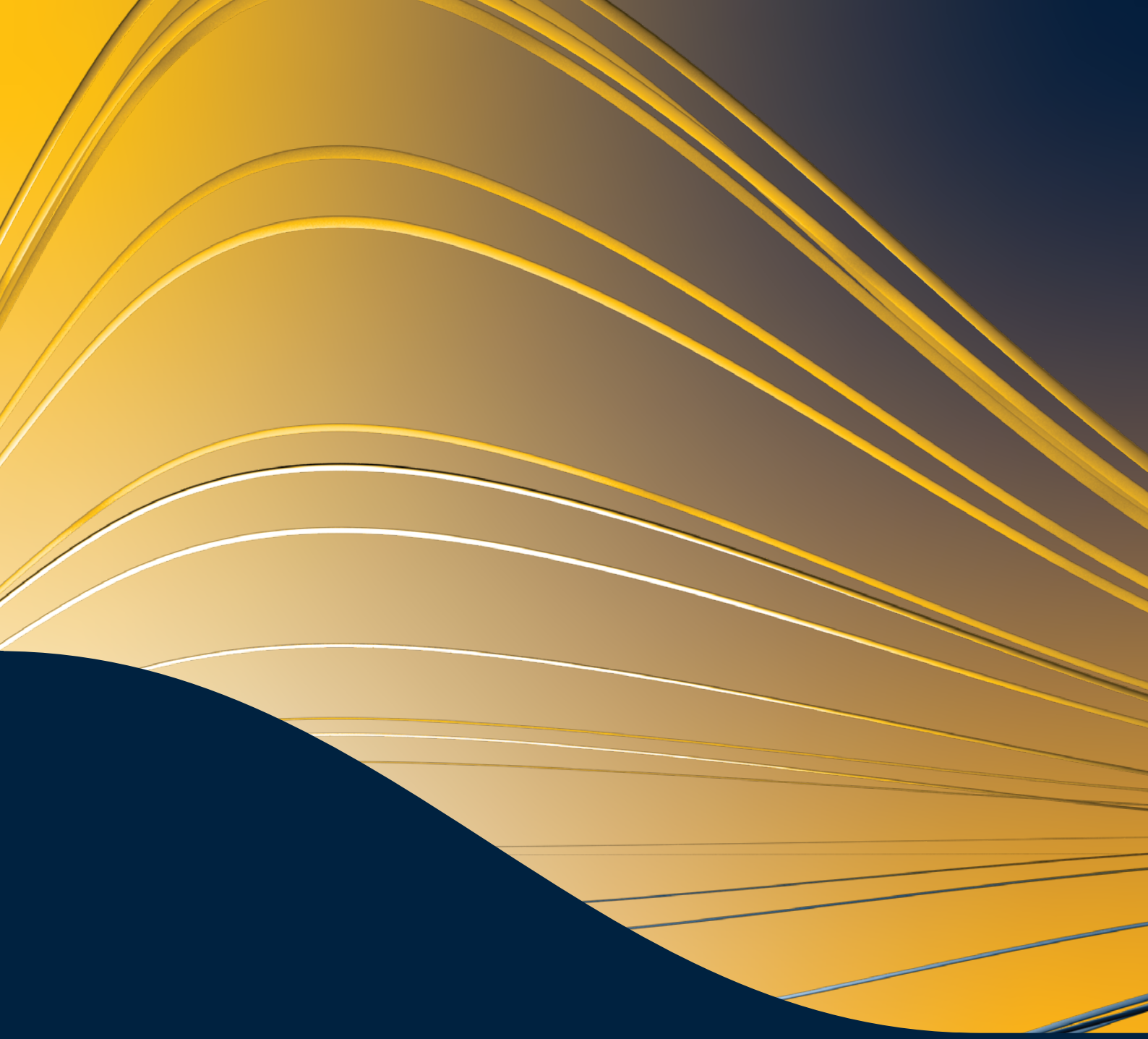

CONSIDERING THE LATEST CASE LAW

Unpacking complex liability clauses

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DLA PIPER

Introduction

It is relatively rare that a dispute between a customer and a supplier relating to a digital transformation project results in litigation which goes to a full trial and even rarer that it goes on to the Court of Appeal or beyond. When these disputes get that far, they are rich and fertile ground for the determination of a variety of issues, as well as providing a reminder of how those sorts of projects can go spectacularly wrong.

