This is the sixth in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

CONTRACT DISPUTES PRACTICAL GUIDES
ISSUE 6, JUNE 2016

DEFINING YOUR LIABILITY IN ADVANCE:
LIQUIDATED DAMAGES, LIMITATION AND EXCLUSION CLAUSES

Parties to commercial contracts commonly seek to set some parameters around what will happen in the event of a breach. They may for example agree a fixed sum that is payable on breach, or set a maximum sum for any damages, or exclude liability (or particular categories of liability) altogether.

Such clauses may not always have the effect the parties expect, either because of how they are interpreted by the courts or because they are held to be unenforceable as a result of statute or common law principles.

James Baily, David Nitek and Gillian Fairfield consider the main types of clause that may be used and the extent to which they will (or will not) be effective, and provide some practical tips for commercial parties.
1. INTRODUCTION

When negotiating a contract, commercial parties may wish to agree in advance their respective entitlements in the event of a breach, or a particular type of breach, rather than leaving that to be determined by the general law of damages. They may provide for a fixed sum that will be payable as “liquidated damages”, or some other remedy such as a requirement to transfer assets to the innocent party, or perhaps the loss of some contractual entitlement the party in breach would otherwise have enjoyed.

In these circumstances, the law of penalties may come into play to render the term unenforceable, so that the innocent party is left to pursue a remedy for the breach in the usual way – see section 2 below.

Alternatively, rather than agreeing a specific remedy, the parties may wish to agree some restrictions on the innocent party’s entitlement to damages. This could be, for example, an exclusion of liability for particular types of breach, or in respect of particular types of loss, or a limit on the aggregate amount of damages that will be payable, or some combination of all of these.

These types of clause are also subject to controls which may mean they cannot be relied on by the party in breach – see sections 3 to 7 below.

“The law of penalties and controls on exclusion clauses are essentially two sides of the same coin: the first aims to protect the party in breach from paying excessive compensation; the second to protect the innocent party from unclear or unreasonable restrictions on its entitlement to compensation.”
2. RULE ON PENALTIES

Where a contractual term provides for some remedy that takes effect on breach, in effect providing a contractual alternative to damages at common law, the term will be unenforceable if it falls foul of the rule on penalties.

The test is whether the clause is out of all proportion to the innocent party’s legitimate interest in enforcing the counterparty’s obligations under the contract. If so it will be penal and therefore unenforceable. This test was established by the Supreme Court decision in *Makdessi* in 2015 (see summary on page 4). It replaced the traditional test of whether a clause that took effect on breach was a “genuine pre-estimate of loss” and therefore compensatory, or whether it was aimed at deterring a breach and therefore penal.

So, under the new test, a clause may be enforceable even if it does not represent a pre-estimate of loss. However, the question of precisely what will amount to a legitimate interest in enforcing a counterparty’s obligations, and whether the remedy provided is out of all proportion to that interest, may be open to debate in many cases.

The Supreme Court in *Makdessi* commented that, in a straightforward damages clause, the innocent party’s interest will rarely extend beyond compensation for breach, and so the traditional test (ie is it a genuine pre-estimate of loss) will usually be adequate to determine the validity of the clause. However, the decision also suggests that, where there is a negotiated contract between properly advised parties of comparable bargaining power, the courts are unlikely to interfere. As the Supreme Court commented, “the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.”

A provision may fall outside the rule against penalties altogether if it takes effect in circumstances other than a breach of contract, for example a payment which is conditional on performance rather than an entitlement to liquidated damages on breach.

There is some uncertainty as to whether “take or pay” clauses (which provide that the buyer will pay for a certain minimum quantity of product, whether it takes that quantity or not) fall within the scope of the rule. It may come down to the drafting of the clause in question.

Even where a provision takes effect only on breach, the rule against penalties will not be engaged if it is, in substance, a primary obligation rather than a secondary obligation which provides a contractual alternative to damages. This distinction may, however, be less than clear in many cases, particularly as the rule will apply if what appears to be a primary obligation (eg a price adjustment clause) is in substance a disguised punishment for breach.

