

Caps on Liability

What are the golden rules for ensuring that caps on liability are (i) robust and (ii) enforceable?

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All construction is risky...



A consequence free environment...

Vanessa Kensington:

Mr. Powers, my job is to acclimatize you to the nineties. You know, a lot's changed since 1967.

Austin Powers:

No doubt, love, but as long as people are still having promiscuous sex with many anonymous partners without protection while at the same time experimenting with mind-expanding drugs in a consequence-free environment, I'll be sound as a pound!



Cap on Liability...



Overview

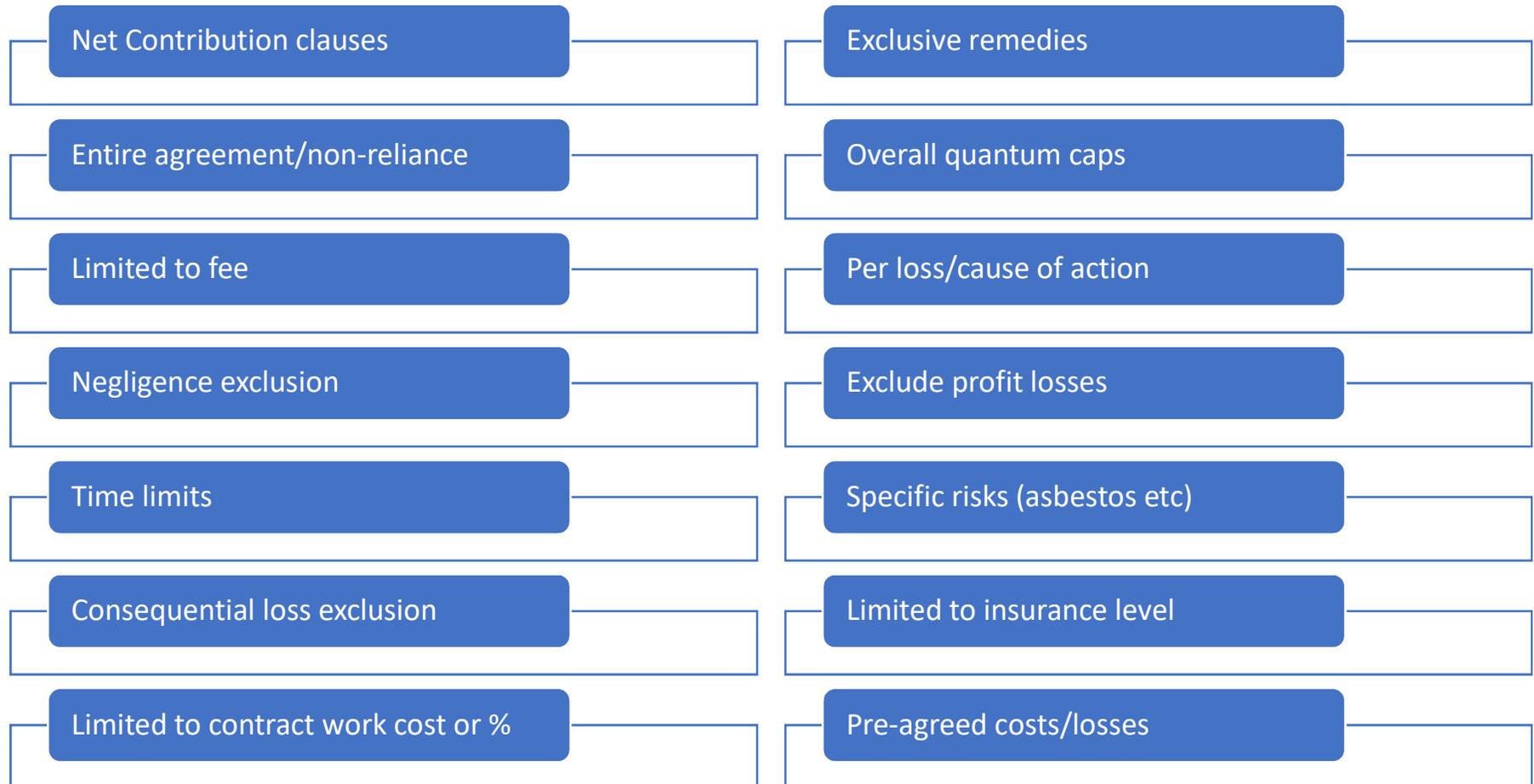
- ▶ Types of Caps
- ▶ Is it in the Agreement at all?
- ▶ Does it mean what you meant it to mean?
- ▶ UCTA
- ▶ Final Thoughts; The Golden Rules?