Whilst the reasons projects fail are interesting – if rarely that novel – they are generally divorced from the contract terms. Indeed, it is often a divergence between the drafting and the operation of the project which contributes to the problems the parties experience and the complexity of the dispute that ensues.

In recent cases, there have been legal issues debated which also apply to other types of commercial contracts. In this White Paper, we focus on issues which fall under the umbrella of 'liability' and examine how the courts have grappled with them, then identify key learning points for lawyers involved in drafting and negotiating these complex contracts.

What is becoming increasingly apparent from these judgments and the way in which the judiciary are applying rules on construction, is that precise drafting is key. Courts will focus on the exact wording on the page, so clarity and accuracy are essential. Relying on a subjective or common understanding between the parties can lead to ambiguity, litigation and unexpected outcomes.

Liability caps

Given that "all roads lead to Rome" in terms of limitation of liability clauses (as it is usually one of the first provisions to be considered in any dispute), it is perhaps surprising that these clauses are often not drafted as well as they could be. This can lead to debate as to what may be the limits on a party's potential recovery.

The Royal Devon case

Warning of one of the key drafting issues was given by the case of *The Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Limited*[1].

In this case, Atos had agreed to provide information management services to Royal Devon under a five-year contract. Royal Devon was unhappy with the performance of the system provided by Atos and terminated the contract, seeking damages for wasted expenditure consisting of the cost of licences, the purchase of hardware and software and the procurement of IT services.

Atos denied liability and relied on contractual liability caps and exclusions clauses. The court was asked to determine (on a preliminary basis) the construction of clauses regarding recoverable damages. The key liability limitation clause was drafted as follows (emphasis added):

*"9.2 The **aggregate** liability of the Contractor…shall not exceed:*

9.2.1 for any claim arising in the first 12 months of the term of the Contract, the Total Contract Price….or

*9.2.2 for claims arising after the first 12 months of the Contact, the total Contract Charges paid in the **12 months prior to the date of that claim**"*

The question arose as to whether this clause created:

- an aggregate cap of 12 months' worth of the charges that applied to ALL claims under it (at least after the first 12-month period of the contract), or
- a 'per claim' cap, i.e. that each claim would look backwards by 12 months to assess the amount of the charges paid in that period, and to use that figure as the cap for that claim.

The principal tension lay between the word "*aggregate*" at the start, suggestive of one cap, and the bold wording above in clause 9.2.2, which appears to make more sense in the context of a separate 'per claim' cap.

This is a major difference and a significant issue. Given the complexity of many technology and/or outsourcing project disputes, it is often possible for a claimant to break up its claim into multiple different causes of action, and then assert that different caps apply to each one individually.

This is important given most claims settle early, so an increase in the amount claimed may increase the amount of any agreed settlement.

In the *Royal Devon* case, the Court of Appeal in fact came down in favour of interpreting the clause as creating two caps: one for the first 12 months of the term, and the other to cover all subsequent claims. This approach gives primacy to the introductory wording of "*aggregate liability*" to avoid making a nonsense of that wording, particularly considering the words "*for claims*" at the beginning of clause 9.2.2.

[1] (2017) EWCA Civ 2196

The Drax case

Roll forward to 2023 and the case of *Drax Energy Solutions Limited v Wipro Limited*[2].

This case relates to Wipro's provision of software services to Drax, the energy supplier. The new system to be provided by Wipro was based on Oracle software and was intended to include CRM, billing and smart metering facilities for Drax's business. Services included the design, build, test and implementation of the software (including a five-year software licence), alongside management and maintenance services.

The project was unsuccessful: milestones were missed, reset and missed again. That much was not in dispute, although the reasons for the failure of the project were inevitably the subject of much argument. Drax alleged that it had to spend significant sums to make Wipro's deliverables acceptable. Ultimately, Drax terminated the contract for what it claimed were Wipro's repudiatory breaches.

In February 2023, there was a trial of preliminary issues, primarily concerning the proper construction of the limitation of liability clause.

The relevant liability clause was somewhat lengthier than in the *Royal Devon* case, but a similar problem arose. The relevant provisions read as follows (emphasis added):

"33.2 Subject to clauses 33.1, 33.2, 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 12 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.*

33.3 The Supplier's ***total aggregate liability*** *arising out of or in relation to this Agreement* ***for any and all claims*** *related to breach of any provision of clause 21 (NB – this was the data protection clause) whether arising in contract (including under an indemnity), tort (including negligence), breach of statutory duty, laws or otherwise, shall in no event exceed 200% of the Charges paid or payable* ***in the preceding 12 months from the date the claim first arose*** *or GBP20 million (whichever is the greater)"*

The similarity to the drafting in the *Royal Devon* example is evident, leading to the same debate as to whether the liability cap produced a 'per claim' cap or a single aggregate cap.

