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Construction Risks: managing your exposure

Construction is a risky industry. Few construction projects escape time and cost over runs. Maintaining a safe work site requires constant vigilance and design errors can have disastrous consequences. If these risks manifest, one party to a construction contract may find themselves in breach of contract and liable to the other party for any loss and damage caused by the contractual breach.

They might also be liable under legislation or on other legal grounds.

It's no wonder construction contracts almost always include clauses seeking to manage the parties' total exposure to construction risks.

These types of clauses often take different forms. They might seek to do one or more of:

- exclude a party's potential liability for certain types or ***categories of costs, loss or damage***;
- limit or exclude a party's potential liability for certain types or ***categories of conduct,*** such as conduct that might be a contractual breach, negligence or a breach of the *Australian Consumer Law*; or
- limit the total amount of damages for which a party might be liable (***limits of liability***).

If these clauses are to be worth the ink required to print them, care must be taken crafting an effective clause.

Excluding Categories of Costs, Loss or Damage

Rarely is a construction contract signed without a clause excluding at least one party from liability for 'consequential loss' and/or 'indirect costs'. However, the meaning and scope of these types of clauses is determined '*by construing the clause according to its natural and ordinary meaning*'.[1] This means that 'consequential loss' under one contract or in respect of a particular breach can be very different (in the courts' eyes) from 'consequential loss' under a different contract or in respect of a different breach.

If contracting parties want to effectively exclude liability for specific types or categories of costs or losses, the excluded categories need to be very clearly identified in the contract.[2] Catch all terms such as 'consequential loss' or 'indirect costs' are rarely sufficient. Much more precise identification of the excluded types of damages will be required, which might include:

1. property damage;
2. personal injury;
3. lost profits, lost sales, lost revenue or other lost opportunities;
4. head office overheads;
5. defect rectification costs, or particular types of costs that might be involved in defect rectification, such as plant and labour hire, but not materials;
6. the cost of idle plant, equipment or staff while a contractual breach is rectified; or
7. the cost of hiring / renting alternative equipment or accommodation while rectification works are completed.

When negotiating contract terms, discipline is required to consider and identify the types of losses that might follow different possible contractual breaches so that any losses to be excluded can be correctly and sufficiently identified in the contract terms.

Excluding Categories of Conduct

Many contracts include terms that either limit or exclude a party's liability for certain conduct, such as certain contractual breaches, negligence or statutory breaches, including breaches of the *Australian Consumer Law* by engaging in misleading and deceptive conduct.[3]

However, even the most carefully drafted clause is unlikely to limit a party's liability for engaging in conduct that is misleading or deceptive because *Australian Consumer Law* cannot be contracted out of[4].

By way of example, in *Clark Equipment Australia Ltd v Covcat Pty Ltd,**[5]* Sheppard J said that the statutory remedy that is available to a party who suffers loss and damage because of misleading or deceptive "*will not be lost whatever the parties may provide in their agreement*".

Similarly, in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd,**[6]* the Full Federal Court said that parties cannot use exclusion clauses to "*oust the effect of the [statutory remedy] or deprive an applicant of [those] remedies*".

That this longstanding approach is entrenched was recently confirmed by the New South Wales Court of Appeal,[7] where a disclaimer clause in a property valuer's report (of itself) did not save the valuer from liability for misleading and deceptive conduct.

Limits of Liability

Sometimes, parties are willing to accept some liability for certain types of conduct, but seek to limit the value of their potential exposure (monetary limits) or the period within which they might be liable (temporal limits[8]).

However, even these types of clauses may not be enforced in certain circumstances: particularly if the clause seeks to limit a party's potential liability under the *Australian Consumer Law*.[9] Several courts have confirmed[10] that monetary limits of liability will not be enforced if they are inconsistent with the *Australian Consumer Law*.[11]

While certain decisions from the NSW Supreme Court suggested that temporal or monetary contractual limits of liability might be enforced to limit claims under the *Australian Consumer Law*,[12] the Supreme Court of Victoria has expressed a more recent contrary views.[13]

Until the High Court resolves the apparent inconsistencies between these court decisions, it is not clear whether – or when – these types of clauses might be effective.

Which proactive steps will be effective?

Allocate time and people to think about your potential exposure. What will you / won't you accept?

Ensure that your contract's terms identify the risks, losses and damages for which you will not accept liability as clearly and precisely as possible.

Parties wishing to limit their liability under the *Australian Consumer Law* should consider a tiered approach, with alternative and reasonable temporal and monetary limits of liability, drafted in crystal clear terms. They also need to consider the very real risk that any such clause will not be enforced by a court, and factor that risk into their overall commercial assessment of the deal.

[1] see Darlington Futures v Delco Aust PtyLtd (1986)161 CLR 500 at 510 (Mason, Wilson, Brennan, Deane and Dawson JJ)

[2] *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* [No 2] [2013] WASC 356

[3] Sections 18 and 236 of the *Australian Consumer Law* (ACL)

[4] *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83. See also *Ripani v Century Legend Pty Ltd* [2022] FCA 242 at [81]

[5] (1987) 71 ALR 367 at 371

[6] (1988) 79 ALR 83 at 98

[7] *CBRE (V) Pty Ltd v City Pacific Ltd (in liq)* [2022] NSWCA 54. See also Century Legend Pty Ltd v Ripani [2022]

FCAFC 242 at [205] – [215]

[8] which are typically achieved by imposing strict time limits within which potential claims must be notified or pursued.

[9] see *Omega Air Inc v CAE Australia Pty Ltd* [2015] NSWSC 802

[10] For example, see Wallis v Downard-Pickford (North Qld) Pty Ltd (1994) 179 CLR 388

[11] or its predecessor, the *Trade Practices Act*

[12] see Owners Strata Plan 62930 v Kell & Rigby Pty Ltd [2009] NSWSC 1342; Lane Cove Council v Michael Davies & Associates [2012] NSWSC 727; Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd [2012] NSWSC 1122

[13] See *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* (2018) 56 VR 557 and *Cargill Australia Ltd v Viterra Malt Pty Ltd* (No 28) [2022] VSC 13