

WHITE PAPER CONFERENCE

HOW DO YOU POSITION YOURSELF TO SUCCEED IN
CAPPING AND LIMITING YOUR LIABILITY IN BUILDING
CONTRACTS, CONSULTANT APPOINTMENTS AND
COLLATERAL WARRANTIES?

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 **ADDLESHAW
GODDARD**

MORE IMAGINATION MORE IMPACT



WHY SEEK CAPS AND LIMITATIONS?

1

Liability in contract and in tort

2

Potential exposure to unquantified sum for an extended period

3

Under Collateral Warranties: potential liability to a range of parties

4

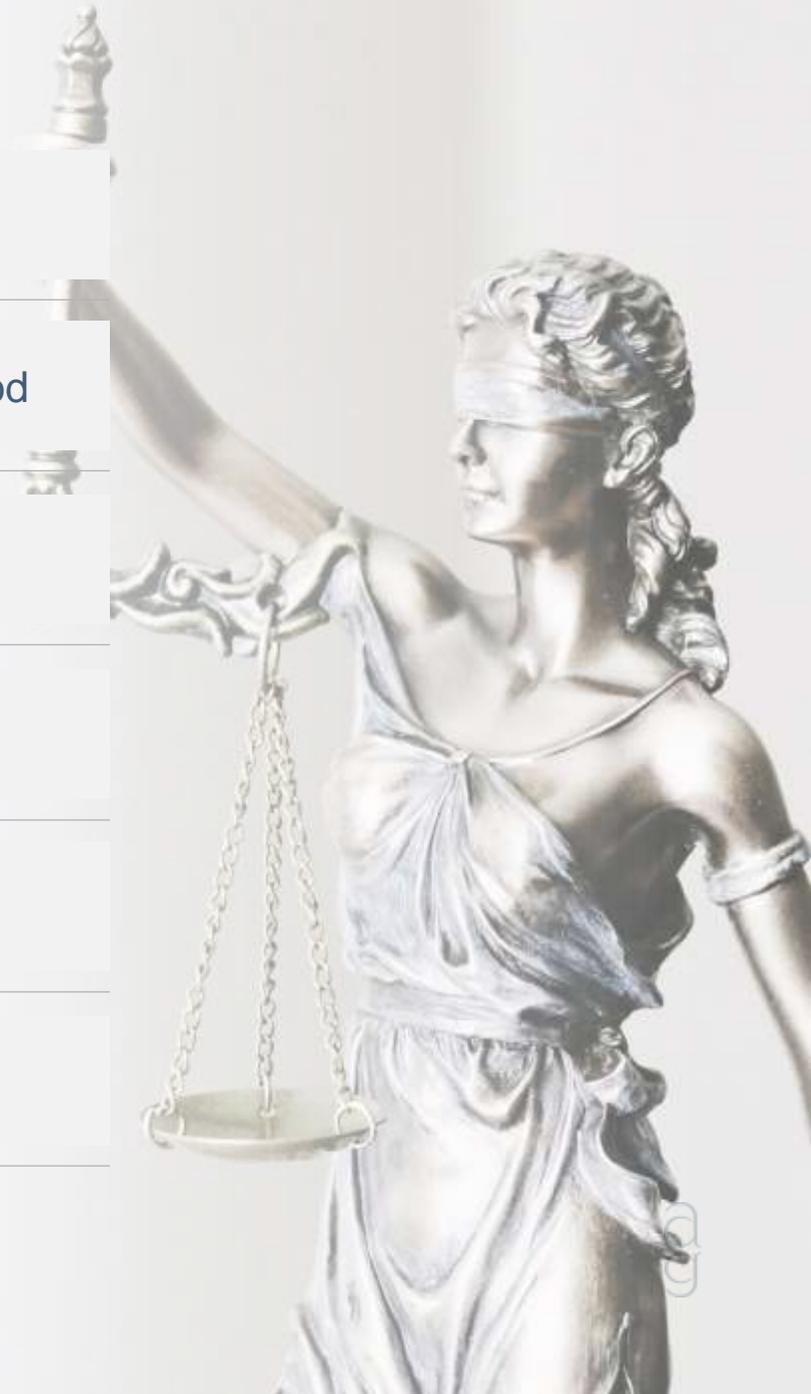
Risk Assessment

5

Competing interests in construction projects and relative bargaining positions

6

Market influences in approaches to caps and limitations



FINANCIAL AND TEMPORAL CAPS AND LIMITATIONS

Financial Caps

Capping liquidated damages

Consequential loss exclusion

Specific caps for different heads of loss

Liability for costs of repair only

Net contribution / proportionate liability clause

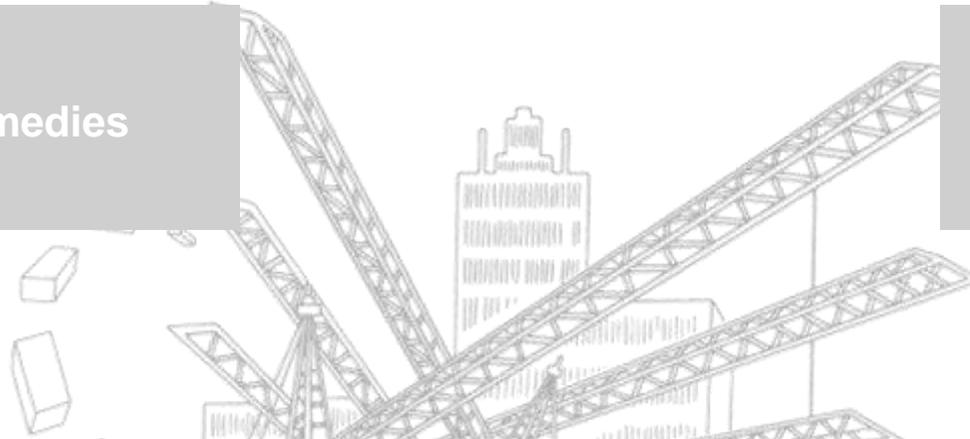
Time limitations

Claim notification dates

Equivalent rights of defence and no greater liability clauses (Collateral Warranties)

Exclusive remedies

Entire agreement clause



SAMPLE BUILDING CONTRACTS

CAPS ON LIABILITY

- **PWC Contract**
- **Liability Cap – Clause 3.10**
 - Contractor's liability not to exceed sum stated in Schedule (Part 1M);
 - If no amount stated, it is the Contract Sum;
 - Exclusions from liability include fraud, LADs, loss or damage to property.
- **FIDIC 2017**
 - Liability capped at the specified sum (or if not stated, the Accepted Contract Amount).
 - Neither party liable to the other for loss of:
 - use of any works, profit, any contract;
 - exclusions from liability cap for:
 - fraud, gross negligence;
 - deliberate default or reckless conduct.

SAMPLE BUILDING CONTRACTS

CAPS ON LIABILITY

- **NEC 4 Engineering Construction Contract**
- Option X18 - parties can agree an overall cap on contractor's liability for all matters arising under or in connection with the contract other than excluded matters:
 - cap does not apply to, inter alia:
 - damage to employer's property (its own cap);
 - liquidated damages;
 - if no amount stated, no cap applies;
 - Can also agree 3 separate limits of liability to apply:
 - Indirect or consequential loss;
 - For loss or damages to the Client's property;
 - Defects for design which are not listed on the *Defects Certificate*.

