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Can companies exclude liability through contractual clauses?

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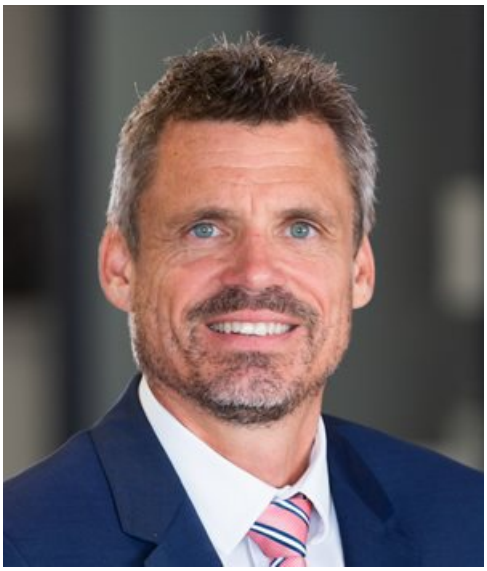
The recent split decision of the Constitutional Court in the case of Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd raises some important questions about the enforceability of such clauses, as well as their alignment with public policy.



Richard Hoal

Can public policy considerations exclude the enforceability of an exclusion of liability clause? The Constitutional Court considered this and delivered a 6:5 split decision on the debate.

On 28 June 2023, the Constitutional Court handed down judgment in the matter of Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd [2003] ZACC.

The Court had to decide whether the exclusion of liability clauses would include wrongful acts committed outside the contractual context (i.e. theft by an employee); and whether such a clause in the contract was contrary to public policy, and therefore unenforceable.

Facts

Fujitsu, an importer, seller and distributor of laptops concluded a national distribution agreement with Schenker. The distribution agreement provided that Schenker would collect, clear and carry goods and, thereafter, deliver them to Fujitsu in accordance with Fujitsu's instructions. The agreement essentially identified two categories of goods which Schenker was permitted to deal with on behalf of Fujitsu: high value and normal, non-high value goods.

Clause 17 of the agreement recorded that Schenker would not accept or deal with high value goods on behalf of Fujitsu unless under special arrangements made in writing in advance. In the event Schenker was required to handle or deal with high value goods without prior written special arrangements, Schenker would not incur any liability "whatsoever", specifically in respect of its negligent acts or omissions when handling such goods.

In 2012, Fujitsu purchased a consignment of laptops and in doing so, it engaged Schenker's services to assist with the logistics of the consignment, by importing the goods into South Africa and receiving them from the airline. Importantly, no prior special arrangements were made in writing permitting Schenker to deal with the high value goods for Fujitsu. When Fujitsu's consignment arrived, one of Schenker's employees collected the consignment of laptops, loaded them into an unmarked car, and never returned to work.

Fujitsu instituted a delictual claim against Schenker for damages on the basis that Schenker was vicariously liable for the loss it suffered because of the theft. Schenker argued that it was not liable having regard to the exclusion of liability in clause 17 of the distribution agreement. Fujitsu argued that the exclusion of liability did not apply to intentional conduct such as theft.

The High Court rejected Schenker's argument that it was excluded from liability for theft and upheld Fujitsu's argument that the exemption clause did not apply to intentional conduct such as theft.

The SCA subsequently overturned the High Court's decision and held that the claim against Schenker in respect of the valuable goods was governed by the contractual clauses which excluded liability for any claim of "whatsoever" nature (whether in contract or delict) and whether for damages or otherwise "howsoever arising". The SCA was of the view that these words should be accorded their ordinary and literal meaning and reasoned that they were "sufficiently wide enough in their ordinary import to draw into the protective scope of the exemption the deliberate and intentional conduct of the employees of Schenker".

On appeal to the Constitutional Court, the pertinent issue was whether exemption clauses, properly interpreted, exclude liability for a delictual claim for theft by employees. The majority of 6:5 held that, on a proper reading of the clause, the loss for which Fujitsu sought to hold Schenker liable was the loss of goods which fell within the goods listed in the exclusion clause.


Rona Evans

The majority found that the agreement between the parties must be upheld unless there were valid reasons to the contrary, and that there was no merit in Fujitsu's argument that clause 17 only applies in the execution of the agreement as it would mean that clause 17 would protect Schenker from liability when, for example, its employee acts in accordance with the contract but not so when he or she acts in breach of the contract. The majority held that exemption from liability is required for conduct that is in breach of the contract or law and not for conduct that is in line with the contract and with the law.

With regard to Fujitsu's contention that the exemption clause was contrary to public policy and is therefore unenforceable, the Court held that there was nothing unfair or unreasonable about the terms of the clause and affirmed that contracts which have been voluntarily and freely concluded should, as a general rule, be enforced unless there is something contrary to public policy about them. The Court also noted that there was nothing to suggest Fujitsu was in a weaker bargaining position than Schenker when the agreement was concluded. As a consequence, the majority held that there was nothing unfair or unreasonable about the exemption clause and for that reason, it was found not to be contrary to public policy.

In reaching this conclusion, the majority relied on authority from the SCA which drew a distinction between an exemption clause purporting to exempt a party from liability for loss or damage arising from its own wilful conduct (in which such a clause would not be enforceable as it would be contrary to public policy) versus a situation where an exemption clause exempted an employer for liability for loss or damage to property arising from the wilful misconduct (e.g. theft) of its employees or agents. The SCA accepted, even by implication, that a clause in a contract that exempted a contracting party from liability for loss arising from the wilful misconduct of its employees such as theft is not contrary to public policy.

Minority judgement

The minority judgement ultimately concluded that Schenker's appeal ought to be dismissed as clause 17 was not applicable to intentional conduct such as theft and it only applied to situations where the loss occurred in the performance or execution of the contract between the parties. If clause 17 applied, the minority reasoned it would be contrary to public policy as the clause would operate to prevent Fujitsu from obtaining judicial redress which would otherwise have been available to it, and enforcing an agreement in such circumstances would offend the principles of good faith and fairness. Further, any contract which envisioned and tolerated theft would be contrary to the doctrine of legality and public policy.

Conclusion

In conclusion, although the majority found that the exemption clause was not contrary to public policy, and was therefore enforceable, it is evident from the minority's judgment that future circumstances and facts may very well present another opportunity for the Court to depart from this judgment and find that an exemption clause may be unenforceable.

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