

LW2903 Business and Law

Lecture 3

Exclusion Clause and Remedies

Exclusion Clauses

An exclusion clause is intended to **exclude or limit liability**

Limitation / Exemption / Exclusion Clauses

when enter contract, one side of party will exclude/limit some liabilities

To be effective, 3 conditions must be satisfied.

1. Incorporation;

2. Construction;

3. Not contravene the Control of Exemption Clauses Ordinance (Cap. 71)

違反

管制免責條款條例

↑ chapter number in LAW

1) Incorporation

condition:

An exclusion clause **can be incorporated** into the contract in a number of ways:

- (i) by **signature**;
sign a document to make it legal-binding / valid enforceable
→ already bound by those terms (no matter read or not)
- (ii) by **reasonable notice**; and
wall, cashier counter...
- (iii) by a **consistent** prior course of **dealings**.
previous dealing
(eg. doing business many times)

買完你咁坏,
/ 整完都坏

Incorporation: by signature

→ you are bound

Customers cannot claim that they misunderstood the exclusion clause (see **L'Estrange v. F. Graucob Ltd. [1934]**)

Best way: Ask what should I pay attention to

plaintiff

buy slot machine
投币机

defendant

Curtis v. Chemical Cleaning & Dyeing Co. (1951) – the exclusion clause was not incorporated due to a misrepresentation. (inducement 誘因)

→ exclusion clause therefore not valid

plaintiff asks: what am I signing

staff : only for any damage they cause to beads and sequins
mislead (but actually the contract excludes all damage too)

↳ ∴ not the one plaintiff agree to

[contract still valid]

∴ defendant need to compensate the plaintiff

Incorporation: by notice

wall, entrance, receipt paper,
ticket...
stating
terms of condition

The party relying on the exclusion clause must **prove** that it has **taken reasonable steps to notify** the other party of this exemption clause. *eg: They tell you no exchange no refund → buyer proceed*

Whether such **reasonable steps** have been taken or not will **depend on the circumstances of the case - Olley v.**

Marlborough Court Ltd. (1949): "The proprietors will not hold themselves liable for articles lost or stolen unless handed to the manageress for safe custody" *(hotel, contract form at counter, X incorporation, (: too late) should state when check in)*

barrier before car entered (need to pay by outopus)

See: Thornton v. Shoe Lane Parking [1971] 1 All ER 686

entrance → enter, then contract formed
(but the terms of condition is displayed inside the car park) → ∴ X incorporation (X reasonable step) acceptance, consideration
** NOT ITT machine = person who make offer*
you proceed to acceptance

regularly order from company B (do business for long time)

Incorporation: by prior course of dealings

- Where there is a **consistent prior course of dealing** occurred between the parties on the **same terms** over a **sufficient length of time**, a party may be deemed to have **implied notice** of the exclusion clause.
very regular (x once a year)
- **Kendall v. Lillico (1968)**: 3 – 4 transactions per month for several years *regular ✓*
- **Hollier V Rambler Motors [1972]**: 3 – 4 transactions in the course of 5 years *x regular*
 - ∴ exclusion clause X incorporated
 - ∴ plaintiff cannot sue for compensation

= interpreting exclusion clause

2) Construction

- Once the court is satisfied that an exclusion clause has been incorporated into a contract, the court will consider whether its **wording** is **clear** and **wide enough** to protect the party relying on it.

X too wide too

cover particular type of law

- If its wording is **unclear**, the court may apply the **contra proferentem rule** to restrict the effects of an exclusion clause (i.e. to **rule against the party who is relying on it**) & resolve any ambiguities **in favour of the other party**.

not clear enough
→ court will help plaintiff

to rule against defendant 又又天

已有真
is made it clear enough

- See: **Baldry V Marshall [1925]**: The plaintiff wanted to buy **a car suitable for touring purposes**. Defendant recommended a Bugatti to the plaintiff which the plaintiff bought – the contract excluded liability for '**guarantee or warranty, statutory or otherwise**'. The car turned out to be unsuitable for the plaintiff's purposes, so he rejected it.

供供

vehicle

(law)

condition

→ not exclude liability for breach of condition

= not liable for anything (so wide)

3) Control of Exemption Clauses Ordinance (CECO)

- The **CECO** restrict one's freedom to exclude or limit one's contractual liability. *legislation (law in HK)*
some certain liabilities cannot to be excluded
- However, the CECO is mainly concerned with excluding or limiting "**business liabilities**".
- Section 7(1) provides that no person can by reference to any exemption clauses exclude liability for **personal injuries or death** caused by **negligence**.

defendant

bumji jump
↳ you sign the declaration = voluntarily give up the right to sue
↳ told you before jump
≠ purpose of exclusion clause

Remedies in Contract Law

(i) Damages; monetary compensation

自由裁量

/ court design to grant it or not at discretion

(ii) Specific performance; ^(+ve) a court order to compel a party to perform its contractual obligations

eg. continue the contract of building house

(iii) Injunction; ^(-ve) a court order to ^{stop} restrain the defendant from starting/continuing a breach

(iv) Rescission/ Repudiation; ^{cancel} contractual parties to ^{reject} cancel the contract/ is unable to perform the obligation ^{both parties happy to cancel}



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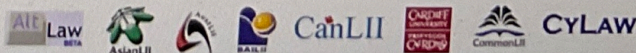
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← **HAU KIT HO** → v. ← **STARWAY INTERNATIONAL DEVELOPMENT LTD T/A TAO HEUNG SUPER 88** → [2003] HKDC 64; DCPI 329/2002 (22 September 2003)

DCPI 000329/2002

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO. 329 OF 2002

BETWEEN

← **HAU KIT HO** →
AND
STARWAY INTERNATIONAL DEVELOPMENT LIMITED [trading as TAO HEUNG SUPER 88](#)

Plaintiff
Defendant

Coram: His Honour Judge L. Chan in Court
Dates of hearing: 18 to 19 September 2003
Date of Judgment: 22 September 2003

JUDGMENT

The plaintiff and her husband had the habit of having a swim at the beach in the morning and then enjoy their morning tea in a restaurant. She did so on 1st September, 2001. On this day, they brought along their eldest daughter for the tea. The daughter mildly mentally retarded. The venue for the tea this time was the defendant's restaurant which was at less than a 10 min. walk from the plaintiff's home in Tseung Kwan O. When the plaintiff went to the defendant's female toilet after the tea, she had a fall suffered a fracture to her left ankle. She was taken by an ambulance to the Tseung Kwan O Hospital where she had an operation to fix the fracture and was hospitalized for 9 days.

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