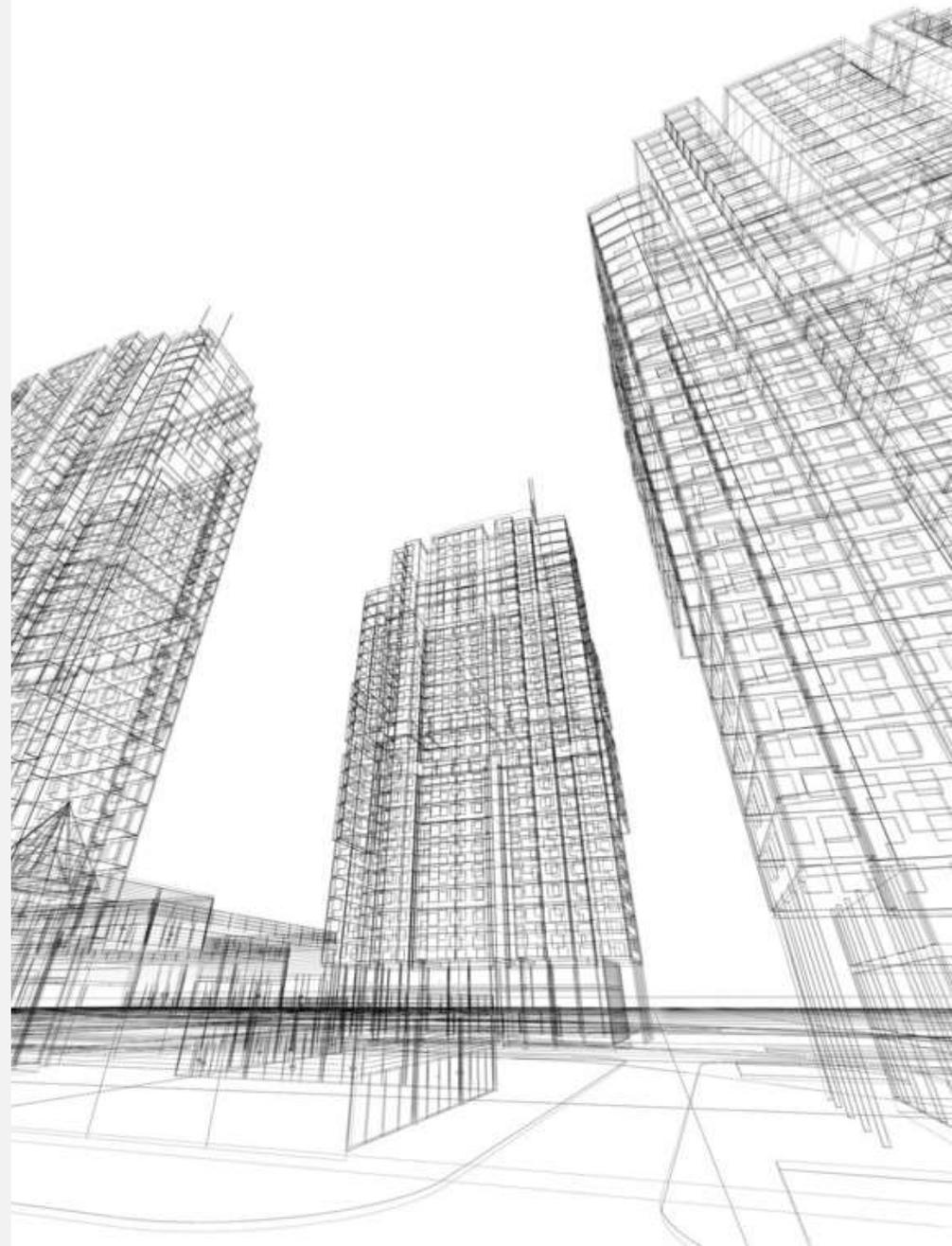
JCT STANDARD BUILDING CONTRACT, 2024

i

**Optional overall cap on
contractor's liability**

ii

**For Contractor Designed Portion
optional clause to limit contractor's
liability for consequential loss
arising from inadequate design**



CONSULTANT'S CAPS AND LIMITATIONS ON LIABILITY

- **PWC: Standard Conditions of Engagement**

- Consultant's liability limited to the Liability Cap in the Schedule;
- Exclusions include death, personal injury, fraud.

- **JCT: Consultants Agreement (Public Sector) 2024**

- Consultant's aggregate liability limited to X sum, if not stated, liability is unlimited.

