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LAW OF CONTRACT

EXCLUSION CLAUSES

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OUTLINE

- **What are exclusion clauses**
- **Incorporation**
- **Statutory controls (CECO)**

WHAT ARE EXCLUSION CLAUSES

- Also known as “exemption clauses”
- Ways to escape liability:
 - in contract
 - in tort
- Problems of exclusion clauses:
 - scope
 - onerous character
 - bargaining power (e.g., consumers)

INCORPORATION: IN GENERAL

- **Applies to terms in general, not only exclusion clauses**
- **Why is incorporation an issue?**
 - ensures that contract really reflects parties' intention
 - prevents unequal power of parties adversely to affect one of them

INCORPORATION: METHODS

- **Methods of incorporation:**
 - by signature
 - by notice
 - by consistent course of dealing or custom

INCORPORATION: SIGNATURE

- **Reflects importance of signature:**
 - bound despite not understanding language of contract
 - Certainty, efficiency, party autonomy (?)
- **Example—*L'Estrange v Graucob* [1934] 2 KB 394:**
 - vending machine stopped working
 - liability excluded for breach of any term
 - exclusion clause in small print, in unusual place, written in black on brown paper

INCORPORATION: SIGNATURE

- **Exceptions to incorporation by signature:**
 - misrepresentation
 - other vitiating factors—duress, undue influence, mistake, etc.
 - non-contractual character of signed document (*Grogan v Robin Meredith Plant Hire* [1996] CLC 1127)

INCORPORATION: CONSISTENT COURSE OF DEALING

- **Main question—what amounts to “consistent” course of dealing?**
- **Examples:**
 - *Henry Kendall v William Lillico* [1969] 2 AC 31—oral contract but parties had contracted more than 100 times over 3 years
 - *McCutcheon v David MacBrayne* [1964] 1 WLR 125—parties had contracted 4 times before but no signature on this occasion
 - *Hollier v Rambler Motors* [1972] 2 QB 71—telephone contract (no writing), contracted 3/4 times over 5 years

INCORPORATION: CUSTOM

- **Similar to consistent course of dealing**
- **Example:**
 - *British Crane Hire Corp v Ipswich Plant Hire* [1975] QB 303—parties contracted only twice previously but were of equal bargaining power and terms relied on were in use “in the trade”
 - custom as a way to overcome lack of “consistent” course of dealing?
 - different scope (compare to terms implied in fact and terms implied in law)

INCORPORATION: NOTICE

- **Applies where document not signed:**
 - document delivered only
 - reference to document not signed
 - notice displayed on premises
- **Problem—party must give adequate notice:**
 - timing of notice
 - nature of document containing notice
 - is notice reasonable?

INCORPORATION: NOTICE

- **Timing—at or before contract is formed:**
 - *Olley v Marlborough Court* [1949] 1 KB 532—exclusion clause in hotel room
 - *Thornton v Shoe Lane Parking* [1971] 2 QB 163—exclusion clause on parking ticket
- **Nature of document—contractual or mere receipt?**
 - *Chapelton v Barry Urban District Council* [1940] 1 KB 532—exclusion clause on ticket issued upon payment
 - *Alexander v Railway Executive* [1951] 2 All ER 442—relevance of commercial practices

INCORPORATION: NOTICE

- **Reasonable notice—examples:**
 - *Parker v South Eastern Railway* [1877] 2 CPD 416—cloakroom receipt stating “See back” (sufficient to inform?)
 - *Thompson v London, Midland & Scottish Railway* [1930] 1 KB 41—illiterate recipient
compare *Geier v Kujawa, Weston and Warne Bros* [1970] 1 Lloyds Rep 364—what if party knows or should have known that recipient cannot read?
 - *Poseideon Freight v Davies Turner* [1996] 2 Lloyd’s Rep 388—reference to terms “on the back” but such page not faxed
 - *Richardson, Spence & Co v Rowntree* [1894] AC 217—terms obscured by stamp

INCORPORATION: ONEROUS OR UNUSUAL TERMS

- Party to take further steps to draw attention to such terms
- What type of terms are onerous/unusual?
 - exclusion clauses—but depends on circumstances
 - other terms—examples:
 - holding fee—*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433
 - bearing costs of keeping post office branch open—*Bates v Post Office (No 3)* [2019] EWHC 606 (QB)

INCORPORATION: ONEROUS OR UNUSUAL TERMS

- What steps to take in respect of onerous/unusual terms?
 - red hand rule (*Spurling v Bradshaw* [1956] 1 WLR 461)

“the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.”