Drax asserted multiple different sub-claims against Wipro, in particular, relating to quality, delay and termination and leading to a total claim value of GBP31.7 million, whereas on Wipro's interpretation the application of a single cap would effectively reduce the value of the claim to GBP11.5 million..... so, a not insignificant difference!

Drax relied upon the lack of any mention in clause 33.2 of the word "*aggregate*" and argued that the reference to the 12 months prior to the date when the claim first arose would not make good sense in the context of a single cap to cover multiple claims. Wipro drew attention to the words "*total liability*" in the opening line of that clause, arguing that this should be read as being equivalent to "*aggregate*" even though it was different to the language used in the following clause.

The court came down in favour of Wipro's argument that there was a single limitation of liability cap. It was influenced by the fact that the parties could have used alternative and clearer text to impose a 'per claim' cap if this was the intention (i.e. by stating expressly that the cap would apply to each claim or would operate on a 'per claim' basis) and accordingly significance should be given to the fact that they had chosen not to do so. Additionally, although the wording in clause 33.3 in relation to data protection claims was different (and was accepted by both parties to create a single aggregate cap), it was considered only to provide guidance as to the intention of the parties' vis-a-vis the liability regime as a whole.

[2] (2023) EWHC 1342 (TCC)

The TCS case

A similar approach has been taken by the court most recently in *Tata Consultancy Services Limited* ("**TCS**") *v Disclosure and Barring Service* ("**DBS**")[3].

DBS had engaged TCS to take over manually intensive BAU Disclosure and Barring processes and, in parallel, build a new system to modernise and digitise DBS' processes.

The modernisation project was not a success. Delays were experienced and milestones revised on several occasions, with DBS alleging serious defects with functionality. Each party blamed the other for the delays. TCS blamed DBS for mis-managing its third-party IT hosting provider and its abandonment of part of the modernisation project, whilst DBS blamed TCS' software as not being ready for deployment.

This resulted in claims and counterclaims going in both directions, each in excess of GBP100 million. Therefore, it should come as no surprise that the limitation of liability clause was the subject of scrutiny and debate.

The relevant part of the liability clause bore an unfortunate resemblance to the language in both of the examples mentioned above, and it read as follows (emphasis added):

"52.2 Subject to clause 52.1, the Contractor's ***total aggregate liability****:*

52.2.1 in respect of the indemnity in clauses 17.2 (Tax), 29 (Employment Indemnity) and 51 (IPR Indemnity), shall be unlimited:

52.2.2 for all loss of or damage to the Authority Premises, property or assets (including technical infrastructure, assets or equipment but excluding any loss or damage to the Authority's Data or any other data) of the Authority caused by the Contractors Default shall in no event exceed GBP5 million (subject to indexation);

52.2.3 for all loss, destruction, corruption, degradation, inaccuracy or damage to the Authority Data caused by the Contractor's Default shall be GBP5 million (subject to indexation);

52.2.4 in respect of Services Credits shall be limited in each Service Year to 10% of the Charges in that Year;

52.2.5 in respect of Delay Payments shall be limited to 10% of the implementation Charges;

52.2.6 in respect of all other claims, losses or damages, shall in no event exceed GBP10 million (subject to indexation) or, if greater, an amount equivalent to 100% of the Charges ***paid under this Agreement during the 12 month period immediately preceding the date of the event giving rise to the claim under consideration*** *less in all circumstances any amounts previously paid (as at the date of satisfaction of such liability) by the Contractor to the Authority in satisfaction of any liability under this Agreement"*

DBS argued that the reference at the beginning of the clause to "*total aggregate liability*" should be read as applying to the combination of the different caps set out in the various sub-clauses, and that clause 52.2.6 should then in effect be a 'per claim' cap enabling DBS to claim a minimum of GBP10 million for each of its separate heads of claim (thereby allowing a total claim from DBS of just over GBP108 million). DBS pointed out that to conclude otherwise would result in a later claim being capped by reference to the level of Charges that may have been paid several years earlier, which would be contrary to a regime that seeks to create a link between Charges paid and liability.

