Managing liabil-I.T. - the construction of limitation clauses in IT services contracts

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The judgment of Mr Justice Waksman in Drax Energy Solutions Limited v. Wipro Limited [2023] EWHC 1342 TCC considered a limitation of liability clause in a contract for the supply of software services.

The case serves to emphasise that parties to software supply agreements, and indeed contracting commercial parties generally, should ensure that such clauses are carefully drafted to avoid disputes about what they mean, and to ensure that the contract provides for what each party thinks it does.

Background

Wipro, an IT services provider, and Drax Energy Solutions, an energy supplier, entered a master services agreement for the provision of an IT system which was to include customer relationship management, billing and smart metering facilities for Drax (the "**Contract**"). These systems were to be developed and implemented by Wipro under 6 "statements of work" ("**SOW**") and additional works could be added by further statements of work. As such, the Contract was in a form often used for the delivery of complex software projects.

Over the following years, the project was not delivered on the expected timeframe and Drax claimed that it had to expend significant sums to remedy the deliverables produced by Wipro. Drax proceeded to terminate the agreement on 7 August 2019 for what it claimed were repudiatory breaches by Wipro.

Drax then commenced court proceedings in the Technology and Construction Court claiming for various sums, broken down into 4 categories. Quality claims (amounting to £9.8 million), delay claims: (amounting to £9.7 million), termination claims (amounting to £12 million) and misrepresentation claims (amounting to £31 million).

Clause 33.2

Wipro, in defending the claims, invoked a limitation of liability clause at clause 33.2 of the Contract, which stated that:

> "33.2 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."

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Two preliminary issues fell to be decided:

i. whether Clause 33.2 imposed a single aggregate cap on Wipro's liability or, rather, multiple caps applying to each of Drax's claims?
ii. if there were multiple caps (i.e. each claim was subject to a cap), what was meant by "claim"?

Did Clause 33.2 impose a single aggregate cap, or were there multiple caps with each claim subject to a cap?

The significance of this question was that, if clause 33.2 operated to impose a single aggregate cap then Wipro's liability would be limited to £11.5 million if Drax's claim arose in the first year (150% of the £7,671,118 of charges payable in the first 12 months) or much less if Drax's claim arose after that (as the charges under the SOWs were skewed towards the first year).

Waksman J first, in answering this question, determined that the ordinary rules of contractual construction (set out in Wood v Capita) were applicable but also had regard to the Supreme Court's decision in *Triple Point Technology v PTT* [2021] AC 1138 as to the interpretation of limitation of liability clauses. In *Triple Point* it was said that "*clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had" and that the court "starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from* [the]… *normal rights and obligations*".

On this basis, the court found that the first three lines of clause 33.2 "*strongly suggested*" that the clause imposed a single, aggregate cap. The words "total liability" and the lack of any wording stating that the cap was in respect of each claim supported this position. Indeed, the court found that if a specific sum (e.g. £10 million) had been stated as the maximum liability then the clause would "*clearly indicate a single cap*".

However, the clause did not state that a specific sum was the maximum liability, but instead defined it as 150% of the charges "*paid or payable in the preceding twelve months from the date <u>the claim</u> first arose*" (emphasis added) (an estimate of the first 12 months' charges was to be used if the claim arose in the first year).

If "*the claim*" was found to mean each claim that had arisen, then this would suggest that the limitation was on a per claim basis. However, the court found that there was force in Wipro's argument that, had this been the parties' intention then one would have expected language referring to when "*<u>each</u> claim*" rather than "*<u>the</u> claim*" arose.

Additionally, the Court found that Wipro's alternative construction that "*the claim first arose*" really meant "*the <u>first</u>* [of the various] *claims arose*" and that the timing of the first claim set the limit, but still operated as an aggregate cap for all claims, was also plausible. This argument was supported by the fact that clause 33.3 (which both parties agreed imposed a single, aggregate, liability cap) also defined the "*total aggregate liability.. for any and all claims"* limitation by reference to the date when "*the claim first arose*". Given that "*the claim*" in clause 33.3 therefore must have meant the first claim, it was likely that the same meaning was intended by the parties to have been given to the same words in clause 33.2.

