



Caps on Liability

(and other limitations...!)

What are the golden rules for ensuring that caps on liability are (i) robust and (ii) enforceable?

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Overview

Capping Liability

- Why?
- What?
- How?

Limiting Liability - Why?

- Core part of overall risk allocation under the Contract
 - As party providing works / services?
 - As recipient of benefit of works / services?

In major construction contracts, the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mind-set determined to cut them down.

(Persimmon Homes Limited & Others –v- Ove Arup & Partners Limited (2017): Jackson LJ)

Limiting Liability - What?

- Limiting exposure to :
 - Financial consequences of breach
 - Certain heads of loss and/or damages
 - Time in which claims / proceedings can be brought

Limiting Liability - How?

Let me count the ways but

- Monetary caps
- Exclusion Clauses
- Time bars / Statute of Limitations
- Exclusive Remedies
- Entire Agreement
- Net Contribution
- No Greater Liability / Equivalent right of defence

Financial Limitations

- Overall monetary cap on liability
 - Contract Price
 - Percentage of Contract Price
 - €fixed amount
 - Level of insurances held
- Liquidated Damages for specified defaults
- Make sure you understand implications of any exclusions from the cap

Financial Limitations

(cont'd)

- Make sure you know what you are signing up to!
- Liability caps incorporated by reference?
 - *Mount Juliet Properties Limited –v- Melcarne Developments Limited & Ors [2013]*
 - Laffoy J. found that the standard terms of SE 9101 and ME 9101 (both standard forms of appointment issued by Engineers Ireland) formed the basis of the respective relationships between the applicant consultants and respondent developer
 - Both standard forms contain financial caps on liability
- No final contract concluded?
 - *Arcadis –v- Amec* (UK Court of Appeal, October 2018)
 - On-going negotiation of final agreement. Included in cap on liability.
 - Work commenced on foot of letter of intent.
 - First instance: none of terms in exchanges between parties incorporated.
 - Appeal: LOI subject to the “Terms and Conditions we are currently working under”.

Exclusion Clauses

- Will be scrutinised closely by the Courts
- Must be drafted carefully
- Is it part of the contract?
- Subject to common law rules
 - Ambiguity /*Contra Proferentem* (but..)
 - Must be brought to attention of the other party
- *James Elliott Construction Limited v Irish Asphalt Limited* (2014 Supreme Court)
 - a term seeking to limit liability included was within Defendant's Ts&Cs
 - noted on the back of delivery dockets as being "available on request"
 - limitation not upheld: no copy of Terms and Conditions provided and not brought to Elliott's attention
- Impact of fundamental breach?

Exclusion Clauses

(cont'd)

- Exclusion of Indirect /Consequential loss:
 - What does this actually mean?
 - *Hadley v Baxendale* (1854):
 - the loss that would fairly and reasonably be considered to arise from a breach in the usual course of things; or
 - the loss that, at the time of contracting, was within the reasonable contemplation of the parties as a not unlikely result of the breach
 - many more heads of loss are 'direct' than you might think
 - expressly call out the heads of loss you want to exclude from your liability
- Excluding negligence:
 - Use the term "negligence" or an appropriate synonym
 - a generic "all claims" clause will generally not suffice
 - recent developments?

Exclusion Clauses

(cont'd)

Example:

- *“16.2 Consequential Loss*
- *...in no event shall either Party be liable whether in contract, tort (including negligence) or otherwise in respect of any of the following losses or damages:*
 - *16.2.1 loss of profits or of contracts arising directly or indirectly;*
 - *16.2.2 loss of business or of revenues arising directly or indirectly;*
 - *16.2.3 any losses, damages, costs or expenses whatsoever to the extent that these are indirect or consequential or punitive.”*

Time Limitations

- Absent any express terms Statute of Limitations Act 1957 Section 11 applies:
 - Contract – 6 years from date the cause of action accrued (Date of breach)
 - Exception: If contract under seal – extended limitation period of 12 years
 - Tort – 6 years from date damage was manifest (NOT the date of actual discovery of the damage but date it is capable of being discovered)
 - NOTE: Brandley & WJB Developments Limited Supreme Court decision 15 November 2017 – date damage is ‘manifest’
- BUT parties can agree any limitation period for bringing claims
 - 6 v 12 years? Could be 3 years! Or 9 years!
 - Increasing use of time bars for claims under construction contracts
 - Notice as condition precedent to entitlement
 - FIDIC 2017

Time Limitations

(cont'd)

- *“17.4 No action or proceedings under or in respect of this Agreement shall be brought against the Contractor after:
(a) the expiry of 1 year from the date of Practical Completion of the Services or;
(b) where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project.”*
- *PWC clause 11.5.1
“If no final statement is given within the time required, the Employer shall be released from all liability to the Contractor under or in connection with the contract”*

Some other ways of limiting liability ...

- Net Contribution
 - Shifts risk of third party insolvency onto beneficiary
- Limit liability to reasonable costs of repair
 - *Star Polaris –v- HHIC Phil* (2016)

- No greater liability

The Contractor shall owe no duty or have any liability under this deed which is greater or of longer duration than that which it owes to the Employer under the Building Contract

- Equivalent rights of defence
 - Make sure you exclude any set off / counterclaim

The “golden rules” for effective caps on liability

- One size does NOT fit all
- Always consider identity of counterparty, nature of contract, and associated risks to determine what is appropriate / reasonable
- Be clear commercially on what you are trying to achieve
- Ensure contract reflects what is intended
- Consider role of insurance to cover risks
- Be creative and flexible

Thank you!

Questions