Sub-Clause 1.15: Limitation of Liability

Written by George Rosenberg[1]

The substance of this provision was already in Sub-Clause 17.6 in the 1999 edition and has now been separated from other provisions dealing with Risk and Responsibility.

As before it generally exempts parties from liability to the other for *"loss of use of any Works, loss of profit, loss of any contract or any indirect or consequential loss"* except in respect of a list of identified Sub-Clauses. The list has been extended and several of the changes are very significant. It also limits liability to certain levels in some circumstances. Finally, it excludes parties from cover by the exemption and limits in certain circumstances. All three elements have changed.

Two additions are particularly noteworthy. The interaction between this Sub-Clause and Sub-Clause 8.8 insofar as it relates to the liability-limiting effect of Delay Damages is confusing and it is very unclear what the final result should be taken to mean. There is also a similar lack of clarity in the way in which the Sub-Clause applies the exemption to Sub-Clause 13.3.1(c) (proposals for valuation of variations).

Exceptions to exemption from liability to the other party for loss of use of any Works, loss of profit, loss of any contract or any indirect or consequential loss

The list of exceptions to the exemptions from liability in the 1999 edition extended to only 2 items (Payment on Termination and Indemnities). It is now extended to some additional items.

It should be noted that the wording of the Sub-Clause goes further than merely to negate the exemption from of liability for these items. It says that *"neither party shall be liable for loss of profit"* etc. … *"other than under…"* . Thus, if the party can show such loss, it confers an express right to claim such loss. Normal rules of the underlying law of the contract (unless mandatory) are thus excluded. Where the Sub-Clause to which the exception applies clearly sets out the loss or damage which this exclusion from exemption refers to this does not raise an issue. However, there are issues in respect of the cross reference to Sub-Clauses 8.8 and 13.3.1(c).

The new items are:

Sub-Clause 8.8 [*Delay Damages*]

Sub Clause 8.8 already states that *"this Sub-Clause shall not limit the Contractor's liability for Delay Damages in any case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor."* Thus, if the Contractor is guilty of one these types of misbehaviour it will not be able to take advantage of the cap on Delay Damages. The lifting of the limitation in the Sub-Clause partly duplicates the last paragraph of Sub-Clause 1.15. This paragraph also lifts the limit in such circumstances but goes further in allowing the general limit of liability under the Contract to be exceeded.

As noted above Sub-Clause 1.15 is divided into two parts. The first lifts the exclusion of liability for loss of profit etc. The second lifts the limits of liability under the Contract.

The reference to Sub-Clause 8.8 in Sub-Clause 1.15 is under the first part and thus is intended to remove the exemption from liability for losses of profit when applying Delay Damages. Since Sub-Clause 8.8 provides that Delay Damages are the only damages due from the Contractor for failure to meet the Completion Date, except in the event of Termination Under Sub-Clause 15.2 [*Termination for Contractor's Default*] it would therefore seem that the exclusion is intended to prevent arguments

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that Delay Damages incorporate loss of profits and to allow for the possibility of loss of profit claims in the event that the Contractor is terminated for cause. If the latter were the case one would have thought that Sub-Clause 1.15 would include Sub-Clause 15.2 (or more correctly Sub-Clause 15.4) in the list. There may, however be an argument that an Employer is now entitled to claim loss of profit following termination for cause.

Sub-paragraph (c) of Sub-Clause 13.3.1 [*Variation by Instruction*]

13.3.1(c) is the provision which requires the Contractor, when carrying out a Variation instruction, to provide the Engineer with a proposal for adjustment of the Contract Price. It specifically sets out the right to include any costs resulting from the omission of any work. In particular it allows the Contractor to claim loss of profit, and other losses or damage it suffers, when it has agreed that work should be omitted to be carried out by others.

A simple reading would say that the exception to the normal exclusion is only intended to apply to the Contractor's rights following an agreed omission in circumstances where the omission was ordered so that the work could be carried out by others. However, the exception is more widely expressed. It does not seem possible to read it down to prevent the Contractor claiming for loss of profit etc. as part of the costs it incurs in the case of any omission.

However Sub-Clause 13.3.1(c) does not only cover omissions. It also covers all adjustments to the Contract Price following variations. It would thus seem arguable that the Contractor is entitled to include loss of profit etc. in all its Variation valuation proposals if there is a basis for it in the circumstances. For example, a very substantial Variation, which the Contractor is required to carry out on the basis of rates which cause it a loss, or which force it to use resources which might have been more profitably employed elsewhere, might open the door to a claim for the loss of profit etc.

It is doubtful that it was FIDIC's intention to open the door to such arguments. However, the reading of the Contract which leads to this conclusion is a reasonable one and it is altogether possible that a tribunal confronted with the issue will reach this conclusion.

See comment on the last paragraph of 1.15 below for the consequences as regards non-consensual omissions intended to allow the Employer to have the work completed by others.

Sub-Clause 15.7 [*Payment after Termination for Employer's Convenience*]

Sub-Clause 15.6 in the new edition is a significant departure from the 1999 edition in that it gives the Contractor entitlement to claim "*loss of profit and other losses and damages suffered by the Contractor as a result of this termination*". Sub-Clause 15.7 only refers to the obligation to pay the amount certified under Sub-Clause 15.6. The exception ought to have referred to Sub-Clause 15.6, though the intention is obvious. It is notable that 15.6 only refers to "*loss of profit and other losses and damages*" whereas 1.15 allows claims for "*loss of profit, loss of any contract or any indirect or consequential loss*". Thus, Sub-Clause 1.15 appears to have the effect of expanding the categories of loss which might have been claimable on a reading of Sub-Clause 15.6 standing alone.

