The Sale and Supply of Goods to Consumers Regulations

This statutory instrument (SI 2002/3045) came into force on 31 March 2003. It implements the 1999 Directive of the EU entitled Directive on the Sale of Consumer Goods and Associated Guarantees. Now that we have completed a study of other UK sale and supply of goods legislation we are in a position to deal with these regulations that give new rights to consumers buying and hiring goods.

A consumer is defined as 'a natural person acting for purposes outside his trade or profession'.

Current law

The implied conditions of other existing legislation that goods are of satisfactory quality and fit for the purpose continue.

The regulations

These can be dealt with under the following heads.

Conformity to the contract

This provision states that where goods sold or hired to a consumer do not conform to the contract of sale or hiring at any time within the period of *six months* beginning with the date on which the goods were delivered to the buyer they must be taken not to have so conformed at that date. This is achieved by inserting a new s 48A into the Sale of Goods Act 1979. Similar provisions are inserted into legislation relating to hire and hire-purchase but the main treatment is in terms of a sale.

The provision in s 48A does not apply if:

- it is established that the goods did so conform on that date; or
- if its application is incompatible with the nature of the goods themselves.

Thus grocery retailers may escape in many ways since for example a dozen eggs will inevitably prove to be defective after six months. The section will not therefore apply.

The effect of the section is that for the first six months after purchase/delivery the burden of proof when reporting faulty goods will be on the seller and thus reversed in the buyer's favour.

If the seller can show that the goods were perfect when delivered and so satisfies the burden of proof and the buyer cannot prove they were defective the buyer could resort to the Sale of Goods Act 1979, for example, by alleging that if the goods were perfect at sale/delivery then they should have lasted longer. This is a possible head of claim under the 1979 Act. After the first six months then only the 1979 Act claims are available.

Repair or replacement

The regulations insert a new s 48B into the 1979 Act. It applies within the first six months' period and if within that period a defect is discovered the seller must, at his own expense, repair or replace the goods at the request of the consumer within a reasonable period of time and without causing any significant inconvenience to the consumer. The seller is not obliged to repair or replace the product if it can demonstrate that replacement or repair is impossible

or that it would be disproportionate to do so. Determining whether such repair or replacement would be disproportionate will rest mainly on whether it would impose unreasonable costs upon the seller in comparison to those arising from any other remedy that might be available to the buyer. The courts will have to work these provisions out through case law but it can be seen straightaway that it is often not worthwhile to repair the cheaper goods so that a replacement would satisfy the requirements on the seller even if the only such products the seller has left are green and the consumer wanted and originally had red!

The court has power to order specific performance in respect of repair or replacement but also has a discretion to order an alternative remedy e.g. damages if that is deemed reasonable in the circumstances.

Reduction of purchase price or rescission

If a problem arises in a consumer contract within the first six months then s 48C (inserted by the regulations) provides that the buyer may require the seller to reduce the purchase price of the goods by an appropriate amount or in the alternative rescind the contract. This remedy is subject to the condition that the buyer has required the seller to repair or replace the goods but the seller has failed to do so within a reasonable time and without significant inconvenience to the buyer. Furthermore, once the buyer has embarked upon price reduction or rescission he cannot ask also for repair or replacement.

If the buyer rescinds the contract any reimbursement to the buyer may be reduced on account of any use which the buyer has had from the goods since delivery.

Consumer guarantees

Suppliers will be affected by the concept under the regulations of consumer guarantees. Sellers and suppliers are not bound to give guarantees but if *any undertaking* is given to a consumer to repair the goods or refund their cost if they fail to meet the specification in the guarantee or in any relevant advertising it will come within the consumer guarantee provision. The guarantee does not have to be given by the supplier and could, e.g. be given by the manufacturer or a distributor or by a salesperson. It takes effect on delivery as a contractual obligation on the organisation giving the guarantee. The consumer can require that the guarantee be put into writing in intelligible language and if the guarantee is given by the manufacturer the request can be made to the supplier. Where the goods are offered within the UK the guarantor must ensure that it is given in English.

Amendment of Unfair Contract Terms Act 1977

If an accountant bought a commercial cooker for his private use the protection of the 1977 Act in terms of reasonable exclusion clauses did not apply because the goods were not ordinarily supplied for private use or consumption. The Act now applies in this situation. Individuals who buy new (not secondhand) goods at auction or by competitive tender are also now treated as consumers for the purpose of the Act of 1977.