Not surprisingly, TCS took the view that there was a single cap under clause 52.2.6 applicable to all claims made against it. It relied on the fact that clause 52.2 and a similar one capping DBS' liability were both prefaced with the "*total aggregate liability*" wording and that the reference to the deduction of "*any amounts previously paid*" suggested an intention to create one cap and not several. TCS also relied on what was determined in the *Royal Devon* and *Drax* cases based on the interpretation of similar wording.

The judge commented that the liability clause was "*far from a model of clarity*" but came down in favour of TCS' interpretation, for four reasons:

(a) The words "*aggregate liability…in respect of all other claims, losses or damages…*" was to his mind a "*clear indicator*" that there was to be a single total cap, regardless of the number of claims (albeit one could readily see how another judge might have drawn the opposite conclusion);

(b) The simple language of 'per claim' could have been used, but was not (although again this might not have been taken by a different judge to alter the interpretation of the language which **had** been used);

(c) The 'netting off' language at the end of the clause demonstrated that the capped sums were not intended to be additive; and

(d) The reference to the date the "*first*" claim was made was in line with the language used in the *Drax* case, and hence supported the same conclusion.

The judge went on to suggest that the cap might be set by reference to the Charges in the 12 months prior to the first claim, but in the event of a later claim it may be set by reference to the Charges in the 12 months prior to that later claim, which may have the effect of increasing the aggregate cap. This only further underlines the confusion and uncertainty caused by the drafting of this clause.

[3] (2024) EWHC 1185 (TCC). Two issues of the first instance judgment were appealed (see (2025) EWCA Civ 380): whether a condition precedent existed relating to a claim for delay payments and the calculation method of some charges, but these do not affect the points covered in this paper.

The judge did not accept that clause 52.2.6 provided an overriding cap impacted by any claims capped by the earlier sub-clauses, which in theory would have had the effect of potentially further reducing DBS' claims. He pointed out that, in view of his findings on liability and quantum, the question of whether there was one cap or multiple caps applying to DBS' claims was academic.

We can take at least three points from these cases:

1. If the intention is to create a 'per claim' cap, then it is best to say so! Avoid overly complex structures and language. A clause which says that the liability cap will apply in relation to each *separate or individual* claim will clarify the intent. However, one would still need to deal with (a) whether 'claim' is the same, in effect, as cause of action, and (b) whether linked or continuing claims should be treated as being part of the same original claim for the purposes of applying the cap.
2. If one wants to create an aggregate cap, set by reference to the charges paid or payable under the contract (as is often the intent, so as to achieve a better balance of risk and reward), then this can be done either:
   - by referring to the total amounts paid or payable under the contract as a whole (e.g. in relation to a shorter-term deliverables-based engagement), or
   - in the case of longer term/multi-year projects where a total contract value cap would be more onerous – by reference to a formula linked to the **average** annual charges (i.e. by calculating the total number of elapsed months during the contract term and dividing the amounts paid or payable by that number so as to provide an average monthly amount, and then multiplying by 12 to create an annualised figure).

   The latter approach has the additional virtue of getting around the problem of setting a cap for the early months of a project, before a full year's worth of charging data has been created.
3. Note the danger of over-reliance on, or reuse of, language from previous contracts or precedents, particularly in such important clauses. The judge considered that the drafters of this particular contract may have been guilty of 'cherry picking' language from different contracts which had different liability structures and attempting, unsuccessfully, to marry them together.

Recovering specific heads of loss

One major battleground for the parties negotiating a technology and/or outsourcing contract is the types of loss that can be recovered, as this can restrict a party's liability even before the liability cap is considered.

Until the late 1990s/early 2000s, there had been a longstanding misapprehension that loss of profit, loss of anticipated savings, loss of revenue etc. formed part of (and were by definition) indirect and consequential losses and so fell into the second limb of *Hadley v Baxendale*[4]. This principle was corrected in cases such as *British Sugar PLC v NEI Power Projects Ltd*[5] and *Hotel Services Ltd v Hilton International Hotels (UK) Ltd*[6], and led to drafting in technology and outsourcing contracts that sought to exclude loss of indirect and consequential losses AND any loss of profits, loss of revenue and loss of savings as separate clauses within the drafting, rather than identifying loss of profits etc as being a subset of indirect or consequential loss (i.e. by 'including' them in that head of loss).