Sub-Clause 16.4 [*Payment after Termination by Contractor*]

Sub-Clause 16.4 already includes a right to payment of loss of profit although it also refers only to "*loss of profit or other losses or damages*". so, as with Sub-Clause 15.7, there may be scope for a wider claim.

Sub-Clause 17.3 [*Intellectual and Industrial Property Rights*]

Under Sub-Clause 17.3 the Employer and the Contractor each indemnify the other against any claims which may arise where the other faces a

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claim resulting from a breach of intellectual or industrial property rights caused by the other. The purpose of this exception is presumably to overcome any suggestion that the costs the indemnified party faces are excluded as indirect or consequential.

Limit on Total Liability

This provision was in the 1999 edition and is to the same effect.

Exclusion from Limits on Liability

This provision prevents the parties escaping from liability in the case of fraud, gross negligence, deliberate default or reckless misconduct. The term "*gross negligence*" has been added to the 2017 edition version.

This may have substantially different results depending on which Law applies to the contract.

In a very interesting treatment of the subject recently presented to the Society for Construction law in London[2] the authors quoted a passage from a Court of Appeal case *Armitage v Nurse*[3] as follows:

"*It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud bad faith and wilful misconduct on the other … we regard the difference between negligence and gross negligence as merely one of degree … civil systems draw the line in a different place. The doctrine is culpa lata dolo aequiparatur [gross negligence is equal to fraud]; and although the maxim itself is not Roman the principle is classical. There is no room for the maxim in the common law.*" [4]

However as far as the English Law is concerned, the Courts will recognise an express contractual agreement that gross negligence (rather than mere negligence) will attract liability.

The distinction between ordinary and gross negligence is not easy to define in abstract terms and the authors of the SCL paper after considering numerous authorities have suggested the following set of tests.

"52. However, where the term is not defined (which seems to be more usual), then we suggest the authorities identify the following seven factors as relevant to determining whether "gross" negligence has occurred:

i. *Was the nature of the error serious, involving a* ***high degree of risk****?*

ii. *Was the conduct undertaken with an appreciationof the risks, but with a* ***blatant disregard of or indifference*** *to an* ***obvious*** *risk?*

iii. *That disregard or indifference need not be conscious, or deliberate; it is sufficient that the reasonably competent professional in the defendant's position would have considered the action or inaction to amount to a blatant disregard of or indifference to the relevant risk.* ***Conscious disregard/recklessness will however be a likely aggravating factor****, and more likely to led to a finding of gross negligence.*

iv. *Were* ***the potential consequences of the action or inaction serious****? The more serious the consequences, the more likely the negligence will be gross.*

v. *Had the same or similar consequences arisen out of the same or similar action or*

[2] Exclusions from Immunity: Gross Negligence and Wilful Misconduct, James Pickavance and James Bowling SCL October 2017

[3] [1997] EWCA Civ 1279, [1997] 2 All ER 705, [1997] 3 WLR 1046

[4] Armitage v Nurse Note 14 [1997] 3 WLR 1046 para [254]

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inaction before? In other words, ***was it a repeat error****?*

vi. *How* ***likely was it that the consequence would occur****? Again, the more objectively likely it was to occur, the more likely a finding of gross negligence.*

vii. ***What precautions were taken (if any) to prevent the consequence occurring****? The more obvious and modest the steps, and the greater and more likely the risk, the more likely it is that the conduct in question will veer towards gross negligence."*

Thus the test to be applied under common law systems before deciding whether a party can escape from liability differs considerably from that under civil systems. In the former a high degree of negligence will make a party liable but in the latter only fraud will enable them to escape. It may well be that some common law and civil systems apply a different test and parties will need to take local legal advice before deciding what the limitation on exclusion means in practice.[5]

Quite apart from this surprising change it should be noted that the exclusion probably does not prevent a Contractor faced with a non-consensual omission by the Engineer in order to allow the Employer to have the works carried out by others from claiming loss of profit. Such an omission is forbidden under Sub-Clause 13.1 unless the Contractor agrees. It would therefore be a breach of contract on the Employer's part and any loss recognised in damages. Since the breach would be deliberate the Employer would not be entitled to protection from a claim for loss of profit.

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[5] In the Guidance included in the 2017 edition FIDIC notes that "*under a number of legal systems (notably in some common law jurisdictions) the term 'gross negligence' has no clear definition and, as such, is often avoided in legal documents*." In the general commentary on the definitions it is suggested that a typical additional definition might be *"Gross Negligence means any act or omission of a party which is contrary to the most elementary rules of diligence which a conscientious employer or contractor would have observed in similar circumstances, and /or which show serious reckless disregard for the consequences of such an act or omission. It involves materially more want of care than mere inadvertence or simple negligence."* Although one might wonder what the difference is between "*serious reckless disregard*" and "*reckless disregard*", it would seem to be sensible to include a definition of what is meant by *"gross negligence*" and this definition has the benefit of improving the level of certainty.

[6] The contents of this article should not be treated as legal advice. Please contact the lawyers at Corbett & Co before acting on or relying upon anything stated in this article.

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