

## Business Law

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# Using contracts to control financial exposure

All businesses should consider if there is scope in their contracts for controlling potential financial exposure to customers.

When contracting, a business accepts certain responsibilities, for example, to deliver products or services to a certain standard. If the business falls short of the required standard, it could face claims for financial loss from its customers. One way of dealing with this is to seek to limit by contract the amounts recoverable by any customer bringing a claim.

### What liabilities can be limited?

The most common types of liability are for:

- **breach of contract**, for example, where a supplier contracts to deliver goods, but the goods are damaged or faulty;
- **negligence**, for example, where a professional agrees to provide advice, but performs below the standards expected;
- **misrepresentation**, where untrue statements are relied on by a customer, inducing a customer to agree a contract.

Other types of liability can be limited, but the limitation must be reasonable in order to be effective. For example, if the strength of the bargaining position of each party is relatively even, with both sides advised by lawyers, the limitations are more likely to be reasonable.

Where a contract is between a business and a consumer, there is less scope for a business to limit its exposure.

### What liabilities cannot be limited?

Total exclusions of liability should be avoided as they are regularly found to be ineffective, leaving the supplier exposed.

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### From the Editor

Welcome to the March 2011 edition of Business Law, Thomson Snell & Passmore's newsletter highlighting some key issues relating to business law.

If you would like further advice on any of the issues covered please contact [James Herbert](#), Partner and Head of [Corporate & Commercial](#).

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Total exclusions of liability should be avoided as they are regularly found to be ineffective, leaving the supplier exposed.

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Liability cannot be limited for loss resulting from:

- breach of certain terms implied into the contract by law, for example, that the seller owns the goods being sold;
- death or personal injury caused by negligence;
- fraud or fraudulent misrepresentation;
- damage to property or injury caused by defective products used by consumers.

### Steps to take

Exclusions and limitations of liability are complicated contractual provisions. Whilst each matter must be considered on its own facts, here are some general tips to bear in mind:

- do seek to include limitation clauses, where practicable, but obtain appropriate legal advice when drafting them;

- fully consider the likely exposure of your business if something goes wrong - draft the clauses accordingly;
- include an overall limit on liability that is no less than the value of the contract. If it can be linked to insurance cover, it is more likely to be reasonable;
- provide alternative remedies in the contract, for example, replace or repair faulty goods;
- ensure that there is a good customer care procedure operating in the background. Train staff not to admit fault and to be diplomatic. ■

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## The value in a portfolio of domain names

This article weighs up the costs of registering a series of domain names against the risk to the business of failing to do so.

The benefit of creating additional domain names may be to protect the main web address and ultimately, the business behind it.

Rather than using commercially unattractive web addresses, such as 987.123.45.678, we have domain names, such as [www.ts-p.co.uk](http://www.ts-p.co.uk). They can be valuable commodities, with the most sought-after names changing hands for large sums of money.

Whether you want a website to be your shop window, to act as your data collection portal or to create a direct sales channel, you will first need to consider the registration of at least one domain name. But the story should not end there. It is good practice to review your domain name policy as the business develops and factors external to the business change, in order to consider whether additional domain names should be obtained.

The benefit of creating additional domain names may be to protect the main web address and ultimately, the business behind it. Consider the fake web address [www.sharpscissors.co.uk](http://www.sharpscissors.co.uk) registered by a hairdressing business. The following week, whether by accident or by design, another business registers the address [www.sharpscissors.com](http://www.sharpscissors.com). The practical effect may well

be to divert business from the original address. It is also possible that cybersquatters will approach the original business with an offer to transfer the conflicting web address for a price.

There are now many forms of domain name to consider, with more levels being added at regular intervals. Short domain names, such as 'aa.co.uk', are the latest of these. Bear in mind that whenever new domains are released, it inevitably opens the door to potential abuse by cybersquatters. Often cybersquatters will register a domain in the hope of selling it back to the brand owner who fears that the cybersquatter will cause commercial damage to the brand.

Although careful consideration will need to be given to which domain names to register, it is likely to be more cost-effective to register additional names rather than have to enforce rights against cybersquatters or others.

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## Changes to international trading terms

Incoterms are internationally recognised rules relating to the movement of goods, created by the International Chamber of Commerce (ICC). They have recently been updated.

Although Incoterms are helpful in relation to the matters they cover, they cannot create a full contract.