- **NEC4: Professional Services Contract**

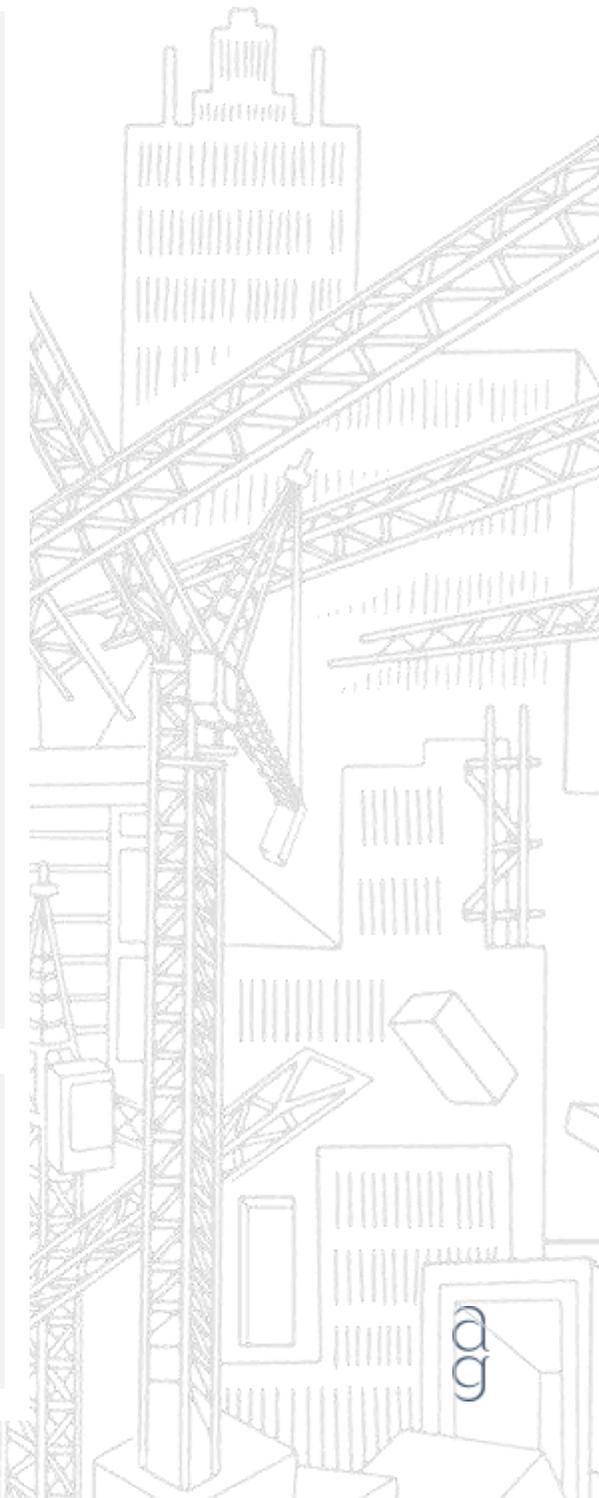
- Option X18, limitation of liability, 3 options:
 - limit indirect or consequential loss;
 - limit liability for defects that are not found until after the defects date;
 - not liable for matters unless notified before end of liability date.
- Option to have an overall cap for total liability (subject to exceptions)

● FIDIC Model Services Agreement

- If either party liable to the other, damages payable only on terms;
- Limited to amount of reasonably foreseeable loss and damage as a direct result of breach;
- Limited to the sum in contract particulars;
- Proportionate liability clause;
- Pre-condition to liability to comply with notice requirements;
- No liability for loss of:
 - profit, productivity, use, business... or any indirect special or consequential loss or damage.
- Overall cap on damages payable by either party to the other subject to exceptions, to include fraud and reckless misconduct;

● IEI: Conditions of Engagement

- Client and engineer can agree sum to limit liability;
- If no agreement, sum deemed to be €635,000 or ten times the fee, whichever is the lesser.