The rule is not restricted to clauses requiring payment of money. It will apply to obligations to transfer assets, either for nothing or at an undervalue, and probably also to clauses preventing the party in breach from recovering instalments paid or payable, though this last point is not settled.

Where there is any doubt as to whether the rule on penalties is engaged, the safe course must be to consider the clause carefully to ensure (so far as possible) that it meets the test.

“It may be possible to avoid the application of the rule on penalties altogether with careful drafting, though classification of a term will depend on substance rather than mere form.”
Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67 (outlined in this post on our Litigation Notes blog) established that a contractual provision will be penal, and therefore unenforceable, if it imposes a detriment on the contract breaker which is out of all proportion to the innocent party’s legitimate interest in enforcing the relevant contractual obligation. 

Makdessi concerned terms of a share purchase and shareholders’ agreement. These provided that if the seller was in breach of certain non-compete restrictions, he lost his entitlement to deferred consideration that would otherwise be payable, as well as the benefit of a put option to sell his remaining shares at a price determined by reference to goodwill; instead the buyer had an option to buy his remaining shares at a price which excluded goodwill. The Supreme Court held that the relevant provisions were not penalties:

(i) Although the provisions took effect on breach, they were (in the view of at least three of the seven Justices) primary rather than secondary obligations. They were not contractual alternatives to damages but, in essence, price adjustment provisions. 

(ii) In any case, the clauses were justified by the buyer’s legitimate interest in the observance of the restrictive covenants in order to protect the goodwill of the business. The parties, who were sophisticated commercial people bargaining on equal terms and with expert legal advice, were the best judges of how their proper commercial interests should be reflected in the agreement. 

In Edgeworth Capital v Aabar Block [2016] EWCA Civ 412, the Court of Appeal considered whether a fee payable to RBS under certain financing documents was an unenforceable penalty. RBS provided loans of €200 million under a Junior Loan Agreement (JLA) and €75 million under a Personal Loan Agreement (PLA). 

The relevant fee was payable to RBS on the occurrence of a “Payment Event”. That was defined as including the repayment of the Junior Loan or, if earlier, the date on which any such repayment fell to be made pursuant to the JLA. The borrower failed to make payments of interest due under the PLA, which constituted an Event of Default under the JLA, and so RBS gave notice to accelerate the Junior Loan. The Court of Appeal agreed with the judge that this constituted a Payment Event which triggered payment of the fee. It rejected the submission that it was unenforceable as a penalty because it far exceeded any loss RBS could suffer as a result of the breach of contract in failing to make a repayment of the Junior Loan. 

The fee was, the court said, the remuneration payable to RBS for providing the finance. It became payable on a specified date when the repayment of the Junior Loan fell due. The event which constituted an Event of Default under the JLA and triggered the repayment obligation was not a breach of the JLA itself but of the PLA. The fee had nothing to do with damages for breach of contract and so, applying Makdessi, it did not fall foul of the rule against penalties.
DEFINING YOUR LIABILITY IN ADVANCE

DECISION TREE: IS IT A PENALTY?

A ready reckoner to help determine whether a contractual provision may be a penalty and therefore unenforceable.

- **Does it apply only in circumstances that are not a breach of contract?**
  - **YES**
  - **NO**

- **Is it, in substance, a secondary obligation that provides a contractual alternative to damages?**
  - **YES**
  - **NO**

- **Is it out of all proportion to the innocent party’s legitimate interest in enforcing performance?**
  - **YES**
  - **NO**

**NOT A PENALTY**

**A PENALTY**
3. EXCLUSION CLAUSES

An exclusion clause is, in essence, any provision which excludes or restricts a party’s liability, whether entirely or for particular types of breach or in respect of particular types of loss. In this briefing we focus on exclusion of liability for breach of contract. Clauses excluding liability in respect of pre-contractual statements were considered in issue 3 of our series of contract disputes practical guides “Pre-contractual statements: When can they come back to bite you?”

As well as the obvious types of clause, which exclude the relevant liability entirely or limit it to a fixed sum, other provisions may fall within the category of exclusion clauses and be subject to the same controls (see box below right). These include provisions making the liability subject to restrictive conditions, such as mandatory time limits for notifying claims, or restricting rules of evidence or procedure, such as providing that acceptance of goods will be conclusive evidence that they comply with the contract.

