

Keep your blunt instrument sharp! - Court of Appeal's interpretation of a liability cap

December 4, 2024 Amanda Larrington

PRACTICES International, Europe, Middle East and Africa, Shipping Dispute Resolution, Ship Construction and Conversion, Construction Dispute Resolution, Litigation, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution

In the recent case of *Topalsson GmbH v Rolls-Royce Motor Cars Limited*¹ the Court of Appeal considered the interplay between a contractual liability cap and set off, and its application to contractual interest.

Background

By a Services Agreement, Rolls-Royce Motor Cars Limited (“**RRMC**”) engaged Topalsson GmbH (“**Topalsson**”) to design and implement customer visualisation software for Rolls Royce. Following disputes and delays to the project, RRMC terminated the agreement, which Topalsson contended was a repudiatory breach that it accepted as bringing the agreement to an end. Topalsson issued proceedings against RRMC for unlawful termination and lost profits, which RRMC defended, and counterclaimed for their losses arising out of the termination.

For the purposes of the dispute, one of the key provisions of the agreement was clause 20, which provided that “*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 TCC Decision

In finding that Topalsson² was responsible for the delays and that RRMC validly terminated the agreement, Mrs. Justice O’Farrell, sitting in the TCC, awarded RRMC €8 million “*termination damages*”, which she proceeded to reduce by €800,000, being the amount that she found due to Topalsson by RRMC. Following this set-off, O’Farrell J then applied the contractual cap of €5 million to the net figure of €7.2 million and awarded damages to RRMC of €5 million (the full amount of the cap), plus contractual interest for late payments.

Topalsson’s Appeal

Topalsson appealed to the Court of Appeal on two grounds, claiming that the cap applied: (1) separately to both RRMC’s liability to Topalsson, and to Topalsson’s liability to RRMC; and (2) to the contractual interest.

Issue 1: The interplay between the cap and the set-off

Topalsson’s appeal was allowed on the first issue. The Court of Appeal agreed that the cap should apply separately to each party’s liability before any set off, and that O’Farrell J had incorrectly applied the cap *after* calculating the net financial position. The effect of applying the cap before the set off was to reduce Topalsson’s liability to RRMC to €4.2 million.

The court relied upon the words “*the total liability to either party to the other*” in clause 20, as contrary to the idea that the net position must be ascertained before the cap is applied, noting “*that those words suggest a totting up, not a netting off*”. If the intention of the parties had been to apply the cap once the net financial position between the two parties had been calculated, the court said that it would have been very easy for clause 20 to clearly say that. Instead, the court considered that the words positively indicated that the cap must be applied to Topalsson’s liability to RRMC and to RRMC’s liability to Topalsson separately, and that the words “*the total liability to either party to the other*” assumed the calculation of two separate liabilities, from either party to the other, with each liability being the subject of the cap. The court further noted that this construction of the correct sequencing of the set-off and the cap accords both with commercial common sense and the only existing authority on point³.

Issue 2: The interplay between the cap and interest

Topalsson’s appeal was dismissed on the second issue. Topalsson’s pleadings had never included a claim that interest fell within the cap and the court refused to allow them to amend so late and run a wholly different case on interest to the one they ran at trial. Topalsson’s failure to comply with previous orders was also directly relevant to the exercise of discretion that arose in respect of this issue.

However, the court did go onto consider the merits of this point in any event, and rejected that interest was subject to the cap because under the agreement the parties had expressly agreed that interest was the “*sole and substantial remedy*” for late payment, and prompt payments would be disincentivised if interest ceased to run once the cap was exhausted. Such an outcome would be contrary to commercial common sense as it would enable the breaching party to deny the innocent party their sole and substantial remedy for late payment. The effect was that RRMC remained entitled to the interest payments beyond the cap.

Conclusion

The Court of Appeal described a contractual cap as “*a blunt instrument*” which, whilst designed to promote certainty, is a potential denial of parties’ common law rights which frequently cuts across more detailed contractual provisions. So, what should parties consider when negotiating and drafting limits on liability? Unsurprisingly, parties should use clear and precise language and consider listing any liabilities which parties intend to be excluded from any cap and examine and test before signing, how the cap fits in alongside other provisions. Finally, if you do unfortunately find yourself litigating those clauses – comply with any court orders before you try and rely on court discretion. Appealing a lower court’s decision is tricky enough, without an “*unsatisfactory background*” hindering your prospects of success.

¹ [2024] EWCA Civ 1330

² [2023] EWHC 1765 (TCC)

³ [1969] The Tojo Maru (No.1)2 Lloyd’s Rep 193