LIMITING LIABILTY FOR WILFUL DEFAULT UNDER ENGLISH LAW:
A CONSTRUCTION CONTRACT PERSPECTIVE

Parties to a commercial contract will often include a clause that limits their liability for damages, or excludes liability for certain types of damages altogether. Limitation or exemption clauses come in many different forms, but in the context of a construction contract they typically range from a cap on damages of a particular kind or on a party's aggregate liability, to an exclusion of certain types of loss – such as indirect, incidental, punitive, exemplary or consequential loss, or loss of profit, loss of use of the plant, loss of revenues, and so on.

Particularly in contracts where the liability for damages can mount up quickly when things go wrong, this can be an indispensable tool in managing contractual risk. At the same time, limitation clauses are a restriction, and sometimes a significant restriction, on the ability of the parties to hold one another to account for contractual breaches. In construction contracts, for example, there is often a cap on liquidated damages for delay: once the Contractor has exceeded this cap, the Employer may, depending on the contract terms, have more drastic remedies available (such as termination), but if it does not wish to use these, the pressure on the Contractor to progress the works efficiently can, in practice, diminish.

Another aspect which parties are sometimes hesitant to limit is liability for wilful or deliberate default. Such a limitation can leave room for a delinquent contracting party to cause substantial damage to its counterparty, while evading the financial consequences. For this reason, parties will often include a set of carve-outs in the limitation of liability clause. For example, in the FIDIC suite of contracts, the limitation of liability clauses provide that they do not "*limit liability in any case of fraud, gross negligence deliberate default or reckless misconduct by the defaulting Party*".

But what is the position where the carve-outs to the limitation clause are not clearly defined? Will the law step in to prevent a party from relying on a limitation of liability clause when it is guilty of particularly egregious behaviour?

The answer to this question will, in practice, depend on the principles set out in the applicable law. As a matter of French law, for example, a limitation clause cannot exclude responsibility for gross negligence, wilful default or fraud (a rough translation of *"faute lourde ou dolosive"*). In England and Wales, on the other hand, there is no such general principle. As a matter of public

policy, a party cannot limit liability for its own dishonesty or fraud: but aside from that, the parties have a broad liberty to tailor their limitation clause as they see fit.

For the English courts, the question of the extent of a limitation clause is thus a question of contractual interpretation.[1] The court or tribunal will first seek to determine the common intention of the parties, taken objectively: the question is not what the parties in fact understood or meant by the words used, but what these words would have conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties. The implications of this principle in cases where a party has been responsible for a wilful or deliberate breach of contract have been clarified in a recent case.

In *Mott Macdonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC), the High Court considered whether a clause excluding and limiting liability would apply to deliberate and wilful breaches taking the form of a refusal to perform. The Defendant in that case argued that the Claimant had positively and deliberately refused to perform its obligations and had done so in order to put improper pressure on the Defendant to pay sums which were not due. The Claimant denied the breaches, but argued that even if the Defendant was correct, its liability was nevertheless excluded because of a limitation clause in the contract.

The Court considered the suggestion, which had been made in a previous High Court decision[2], that there is a "*strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract*", which can only be rebutted by strong language. According to the Defendant, this meant that for an exemption clause to cover wilful default, it was necessary for the clause to say so in express terms.

The Court rejected both the idea that an exemption covering wilful default had necessarily to be stated in express terms, and the idea that there is a presumption against any such exemption. Instead, the Court affirmed the principle that limitation of liability clauses, including those purporting to exclude or limit liability for deliberate and repudiatory breaches, were to be construed by reference to the normal principles of contractual construction. There was no presumption against the exclusion of liability, and no particular form of words or level of language was required to achieve the effect of excluding liability.

The Court found that the wording of the exemption clause in that case did in fact operate to include breaches that were fundamental, deliberate or wilful, despite the fact that it did not say this in express terms. The Court, accordingly, found that the Claimant would be exempt from liability for a wilful breach of contract.

But where does this leave us with contract drafting? This depends on the outcome the drafter wants to achieve, and the parties will often have differing goals and expectations. The Contractor will probably prefer as comprehensive a limitation of liability as possible, extending to all manner of breaches of contract, including a wilful default. The Employer will most likely prefer the opposite. In any event, the drafter should reflect on, and be careful to state clearly, both the events for which liability is limited or excluded, and any carve-outs from the exemption clause.

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[1] *Suisse Atlantique Société d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361.

[2] *Internet Broadcasting Corporation Ltd & others v MAR LLC* [2009] EWHC 844 (Ch) at [33]