's Rep. 509, 512; *Bremer Handelsgesellschaft mbH v C. Mackprang* [1979] 2 Lloyd's Rep. 221, 224; *Westfälische Central-Genossenschaft GmbH v Seabright Chemicals Ltd, Unreported 1979* cited [1983] 1 Lloyd's Rep. 269 at [291]–[294].
- [844.](#) *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304, 307.
- [845.](#) *Westfälische Central-Genossenschaft GmbH v Seabright Chemicals Ltd Unreported 1979*, above at n.812.
- [846.](#) 1977 Act s.3(2)(b); above, paras 15-084—15-087 where it is noted that the scope of the protection of s.3 changes with the coming into force of the Consumer Rights Act 2015 so as no longer to benefit persons “dealing as consumer”. On the view that s.3(2)(b) can apply to force majeure clauses, cf. Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.12-022.
- [847.](#) See *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 612. But see above, para.15-086 n.452.
- [848.](#) On the test of fairness and this effect of unfairness see Vol.II, paras 38-201 et seq. which also explains which contract terms are excluded from the test of unfairness.
- [849.](#) See Vol.II, para.38-259 and 38-317—38-321.
- [850.](#) See Vol.II, para.38-318.
- [851.](#) See, in particular, 1999 Regulations Sch.2 para.1(f), (g), (h), (j), (k) on which see Vol.II, para.38-282—38-284 and 38-286.
- [852.](#) Consumer Rights Act 2015 s.62 on which see Vol.II, paras 38-334 et seq.

- [853.](#) Vol.II, paras 38-358 et seq. It is *possible* for a force majeure clause to fall within the “core exclusion” if it were to describe the main subject-matter of the contract: see Consumer Rights Act 2015 s.64 on which see Vol.II, paras 38-363—38-368.
- [854.](#) SI 2000/2334 reg.19 (as amended).
- [855.](#) Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19 art.7(3).
- [856.](#) Directive 2011/83/EU on consumer rights [2011] O.J. L304/64.
- [857.](#) 2011 Directive art.31 (repeal as from June 13, 2014).
- [858.](#) The main implementation of the Consumer Rights Directive 2011 was by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) on which (and on the 2011 Directive) see Vol.II, paras 38-056 et seq. The 2013 Regulations apply in relation to contracts entered into on or after June 13, 2014, whereas the 2000 Regulations remain applicable to contracts made before that date and after their own coming into force: 2013 Regulations reg.1 and 2.