Types of Caps



Types of Caps



Is it in the Agreement?

- ▶ *“...the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”*
- ▶ *Thornton v Shoe Lane Parking [1971]*



Is it in the Agreement?



► *Arcadis v AMEC [2018]*

What does it mean?

- ▶ General modern approach:
- ▶ *“Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o’ war of commercial negotiation, **business common sense can rarely assist** the court in ascertaining on which side of the centre line marking the tug o’ war rope lay, when the negotiations ended”*
- ▶ *Wood v Capita Insurance Services Ltd [2017]*

What does it mean?



“Contra Proferentem”

What does it mean?

- ▶ Does *contra proferentem* mean anything these days?
 - ▶ “In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. *There is no need to approach such clauses with horror or with a mindset determined to cut them down.* Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree.”
- ▶ *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017].
- ▶ Also see *McGee Group Ltd v Galliford Try* [2017].

What does it mean?

- ▶ Excluding negligence?
- ▶ *R v Canada Steamship* [1952].
- ▶ But things have “moved on”; *Taberna Europe v Selskabet* [2016].
- ▶ *Persimmon Homes* [2017]
- ▶ Chitty [15-013]



What does it mean?



- ▶ Consequential loss exclusions?
- ▶ Generally, these don't exclude losses which are consequential to the damage or breach (!) - *Pegler v Wang (UK) [2000]*.
- ▶ Instead, they exclude *Hadley v Baxendale [1854]* 'Limb 2'.
- ▶ Well, probably (*Star Polaris v HHIC-Phil [2016]*)

What does it mean?

- ▶ Can you exclude all liability?
- ▶ No such concept as a ‘fundamental breach’ (*Photo Production v Securicor* [1978]).
- ▶ In exceptional circumstances, would render contract as only a “statement of intent” (*Tor Line v Alltrans* [1984]).
- ▶ But, only where effect is “...to relieve one party from all liability for breach of any of the obligations...” (*Transocean Drilling v Providence Resources* [2016]).

