

## Exclusion Clauses Part 2: Recent Developments

### Introduction

This is the second of a two part series on exclusion clauses in English law. In last month's newsletter, we examined the general English law approach to such clauses and highlighted potential issues which that can arise when drafting, negotiating and interpreting exclusion clauses.

In this month's newsletter, we take a look at a recent decision of the English High Court, *Internet Broadcasting Corporation Limited (trading as NetTV) & Anor v. MAR LLC (trading as MARHedge)*,<sup>1</sup> which clarified the position on the effectiveness of exclusion clauses in respect of intentional repudiatory breaches;<sup>2</sup> and, in so doing, laid down guidance as to how similar issues will likely be approached by English courts in the future.

### Facts

In 2005, NetTV entered into an agreement with MARHedge under which NetTV agreed to provide an internet television channel for the broadcasting of material including coverage of MARHedge's conferences (the "**Agreement**"). The Agreement could not be terminated for three years other than in response to a material breach that was not remedied within 30 days of a notice requiring such a cure.

In 2006, MARHedge gave notice to NetTV purporting to terminate the Agreement with immediate effect. Although MARHedge subsequently admitted that it was not entitled to terminate the Agreement in this way and that its actions amounted to a deliberate repudiatory breach of the Agreement, it claimed that it was in any event protected from a claim relating to the loss of NetTV's profits due to an exclusion clause in the contract.

### The Exemption Clause

The exclusion clause in question set out that:-

*"neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."* (Emphasis added)

Both NetTV and MARHedge agreed that no legislation which potentially limits the ability of a party to rely on an exclusion clause applied in this case.<sup>3</sup>

### "Loss of Profit" Issue & Decision

The issue was therefore whether the exemption clause protected MARHedge from liability in respect of NetTV's loss of profits caused by MARHedge's deliberate repudiatory breach of the Agreement.

The starting point to the court's analysis was the presumption that parties would not ordinarily intend to exclude liability for a deliberate repudiatory breach of the contract. As the exclusion clause in this Agreement did not state expressly that it was intended to exclude the parties from liability for deliberate wrongdoing, it was not considered that a reasonable businessman would understand the words to cover such a situation. It was therefore concluded that the exclusion clause did not exclude liability in the circumstances.<sup>4</sup>

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### Contacts



**Peter Godwin**

Partner  
Registered Foreign Lawyer  
Tel: +81 3 5412 5412  
E: [peter.godwin@herbertsmith.com](mailto:peter.godwin@herbertsmith.com)



**Dominic Roughton**

Partner  
Registered Foreign Lawyer  
Tel: +81 3 5412 5412  
E: [dominic.roughton@herbertsmith.com](mailto:dominic.roughton@herbertsmith.com)



**David Gilmore**

Partner  
Registered Foreign Lawyer  
Tel: +81 3 5412 5412  
E: [david.gilmore@herbertsmith.com](mailto:david.gilmore@herbertsmith.com)



**Gavin Margetson**

Senior Solicitor  
Tel: +81 3 5412 5412  
E: [gavin.margetson@herbertsmith.com](mailto:gavin.margetson@herbertsmith.com)

<sup>1</sup> [2009] EWHC 844.

<sup>2</sup> A repudiatory breach is a breach of a contractual condition or a fundamental breach that entitles the innocent party to terminate contract.

<sup>3</sup> The provisions of, for example, the Unfair Contract Terms Act 1977 ("**UCTA**") were therefore not considered or applied.

<sup>4</sup> [2009] EWHC 844 at paragraphs 35 and 36.

## Summary of Principles

At paragraph 33 of the High Court judgment, Moss QC (sitting as a deputy High Court judge) set out what he deduced to be the relevant principles from the authorities concerning deliberate, repudiatory breach involving personal wrongdoing<sup>5</sup> including:-

*"...There is a presumption, which appears to be a strong presumption, against the exemption clause being construed so as to cover deliberate, repudiatory breach.*

*... The words needed to cover a deliberate, repudiatory breach need to be very "clear" in the sense of using "strong" language such as "under no circumstances" ....*

*... There is a particular need to use "clear", in the sense of "strong", language where the exemption clause is intended to cover deliberate wrongdoing by a party in respect of a breach which cannot, or is unlikely to be, covered by insurance. Language such as "including deliberate repudiatory acts by [the parties to the contract] themselves" ....would need to be used in such a case.*

*... Words which, in a literal sense, cover a deliberate repudiatory breach will not be construed so as to do so if that would defeat the "main object" of the contract."*

## Practical Implications

The overriding lesson to take from the case is that if the parties intend for an exclusion clause to cover deliberate, repudiatory breaches committed by the parties, then "clear" and "strong" language must be used in the clause to demonstrate this. Parties cannot assume that a deliberate, personal, repudiatory breach will be covered under an exclusion clause unless the exclusion clause specifically states this to be the case. Even where clear wording to this effect is included, the English courts will be slow to apply such wording where doing so would in effect defeat the main purpose of the contract. Similarly, although its application may be limited where the contractual parties are from outside the UK<sup>6</sup>, where UCTA does apply, the inclusion of such wording may render the exclusion clause as a whole of no effect.

A party may, in any event, be reluctant to press in negotiations for an exclusion clause covering its own deliberate, repudiatory breach of contract. Such an exclusion will of course be difficult to justify even where the exclusion clause in question relates only to limited categories of potential loss.

Where a company wishes to exit an English law contract with an intentionally wrongful termination, it ought therefore to first think carefully of the consequences, even where apparently favourable exclusion clauses are included in the contract.

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Herbert Smith LLP, 41st Floor, Midtown Tower, 9-7-1 Akasaka, Minato-ku, Tokyo 107-6241.

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<sup>5</sup> The reference to "personal" wrongdoing is to the wrongdoing of the "controlling mind" of the company (e.g. President or CEO), rather than simply the company's (vicarious) liability for the wrongdoing of its agents or employees. In respect of "personal" repudiatory breach, it was held that a stricter approach is needed when interpreting exclusion clauses as it is less likely that the parties would intend the words to extend to such breach.

<sup>6</sup> UCTA Section 27