“Exclusion clauses can provide important contractual protection in the event of a breach, but their scope is frequently the subject of disputes and they may not always have the desired effect.”

In principle, parties are free to agree in advance how any liability will be allocated between them. In practice, however, exclusion clauses may fail to protect the party in breach for any one of a number of reasons.

As with any contract term, in order to be effective the clause must be properly incorporated into the contract; this will not be an issue where there is a formal written agreement. There is also a well-established common law rule that liability for a party’s own fraud cannot be excluded, and so an attempt to do so will not be effective.

Assuming the clause is properly incorporated and does not seek to exclude liability for fraud, the question of whether the clause is effective will depend on two key factors:

(i) Interpretation: Whether the clause, as properly interpreted, covers the breach and the type of loss in question – see sections 4 to 6 below.

(ii) Statutory controls: Whether the clause is subject to statutory controls under the Unfair Contract Terms Act 1977. These may render an exclusion clause in a business to business contract either unenforceable or subject to a requirement of “reasonableness” – see section 7 below. (Consumer contracts are subject to the Consumer Rights Act 2015, which is not considered further in this briefing.)

If the clause is not effective, the party in breach will have unrestricted liability, subject only to common law rules on causation and loss (such as remoteness and mitigation).

Unfair Contract Terms Act 1977 – section 13:
(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents –

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure...

“In negotiating a mutual exclusion of liability, you will want to think carefully about whether you are more likely to benefit from the clause as the party in breach, or suffer as the party whose recovery is restricted by it.”
DEFINING YOUR LIABILITY IN ADVANCE

4. INTERPRETATION

The court’s aim in interpreting a contract term is to determine the meaning it would convey to a reasonable person with all the background knowledge available to the parties at the time the contract was made. As well as the words used and the relevant background, the court will take into account how the clause fits within the contract as a whole and considerations of commercial common sense.

Recent judgments in the higher courts, however, tend to place greater emphasis on the language used and downplay considerations of commercial common sense, unless there is some ambiguity or lack of clarity. (For more detail on the court’s approach to contractual interpretation generally, see issue 2 of this series of contract disputes practical guides “What does your contract mean? How the courts interpret contracts”.)

In interpreting exclusion clauses, the courts have historically applied various principles or tools of construction which tend toward a narrow interpretation. Some of these are outlined on pages 8 and 9 below. The extent to which these principles remain applicable is not, however, entirely clear.

It certainly remains the case that, where there is ambiguity in an exclusion clause, it will be given a narrow construction. The courts will generally assume the parties did not intend to cut down their contractual entitlements unless that is clear from the words used. Recently, however, in line with the trend toward a greater emphasis on the words used in the contract, the courts may be less inclined to consider a clause ambiguous so that this principle, or other principles which tend toward a narrow construction, come into play.

“As with many things, the key is to use clear and unambiguous drafting.”

In Nobahar-Cookson v The Hut Group Ltd [2016] EWCA Civ 128 (see post) the buyer of a business brought a claim against the sellers for breach of warranty. The agreement contained a clause which excluded liability unless the buyer served notice of the relevant claim on the sellers within 20 business days after becoming “aware of the matter”.

There was a dispute as to the meaning of “aware of the matter”, the key alternatives being awareness of the facts giving rise to the claim (the wide construction) and awareness that there was a proper basis for the claim (the narrow construction).

The Court of Appeal confirmed the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed. This is because parties are not lightly to be taken to have intended to cut down the remedies the law provides for breach of important contractual obligations unless clear words are used. This principle is of similar effect to the traditional “contra proferentem” rule. However, the court rejected that underlying rationale for the principle, saying it has nothing to do with the identification of the party putting forward the clause or seeking to rely upon it.

This approach to exclusion clauses is not now regarded as a presumption or “special rule” that justifies giving a strained meaning to an exclusion clause, nor is it to be applied mechanistically whenever there is an ambiguity. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means, but if ambiguity remains then a narrower construction should be adopted.

