

Avoiding Unnecessary Exposure



Limitation and Exclusion of Liability for IT Providers

Whilst the focus of this article is IT providers, the principles are largely applicable to anyone entering into a contract for the supply of goods or services in the UK.

This is a very complex subject. Many people think that if they include in their terms and conditions clauses which purport totally to exclude their liability under the contract in question, they will be safe and that they cannot be sued successfully should they be negligent in the subsequent provision of goods/services or otherwise breach the terms of the contract.

This is not the case. There is a great quantity of caselaw and many statutory and regulatory provisions which impact on this area.

It is not within the scope of this article to analyse each judicial decision and legislative/regulatory provision. The bottom line is that, in simple terms, the chances of a liability limitation or exclusion clause being successful depend largely on whether the clause is "reasonable" when set against all the factors which make up the contractual scenario.

No limitation/exclusion of liability clause is bound to be upheld by a court. It is always a question of reasonableness in the eyes of the court. The court will look at many factors in determining reasonableness.

It is wise to draft a raft of different clauses which address different aspects of potential liability and to make them independent of one another so that if one or more of the clauses is found to be unreasonable, the supplier can still hope to find shelter behind those which pass the reasonableness test.

It is thought best not to merge the provisions together into a single sub-clause but to leave them as separate sub-clauses. The rationale for this is that a court may hold certain elements of a limitation of liability clause to be unreasonable and, if so, it may delete them. If all the provisions are merged into a single clause and the court objects to one element of that clause, the whole clause may become ineffective.

Maximum Liability Clause

This is included as a long-stop so that if the other clauses which purport to limit or exclude liability fail to stand up in court. It is apparent from several high-profile judgments that if a supplier hopes to be able to rely on a maximum liability cap in a contract, probably the best approach is to tie this into the cap set on the professional indemnity insurance that has been taken out by that supplier.

Hence there is an inextricable link between the interests of software houses (and suppliers more generally), professional indemnity insurers and lawyers. This runs as follows:-

1. **Insurers** are far less likely to have to pay out on a claim made by one of their insured supplier clients if that client has dealt on the basis of a properly drafted contract of supply which has limited and excluded liability in a reasonable way and is therefore more likely to be upheld by a court. Thus insurers should carry out due diligence on potential customers to ensure not only that they have terms and conditions in place but also that the terms have

been properly drafted and thereby minimise the client's exposure and, consequentially, that of the insurer.

2. **Suppliers** are far less likely to be sued if the contract under which they have made the supply in question has been well drafted and addresses different potential areas of liability and appropriately and reasonably imposes limits and exclusions in relation to such potential liability.
3. **Lawyers** have a far easier time defending a case when their client's contract of supply contains clauses which have been properly drafted to limit and exclude various aspects of potential liability.

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