

# CONTRACTUAL LIABILITY CAPS

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# Topalsson GmbH v. Rolls-Royce Motor Cars Limited

- O'Farrell J. 12 July 2023 [2023] EWHC 1765 (TCC)
- Coulson LJ 5 November 2024 [2024] EWCA Civ 1330

# The issues

- When do you apply the cap – before or after the set-off?
- Does the cap apply to the claim for contractual interest?

# The clause

“... the **total liability** of **either Party** to the other under this Agreement shall be **limited in aggregate** for **all claims** no matter how arising to the amount of **€5 million**”

# The facts

- RRMC due "termination damages" €7,962,323
- Topalsson due at termination €794,759.

# When would you apply the cap: version 1

- RRMC due €7,900,00
- Topalsson due €790,00.
- Balance due to RRMC €7,110,000.
- **Apply the €5 million cap**
- **RRMC due €5,000,000.**

# When would you apply the cap: version 2

- RRMC due €7,900,00
- Apply the €5 million cap €5,000,000
- Topalsson due €790,00
- “Apply” the €5 million cap €790,00
- Balance due to RRMC €4,210,000

# The clause again: what do you think?

“... the total liability of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# 1<sup>st</sup> Instance

- RRMC due €7,900,00
- Topalsson due €790,00.
- Balance due to RRMC €7,110,000.
- Apply the €5 million cap
- RRMC due €5,000,000.

# Court of Appeal

- RRMC due €7,900,00
- Apply the €5 million cap €5,000,000
- Topalsson due €790,00
- “Apply” the €5 million cap €790,00
- Balance due to RRMC €4,210,000

# Why? Phrase 1

“... the **total liability** of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# Not “net liability”

“... the **net liability** of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# Not “aggregate”

“... the “**aggregate for all claims no matter how arising**” of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# Why? Phrases 1 and 2

“... the **total liability** of **either Party to the other** under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# Why?

"the **total** liability of either party to the other"

“totting up, not a netting off”

"of **either party to the other...**"

“assumes the calculation of two separate liabilities, either party to the other, with each liability being the subject of the cap”

# The clause yet again

“... the **total liability** of **either Party to the other** under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

# Contractual interest: what would you do?

“... the total **liability** of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5 million”

## Court of Appeal says no

- Contrary to purpose - promote certainty
- Contrary to clauses 14.11 and 14.12, contractual interest "a substantial remedy for late payment" and "the sole remedy"
- Difference between liability for interest on late payments, and other liability
- Requires clear words - none present
- Positive disincentive to pay sums due when fell due, contrary to commercial common sense.

# What are your blue flashing lights? Starter for 10

- Single aggregate cap? Or multiple caps?
- All or some claims?
- Before or after set-off?
- Are the LADs included in the cap?
- Is (all or some) interest included in the cap?