4. EXCLUSION OF LIABILITY

- a. The club will not be liable for damage to the property of visitors, whether caused by fire or theft.
- b. ‘We can remove the car from the club reception for up to 24 hours. We will not be responsible for any damage to the car.’

- placing of term—e.g., *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

STATUTORY CONTROLS: CECO (CAP. 71) IN GENERAL

- **Control of Exemption Clauses Ordinance (commenced 1 December 1990)**
- **Aim—limit avoidance of contract and tort liability**
- **Based on Unfair Contract Terms Act 1977:**
 - applies to businesses and consumers
 - passing of Consumer Rights Act 2015
- **CECO's ways to limit liability:**
 - invalidate some exclusion clauses
 - subject others to control of reasonableness

STATUTORY CONTROLS: CECO (CAP. 71)—SCOPE

- **To which contracts does CECO apply?**
 - B2B and B2C contracts
 - excluded:
 - exempted supply contracts (s16)
 - certain specific contracts under Schedule 1—e.g., insurance, land, employment
- **Some contracts must:**
 - include a “consumer”—defined in s4
 - be “in the course of a business”—defined in s2

STATUTORY CONTROLS: CECO (CAP. 71)—OVERVIEW

- **Structure of CECO's provisions on control of exclusion clauses:**
 - ss7–9: liability for negligence and breach of contract
 - ss10–12: liability relating to contracts for the sale or supply of goods
 - s3 and Schedule 2: reasonableness test

STATUTORY CONTROLS: CECO (CAP. 71)—NEGLIGENCE

7. Negligence liability

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons **exclude or restrict** his **liability for death or personal injury** **resulting from negligence**.

(2) In the case of **other loss or damage**, a person cannot **so exclude or restrict** his liability **for negligence** **except in so far as the term or notice satisfies the requirement of reasonableness**.

(3) [...]

STATUTORY CONTROLS: CECO (CAP. 71)—CONTRACT LIABILITY

8. Liability arising in contract

- (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
 - (2) As against that party, the other cannot by reference to any contract term—
 - (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
 - (b) claim to be entitled—
 - (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
 - (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
- except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

STATUTORY CONTROLS: CECO (CAP. 71)—INDEMNITY

9. Unreasonable indemnity clauses

(1) A person dealing as consumer 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 or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.

(2) This section applies whether the liability in question—

- (a) is directly that of the person to be indemnified or is incurred by him vicariously;
- (b) is to the person dealing as consumer or to someone else.

STATUTORY CONTROLS: CECO (CAP. 71)—SOGO s16

11. Seller's liability

(1) [...]

(2) As against a person dealing as consumer, liability for breach of the obligations arising from section 15, 16 or 17 of the Sale of Goods Ordinance (Cap. 26) (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

(4) [...]

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

3. The “reasonableness” test

- (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Ordinance and section 4 of the Misrepresentation Ordinance (Cap. 284) is satisfied only if the court or arbitrator determines that the term was 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.
- (2) [...]
- (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Ordinance is satisfied only if the court or arbitrator determines that it would be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

3. The “reasonableness” test

(1)–(3) [...]

(4) In determining (under this Ordinance or the Misrepresentation Ordinance (Cap. 284)) whether a contract term or notice satisfies the requirement of reasonableness, the court or arbitrator shall have regard in particular [...] to whether (and, if so, to what extent) the language in which the term or notice is expressed is a language understood by the person as against whom another person seeks to rely upon the term or notice.

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

3. The “reasonableness” test

(1) [...]

(2) In determining for the purposes of section 11 or 12 whether a contract term satisfies the requirement of reasonableness, the court or arbitrator shall have regard in particular to the matters specified in Schedule 2; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

Schedule 2

“Guidelines” for Application of Reasonableness Test

The matters to which the court or arbitrator shall have regard in particular for the purposes of sections 11(3) and 12(3) and 4 are any of the following which appear to be relevant—

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;
- (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;
- (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 previous course of dealing between the parties);
- (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;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

3. The “reasonableness” test

(1)–(4) [...]

(5) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this Ordinance or the Misrepresentation Ordinance (Cap. 284)) whether the term or notice satisfies the requirement of reasonableness, the court or arbitrator shall have regard in particular (but without prejudice to subsection (2) or (4)) 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.

STATUTORY CONTROLS: CECO (CAP. 71)—REASONABLENESS

3. The “reasonableness” test

(1)–(5) [...]

(6) It is for the person **claiming** that a contract term or notice satisfies the requirement of **reasonableness** to **prove** that it does.