

STUART JORDAN* highlights the difficulties in making enforceable contract provisions for the limitation of liability in the UAE.

A LARGE proportion of all mainstream international construction contracts is devoted to limiting contractual liability. By this, I don't just mean the cap on overall contractor liability, which is an established feature of EPC (engineering, procurement, and construction) contracts – and increasingly seen in other areas of construction.

Looking at it more broadly, construction contracts are full of provisions that seek to exclude, limit, constrain or otherwise manage the ability of one party to hold the other party accountable. In other words, to exclude or manipulate the 'general law' contract rules of breach, causation and compensation. This is not just a question of "How much?" but of what type of damages might be recoverable, for how long a party might be on the hook to meet a claim and by what process a claim can be made. By this definition, all of the following provisions are, in some way, limits on liability:

- Liquidated damages for delay or underperformance;
- 'Exclusive Remedies' clauses;
- Time bars and mandatory process in making claims;
- Component/plant warranty periods;
- Exclusion of indirect and consequential losses; and
- Mutual indemnities and waivers.

All of these provisions have a commercial purpose: Parties' need to manage their exposure to potential liabilities carefully and in balance with their view of their benefit from the contract. The difficult question is always whether such provisions are legally effective – and this question is especially important in the Middle East.

All major trading jurisdictions have laws that seek to curtail contractual exclusions and limits on liability. There are obvious public policy grounds for this, whether to protect consumers or to prevent public harm. Even in the most permissive contracting environment, such as England, parties may not (for instance) exclude liability for personal injury or death. In these countries, public law interventions like this remain isolated and the contracts are written to accommodate them quite easily.

The more interesting question is whether contract provisions for limiting liability can

Little success in limiting liability

be at all effective in the Gulf jurisdictions. Here, the laws are codified and are more interventionist, albeit starting from the same common principle of freedom of parties to contract on whatever terms they are able to agree. We can examine a few examples under UAE law.

To begin with the general principle: Clauses excluding and limiting liability are not unlawful per se in the UAE unless they seek to cover acts of fraud or wilful misconduct, and subject to some statutory prohibitions.

The most general statutory exception is in UAE Civil Code Article 296, which voids any contract provision exempting a party from liability for "harmful acts". Contractual liability for criminal acts may also not be avoided. This means that provisions such as mutual indemnities and waivers need to be thought through, especially where the underlying act might be both illegal and harmful, such as an environmental breach.

Provisions for liquidated damages are also a good example, as they are ubiquitous in construction. There is an express right of parties, under Article 390 of the UAE Civil Code, to pre-fix damages. A court may, however, examine the outcome and may order that the allowable compensation shall be made equal to actual losses. This raises a question about the effectiveness of the contract provision: will it have any influence on the court's decision? It might, but there is nothing in the article or in the official guidance to it, which requires the court to have regard to the pre-agreed damages. Nor are there any limits on that discretion such as upward-only or downward-only adjustment. On the face of it, the parties can be returned to the 'general law' principles of compensation as though the liquidated damages provision was never agreed.

There is potentially a wider application to this, beyond liquidated damages. The principle of pre-fixing of damages might arguably be stretched to include both liability caps and provisions to exclude recovery of certain types of loss such as profits or indirect and consequential losses. The UAE law does allow for recovery of at least some types of such

losses: Article 292 states that compensation shall be assessed on the basis of the amount of harm suffered "together with loss of profit, provided that that is a natural result of the harmful act".

This law is just one expression of the strong Middle Eastern legal principle in favour of producing justice between the parties in terms of outcomes. All of the above-listed provisions can affect outcomes, and parties need to be aware that the efficacy of a contract is not judged only by its logic and clarity as written, but also through the way it has played out for the parties. Provisions limiting liability could also conceivably fall foul of the UAE law for contravening good faith, being unfair contract terms, for causing disproportionate harm to one party or being against custom and practice.

The UAE Civil Code Article 880 places a decennial (10-year) liability on both designers and contractors to pay compensation in the event of a partial or total collapse of a building, or where a defect threatens such collapse. Article 883 states that any contract provision purporting to exclude decennial liability shall be void.

In conclusion, there is nothing in the Civil Code which would automatically strike down a conventional limitation clause. However, we need to be aware of the practical limits to that statement – only some of which are summarised here.

Finally, a word about the consequences of potentially void provisions: Depending on the importance of a void provision in the purpose and operation of the contract, there may be wider consequences for the enforceability of the entire contract. Parties need to consider enforceability throughout the drafting process and not rely on the usual "severance" clause to isolate void provisions. Care and good advice are needed.

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