Recent case law has considered the extent to which financial loss suffered by a party to a technology or outsourcing contract is excluded by contractual drafting that purports to exclude both indirect and consequential losses and loss of profits, revenue or savings, with the courts analysing what 'form' the loss takes and the extent to which it is or is not covered by the contractual exclusions.

[4] *(1854) EWHC Exch J70*
[5] *87 BLR 42 (08 October 1997)*
[6] *(2000) BLR 235*

The Soteria case

The case *of Soteria Insurance Limited (formerly CIS General Insurance Limited) v IBM United Kingdom Limited*[7] concerned what had been the wholly owned subsidiary of the Co-Operative Group (CISGIL, subsequently known as Soteria) which was being spun out of that Group. As part of the corporate restructuring, Soteria needed to acquire its own platform on which to run its business.

In June 2015, Soteria entered a contract with IBM for the supply of a new IT system for its insurance business and for the management of that system for a ten-year term. The project was severely delayed, and matters came to a head when IBM submitted an invoice in March 2017 which Soteria refused to pay. As a result, IBM terminated the contract. Soteria asserted that IBM's purported termination was wrongful, and it elected to terminate the contract for IBM's repudiatory breach.

In a judgment handed down in the Technology and Construction Court in 2021, the judge described the project as "*...a failure. The parties abandoned unfinished a project that had consumed costs in excess of GBP120 million, leaving them with a system offering little or no value and substantial financial losses.*"

The Court of Appeal considered the first instance judgment in which the judge had found that an exclusion for loss of profits also excluded a claim for wasted expenditure arising from the late delivery or non-delivery of the IT system.

The contract for the provision of the IT system contained the following exclusion clause (clause 23.3) (emphasis added):

"*Subject to clause 23.2 and 23.4, neither party shall be liable to the other or any third party for any Losses arising under and/or in connection with this Agreement (whether in contract, tort (including negligence), breach of statutory or otherwise) which are indirect or consequential Losses, or* ***for loss of profit, revenue, savings (including anticipated savings)****, data (save as set out in clause 24.4(d)), goodwill, reputation (in all cases whether direct or indirect) even if such Losses were foreseeable and notwithstanding that a party had been advised of the possibility that such Losses were in the contemplation of the other party or any third party.*"

The contract defined "Losses" as:

"*All losses, liabilities, damages, costs and expenses including reasonable legal fees on a solicitors/client basis and disbursements and reasonable costs of investigation, litigation settlement, judgment, interest.*"

At first instance, the judge in the High Court had found – amongst other things – that Soteria had established a claim for wasted expenditure resulting from the termination of the contract to the value of around GBP122 million, but that clause 23.3 completely excluded its recovery. The first instance judge reached this conclusion on the following grounds:

(a) The new IT system underpinned Soteria's business and would have produced material savings and increased revenues and profits;

(b) The loss of bargain that Soteria suffered was the loss of savings, loss of revenue and loss of profits that Soteria had expected to earn from a successful implementation;

(c) Wasted expenditure is a different means of quantifying loss of bargain, but ultimately amounts to the same as loss of profits, loss of savings and loss of revenue;

(d) Clause 23 excluded loss of profits, loss of savings and loss of revenue; and

(e) Therefore, the claim of wasted expenditure was excluded.

Interestingly, the judge in the *Soteria* case was the same judge as in the earlier *Royal Devon* case; however, in that earlier case, the judge found that a claim for wasted costs by Royal Devon was **not** caught by a similar clause excluding loss of profits. The judge's rationale for drawing a distinction was that Royal Devon was a non-profit making NHS trust, such that the loss it suffered was a "*non-pecuniary benefit*" as it did not expect to make a financial gain.

[7] *(2022) EWCA Civ 440*

The Court of Appeal rejected the High Court's analysis and overturned the first instance judgment on four principal grounds:

1. Based on the natural and ordinary meaning of the words in clause 23.3, and on the proper approach to the construction of exclusion clauses, clause 23.3 did not mention wasted expenditure at all.

2. The construction and interpretation of the exclusion clauses must be undertaken strictly, and the court recognised that "*as a general rule (...) the more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the court's approach should be in requiring that the exclusion or limit should be clearly and unambiguously expressed*"[8]. Moreover, consistent with other authorities, the courts should consider that if a party intended to give up valuable rights otherwise available at common law, then very clear words need to be used in the clause to demonstrate that intention.