Applying this approach, the Court of Appeal found that the clause in this case was ambiguous and adopted the narrow construction.
5. TRADITIONAL PRINCIPLES

The following principles or tools of construction have traditionally been applied to exclusion clauses. As noted above, the precise extent to which these principles remain applicable is currently unclear, particularly in light of the Court of Appeal’s decisions in Nobahar-Cookson (outlined above) and Transocean (to the right).

- **Contra proferentem rule**: The clause should be construed against the party that has put it forward and/or is seeking to rely on it.

- **Canada Steamship guidelines**: In essence these guidelines, from the Privy Council decision in Canada Steamship Lines v The King [1952] AC 192, require clear words to exclude liability for negligent wrongdoing. They can be summarised as follows:
  
  (i) If a clause expressly excludes negligence it must be given effect.
  
  (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence; any doubt must be resolved against the party seeking to rely on the clause.
  
  (iii) If they are wide enough to cover negligence, the court must consider whether there is some other head of damage that the clause might realistically have been intended to cover; if so, it will not be interpreted to cover negligence.

- **No remedy**: The courts have tended to construe exclusion clauses narrowly where otherwise the effect would be to exclude all liability for non-performance (see for example Kudos Catering v Manchester Central Convention [2013] EWCA Civ 38 considered in this post on our Litigation Notes blog).

“The safest course is to assume you will need clear and specific words to exclude your own liability, but at the same time not to assume broad wording will fail to protect your counterparty.”

In Transocean Drilling UK Ltd v Providence Resources PLC [2016] EWCA Civ 372 the key question was whether “spread costs”, or additional overheads incurred as a result of the breach, fell within the exclusion of consequential loss, as defined in the contract. The High Court held that they did not, construing the clause contra proferentem and applying a presumption that contracting parties do not intend to abandon any remedies for breach unless clear words are used. The Court of Appeal disagreed.

It held that the judge was wrong to invoke the contra proferentem principle. First, it had no part to play where the meaning of the words is clear, as the Court of Appeal considered they were in this case. Second, it did not apply where the clause was mutual, especially where the parties were of equal bargaining power.

The Court of Appeal did not consider that the judge’s conclusion was justified by a presumption against giving up the right to claim damages for breach; any such presumption must, the court said, give way to the language of the contract.

Nor did it accept the argument that a broad interpretation of consequential loss would rob the contract of any meaningful obligations, in the sense of leaving the innocent party without a remedy if the other party breached it terms, making it unlikely to have been intended. Such a principle should be seen as one of last resort and should only apply where the effect of the clause would be to relieve a party from all liability for any breach. The court did not accept that was the case here. In any event, it expressed the view that, if it was clear the parties had agreed to exclude all liability, it was difficult to see why the court should not give effect to that agreement.
In McCain Foods GB v Eco-Tec Europe [2011] EWHC 66 (TCC) the court considered a clause excluding “indirect, special, incidental and consequential damages” in a contract for the sale of equipment to remove hydrogen sulphide from biogas produced in the claimant’s waste water treatment processes at its Cambridgeshire plant. The clean biogas was to be used by the claimant in generating electricity for the plant, which the claimant alleged would entitle it to obtain Renewables Obligation Certificates (ROCs) based on the value of electricity produced. The claimant brought a claim for breach of contract, alleging that the system supplied was impossible to commission successfully.

Once liability was established, the defendant accepted that it was liable to pay damages in respect of replacement equipment but challenged all other items of quantum, including lost income from ROCs, on the basis that they were “indirect, special, incidental and consequential” damages and therefore excluded.

The court referred to various Court of Appeal decisions confirming that consequential loss is confined to loss or damage within the second limb of Hadley v Baxendale (1854) 9 Ex 341, namely those losses which arise naturally from the breach of contract itself.

In Transocean (referred to above), however, the Court of Appeal commented that it is questionable whether this traditional approach to construction of the term “consequential loss” would be taken today, when the courts are more willing to recognise that words take their meaning from their particular context.

“Simply excluding ‘indirect or consequential’ loss may not have the desired effect. Think about what categories of loss might result from a breach and tailor your drafting.”
DECISION TREE: IS YOUR EXCLUSION CLAUSE EFFECTIVE?