DIRECT / INDIRECT OR CONSEQUENTIAL LOSS

Hadley v. Baxendale (1854)

- 2 limb test for remoteness of damage:
 - not remote if damages flow naturally from the breach;
 - where damages might reasonably have been in the contemplation of the parties at time of entering into the contract;
- mixed case law on categorisation of damage;
- best to exclude specific heads of loss if particular concern re specific losses.

NET CONTRIBUTION / PROPORTIONATE LIABILITY CLAUSE

Civil Liability Act 1961

- Two or more persons responsible to a third party for the same damage.
- Joint and several liability and 1% rule.

West v. Ian Finlay & Associates [2014]

UK Court of Appeal referred to the net contribution clause and agreed that it qualified the normal rule on joint and several liability so that the architect's liability was limited by the liability of the contractor.

NO GREATER LIABILITY/ EQUIVALENT RIGHTS OF DEFENCE



Alignment of liability under the appointment/building contract/sub-contract with the CW



Use of “no greater liability”, ERD clauses to import limitations



Safeway Stores v. Interserve Project Services

COLLATERAL WARRANTY PROVIDED

“The contractor shall owe no duty or have any liability under this deed which are greater or of longer duration than that which it owes to the Developer under the Building Contract”

- Purpose of the clause was clear - to restrict contractor’s liability to the beneficiary to its equivalent liability to the employer.
- Court found the set off was effective.
- Now common for beneficiaries to exclude application of set off or counterclaims.



TEMPORAL LIMITATIONS

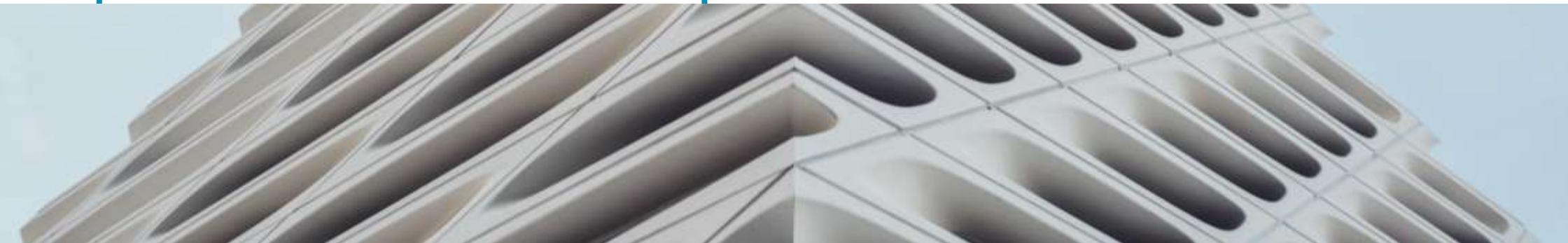
1

Seek to limit liability to a defined period.

2

Application of Statute of Limitations Act, if no express period stated:

- in contract, 6 years from date the cause of action accrues;
- in tort, 6 years from the date damage occurs (date damages is manifest);
- liability often stated as being 6 years from Practical Completion of the works;
- if contract executed under seal, liability period will be 12 years (unless expressly stated otherwise).



EXCLUSIONS OF LIABILITY

1

Courts traditionally
wary

2

Should be brought
to attention of
other party

3

Do the exclusions
form part of the
Contract?

EXCLUSIONS OF LIABILITY

***Persimmon Homes Ltd v.
Ove Arup & Partners
Limited & Anor. [2017]***

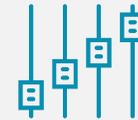
Recognition of exemption clauses in construction contracts as part of contractual apparatus for distributing risk

- "Liability for pollution and contamination" limited to £5 million
- "Liability for any claim in relation to asbestos" was excluded.

ENHANCING SUCCESS



In a negotiation,
identify what is
important for you



Risk assessment
and negotiate
accordingly



If want to exclude
specific losses,
clear drafting



Don't confuse
professional
indemnity insurance
obligations with
liability caps



Is exclusion clause
actually
incorporated in the
contract



Don't assume loss
of profits is an
indirect loss

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