Incoterms are used as shorthand for some common trading terms, particularly, but not exclusively, in relation to international trade in goods. For example, they describe which party is responsible for certain costs and who bears the risk if goods are lost or destroyed. Their effect is to reduce the uncertainty arising when terms are interpreted by people from different business cultures. On 1 January 2011, the updated Incoterms 2010 came into force. The update was necessary to reflect the increased use of technology in trade, greater security concerns and changes in transport practices.

These are some of the main changes:

**Electronic communication** - the Incoterms now give electronic records the effect of paper documents "if agreed between the parties or customary". Previously, use of email had to be agreed by the parties.

**Insurance** - Incoterms requiring the seller to arrange insurance for the buyer's benefit have been updated. However, buyers should be aware that the changes have not imposed any obligation on the seller to obtain more than basic cover.

**Terminal handling costs** - new rules have clarified which party must pay terminal handling costs. This will help to eliminate instances of double-charging by the seller and the terminal authorities.

**Delivery** - the rules identifying where delivery occurs have been simplified by the introduction of two new delivery terms. This means that delivery will take place either at the terminal or at another named place, usually the buyer's premises.

**Security** - new rules require parties to provide any information needed by the other in order to satisfy the increasing obligations in obtaining export and import clearance.

### Dealing on Incoterms

One significant drawback of using Incoterms (and probably the reason why they are not used more), is that the rules are basic. Although they are helpful in relation to the matters they cover,

they cannot create a full contract. This means that parties will still need to take care when using Incoterms and negotiate special terms such as those that relate to the parties' obligations, financial exposure, payment terms, intellectual property rights and jurisdiction.

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### First fine for corporate manslaughter

The first fine, of £385,000, has been ordered under the Corporate Manslaughter and Corporate Homicide Act 2007.

Criminal prosecutions may be brought under the Act where failings in an organisation's senior management lead to a death.

The defendant, Cotswold Geotechnical Holdings Limited, was found guilty in relation to the death of one of its geological surveyors. Potential fines are unlimited. In this case, the fine was set at this level to reflect the small size and poor financial state of the company. The amount of the fine suggests that fines for larger organisations could be very substantial.

Businesses should review their policies and procedures to ensure that they comply with existing health and safety legislation and take specialist legal advice in the event of any workplace related death or serious injury.

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Recent cases show that data protection has become an area of genuine concern for all businesses. More worryingly, it is now a subject to be considered under the heading of 'risk management'.

## The Information Commissioner takes a stand

The Information Commissioner (the IC) has, for the first time, exercised his power to fine organisations that do not handle personal data according to the rules of the Data Protection Act 1998. The first fines, of £100,000 and £60,000 were handed out in November 2010.

Businesses should assess their own data protection policies. Here are some suggestions to consider:

- appoint a senior person with sufficient authority and understanding of the business to conduct a risk assessment and to lead on compliance;
- ensure that you have registered with the IC and that you renew the registration annually;
- identify the personal data that the business holds - client databases, data stored in mobile phones and data about your employees will all be personal data;
- identify the ways in which personal data

flows and consider whether policies are needed to control this or if improved security should be put in place;

- is personal data processed externally, even using cloud computing? For example, where payroll has been outsourced, the employer is still responsible for the proper processing of that data.

Businesses should be wary if they are currently treating data protection as a box to be ticked on a compliance checklist. It will be an ongoing requirement to regularly review your data protection processes. Adverse press coverage impacts on the bottom line, as would the maximum possible fine of £500,000.

A useful place to start is the IC's website: [www.ico.gov.uk](http://www.ico.gov.uk).

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## Bribery Act update

The implementation of the Bribery Act has been delayed for a second time. No date for implementation has been set at the time of writing. Originally due to come into force in October 2010, implementation of the Act was postponed to allow for consultation on Ministry of Justice guidance. The guidance is of paramount importance as it will assist organisations to establish procedures and policies so that they can demonstrate that they have taken adequate steps to prevent bribery.

The original draft guidance was criticised as lacking detail. Under particular attack were those aspects dealing with corporate hospitality and facilitation payments and when these will amount to bribery. There is a fear amongst business leaders that the Act will mean that United Kingdom businesses will be unable to compete on an even playing field with businesses in certain overseas jurisdictions. The Act will now come into force no earlier than three months from the publication of the final revised guidance. At the time of writing, no firm date has been set for publication of the final guidance.

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Although this newsletter highlights some key issues relating to business law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.