

## Guidance note on limitation of liability clauses

1. Members will be aware of the increasing use of limitation of liability and disclaimer clauses. The Bar Council makes clear that the Standard Contractual terms can be varied and there is guidance on including liability caps on the Combar website. The Chancery Bar Association also states that a clause limiting liability is an optional extra for inclusion in any contract.
2. In addition to including clauses seeking to limit the amount of their liability under the contract, Members may also seek to include clauses excluding certain types of damage, limiting the time within which claims against them can be brought, limiting the scope of work and defining proportionate liability.
3. The purpose of this Guidance Note is to provide information in relation to limitations of liability clauses and some of the issues that Members should consider should they wish to include such clauses in their own contractual terms.
4. If Members have any queries with regard to the information in this Guidance Note, please do not hesitate to contact the Managers by calling 020 7621 0405 or emailing [info@barmutual.co.uk](mailto:info@barmutual.co.uk).

### 5. **BMIF Cover**

Members will be aware that BMIF excludes liability for contractual liabilities save to the extent that such liability would have been incurred irrespective of the terms of the contract or the contract is between the Insured Member and instructing solicitors and in a form approved by BMIF. In giving that approval, BMIF is entitled to, and has, imposed terms on the maximum amount to be indemnified; accordingly the maximum indemnity provided by BMIF for contractual liabilities arising only by virtue of contract is £100,000 exclusive of defence costs.

BMIF has a Guidance Note on the limit of cover for purely contractual liabilities. [Guidance Note to Members - February 2013 \(barmutual.co.uk\)](#)

### 6. **Standard Contractual Terms**

In its guide to the Standard Terms [Contractual Term – explanation \(barcouncilethics.co.uk\)](#) the Bar Council notes that barristers can choose between:

- Accepting instructions on the Standard Contractual Terms.
- Accepting instructions on 'bespoke' terms (contractual or non-contractual) that have been drafted by the barrister or their Chambers or a Specialist Bar Association (SBA). In this case it will be the responsibility of the individual barrister to ensure that their bespoke terms do not leave the barrister exposed to liabilities that are not covered by BMIF and barristers are reminded that practising without full insurance cover may amount to professional misconduct. The guide notes that broadly, BMIF will not cover a barrister's contractual liability to the extent that it exceeds the barrister's liability at common law in tort. It recommends that if a barrister is minded to draft or agree a bespoke term which potentially could affect their professional indemnity, enquiry should be made of BMIF.
- Accepting instructions on 'bespoke' terms that have been drafted by the instructing solicitor. Again it will be the responsibility of the individual barrister to ensure that the bespoke terms do not leave the barrister exposed to liabilities that are not covered by BMIF, with the risk of professional misconduct.

- Accepting instructions on terms that are a negotiated variant of any of the above. Here again it will be the responsibility of the individual barrister to ensure that the negotiated terms do not leave the barrister exposed to liabilities that are not covered by BMIF with the risk of professional misconduct.

## 7. Combar and Chancery Bar Association Guidance

Combar publishes its own standard terms for the supply of legal services. [Combar-CLLS-Barristers-terms-version-3.0-35243-5-194-v0.12.pdf](#). Optional clauses are listed as a limitation of liability clause arising solely under contract and a limitation of general liability clause.

Combar has also published a guidance note on the agreement for the supply of services by a barrister in a commercial case –Third edition 27 April 2018 [Guidance-note-on-Combar-CLLS-barristers-terms-version-3.01.pdf](#)

The background explanation states that entering into a contract potentially gives rise to new liabilities against which barristers have traditionally been uninsured. It refers to the fact that Bar Mutual has confirmed that it will extend its cover to indemnify barristers against liabilities arising solely as a result of entering into a contract up to a limit of £100,000. Accordingly clause 12.4 of the Combar terms limits a barrister's liability to the lay client or the solicitor which is exclusively contractual to £100,000.

Clause 20.3 reflects the fact that a barrister and solicitor may agree to limit the barrister's liability to a particular sum, chosen by reference to the circumstances of the case and the level of insurance cover reasonably available to the barrister (clause 20.3). The general limitation on the barrister's liability is intended to apply to claims by the lay client as well as to claims by the solicitor and the guidance stresses that the solicitor should therefore ensure that the lay client is aware of the limitation and agrees to it.

Additions at the beginning of the clause therefore clarify that any cap applies to all liability and at the end of the clause clarifying that, for claims against the barrister that sound only in contract, the limitation of liability in clause 12.4 continues to apply to those claims even if there is a higher overall cap on the barrister's liability.

The Chancery Bar Association contract terms dated June 2014 are available on the ChBA website. <https://www.chba.org.uk/for-members/library/guidance-and-notes/chba-contractual-terms-june-2014.pdf/view>

These include the standard contractual limitation of liability clause, which is included to comply with rC76 and rC77 of the BSB Handbook, and in view of the limitations on cover for purely contractual liability imposed by BMIF( which limits liability to £100,000 in respect of any breach on the part of the Barrister which would not have arisen had the Barrister provided the service on a non-contractual basis and/or for all breaches attributable to i) the same act or omission; ii). a series or group of related acts or omissions; iii). a series or group of similar acts or omissions or iv) the same originating case.

The terms also allow for the inclusion of special terms if expressly agreed in writing.

## 8. Regulatory position

The BSB does not have specific guidance on limitation of liability clauses beyond the minimum terms of cover.

## **9. General points to consider**

Members should note that there is no power to exclude liability for their own fraud or wrongdoing.

Members should also note that when determining if a limitation of liability or disclaimer clause is reasonable, the position differs depending on whether the contract is with a consumer (where the applicable law is the Consumer Rights Act 2015) or non-consumer (where the law is the Unfair Contract Terms Act 1977). When considering clauses under the Consumer Rights Act, the clause must not be contrary to the requirement of good faith between the parties or cause a significant imbalance in the parties' rights to the detriment of the consumer. Under UCTA, the main test is one of core reasonableness with the onus on the defendant to prove the clause was reasonable. Members will appreciate that the courts may be more willing to uphold limitation of liability clauses in business contracts than in contracts concluded with consumers.

Finally, in choosing to include a general liability cap the Managers consider that it would be good practice for Members to take their level of indemnity insurance into account. Members should ensure that specific provision is made for claims made during a barrister's retirement or death where cover may be lower. Members will also need to make specific provision to reflect the £100,000 limit on liability in respect of claims arising purely out of contractual terms.