

## BRIEFING NOTE

**Limitation of Liability Clauses****- Are Such Clauses Effective in Limiting Liability?**

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**Introduction**

Limitation of liability clauses are quite common in contracts. Often, commercial parties are of the view that once they have incorporated such a clause (stipulating, for e.g., that their liability is limited to only the cost of the goods or services provided), they have sufficiently protected their business exposure should they be found liable to the other party.

Or have they? Are limitation of liability clauses really as effective at limiting liability as believed to be? As lawyers, we tend to provide the infuriating response of *it depends*. Indeed, it really depends. Such clauses are not as fool proof as thought. Below, we explain why.

**Statutory Restrictions**

Contracts in Singapore are subject to the Unfair Contract Terms Act 1977 (the “UCTA”). For contracts with limitation of liability clauses, Section 11(4) of the UCTA is relevant:

*“Where by reference to a contract term or notice a person seeks to restrict liability to a specific sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to section (2) in the case of contract terms) to –*

- (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and*
- (b) how fair it was open to him to cover himself by insurance.*

In simple terms, whilst commercial parties are entitled to rely on limitation of liability clauses, such reliance is subject to those clauses being ‘reasonable’. ‘Reasonable’ is determined by the Court with reference to a whole host of factors (including whether parties are of equal bargaining positions, whether the counterparty could contract with someone else who would not impose a similar clause, whether the counterparty knew or reasonably should have known of that clause, whether the counterparty could have self-insured or purchased insurance, etc).

**Case Studies**

There is no absolute figure as to what amount would be ‘reasonable’ and what amount would not be so. In *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] 2 SLR(R) 583, it was decided that the question whether a contractual term satisfied the requirement of reasonableness depended on the facts of each case. In other words, a limitation of liability clause which had been found ‘reasonable’ in one case may not be found so in another case.

In *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2002] SGHC 286, the Singapore High Court had to consider whether the limitation of liability clause was 'reasonable'. Considering: (a) the widespread nature of limitation of liability clauses in the transport industry; (b) the limit in this particular instance was high by industry standards; (c) the option for the counterparty to pay more to increase the limit; and (d) the option for the counterparty to procure cargo insurance at a cheaper cost compared to the transport company's liability insurance, the High Court decided that the limitation of liability clause was 'reasonable'. Yet, in *Holland Leedon Pte Ltd (in liquidation) v C & P Transport Pte Ltd* [2013] SGHC 281, the limitation of liability clause was held to be 'unreasonable' by the Singapore High Court, exposing the party relying on that clause to the full extent of damages.

Aside from the transport industry, limitation of liability clauses are also commonplace in the construction industry as well. For example, it is not surprising to have architects limiting their liability to the amount of professional fees. Note, however, that this may be deemed 'unreasonable' if the cap is not a fair estimation of potential damages and the architect could have procured adequate professional indemnity insurance cost-effectively.

### **Commentary**

In circumstances where a limitation of liability clause is deemed 'unreasonable', the Singapore Courts will simply proceed on the basis that the clause does not exist (i.e., there is no limit of liability clause). The Singapore Courts will not re-write the offending clause to make it 'reasonable'. This means that if commercial parties insert 'unreasonable' limitation of liability clauses into contracts, these clauses are effectively useless at limiting exposure because parties will be exposed to the full extent of liability.

Whether you are in the shoes of the drafter (i.e., inserting the limitation of liability clause) or the shoes of the counterparty (i.e., frustrated over the low liability cap), the first step is to determine whether the clause is 'reasonable'. As dispute resolution specialists, our team members are well equipped to assist in this regard. To find out how we can help, please feel free to reach out to any member of our team.

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