Passing of risk

Relevant legislation is now amended so that when a buyer of goods deals as a consumer the goods will remain at the seller's risk until they are delivered to the consumer. Furthermore, the parties cannot effectively change this rule even in cases where title may have passed before delivery under contractual arrangements.

Application of the regulations

Equivalent changes are made to the Supply of Goods and Services Act 1982 in regard to the hiring of goods and in the Supply of Goods (Implied Terms) Act 1973 in regard to goods taken on hire-purchase.

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EXCLUSION CLAUSES AND OTHER UNFAIR TERMS

In this chapter we shall look at the rules which decide whether an exclusion clause which purports to exclude liability for breach of contract and other civil damage is valid.

Exclusion clauses – the issue of communication

A contract may contain express terms under which one or both of the parties excludes or limits liability for breach of contract or negligence. Although such express terms are permissible, both the courts and Parliament have been reluctant to allow exclusion clauses to operate successfully where they have been imposed on a weaker party, such as an ordinary consumer, by a stronger party, such as a person or corporation in business to supply goods or services.

The judges have protected and continue to protect consumers of goods and services against the effect of exclusion clauses in two main ways, i.e. by deciding that the exclusion clause never became part of the contract, and by construing (or interpreting) the contract in such a way as to prevent the application of the clause.

It is still important to consider the judicial contribution because even though an exclusion clause can now, under the Unfair Contract Terms Act 1977 (see below), be regarded as not applying if it is unreasonable, there is no need to consider the matter of unreasonableness if the clause has not been communicated or does not apply under the rules of construction (see below). As important is the fact that even if an exclusion clause is acceptable as reasonable, it will not apply if it has not been communicated or cannot survive the judicial rules of construction.

Was the clause part of the contract?

The court will require the person wishing to rely on an exclusion clause to show that the other party agreed to it at or before the time when the contract was made, otherwise it will not form part of the agreement. In this connection:

(a) Where a contract is made by signing a written document the signer will in general be bound by everything which the document contains, even if he has not read it, unless the signature was induced by misrepresentation as to the effect of the document. An exception is the rule of *non est factum*, provided the signer is not negligent.

L'Estrange Ltd v *Graucob (F)*, 1934 – Where the document containing the clause is signed (**175**)

Curtis v *Chemical Cleaning and Dyeing Co*, 1951 – Where the claimant was misled as to the extent of the clause (**176**)

(b) Where the terms are contained in an unsigned document, the person seeking to rely on an exclusion clause must show that the document was an integral part of the contract which could be expected to contain terms. However, if the document is contractual in the sense outlined above, the clause will apply even though the claimant did not actually know about the exclusion clause in the sense that he had not read it. Communication may be constructive so long as the document adequately draws the attention of a reasonable person to the existence of terms and conditions.

Thompson v *LMS Railway*, 1930 – A constructive communication (**177**)

Chapelton v *Barry UDC*, 1940 – Where the document is not contractual (**178**)

This rule of constructive communication will not necessarily be applied if the term in the contract is particularly burdensome for the other party. In such a case the law may require that the burdensome clause is actually brought to the attention of the other party. This results from the decision of the Court of Appeal in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1988] 1 All ER 348. In that case Interfoto sent some transparencies to Stiletto for it to make a selection. The delivery note, which is a contractual document, contained a clause that if the transparencies were not returned within 14 days, Stiletto would pay £5 per day for each transparency retained after that. Stiletto delayed returning the transparencies for three weeks and ran up a bill of some £3,783. When Stiletto was sued for this sum the court said that it could not be recovered by Interfoto because the clause was not specifically drawn to the attention of Stiletto. The court awarded damages of £3.50 per transparency per week but would not apply the clause.