A ready reckoner to help determine whether a contractual exclusion or limitation clause in a business to business contract is likely to be effective.

Is it incorporated into the contract?
- YES
- NO

Does it seek to exclude liability for a party’s own fraud?
- YES
- NO

Properly interpreted, does it cover the liability?
- YES
- NO

Is it in an international supply contract (essentially a contract for the sale or supply of goods between parties in different states)?
- YES
- NO

Does it seek to exclude/restrict liability for:
  - death or personal injury caused by negligence?
  - statutory implied undertakings as to title?
- YES
- NO

Does it seek to exclude/restrict liability for:
  - other loss or damage resulting from negligence?
  - breach of contract, where one party deals on the other’s written standard terms?
  - statutory implied terms relating to conformity of goods with description or sample, or their quality or fitness for purpose?
- YES
- NO

Was it fair and reasonable to include in the circumstances when the contract was made?
- YES
- NO

Note: Consumer contracts are subject to statutory controls under the Consumer Rights Act 2015, which is not considered further in this guide.
7. UNFAIR CONTRACT TERMS ACT 1977 (UCTA)

As noted above, even where an exclusion clause is interpreted to cover the breach and the liability in question, it may be ineffective as a result of UCTA. UCTA does not, however, apply to international supply contracts, as defined in the Act; in essence, these are contracts for the sale or supply of goods between parties in different states. Where UCTA applies:

- Any attempt to exclude or restrict liability for the following will be void:
  - death or personal injury resulting from negligence (defined to include breach of any duty to take reasonable care or exercise reasonable skill)
  - statutory implied undertakings as to title

- Any attempt to exclude or restrict liability for the following will be effective only to the extent that it satisfies the test of “reasonableness” under section 11(1):
  - other loss or damage (i.e., other than death/personal injury) resulting from negligence
  - breach of contract, where one party deals on the other’s written standard terms of business (and similarly, any claim to be entitled to perform the contract in a substantially different manner from that which was reasonably expected, or not perform the contract at all, is subject to the test of reasonableness)
  - statutory implied terms relating to conformity of goods with description or sample, or their quality or fitness for purpose

Where a term is subject to the test of reasonableness, it will be effective only if it was fair and reasonable to include the term, having regard to the circumstances which were (or ought reasonably to have been) known to or in the contemplation of the parties when the contract was made.

In assessing reasonableness, the court must have regard to the factors set out in schedule 2 to the Act. Probably the most important of these is the relative strengths of the parties’ bargaining positions. Other factors in schedule 2 include whether the customer received some inducement to agree to the term, or could have avoided the term by contracting with a different party, and whether the customer knew or should have known of the existence and the extent of the term. The ability of each party to insure against the excluded loss is also often highly relevant.

It used to be thought that a term would be unreasonable if it did not include an express carve-out for fraud. That may no longer be necessary in light of the House of Lords decision in HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6. However, it remains common practice, and it may be advisable given current uncertainties regarding the relevance of traditional principles in the interpretation of exclusion clauses.

It is generally advisable for different elements of an exclusion clause to be separated into sub-clauses, rather than using a single all-embracing clause. Where that is done, it may be possible for an unreasonable element of the clause to be severed from the clause leaving the other “reasonable” parts intact.

“Negotiating an exclusion clause requires a balancing act between, on the one hand, a desire to exclude liability to the greatest extent possible and, on the other, ensuring you stay on the right side of the line as to what is reasonable.”
In *Saint Gobain Building Distribution v Hillmead Joinery* [2015] EWHC B7 (TCC), the court considered whether the seller’s standard terms and conditions satisfied the statutory test of reasonableness.

The contract was for the sale of laminate sheets to be used in bonded panels in Primark’s stores. The seller’s standard terms included a wide-ranging exclusion clause which purported to (in broad summary):
- exclude implied terms as to satisfactory quality / fitness of purpose;
- exclude any liability if the buyer did not inspect the goods on delivery and report complaints to enable the seller to inspect the goods before they were used;
- confine the buyer’s remedy to replacement of the goods or limit liability to the invoice price;
- and exclude any liability for consequential loss.

