

# English High Court applies ‘reasonableness’ test in determining enforceability of limitation or exclusion clauses

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**PRACTICES** Shipping Dispute Resolution, Energy Litigation, Energy, Power and Natural Resources, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Oil and Gas, Oil and Gas Litigation, Litigation

In March 2023, the English High Court ruled in *Microlise Ltd v James Kemball Ltd [2023] EWHC 579 (KB)* that the starting point in considering whether a limitation or exclusion clause would be enforceable is the ‘reasonableness’ test in section 11 of the Unfair Contract Terms Act 1977 (“**UCTA**”). The judgment also highlights the need for certainty in determining the applicable terms and conditions that govern the commercial relationship between parties and in identifying the contracting parties.

## Background of the case

The dispute relates to the supply and maintenance of telematic devices and data technology by Microlise Limited (the “**Claimant**”) to commercial haulage operators, James Kemball Limited and Uniserve Holdings Limited, and a warehousing and distribution company, Zenith Logistical Services (UK) Limited (together the “**Defendants**”).

Over the course of 2015 and 2016, the Claimant sent a number of quotation forms to the Defendants which were addressed to different entities (e.g. to “Uniserve Group” which is not a legal entity, and to “Uniserve Holdings Limited”). The quotation forms were either accompanied by the Claimant’s “general term and conditions” or by the Claimant’s Supply of Products and Services Agreement (the “**SPSA**”), which was a much more detailed contractual document that was intended to act as an umbrella or framework contract. In particular, the SPSA contained provisions which sought to exclude indirect and consequential loss and to limit liability to £1m.

When a dispute arose between the parties, it was unclear whether the Claimant’s “general terms and conditions” or the terms of the SPSA applied.

The court was asked to consider three preliminary issues relating to:

- (a) the applicable contractual matrix;
- (b) the contracting parties; and
- (c) the enforceability of limitation and exclusion clauses.

## Judgment and implications

### *Applicable contractual matrix*

On the first issue on the applicable contractual matrix, the court cited *Chitty on Contracts, 34th Edition at 4-032 ("Chitty")* and said that where there have been lengthy negotiations and it is left unclear what precisely has been agreed and when, the *"court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms."*

In October 2015, the Claimant sent a quotation order which contained the Claimant's *"general terms and conditions"* and which stated by way of a rider that by accepting the quotation, *"you agree to Microlise standard terms & conditions (available on request)"*. In December that year, the Claimant sent two further and updated quotation orders which were accompanied by a copy of the SPSA. In February 2016, the Claimant emailed a further quotation form to the Defendants which stated: *"This quotation is valid for 30 days from the date of issue. Please note that by accepting this quotation, you agree to Microlise standard terms and conditions attached below. Please note any customer specific terms & conditions previously agreed with Microlise override the Microlise standard terms & conditions enclosed."*

Ultimately, the court ruled that an objective assessment of the parties' intentions, based not upon the subjective state of mind of the persons involved, but upon a consideration of what was communicated between them by words or conduct, provided that a contract was agreed through the SPSA.

### *Contracting parties*

In terms of the second issue on the identity of the contracting parties, the court again cited *Chitty* which states an *"objective test applies when determining the identity of the parties to the contract."* In particular, in adopting the approach by the Court of Appeal in *Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership [2013] EWCA Civ 470*, the *"question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible."*

The first three quotation orders sent by the Claimant to the Defendants were addressed to "Uniserve Group", which is not a legal entity, whilst the last quotation order was addressed to "Uniserve Holdings Limited".

Although "Uniserve Group" is not a legal entity but consists of more than 50 different companies and joint ventures, including the Defendants, the court held that the SPSA governed the relationship between the Claimant and the "Uniserve Group". At the time, it was common knowledge that the Defendants within the "Uniserve Group" were to utilise the Claimant's products and services. Therefore, to the extent quotation orders/forms were turned by or on behalf of the Defendants, they would be taken to have contracted with the Claimant under the terms of the SPSA.

### *Limitation and exclusion clauses*

Finally, the court was asked to consider whether the exclusion and/or liability clauses in the SPSA (as set out above) were fair, reasonable and enforceable under the UCTA. Section 11 of UCTA sets out the 'reasonableness' test and provides:

*"(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."*

*(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act...*

*(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to— (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise...*

*(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.”*

In terms of the specific clauses in the SPSA:

Clause 29.1 of the SPSA stated: *“Subject to clause 30 of this Agreement, the Supplier shall not be liable to the Customer for any indirect or consequential loss the Customer may suffer even if such loss is reasonably foreseeable or if the Supplier has been advised of the possibility of the Customer incurring it.”*; and

Clause 29.2 of the SPSA stated: *“The Supplier’s entire liability to the Customer in respect of any breach of its contractual obligations, any breach of warranty, any representation, statement or tortious act or omission including negligence arising under or in connection with this Agreement shall be limited to £1M.”*

The court ruled that the exclusion for indirect and consequential loss was fair and reasonable and that the parties are of sufficiently equal bargaining power. The clause is also commonly used across the haulage/logistics/telematics sectors. Notably, even *“Uniserve’s own terms and conditions exclude indirect or consequential loss, including loss of profit”* and the Defendants were therefore well aware of the commercial considerations that lead a service provider to include a provision restricting liability for indirect or consequential loss. In addition, the court also ruled that the limitation clause capping liability at £1m is also fair and reasonable under UCTA.

### **Key takeaways**

This judgment demonstrates the importance of certainty and clarity on the terms and conditions applicable to a commercial relationship between parties and the identity of contracting parties – this would help to minimize disputes, and ultimately avoid costly and time-intensive litigation. In addition, in determining the enforceability of limitation and exclusion clauses, the court will look at the bargaining power of the parties and market practice in the relevant industries, in order to determine the reasonableness and fairness of such clauses.