(c) As regards previous dealings, where the defendant has not actually given the claimant a copy of conditions or drawn his attention to them when making a particular contract, the doctrine of constructive notice will not apply, at least in consumer transactions, in order to enable the defendant to rely on previous communications in previous dealings, unless, perhaps, the dealings have been frequent. Thus in *Hollier* v *Rambler Motors* [1972] 1 All ER 399 it appeared that the claimant had had his car repaired five times in five years (i.e. infrequently) by the defendants and had signed a form containing a clause stating 'the company is not responsible for damage caused by fire to customers' cars on the premises'. On the occasion in question the claimant was not required to sign a form when leaving his car for repair. In the event the car was damaged by fire caused by the defendants' negligence. In an action by the claimant the defendants pleaded the clause. It was held by the Court of Appeal that the claimant succeeded and that the clause did not apply. Previous dealings were not incorporated and in any case as a matter of construction the wording was not sufficiently plain to exclude negligence. However, where the parties are, for example, large corporations, terms used in previous dealings between the parties themselves or *in the trade generally* may be incorporated.

Thus in *British Crane Hire Corporation Ltd* v *Ipswich Plant Hire Ltd* [1974] 1 All ER 1059 the defendants hired a crane from the claimants who were the owners. The agreement was an oral one, though after the contract was made the defendants received a printed form from the claimants containing conditions. One of these was that the hirer of the crane was liable

to indemnify the owner against all expenses in connection with its use. Before the defendants signed the form the crane sank into marshy ground, though this was not the fault of the defendants. The claimants were put to some cost in repairing the crane and now sued the defendants for an indemnity under the contract. The defendants argued that the indemnity had not been incorporated into the oral contract of hire. It was held that the bargaining power of the defendants was equal to that of the claimants and the defendants knew that printed conditions in similar terms to those of the claimants were *in common use in the business*. The conditions had therefore been incorporated into the oral contract on the basis of the common understanding of the parties and the claimants' action for an indemnity succeeded.

(d) Any attempt to introduce an exclusion clause after the contract has been made is ineffective because the consideration for the clause is then past.

(e) An exclusion clause may be made ineffective by an inconsistent oral promise.

> *Olley* v *Marlborough Court Ltd*, 1949 – Belated notice of a exclusion clause (**179**)
> *J Evans & Son (Portsmouth) Ltd* v *Andrea Merzario Ltd*, 1976 – An inconsistent promise (**180**)

(f) At common law the rule of privity of contract may also prevent the application of an exclusion clause. Thus, if A, the owner of a road haulage company, excludes his own and his employees' liability for damage to the goods of his business customers by a properly communicated clause, an employee who causes damage to the goods will be liable under common law, although his employer will not be, provided the clause is reasonable under the Unfair Contract Terms Act 1977, because the employee has not supplied consideraton for the contract which is between his employer and the customers.

Reference should, however, be made to the case of *NZ Shipping* v *A M Satterthwaite* (see below) where by application of the common law rules relating to acceptance in unilateral contracts and the performance of existing contractual duties owed to a third party the court was able to hold that a stevedore could take the benefit of an exclusion clause in the shipping company's contract of carriage.

> *The New Zealand Shipping Co Ltd* v *A M Satterthwaite & Co Ltd*, 1974 – An exclusion clause avoids privity rule at common law (**181**)

It has already been noted in Chapter 10 that exclusions and defences available to a carrier of goods can under the Contracts (Rights of Third Parties) Act 1999 be extended to employees, agents and independent contractors that will be effective without the ingenious application of common law rules seen in the *New Zealand Shipping* case, though the common law rules will be helpful to such persons where the main contract does not extend exclusion rights to them and is, therefore, construed as not applying to them even by implication.

The position of the third party under the 1999 Act

The Contracts (Rights of Third Parties) Act 1999, s 7(2) may apply. A may enter into a contract with a builder to build a house for his daughter Jane to live in. A may name Jane as having third-party rights under the contract. Let us suppose that the contract contains an exclusion clause exempting the builder from liability caused by his negligent building. There is a provision in s 7(2) of the 1999 Act that can best be understood by an example. The builder's negligence results in death or personal injury to A or his daughter Jane. Any exclusion clause

inserted by the builder in his contract with A is void and of no effect in so far as it tries to exclude liability for death or personal injury. The 1999 Act leaves this untouched. The 1977 Act outlaws such clauses. However, if by reason of negligence by the builder a wall collapses and A's car is damaged he can sue the builder successfully unless the builder can show that the exclusion clause is reasonable. However, because of s 7(2) of the 1999 Act, if it is Jane's car which is damaged the clause, even if unreasonable, will be effective to exclude the builder's liability to her.

