

## Podcast – How to approach the analysis of exemption clauses

This podcast addresses an important question which often ‘bothers’ students when dealing with the area of exemption clauses: the question of what is the right approach to a term that might be unreasonable / unfair. This difficulty usually arises because students often overlook some of the basics of this area of law - this podcast is intended to help you to refresh your memory of the basic points you need to consider. However, for spatial reasons, this podcast can only act as another aide-mémoire in addition to what is covered in chapter 4 of the revision guide in order to deepen your knowledge and understanding of the topic ‘exemption clauses’; you will still need to fill in the details yourself. Hopefully however, the overview provided by this podcast will help you to do this much more easily.

So what is it then, when you are confronted by a contractual clause which attempts to exempt – i.e. exclude or limit – liability of the party putting the clause forward, that do you need to do? How should you approach the question of whether this clause is effective? Obviously, as with any contractual term, you first need to decide if the clause in question has become a part of the contractual agreement between the parties and also what its content is; these are the points ‘incorporation’ and ‘interpretation’:

Therefore, you should ask first if the clause in question has been properly incorporated into the contract by considering the usual ways of incorporation as they are relevant in the context of the scenario at hand, i.e. it does not make sense to consider incorporation by signature if no document was signed according to the facts.

After considering the issue of incorporation – and obviously only when you have come to the conclusion that the clause at hand was properly incorporated – you should then ask yourself if the clause purporting to except or limit liability actually covered the breach, i.e. if it was appropriately worded to cover what has occurred? There are no ‘special’ rules regarding the interpretation of exemption clauses as they are subject to the same common law rules as all contract terms; however, keep in mind that the Courts have taken a stricter approach towards the interpretation of exemption clauses than in relation to the interpretation of other types of contractual terms. Of particular importance in this context are the so-called *contra proferentum* rule and the ‘Canada Steamship test’ regarding the attempt to exclude liability for negligence as detailed in chapter 4 in your revision guide.

If you have concluded (and again, only then) that the clause at hand was appropriately worded to cover the breach, e.g. the clause in question dealt with the issue of limited liability in case personal property got damaged in performing a removal contract and a box of china got destroyed whilst transporting the packed removal boxes from A to B, then you need to move on to the point which often causes students the most headaches: the issue of what legislation does do to such terms. There are two pieces of legislation which might come into play here, the Unfair Contract Terms Act 1977 (‘UCTA’) and the Unfair Terms in Consumer Contracts Regulations 1999 (‘UTCCR’). At first glance, that is, given their respective names, the application of either piece of legislation seems easy enough; however

and unfortunately, this first impression is erroneous and it is actually one of the main reasons why students often struggle to properly analyse the potential impact of legislation on exemption clauses: unlike its name suggests, UCTA neither deals with all types of terms nor does it deal with all types of contracts; likewise, the scope of the UTCCR is limited to business-to-consumer contracts and, furthermore, to clauses in such contracts which have NOT been individually negotiated between the contractual parties (see reg.5(1)) and which do not fall within certain 'core exclusions' (see reg.6(2)).

What this means for you is the following: (after having established that the term is incorporated AND that the term covers the breach) start to consider the legislation by looking at UCTA – this is because despite the limitations as regards its applicability to exemption terms, UCTA is still wider in its general scope than the UTCCR as it is capable of being applied with regard to both business-to-business contracts and business-to-consumer contracts. In other words, if you remember that UCTA only applies to clauses and terms in a covered contract (see Schedule 1 of UCTA for excluded types of contracts) IF the term EITHER a) excludes liability or b) limits liability, then you will avoid applying UCTA wrongly. See the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 where UCTA could not be used because the clause in question (though arguably unfair) did neither exclude nor limit liability; all it did was to *impose* liability for overdue transparencies. – If your analysis of the points above shows that UCTA applies to the clause at hand, then set out and analyse those sections of UCTA which might apply and what they do to the clause, i.e. do they render it automatically ineffective or is the clause only effective if it satisfies the 'reasonableness test' of s.11 as elaborated in Schedule 2?

After considering UCTA, you might also want to analyse the potential impact of the UTCCR, especially if you have concluded that UCTA does not 'bite'. However, remember the first and foremost limitation of the UTCCR: they only apply to business-to-consumer contracts! So if A Ltd deals with B Ltd, then the UTCCR will NOT apply, regardless of how 'unfair' a contractual term might appear. Furthermore, you should keep in mind that, if the contract term in question had been individually negotiated between the parties or if the term relates to a 'core subject matter' as per reg.6(2), then again the UTCCR will NOT come into play. - If your analysis of the points above shows that the UTCCR apply to the clause at hand, then set out and analyse those bits of the UTCCR which might apply and what they do to the clause, i.e. does the term satisfy the 'fairness test' and is thus effective?