The court held that none of these provisions met the statutory test of reasonableness under UCTA. Relevant factors included that the seller was in a significantly stronger bargaining position than the buyer, there was no attempt to negotiate the relevant terms, they purported to exclude all liability if the buyer failed to inspect the goods for defects before using them, and at the time of the contract the parties knew that any direct loss to the buyer would be greater than the cost of replacement (i.e. because the laminate sheets were going to be fabricated into bonded panels).

In *Regus (UK) v Epcot Solutions* [2008] EWCA Civ 361 (considered in this post on our Litigation Notes blog) the Court of Appeal considered an exclusion clause in a contract for the provision of serviced office accommodation. The clause purported to exclude Regus’s liability for various items of loss, including loss of business and loss of profits, and stated that Epcot was advised to insure against all such potential loss.

The High Court held that the clause was unreasonable because it deprived Epcot of any remedy at all. The Court of Appeal allowed Regus’s appeal. It did not agree that Epcot was left with no remedy, pointing out that the obvious and primary measure of loss for Regus’s breach (in providing defective air conditioning) was the diminution in value of the services promised.

It rejected the argument that the exclusion clause was unreasonable because it was expressed to operate “in any circumstances”, which meant it excluded liability for fraud or for deliberately damaging the customer’s business. The Court of Appeal said that parties contract with one another in the expectation of honest dealing and therefore it would be an error to construe the words “in any circumstances” as intended or effective to exclude liability for fraud or malice.

The Court of Appeal concluded that the clause satisfied the reasonableness test under UCTA based on a number of factors, including that the customer was well aware of the term and used a similar exclusion of liability in its own business. There was no inequality of bargaining power, largely because alternative suppliers were available. The court’s view that it would have been easier for Epcot to insure against the loss was also relevant.

“In assessing whether an exclusion clause is reasonable, a key factor will often be whether or not the contracting parties were of equal bargaining power. If so, the court will be much less inclined to interfere.”
DEFINING YOUR LIABILITY IN ADVANCE

CONTACTS

James Baily
T +44 20 7466 2122
james.baily@hsf.com

James is a solicitor advocate and partner in the firm’s dispute resolution division in London. He specialises in advising on disputes within the energy sector. He is ranked in the main directories; Legal 500 2015 and Chambers UK 2016 both list him as a Leading Individual for oil and gas work.

James’ experience covers cross-border disputes in the context of major oil and gas projects, joint ventures and gas sales agreements, including challenges to the jurisdiction of the English courts and parallel proceedings in foreign courts. He has advised clients in relation to projects in the UK, West Africa, the Middle East, Central Asia and Australia.

David Nitek
T +44 20 7466 2453
david.nitek@hsf.com

David specialises in the resolution of construction and engineering disputes. He has advised on disputes arising out of some of the UK’s largest infrastructure projects of recent years, in particular in the transport sector.

Internationally, David has advised a range of employers, contractors, subcontractors and consultants on arbitration proceedings related to projects in the infrastructure, energy, commercial property and shipbuilding sectors.

His international practice has a particular focus on the Middle East, where he was based between 2008 and 2010. David represents clients in a range of formal proceedings, including adjudication, dispute boards, litigation and arbitration.

Gillian Fairfield
T +44 20 7466 2901
gillian.fairfield@hsf.com

Gillian specialises in corporate finance work, having particular experience of public takeover bids (both hostile and recommended), private mergers and acquisitions and primary and secondary offerings. She heads the consumer products sector group and acts regularly for clients in that sector such as BAT as well as clients in other sectors such as Pearson, Lonmin and AbbVie, as well as investment banks such as Morgan Stanley, Rothschild and Credit Suisse.

Clients (both corporates and investment banks) in a wide range of sectors seek her counsel on public takeovers, private M&A and share offerings. Gillian is listed as a leading individual for M&A in Chambers 2016, as well as the Legal500, and appeared in the Lawyer’s Hot 100 in 2011.

The contents of this publication, current at 7 June 2016, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication. ©Herbert Smith Freehills LLP 2016.