There are those who think that unreasonable exclusion clauses should be void even in regard to Jane's (the third-party's) loss but the 1999 Act does not reflect this view.

Construction of exclusion clauses

Rules of construction (i.e. interpretation) of contract may, when applied, prevent the application of an exclusion clause. The major rules of construction are as follows.

The *contra proferentem* rule

Under this rule, if there is any ambiguity or room for doubt as to the meaning of an exclusion clause, the courts will construe it in a way unfavourable to the person who put it into the contract. An example of the application of this rule is to be seen in *Hollier* v *Rambler Motors* because the Court of Appeal, having decided that previous dealings were not incorporated, went on to use the rule by saying that the wording in the form was not sufficiently plain to exclude negligence. That ambiguity had therefore to be construed against the defendants who put it into the contract. Those who wish to exclude liability for negligence must use clear words, said the House of Lords in *Smith* v *South Wales Switchgear* [1978] 1 All ER 18.

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Alexander v *Railway Executive*, 1951 – The *contra proferentem* rule (**182**)

The repugnancy rule

This rule says in effect that the exemption clause is in direct contradiction to the main purpose of the contract and is therefore repugnant to it. Where such repugnancy exists the exemption clause can be struck out. Thus, if A makes a contract to supply oranges to B but includes a clause which allows him to supply any sort of fruit, the clause is repugnant to the main purpose of the contract and could be struck out. Thus, A would be liable in breach of contract if he supplied B with apples and could not rely on the clause to excuse his breach of contract.

The four corners rule

Under this rule exemption clauses only protect a party when he is acting within the four corners of the contract. Thus he is liable for damage which occurs while he is deviating from the contract and he would not be protected by the exclusion clause.

Pollock & Co v *Macrae*, 1922 – Where the clause is repugnant (**183**)

Thomas National Transport (Melbourne) Pty Ltd v *May and Baker (Australia) Pty Ltd*, 1966 – The four corners rule (**184**)

The doctrine of fundamental breach

This doctrine (or rule) was usually invoked where a claimant sought a remedy on a contract containing exemption clauses which had been adequately communicated. The doctrine said, in effect, that where one party had fundamentally broken his contract, i.e. done something fundamentally different from what he had contracted to do, an exclusion clause could not protect him, and that this was a *rule of law* and *not a rule of construction*, so that the court had no discretion in the matter.

After some years of differing judicial opinion regarding this, the House of Lords eventually affirmed that there was no rule by which exclusion clauses had become inapplicable to exclude liability for a fundamental breach of contract. It was in each case a question of construction whether in fact the clause covered the breach which had taken place.

Fundamental breach, which survives as a rule of construction, is only a simple presumption that exclusion clauses are not intended to apply where there is a very serious breach of contract. This presumption can be rebutted, as in *Photo Production* (below) and is not *automatically* applied.

Photo Production Ltd v *Securicor Transport Ltd*, 1980 – Fundamental breach: no automatic application (**185**)

The approach of Parliament to exclusion clauses

Parliament has tried to prevent the widespread use of exclusion clauses by the passing of various statutes, the main one being the Unfair Contract Terms Act 1977.

The strongest protection is given by the Act to persons who deal as consumers (C), though those dealing otherwise than as consumers, e.g. where the goods are bought for use in a business, are covered. To be a consumer one must be dealing as a *private buyer* with a *person in business* (B). In addition, as the 1977 Act was originally enacted, the contract had to be for the supply of goods ordinarily supplied for private use or consumption and not obtained at an auction or by competitive tender (but see below). Thus a contract between a *private buyer* and a *private seller* is not a consumer deal.

However, in *R & B Customs Brokers Co Ltd* v *United Dominions Trust Ltd* [1988] 1 All ER 847 the Court of Appeal decided that when a business buys goods it may still take advantage of consumer law applying to an ordinary member of the public if the transaction concerned is not a regular one. The facts of the case were that R & B Customs bought a car for the use of a director. The contract excluded an implied term under s 14(3) of the Sale of Goods Act 1979 that the goods be fit for the purpose. Such an exclusion does not operate if the sale is between a person in business and a consumer. It was held that R & B Customs must be treated as a consumer. The purchase of the car was not a frequent transaction and unless regularity could be established the transaction could not be regarded as an integral part of the business and was not therefore in the course of business. (See as a contrast *Stevenson* v *Rogers* [1999] 1 All ER 613 in Chapter 14.)