3. Loss of profits, loss of revenue and loss of savings can be distinguished from wasted expenditure. The former are all based on a hypothetical counterfactual of what would have been the outcome if things had gone as planned; therefore, they include an element of speculation and so are difficult for the party in breach of contract to estimate in advance, which is why they are routinely excluded. Conversely, wasted expenditure is easy to ascertain, as it amounts to an accounting exercise looking at invoices, contracts and receipts etc.

4. A party can claim losses either as expectation losses (i.e. losses suffered as a result of the contact not being performed) or reliance losses (i.e. expenditure incurred in reliance upon the fact that the contract would be performed), but not both. In either case, the long-established compensatory principle is that the party suffering loss as a result of a breach of contract is entitled "*to be placed in the same situation, with respect of damages, as if the contract had been performed*".

Wasted expenditure is considered a reliance loss, being compensation of the loss of bargain "*based on a rebuttable presumption that the value of contractual benefit must be at least equal to the amount that the claimant is prepared to expend in order to obtain such benefit*"[9]. In the *Soteria* case, the 'thing' that was lost was the new IT system in respect of which Soteria had expended several million pounds – this was the loss of bargain, not the loss of profits, savings and revenues that would have (or might have) resulted from its use. As such, the wasted losses did not equate to loss of profits, loss of revenue or loss of savings, and (as they were not expressly listed within the exclusions in clause 23.3) were recoverable.

So, with a Court of Appeal judgment providing that a claim for wasted expenditure should be distinguished from a loss of profits, loss of revenue or loss of anticipated savings claim, we return to the *TCS* case.

[8] *BHP Petroleum Limited v British Steel PLC (2000) 2 Lloyd's Rep 277*

[9] *The Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Limited* (2017) EWCA Civ 2196.

The TCS case

TCS brought a claim against DBS for loss of revenue. This related to allegations that, as a result of the delays which TCS argued were due to DBS, TCS was not able to reduce its costs of delivery of the services but it was nonetheless required to reduce the pricing for providing the services. Without the commensurate reduction in the costs of delivering the services, TCS' net revenue was materially lower than it would have been. This loss of revenue was reflective of the "*difference in charges (and) a proxy for and reasonable estimate of the lost anticipated costs savings*".

DBS argued that this was a claim for lost profit, whereas TCS argued that it was entitled to frame the loss as a loss of anticipated savings, not least because such a loss was not expressly excluded by clause 52.4.

The contract provided at clause 52.4 that:

"Subject to clauses 52.1 and 52.5, neither party will be liable to the other party for:

52.4.1 any indirect, special or consequential loss or damage; or

52.4.2 any loss of profits, turnover, business opportunities or damage to goodwill (whether direct or indirect)."

The contract further provided at clause 52.5 that

"Subject to clause 52.2, the AUTHORITY may, amongst other things, recover as a direct loss:

52.5.1 any additional operational and/or administrative costs and expenses arising from the CONTRACTOR's Default;

52.5.2 any wasted expenditure or charges rendered unnecessary and/or incurred by the AUTHORITY arising from the CONTRACTOR's Default; and

52.5.3 the additional cost of procuring Replacement Services for the remainder of the Term; and

52.5.4 any anticipated savings."

The court found that, applying the "*natural and ordinary meaning of the words*", anticipated savings was not covered in clause 52.4. However, the court further found that TCS could not take advantage of clause 52.4 (or rather what was **not** included in clause 52.4) because its claim for anticipated savings was "*no more or less than a loss of profit claim*". Counsel for TCS accepted that it could easily have framed the claim as a loss of profit claim, but chose not to do so, given that the exclusion clause wording of clause 52.4 would have struck down such a claim.

The court considered the *Soteria* case and concluded that it was good authority for the distinction to be drawn between, on the one hand, a claim for wasted expenditure (reliance loss) and, on the other hand, a claim for loss of profit, loss of revenue or loss of anticipated savings (expectation loss). However, the court pointed out that an important part of the rationale for that distinction in the *Soteria* case was the fact that a loss of bargain claim could be characterised by reference to either (i) speculative and open-ended claims for loss of revenue, profits etc (the expectation loss) **or** (ii) claims for actual, incurred, but wasted expenditure (the reliance loss). TCS' characterisation of its claim as a loss of anticipated savings was (as it accepted) a convenient, alternative formulation for a loss of profit claim. Moreover, both such claims are types of expectation loss which, notwithstanding there being no express reference to loss of anticipated savings, it appeared that the parties intended to exclude pursuant to clause 52.4.2. In those circumstances, the court would not allow TCS to circumvent such an intention by using a different formulation for the same type of loss.

