

Limitation of Liability in Supply Agreement

By: Dinesh Kumar Jap

Background

Reference is made to the Supply Agreement which is a standard form used by the ABCXYZ company ("Company") in entering into contracts with its clients.

The Supply Agreement needs to be reviewed, particularly the sections related with exemption or limitation of liability, to ensure that the contents are not in violation to the Unfair Contract Terms Act 1977 ("UCTA"), in order for its enforceability to be un-impaired.

In principal, despite of the wordings used, the limitation of liability will not be construed to cover a situation which would defeat the main object of the agreement or create a commercial absurdity¹.

Pursuant to UCTA, certain liabilities cannot be restricted or limited in a contract, such as claims to be entitled to perform its contractual duties substantially different from the duties which was reasonably expected to be performed by him²; claims to be entitled to render no performance of his contractual duty at all³; and liability for its own breach of contract⁴. Liabilities arising due to negligence which results in death or personal injury or other losses or damage are also restricted to be excluded or limited⁵. However certain liabilities can be limited by satisfying the requirement of reasonableness⁶, which are:

- Liability in respect to the transfer of ownership of goods⁷;
- Liability in respect of the assurance of quiet possession⁸.

In addition to the above, UCTA also regulates the liabilities arising from sale and supply of goods. This section applies to the supply of consumer goods, where it is stated that a liability for the loss and damage to the goods proving to be defective while in consumer use, arising due to the negligence of the manufacturer or the distributor, or the liabilities for the breach of obligations arising from seller's implied undertakings, cannot be restricted by a contract⁹.

In regard to customer, the rights of customer and other parties acting not as a customer is differentiated. Liabilities for the breach of obligations arising from seller's implied undertaking as to conformity of goods and other matters related to hire-purchase cannot be excluded or limited, while for other party's dealing not as a customer, such limitation can be

¹ *Internet Broadcasting Corp Ltd. v Mar LLC* [2009] EWHC 844 (Ch)

² *Ibid*, s 3 (2.b.i)

³ *Ibid*, s 3 (2.b.ii)

⁴ *Ibid*, s 3 (2.a)

⁵ *Ibid*, s 2

⁶ UCTA 1977, Schedule 2

⁷ *Ibid*, s 7 (4.a)

⁸ *Ibid*, s 7 (4.b)

⁹ UCTA 1977, s 5 (1)

exercised safe to the extent that the requirement of reasonableness can be satisfied. The liabilities set forth above in this paragraph include the business liabilities¹⁰ and other relevant liabilities in a sale of goods and hire-purchase contracts.

Apart from the restriction to exclude liabilities as mentioned above, UCTA also prevents clauses that renders a liability or its enforcement to be subject to restrictive or onerous conditions, excluding or restricting the rights or remedies in respect to the liability, or cause a person to be prejudiced during his effort to pursue his right or remedy to such liability, and restricting rules of evidence¹¹.

Requirement of Reasonableness

UCTA specifies that the requirement of reasonableness shall survive the termination or repudiation of a contract¹². For satisfying the requirement of reasonableness, the terms in a contract should be considered as fair and reasonable by taking into account the circumstances which were known or ought to be known, or in accordance with the intention of the parties when the contract was entered.

To determine whether a contract satisfies the requirement of reasonableness, schedule 2 of UCTA should be taken into consideration. This schedule 2 sets the guidelines for a reasonable test, which shall include the following consideration:

- a. the equal position of the parties in the contract and whether the customer can meet his requirements from another party or supplier;
- b. whether there are any inducement made, or whether a similar contract can be entered by the customer with any other party without having to agree on the similar terms;
- c. whether the customer is knowledgeable on the existing term in the contract as well as its consequences;
- d. whether the exclusion or restriction to a liability due to non-compliance with a certain condition is practicable and reasonable during the time of the contract;
- e. whether the manufacturing, processing, or adaptation of the goods were specifically made exclusively for the customer.

However, the above reasonable test does not prevent the court or arbitration tribunal to rule that a term in a contract which excludes or restricts a liability to be void.

Jurisdiction of UCTA

¹⁰ Liability arising from things done or to be done by a person in the course of a business; or, from the occupation of premises used for business purposes of the occupier.

¹¹ Ibid 10, s 13 (1)

¹² UCTA 1977, s 9

UCTA applies to contracts made by the parties to be subject to the laws of United Kingdom, or governed by the laws of other country but meets either one of the following:

1. the term in the contract appears to the court or arbiter to be deliberately made in an attempt to evade the law (UCTA);
2. one of the parties dealing as consumer is habitually a resident in the United Kingdom and the making of the contract by him or by others on his behalf is in United Kingdom.

Summary

In order to ensure that the terms and conditions set forth in the Supply Agreement can be enforceable, the clauses related with exclusion of limitation of liabilities needs to be observed and revised in accordance with UCTA. Any provision in the contract that contravenes UCTA can be deemed to be void and un-enforceable by the court or arbitration.

Disclaimer: This article is not intended or offered as legal advice or opinion and has been prepared for information purposes only. The information specified herein is not a substitute for the advice from your legal counsel and you should not act or rely on the information and materials as legal advice without first consulting your legal counsel for your specific circumstances. Unless expressly stated otherwise, no document herein should be assumed to be produced by an attorney licensed in your state.