Changes effected by the Sale and Supply of Goods to Consumers Regulations

As already noted, if a private person bought a commercial cooker for his or her private use, the protection of the Unfair Contract Terms Act 1977, in terms that any exclusion clause had

to be reasonable or it would not be effective, did not apply because the goods were not ordinarily supplied for private use or consumption. The 1977 Act now applies in this situation and exclusion clauses are ineffective unless reasonable. Individuals who buy new (not second-hand) goods at auction or by competitive tender are now treated as consumers for the purposes of the 1977 Act.

Clauses rendered ineffective by the Unfair Contract Terms Act

These are as follows:

(a) Any exclusion clause contained in a contract or notice by which B tries to exclude or restrict his liability for death or personal injury resulting from negligence is wholly ineffective (ss 2 and 5). However, in *Thompson* v *Lohan* [1987] 2 All ER 631 A hired plant together with operatives to B. The contract contained a clause stating that B was liable for the negligence of the operatives who were A's employees. This clause was held by the Court of Appeal not to be contrary to s 2 of the Unfair Contract Terms Act. It was not designed to restrict or exclude liability to those who might be injured by the negligence of the operatives but merely decided whether A or B was to bear the liability.

(b) A manufacturer's guarantee cannot exclude or restrict the manufacturer's liability for loss or damage arising from defects in goods if used by a consumer which results from negligence in manufacture or distribution (s 5). The section is concerned with actions either in negligence or on the collateral contract (see further Chapter 9) which the guarantee can create against the manufacturer who is not the seller of the goods to the customer. The section is not concerned with a contractual relationship between the seller and the customer which is covered by ss 6 and 7. Thus, a manufacturer's 12-month guarantee for a vacuum cleaner which said that the goods would, if defective, be replaced or repaired free of charge but ended with a phrase such as: 'This guarantee is in lieu of, and expressly excludes, all liability to compensate for loss or damage howsoever caused' would not prevent a claim by the purchaser against the manufacturer if he/she was electrocuted by the cleaner (see *Donoghue* v *Stevenson* (1932), Chapter 21).

As regards *consumer guarantees*, the Sale and Supply of Goods to Consumers Regulations 2002 provide that such guarantees whoever gives them in the supply chain take effect on delivery as a contractual obligation on the part of the organisation giving them and there would be no need for the consumer to resort to the collateral contract or negligence approach. The claim would normally be for breach of the contract of guarantee, and exclusions would not apply in a claim on the guarantee.

(c) A clause under which B tries to exclude his liability, whether by guarantee or otherwise, to C for breach of the implied terms in the Sale of Goods Act 1979 (on a sale) or the Supply of Goods (Implied Terms) Act 1973 (as amended) (on a hire-purchase transaction), e.g. that the goods are fit for the purpose or of satisfactory quality, is wholly ineffective, as is a clause which tries to exclude against the consumer the implied terms in the Supply of Goods and Services Act 1982 in a contract of pure hiring, e.g. of a car, or a contract for work and materials, as in the repair of a car (Unfair Contract Terms Act 1977, ss 6(2) and 7(2)).

Section 6 also applies to non-business liability. However, since the implied terms requiring satisfactory quality and fitness for the purpose do not apply to non-business transactions, only s 13 of the Sale of Goods Act 1979 (sale by description) can be implied. However, s 13 cannot be excluded in a non-business transaction with a consumer.

Exclusion clauses applicable if reasonable

General

These are as follows:

(a) Any clause by which B tries to exclude or restrict his liability for loss arising from negligence other than death or personal injury (s 2(2)).

Such a clause may be raised successfully to defeat a claim by a third party who has acquired rights under the Contracts (Rights of Third Parties) Act 1999 whether the clause is reasonable or not. Even an unreasonable clause would be effective. The reasonableness test would be applied in an action between the original promisor and promisee. The relevant provision is contained in s 7(2) of the 1999 Act.

(b) Any clause by which B tries to exclude or restrict his liability to a non-consumer for breach of the implied terms in the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973, and the Supply of Goods and Services Act 1982 relating, for example, to contracts of hiring and work and materials (ss 6(3) and 7(3)).

