Legal Issues for Service Providers

Limitation of Liability

I am often asked by service providers whether they may limit their liability in their commercial contracts. The answer is yes (with the exception of liability under the Consumer Guarantees Act and the Fair Trading Act). An example in the market place is the large accounting firms who often limit their liability to a multiple of their fees. Such a limitation is likely legally effective (though I am not aware of it being tested).

A bald limitation of liability to a fixed dollar amount, while feasible, is likely to be difficult to negotiate. More fruitful progress is often made in limiting liability to "direct" losses and excluding liability for "consequential" losses. An example of consequential losses might be loss of profits or losses comprising continued operational costs in circumstances where physical damage to plant and equipment interferes with their use. This is a far more pragmatic and realistic path to take. By limiting liability to direct losses, a service provider's exposure will only be to repair or replacement costs and will not also extend to open ended and expensive costs of lost production.

As with any commercial negotiation liability for direct and/or consequential losses entails allocation of risk. On the supplier side there is expectation that the customer accept ordinary business risks of trade; on the customer side there is expectation that the supplier stand behind the quality of its services. The end result is usually a reflection of who needs who the most.

A Fool's Paradise

Hand in hand with limiting liability is managing disputes about it. A common dispute resolution mechanism is appointment of an expert. Terms of their appointment often dictate that the expert's opinion is final and binding and is without any liability falling on them.

Where that is the case, be careful to ensure that you have first established and thoroughly tested the process to be employed by the expert in resolving the dispute. Where you expressly agree that the expert is not liable, your only recourse where the outcome is manifestly unfair to you, will be a failure on the expert's part to follow due process. A sensible pathway is to clearly establish the process (opportunity for submissions and to be heard) in the expert's terms of appointment.

The advantage in appointing an expert as the determinant of the dispute is the speed and simplicity it offers. Often this is attractive. However, in my experience this holds true only where the nature of the dispute is wholly within the expert's field. Disputes almost always have a legal facet to them. Where that is the case, there is material benefit in having a judge or similarly legal skilled person with purview of the dispute. Accordingly, arbitration is I think, invariably a better route; the expedience and simplicity of an expert determination will often prove to be a fool's paradise.

Don't hesitate to contact me for further information.