Commercial Contracts and Exclusion Clauses

When buying or selling goods and services certain terms are implied into the arrangement by the Sale of Goods Act 1979(1979 Act).

The 1979 Act implies conditions into a contract for the sale of goods that the goods correspond with their description, are of satisfactory quality, and are fit for purpose. The rules are applied differently to agreements and contracts between businesses or between a business and a consumer.

It is possible in some business-to-business contracts to exclude some implied terms in what is called 'the exclusion clause'. The High Court has recently decided that general wording in an exclusion clause that excludes obligations implied by law can be sufficient to exclude conditions implied by the Sale of Goods Act 1979.

But what could this mean for your business?

Background

A seller's ability to exclude or limit liability for breach of these implied conditions is subject to both common law and statute (for example, the Unfair Contract Terms Act 1977) (UCTA). An exclusion clause must expressly use the word "conditions" in order to exclude conditions implied by legislation. In a business-to-business contract, an exclusion of 1979 Act-implied conditions is subject to reasonableness but in a business-to-consumer contract, the implied conditions cannot be excluded. Furthermore, the business–to-business exception will not apply if the contract is an international supply contract.

Air Transworld Ltd v Bombardier Inc [2012]

Facts

'B', an aircraft manufacturer, sold a private jet to an Angolan company, pursuant to a purchase agreement (the agreement) that was assigned (by an assignment agreement) to 'A'.

In 2010, the jet had an engine problem, and 'A' alleged that the aircraft did not correspond with its description, was not of satisfactory quality, and was unfit for purpose under the 1979 Act. 'B' claimed that the agreement excluded such statutory liability and so it was subject only to contractual warranties, which had not been breached.

Decision

The court held in 'B's favour, finding that:

- The exclusion clause successfully excluded the implied conditions, even though it made no express reference to the word "conditions". The court found the contractual phrasing precise and clear enough such that there was "plainly intended to be no room for the

operation of any primary or secondary rights or obligations outside the terms of the contract itself". To adopt a different interpretation would distort the meaning of the contractual wording, which was unambiguous and susceptible of only one meaning.

- UCTA did not apply because both the agreement and the assignment were international supply contracts.
- 'A' was dealing as a business, not as a consumer, and so had entered into a business to business contract.

What does this mean for you?

Although 'B' was successful in this case, it is advisable to be precise when drafting exclusions of statutory terms and/or conditions, including those implied by UCTA or the 1979 Act. In such circumstances, a seller should expressly exclude the implied statutory terms and conditions in a form which uses the word "conditions", rather than leave it to the court to construe the meaning of an exclusion clause.

This highlights the importance of properly worded and carefully considered supply contracts. If you are negotiating or re-negotiating a supply, manufacturing or service contract, call John Burrowes on 01743 292 444 to discuss further, or e-mail.