(c) Any clause by which B tries to exclude his liability for breach of contract if the contract is with a consumer or, in the case of a non-consumer contract, the agreement is on B's written standard terms (s 3(1) and (2)(a)). There is no definition of 'written standard terms' in the 1977 Act, but it obviously covers cases in which the seller requires that all (or nearly all) of his customers purchase goods on the same terms with no variation from one contract to another. An example is provided by *L'Estrange* v *Graucob* (1934). This section applies also to cases where the clause purports to allow B to render a substantially different performance, as where a tour operator tries to reserve the right to vary the accommodation or itinerary or reserves the right to render no performance at all (s 3(2)(b)).

Section 3 of the 1977 Act which applies, as we have seen, between contracting parties where one 'deals as a consumer' to prevent the other from excluding or restricting any liability of his or hers for breach of contract extends to *contracts of employment* said the High Court in *Brigden* v *American Express Bank Ltd* (2000) 631 IRLB 13. Thus a clause in a contract of employment that excluded or restricted the employer's liability for wrongful dismissal would not apply by reason of the 1977 Act.

(d) As regards indemnity clauses in consumer transactions, B may agree to do work for C only if C will indemnify B against any liability which B may incur during performance of the contract, e.g. an injury to X caused by B's work (s 4). B may, for example, be a builder who takes an indemnity from C, the owner of a property on which B is to do work in regard to any injuries which B's work might cause to third parties. Such an indemnity will be unenforceable by B unless reasonable. Such clauses are unlikely to be found reasonable and B will have to cover himself by insurance. The section does not cover non-consumer situations and the indemnity found in *British Crane Hire* would still be enforceable (and see also *Thompson* v *Lohan* (1987)).

Inducement liability

Any clause purporting to exclude liability for misrepresentation applies only if reasonable, whether the transaction is with a consumer or a non-consumer (Misrepresentation Act 1967, s 3, as substituted by s 8(1) of the Unfair Contract Terms Act 1977). Thus, an estate agent would not be able to exclude his liability for falsely representing the state of a house unless

the court felt that it was reasonable for the agent to exclude his liability, as it might be if the property was very old and there had been no survey.

However, the matter of reasonableness is a matter for the court in each case and will depend upon the circumstances. Thus an estate agent may be allowed to enforce a disclaimer in the case of a high value property where the client is a more sophisticated person whereas in the case of a property of less value and a less sophisticated client the court may take the view that enforcement of a disclaimer by the agent is unreasonable. (Contrast *McCullagh* v *Lane Fox* with *Smith* v *Eric S Bush*: Chapter 21.)

It is also worth noting that the Property Misdescriptions Act 1991 makes it a criminal offence to make a false or misleading statement about property matters in the course of an estate agency or property development business.

Section 3 also applies to non-business liability. A private seller cannot exclude his liability for misrepresentation unless he can show that the exclusion clause concerned satisfied the test of reasonableness.

Walker v *Boyle*, 1982 – When liability for misrepresentation cannot be excluded (**186**)

Reasonableness

The burden of proof

The burden of proving that the clause is reasonable lies upon the party claiming that it is – usually B, the person in business (s 11(5)).

Meaning of reasonableness

Although the matter is basically one for the judge, the following guidelines appear in the 1977 Act.

(a) The matter of reasonableness must be decided on the circumstances as they were when the contract was made (s 11(1)).

(b) Where a clause limits the amount payable regard must be had to the resources of the person who included the clause and the extent to which it was possible for him to cover himself by insurance (s 11(4)). The object of this rule is to encourage companies to insure against liability in the sense that failure to do so will go against them if any exclusion clause which they have is before the court. However, in some cases it may be right to allow limitation of liability, e.g. in the case of professional persons such as accountants where monetary loss may be caused to a horrendous amount following negligence and be beyond their power to insure against.

(c) Where the contract is for the supply of goods, i.e. under a contract of sale, hire-purchase, hiring, or work and materials, the criteria of reasonableness are laid down by s 11(2) of and Sch 2 to the 1977 Act. They are:

(i) strength of the bargaining position of the parties. Thus if one party is in a strong position and the other in a weaker in terms of bargaining power, the stronger party may not be allowed to retain an exclusion clause in the contract;