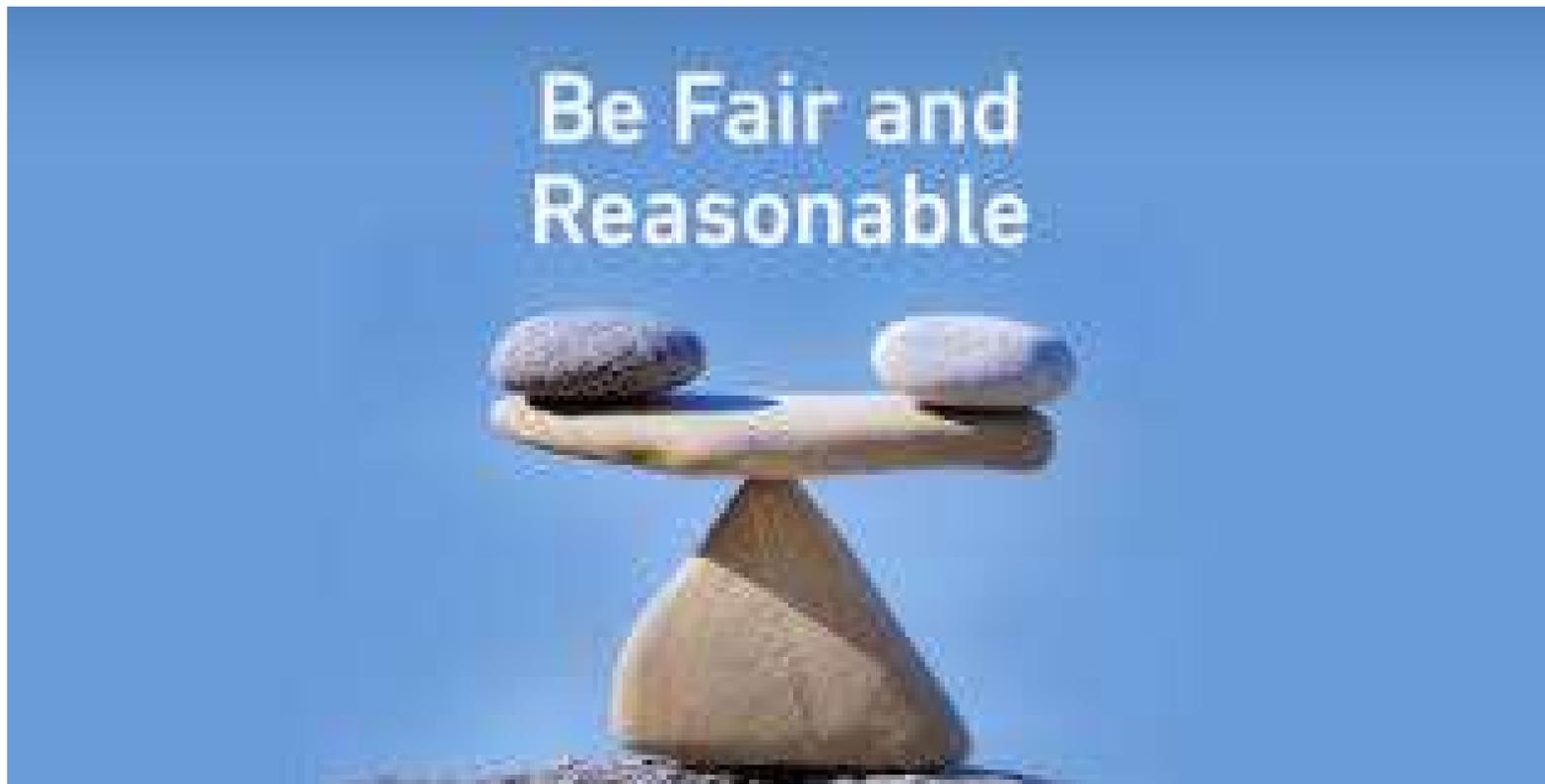


UCTA:

- ▶ Is it on standard terms?
- ▶ Are you trying to exclude negligence?
- ▶ Are you dealing with a consumer?
- ▶ Have you looked at the guidelines?



UCTA:



10 Golden Rules:

- ▶ Make sure it's in the contract.
- ▶ Specify exactly what you are addressing; terminology is troublesome.
- ▶ If you are excluding negligence, say so, carefully.
- ▶ Don't try and exclude everything.
- ▶ Different caps for different breaches?
- ▶ Give options for caps against price.
- ▶ Role of insurance.
- ▶ Bargaining power and bargaining process are key.
- ▶ Be fair. Be reasonable.
- ▶ Context is everything; precedents are a fool's gold.

Case List:

- ▶ *Thornton v Shoe Lane Parking* [1971] 1 All ER 686
- ▶ *Arcadis v AMEC* [2018] EWCA Civ 2222
- ▶ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24
- ▶ *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373.
- ▶ *McGee Group Ltd v Galliford Try* [2017] EWHC 87 (TCC).
- ▶ *R v Canada Steamship* [1952] AC 192
- ▶ *Taberna Europe v Selskabet* [2016] EWCA Civ 1262
- ▶ *Pegler v Wang (UK)* [2000] BLR 218
- ▶ *Hadley v Baxendale* [1854] 156 ER
- ▶ *Star Polaris v HHIC-Phil* [2016] EWHC 2941 (Comm)
- ▶ *Photo Production v Securicor* [1978] 1 WLR 856
- ▶ *Tor Line v Alltrans* [1984] 1 WLR 48
- ▶ *Transocean Drilling v Providence Resources* [2016] EWCA Civ 372
- ▶ *Moores v Yakeley* (1998) 62 Con LR 76
- ▶ *Shepherd Homes v Enica* [2007] EWHC 70
- ▶ *Trustees of Ampleforth v Turner & Townsend* [2012] EWHC 2137
- ▶ *Saint Gobain v Hillmead* [2015] BLR 555
- ▶ *Commercial Management v Mitchell Design* [2016] EWHC 76
- ▶ *Goodlife Foods v Hall Fire* [2018] EWCA Civ 1371

Thank you! Any questions?

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