

## **GUIDANCE NOTE**

### **EXCLUDING OR RESTRICTING BUSINESS LIABILITY FOR CONTRACTUAL OR COMMON LAW NEGLIGENCE**

#### **Introduction**

There are legal limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by your business. Nonetheless, Courts recognise the principle of freedom of contract in private business and will uphold contractual terms excluding or restricting liability when it is reasonable to do so.

Your business may face claims that it failed to take reasonable care and exercise reasonable skill in the performance of a contract. Allegations can arise many years after you performed the contract, making it difficult to investigate and defend. It is not uncommon for the loss claimed to substantially exceed the contract value. Your business clients should arrange suitable insurance to protect against such losses, but your clients' insurers may still seek to recover their outlay from your business, so it is sensible to take steps to manage and limit exposure to claims.

#### **Excluding or restricting liability**

It is permissible to exclude or restrict your liability for loss or damage for negligence (you cannot exclude liability for death or personal injury), provided your contract term satisfies the requirements of reasonableness. You will need to demonstrate your contract term excluding or restricting liability was part of the contract agreed with your client (incorporated) and that it was a reasonable term to include.

If you operate more than one company providing different services to a client, then you need to make sure all of your companies are covered and protected by your contract terms.

#### **Some tips on incorporating your terms**

- If you produce written quotes/proposals, identify the application of your business terms and conditions in them
- Send a copy of your terms to the client. If the client is expected to refer to your website or request a copy, make sure you provide all they need to do so
- Consider whether the client can sign to accept your terms
- Look out for clients sending you or referring you to their terms of business
- Ensure your terms are legible, sensibly set out with suitable headings and sufficiently draw the client's attention
- Identify the types of loss you exclude or restrict
- Identify the types of loss you accept, whether voluntarily or by imposition of the law
- If applicable, set out any warranty or guarantee offered to the client, including those provided by others such as a manufacturer's warranty for products
- Identify the expected insurance position of your client and the loss you expect them to protect against

## Assessing if your contract term excluding or restricting liability is fair and reasonable

The Court will decide whether your contract term excluding or restricting liability was a fair and reasonable term to include in the contract, having regard to the circumstances which were, or ought reasonably to have been known or in the contemplation of you and your client when the contract was made. If the Court decides the term was unreasonable, you will lose any benefit from the term. The Court will consider (amongst others);

- The strength of your bargaining position with the client, taking account of alternative means the client's requirements could be met such as by other suppliers
- Whether you provided your client with an inducement to accept the term
- Your client's knowledge of the existence of the term and its extent
- Availability of insurance cover and the expectation for arranging insurance
- Value of the contract in comparison to the potential value of losses claimed
- Value of any liability accepted by your business such as a fixed sum and/or warranty
- Whether the term represents industry standards
- Option to contract on different terms but for a different price

Our [link](#) records an example of how one of our clients defeated a claim in excess of £6.6m by successfully excluding its liability by operation of a condition excluding liability.

We include below example terms for illustration. Such terms will form part of a wider contract and it is important you seek professional guidance and advice when preparing your contracts.

## Example terms for excluding or restricting liability, insurance and warranty

### 1. Limitation of Liability

1.1. The Customer's Attention is particularly drawn to this clause. Nothing in these terms and conditions shall exclude or restrict the Company's liability for:

- a death or personal injury caused by its negligence, or the negligence of its employees, operatives or agents
- b fraud or fraudulent misrepresentation

1.2. Subject to condition 1.1:

- a the Company excludes all liability to the Client, whether in contract, tort (including negligence), breach of statutory duty (where permissible), or otherwise, for any indirect or consequential loss arising under or in connection with the contract; and
- b The Company's total liability to the Client in respect of all other losses including direct loss arising under or in connection with the contract, whether in contract, tort (including negligence), breach of statutory duty (where permissible), or otherwise, shall in no circumstances exceed the fixed sum of £[enter fixed sum] or the contract value, whichever is the greatest sum.

## 2. Insurance

2.1. The Client is best placed to protect its business and property against losses not otherwise provided for by these terms and conditions by arranging suitable insurance and the Client is understood to maintain such policies of insurance with reputable insurers.

## 3. Warranty

3.1. Any major items of plant supplied by the Company shall carry...

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