Case study: Limiting ICT B2B liabilities under new NZ law -updated

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Speed read

A claim against a multi-national ICT supplier by an English City Council is a great example of how the new Fair Trading Act legislation could affect NZ ICT suppliers. The new law comes into effect on 17 June 2014. Limitation of liability (LoL) clauses are major protections relied on by ICT suppliers. The ICT supplier in that case couldn't rely on its LoL clause and lost the case on that point for reasons that are common in NZ ICT deals with large corporate customers, including standard form terms, two strong contracting parties but with differences, insurance implications and time pressure to get the contract signed. The fact that the ICT supplier's customer was also a strong and large corporate, for example, did not get it off the hook.

Having summarised the likely new law relating to B2B sales generally in our article, New law from June 2014- Reducing exposure under NZ B2B supply contracts,[1] we now drill down to implications for LoL clauses ubiquitously found in ICT supply contracts. While the law changes bring benefits for ICT suppliers, there are still significant issues, and risk of liability beyond the LoL. ICT suppliers should review their contracts and sales processes carefully. This article is a case study highlighting the issues to be developed and resolved by ICT suppliers in the coming months.

Here's a list of things to do for B2B ICT contract issues:

1. Check existing B2B contracts:
   - 1.1. to ensure CGA carve out is still effective (if not, change if possible);
   - 1.2. to see if change can and should be made to contract out of limited FTA exemptions
2. Check compliance regardless with the FTA, despite the limited carve out, including the new substantiation provision;
3. Set up system and precedents for new B2B contracts to maximise CGA and FTA carve-outs where appropriate.

This article updates our article on the same topic in April 2013, Case study: Limiting ICT B2B liabilities under new NZ law.[2]

What happened: the case study

In *Fujitsu v St Albans and District Council*,[3] ICL, now Fujitsu, provided a computer system to St Albans for use in collecting rate-like charges from ratepayers. Due to a fault in the software, the charge was set too low. St Albans sued ICL under the contract. ICL said that its liability was limited by a LoL clause in its contract. But St Albans claimed that the term was unreasonable and should not be able to be relied upon, under the UK unfair contract term legislation applicable to B2B transactions. Reasons for this included facts that are also commonplace in deals between multi-national and national ICT vendors, and NZ larger corporates, including the public sector. Those reasons include:

- ICL was a multi-national with large assets and far higher insurance cover than the LoL cap[4] (compared with St Albans Council, which would have to increase rates and/or reduce services due to the error);

- ICL was the one making the profit;
- ICL was in a strong bargaining position. While St Albans had raised the LoL cap during negotiations, they decided not to pursue that further as ICL said they would have to escalate the issue to their in-house lawyers. If that happened, St Albans wouldn't be able to meet its timetable for implementation of the charge, and so it had no realistic option but to accept the LoL. In our experience, such time pressure, and variations on that theme, are commonplace.
- ICL didn't offer consideration such as a reduced price to accept the limitation;
- St Albans had no opportunity of getting better terms elsewhere, as other suppliers had similar LoL terms.

The Court of Appeal confirmed[5] that the LoL clause was not fair and reasonable under the UK legislation including for the bullet-pointed reasons. There are overlaps with the NZ legislation, even though the UK regime applies to contract terms as such and the NZ legislation applies to attempts to disclaim FTA liability.[6] Given the facts outlined above often arise on NZ ICT deals, this is a useful case study to show the sorts of issues that may arise when interpreting and applying the new NZ legislation. For example, sales to large corporates and public sector entities will not necessarily be outside the NZ regime striking out FTA disclaimers. ICT suppliers will need to look closely at their contracts and sales processes over the coming months.

1. http://www.wigleylaw.com/assets/Uploads/New-law-from-June-2014-Reducing-exposure-under-NZ-B2B-supply-contracts.pdf

2. http://www.wigleylaw.com/assets/Uploads/Case-study-Limiting-ICT-B2B-liabilities-under-new-NZ-law.pdf

3. [1996] 4 All ER 481

4. There are subsequent cases that make the countervailing point that, often, the party directly affected is better able to insure, and that points to the risk lying upon it (e.g. the NZ case of *DHL v Richmond* (in a different context) and the UK case, in the current context, of *Regus v Epcot*).

5. *St Albans v ICL* [1996] EWCA Civ 1296

6. There are overlaps and differences. In particular, the UK legislation (the Unfair Contract Terms Act) deals with unreasonable terms in contracts but the NZ legislation will deals with contracting out of the FTA. Additionally, subsequent cases in the UK have refined the approach (e.g. *SAM Business Systems v Hedley* [2003] 1 All ER (Comm) 465). But there is enough overlap in the principles and approach to reasonableness for this to be both a useful case study and for the case to be useful authority in interpreting and applying the new NZ legislation.

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