Alert

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Notification of Unreliability: Excluding Liability for Misrepresentation by Notice

It is becoming increasingly common to see allegations of misrepresentation made in shipbuilding and offshore construction disputes. In recent years here at Haynes and Boone CDG, we have seen misrepresentation claims made regarding pre-contractual statements about, for example: the time period required to carry out certain elements of a construction project; the capability of the yard or contractor to carry out the work; the standard of maintenance of a rig; the accuracy of preliminary specification details provided to a builder; and the reliability of information provided to an offshore contractor on the intended project site.

Responding to such allegations can be costly and time consuming. As such, the recent decision of the Court of Appeal in *Taberna Europe CDO II plc v. Selskabet AF 1*[1] provides helpful clarity on the ways in which a party can exclude liability for misrepresentation by notice at the contract stage, and thereby minimise the chances of a successful misrepresentation claim being made at a later date.

Misrepresentation

The English Misrepresentation Act 1967 provides recourse for an injured party that has been induced to enter into a contract by a misrepresentation made by the other party, unless the party alleged to have made the statement can prove it had reasonable grounds to believe, and did believe, that the facts it represented were true. If the relevant representation also formed part of the contract itself, then the innocent party may be entitled to damages under the English common law doctrine of negligent misstatement[2]. It may also have the right to rescind the contract. The consequences of a successful claim based on misrepresentation can therefore be extremely significant.

Parties may explicitly exclude liability for misrepresentation in the terms of the contract. In order to do so, the relevant clause must satisfy the "*reasonableness test*" set out in Section 11(1) of the Unfair Contracts Terms Act 1977[3]. The relevant clause must be clearly worded and state explicitly that the parties intend for no reliance to be placed on any representations made prior to the contract or, indeed, within the contract itself.

Until recently, however, the position as to whether or not a party could exclude liability by notice to the other party was unclear.

The Decision

Taberna, an Irish investment fund, purchased subordinated debt issued by Roskilde, a Danish Bank, in the secondary market. Taberna claimed it had relied on representations made by Roskilde in an "investor presentation" on its website when deciding to buy the notes. The presentation included a "disclaimer notice" which stated that the accuracy of the information provided could not be guaranteed, and that no warranty or representation with respect to its contents was made.

The disclaimer statements could be split into two types:

1. "Duty-negating clauses" which sought to make clear that any representations should not be relied on: "*no reliance should be placed on the information contained herein*"; and

[1] *Taberna Europe CDO II plc v. Selskabet AF 1.September 2008 (formerly Roskilde Bank A/S)* [2016] EWCA Civ 1262
[2] As set out in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 and *Caparo Industries plc v. Dickman* [1990] 2 AC 605
[3] While UCTA does not apply to international supply contracts (i.e. contracts where the ownership of goods passes from one party to another where each party is in a different country), it is advisable to keep these requirements in mind when drafting any such clauses.

2. Exclusion clauses which attempted to exclude liability for such representations, should they be discovered to be incorrect: “*No liability whatsoever is accepted as to any errors, omissions or misstatements contained herein*”.

In the English Commercial Court, at first instance, the trial judge decided that “duty-negating clauses” could only take effect when incorporated into a contract, whereas exclusion clauses could take effect either by contract or by notice. In this case, as there was no contract between Taberna and Roskilde, only the latter was capable of having any effect.

However, the trial judge held that exclusion clauses should be read *contra proferentem* and therefore ruled that those provided by Roskilde were insufficiently clear to exclude liability for misrepresentation.

The Court of Appeal disagreed. It held that a party could, by suitably worded notice, limit the scope, or exclude entirely, liability for any representations made where the notice is included within the very document that is said to contain the relevant misrepresentation.

It also held that, while the rules of construction require the court to be very careful in its interpretation of exclusion clauses, experienced commercial parties could be expected to read and understand the intended meaning of a clearly worded statement that one party accepts no responsibility for the information it has provided. As such, Taberna was not entitled to claim damages and the appeal was allowed.

Comment
Statements made, and documents provided, prior to the signing of a contract must be treated with great care. If such information is incorrect, and the innocent party relies on it when deciding to enter into the contract, a claim for misrepresentation may arise.

Parties often assume that an “entire agreement” clause will exclude liability for such statements. Unfortunately the standard wording for such clauses is often insufficient and clear and explicit wording is necessary before such exclusions can take effect.

With this helpful confirmation from the Court of Appeal that a clearly worded notice contained within the information provided by one party to another may be sufficient to defeat such claims, parties should review their use of disclaimers. If a party does not intend any reliance to be placed on the information it provides in the pre-contractual stage, we would advise that this fact is made very clear in suitable wording either on the document itself, or in a covering email. Presentations made to interested parties which set out that party’s capabilities should, for example, contain clear wording limiting liability for such representations. The fact that it is well understood at the time by the relevant individuals that such information is not to be relied on should not be considered sufficient protection. It is always best practice to have such things stated clearly in the relevant documents and Haynes and Boone CDG can assist you to ensure that appropriate exclusions and notices are included in the pre-contract documents and in the contract.