

FIXED LIABILITY PROVISIONS IN CONTRACT

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INTRODUCTION

- **Liquidated Damage clause:** agreement to pay a fixed sum in damages in the event of a breach or a particular type of breach.
- **Relevant common law principles:**
 - Freedom of contract
 - Limitations on the right to exclude liabilities
 - Penalty clauses not enforceable



EXCLUSION OF LIABILITY



- **Exclusion of liability by contract:**
 - Exclusion clause must be clear and precise
 - Generally subject to *contra proferentem*
- **Liability that cannot be excluded by contract:**
 - Fraud or intentional misconduct
 - Misrepresentation (unless clearly stated)
 - Death / Personal Injury (where the Unfair Contract Terms Act applies)

ENGLISH LAW - STATUTES

- Unfair Contract Terms Act 1977 (“**UCTA**”): requires that exclusion or limitation of liability be subject to the requirement of reasonableness. This applies to business to business contract.
- The burden of proving whether a term satisfies the reasonableness test lies on the Seller. Broad guidelines are:
 - Relative bargaining power of the parties
 - Any inducement given to a consumer to agree the terms.
 - Whether the consumer knew the term existed.
 - If a term excludes or restricts 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.

ENGLISH CASE LAW

- Standard terms' limitation of liability unreasonable under UCTA - *Saint Gobain Building Distribution Ltd (t/a International Decorative Surfaces) v Hillmead Joinery (Swindon) Ltd* [2015] EWHC B7 (TCC)
- Clause seeking to exclude all liability may be interpreted restrictively - *Scottish Power UK Plc v BP Exploration Operating Company Ltd* [2015] EWHC 2658
- Knock-for-knock indemnities being upheld and the court refusing to apply restrictive principles of interpretation for fully mutual clauses negotiated between parties of equal bargaining power - *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 37
- UCTA reasonableness test: unreasonable to attempt to exclude liability when insurance for such liability could have been purchased easily- *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA Civ 5

SINGAPORE LAW



- Largely based on English law
 - UCTA applies in Singapore under the Application of English Law Act 1993
 - Construed narrowly – *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2014] SGCA 62.
 - Clauses purporting to limit liability generally interpreted less stringently than clauses purporting to totally exclude liability - *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, third party)* [2006] 2 SLR(R) 268



PENALTY CLAUSES



- **Test for penalty clause:** genuine pre-estimate of future loss, it does not have to be accurate, but has to be a reasonable, commercially justifiable attempt to estimate the amount of loss.- *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.
- **Current position:** emphasis no longer on genuine pre-estimate but rather a two stage test of whether the penalty rule applies and if so, whether the provision protects a legitimate interest and is proportionate - *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67

ENGLISH LAW

- The examination of a penalty clause does not address the fairness of the primary obligation itself (freedom of contract) but only the remedies available for breach of that primary obligation.
- Provisions can only be penalties if they provide an exorbitant alternative to common law damages (i.e. has to be a provision operating on breach of contract) - *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399
- If the penalty rule applies, the specified consequence of a breach needs to be tested if it is out of all proportion or unconscionable or extravagant having regard to the legitimate interests of the innocent party.

SINGAPORE LAW



- Distinction is drawn, as in *Cavendish*, between primary and secondary obligations. Singapore follows the UK position.
- The first Singaporean case to consider *Cavendish*: *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] SGHC 77

QUESTIONS?



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