Clarity needed in liability cap clauses

STUART JORDAN* stresses the need to take care and seek advice in contract drafting, especially with regard to liability caps, highlighting the implications of overall liability as seen in a recent court case.

LIABILITY caps are prevalent in most high-value contracts in our industry. Apart from overall aggregate liability caps, we often have sub-caps on specific liabilities such as delay or performance liquidated damages.

Since these caps are so common and are agreed on a commercial basis, it is easy to forget about the words on the page – especially when it comes to the simplest cap: overall liability. How hard can it be to get that right? Well, a recent dispute reminds us again to take care in drafting these provisions:

A power generator (Drax Energy Solutions Ltd) entered into a master services agreement (the "Agreement") with a provider (Wipro Ltd) for software services.

The Agreement included this clause (cl.33.2) on liability:

Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months.

Drax was unhappy with the performance by Wipro (the 'Supplier', in the above clause). The parties fell out and Drax sought recovery of damages arising from several alleged breaches by the provider, including late and substandard work, also misrepresentation and in connection with termination. On its primary case, it had 16 claims against Wipro.

One initial question was the impact of the above clause on liability. In short, does it limit overall aggregate liability arising from any and all alleged breaches (or other basis of liability) or does it limit liability only in relation to each alleged breach (or other basis of liability)?

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This question mattered a lot. In one interpretation, of course favoured by Wipro (in which the clause states the aggregate cap for all liability accruing under or in connection with the contract), the Supplier's liability is limited to around $14 million; and in the other interpretation, argued by Drax (a per-claim cap), Wipro's maximum liability across an alleged 14 claims, was a long way above Drax's full stated losses of around $39 million.

We can see why the parties disagreed on how to interpret this clause. It begins with reference to Wipro's "total" liability, which suggests an aggregate approach. But the clause then references a period prior to "the claim" first arising. So, given that we know there can be multiple "claims" arising from any contract (as indeed there were in this action), this wording steers us to the idea that the parties were intending to limit the "total" liability in each such claim, but not the aggregate.

To put that another way: the "single aggregate cap" interpretation simply does not make sense when applied to a situation with multiple claims. By which claim is a single cap to be calculated? The first one? The last? An average of all of them?

As we see often, we have two interpretations; neither one is fully supported by the words and neither is so poor as to be discounted immediately. So, the choice is a question of balance between two imperfect interpretations.

This question came before the English Technology and Construction Court, which surveyed the relevant (English) law on interpretation of contracts, in particular the approach to ambiguous language, in order to reach the best meaning: the one most likely intended by the parties.

Other contract clauses helped in this. In particular, another liability limitation provision, cl.33.3:

The Supplier's total aggregate liability arising out of or in relation to this Agreement for any and all claims related to breach of any provision of clause 21 [data protection]… shall in no event exceed 200% of the Charges paid or payable in the preceding twelve months from the date the claim first arose or £20m (whichever is greater).

This clause is more clear in that it refers to total "*aggregate*" liability "*for any and all claims*" but then contains similar language to cl.33.2 in referring to a period prior to "the claim" first arising. So, this clause is also not perfect but the parties both agreed that this clause is a single aggregate liability cap.

This point assisted the court in deciding the original question in favour of Wipro. In short: if cl.33.3 was agreed to be an aggregate cap then the reference to "the claim" has to mean one of the claims – and the court decided that it is the first claim.

Taking that logic back into cl.33.2, it was more likely that the parties here also intended to refer to the *first* claim, in calculating a single cap.

The court acknowledged that both clauses were flawed.

As always, we need to take care and take advice in contract drafting. ■

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