While the Court acknowledged that in clause 33.3 more specific language was used to clarify that this clause imposed an aggregate cap , it did not believe that this was a significant factor pointing

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away from clause 33.2 *also* imposing an aggregate cap. On this, the Court refused to accept that "*total*" in clause 33.2 was merely superfluous boilerplate.

Drax had argued that this interpretation would lead to surprising results, particularly given that it was envisaged that future SOWs could be entered into, and that claims could therefore stretch far into the future. This would mean that these later, potentially significant value, SOWs would be "*stuck with*" a cap determined by reference to charges paid prior to an earlier claim. The Court, however, did not accept this. While this could be an issue in theory, it found that Drax would be unlikely to continue to issue additional SOWs in circumstances where the project had already proved to be problematic, particularly in circumstances where the Contract provided for partial termination and step in rights. While not explicitly mentioned by the Court, it may also have been considered that subsequent SOWs could have provided for a bespoke limitation amount, to accommodate their higher value.

There was also found to be no argument from *Triple Point*, and the comments therein regarding parties not easily giving away rights, which could assist Drax. There was a relatively large cap of £11.5 million which Wipro was subject to, which was approximately 1/3 of the value of Drax's largest claim. It was not the case that the limitation clause had effectively excluded Wipro's liability.

What would constitute "a claim"?

While it was not necessary to decide this, in light of the fact that the Court had found that the limitation clause operated on an aggregate basis, the Court rejected Drax's argument that "*claim*" should be equated with "*cause of action*". While cases had suggested this before, these were in entirely different contexts which were not useful for the present case.

Additionally, this would have led to an extremely high cap being imposed (if the cap was on a per claim basis) which would have made it devoid of virtually all utility. This consequence had caused O'Farrel J to reject a similar construction in the first instance decision in *Royal Devon and Exeter NHS Trust v ATOS* [2017] EWCA Civ 2196 (set out at [18]).

The Court also rejected Wipro's argument that "*claim*" merely meant "*liability*", so that there would only be one claim, finding that the two words mean something different.

In truth, the court found, there was a middle ground, construing "*claim*" in the context of clause 33.2. In the circumstances there was nothing wrong with Drax's categories (quality, delay, termination and misrepresentation) given that they did not overlap and corresponded to a "*common sense view of what claims are being made in this case*".

Analysis

Software supply and other IT-related contracts will typically contain limitation of liability clauses, because of the potentially significant losses that could be caused by a breach of contract and the need to ensure certainty as to the provider's potential exposure. *Drax v Winpro* offers a reminder to ensure that these clauses are drafted sufficiently clearly to ensure that the intended limitation is actually what is intended to be agreed. We regularly see contracts in which limitation clauses have been drafted in such a way that their intended operation is unclear, or subject to different interpretations. In this case, it may well have been that Drax believed that it was contracting on a quite different basis from that on which the Court determined it had ultimately contracted.

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It is therefore important to ensure that sufficient pointers are included to make it abundantly clear how the relevant clause is intended to work including (if the intention is to provide for an aggregate cap):

i. references to "*total aggregate liability*" and references to "*any and all claims*";
ii. defining the limiting sum as a definite figure, rather than by reference to fees prior to a particular event;
iii. if the value of the contract is uncertain, such that defining by reference to a particular event is unavoidable, it should be clarified that the relevant event in respect of which the amount of prior fees is to determine the liability cap is when the *first* claim arises – in order to head-off the possibility of the other party to the contract contending for an alternative construction.

In this way, given that performance issues will commonly arise under such contracts, claims can be promptly resolved and long and costly disputes leading to court proceedings avoided.

Postscript: *An application for permission to appeal the High Court's decision to the Court of Appeal was made in the summer, however the basis of the application has not been published and the application has not yet been determined.*

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