The EE and Virgin Mobile Case

The interpretation of exclusions of loss of profit has recently been in the spotlight once more, in the case of *EE Limited v Virgin Mobile Telecom Limited*[10].

This case concerned EE's provision of 2G, 3G and 4G (but notably not 5G) mobile network services to Virgin Mobile under a Telecommunications Supply Agreement ("**TSA**"), in which there was an exclusivity provision in EE's favour. A 2016 amendment provided for potential agreement between EE and Virgin Mobile in relation to the provision of 5G services using EE's network; in the absence of such agreement, it allowed Virgin Mobile to source 5G services for its customers from other providers and, in respect of those customers, to offer 2G/3G/4G services from that same alternative provider.

EE launched its 5G service in May 2019, but in the absence of agreement between the parties, Virgin Mobile contracted with Vodafone for 5G services and began migrating customers from EE's network from around January 2021.

EE claimed that both Virgin Mobile's arrangements with Vodafone and the use of services offered by Vodafone were a breach of the TSA, and EE sought substantial damages in the form of lost revenue that it claimed would have been due from Virgin Mobile under the contract but for that breach. Virgin Mobile denied the claims, asserting that (i) there was no breach of the exclusivity obligation and (ii) in any event, EE's claim was precluded by the contract's limitations and exclusions of liability, which stated that neither party could recover "*anticipated profits*".

The High Court granted summary judgment for Virgin Mobile, interpreting EE's claim as one for loss of anticipated profits, the recovery of which was excluded by the contract. It was this issue (as opposed to whether there was in fact any breach) that formed the issue on appeal, with the Court of Appeal asked to examine whether the first instance Judge had been correct to find that the terms of the exclusion clause applied to EE's claim.

The contract stated at clause 34.4:

> *"Neither Party shall be liable to the other for any loss which is not directly foreseeable or which does not arise directly from the performance of this Agreement and thus neither Party shall be liable for any indirect or consequential or special or incidental loss whatsoever."*

It then further provided at clause 34.5:

> *"Except for any damages claims by* [Virgin Mobile] *pursuant to Clause 34.2(c), to which Clause 34.3* [this was a clause relating to the treatment of wilful misconduct] *applies (which EE acknowledges may include claims of damages for loss of profits), and for no other damage claims whatsoever, neither Party shall have liability to the other in respect of:*
>
> *(a) anticipated profits; or*
>
> *(b) anticipated savings."*

EE argued that its claim was for "*diminution in price*" or "*charges foregone*", not for "*anticipated profits*" or "*loss of profits*", and in any event that the phrase "*anticipated profits*" should be narrowly construed to mean only profits anticipated to be earned outside the TSA, not revenue directly payable under the TSA. EE further argued that it would be commercially unreasonable to interpret the exclusion clause in a way that would deprive it of any meaningful remedy for Virgin Mobile's breach of the exclusivity obligation, which was central to the commercial bargain.

Virgin Mobile submitted that EE's claim was "*an expectation loss claim for loss of profits*" (i.e. the revenue that EE would have received from Virgin Mobile had Virgin Mobile not breached the exclusivity clause) and that the exclusion clause was clear and unambiguous and represented a carefully constructed allocation of risk between the parties, in excluding all claims for anticipated profits, such that the court should not give it a narrower meaning.

EE's appeal was dismissed by the Court of Appeal on a 2:1 majority. Zacaroli LJ stated the core issue to be whether the use of the phrase "*anticipated profits*" in clause 34.5(a) meant something other than the charges that EE would have expected to earn under the TSA for the provision of services to Virgin Mobile's customers (less EE's costs of servicing those customers) but for the alleged breach of contract. In the court's view, it did not.

[10] (2025) EWCA Civ 70

The key factors considered in reaching this decision were:

- there is no general principle that expectation-based loss will not fall within the scope of exclusion clauses, or that a "*diminution of price*" is not a loss of profits. Whether such loss is excluded or not will depend on the specific contractual wording and the overarching context being applied in each case;
- there is nothing in the language of clause 34.5 to indicate that the exclusion of "*anticipated profits*" should be interpreted narrowly (i.e. as only excluding profits outside the TSA). If the parties had contemplated a narrower meaning, they would have drafted the clause accordingly;
- it would be wrong to focus too narrowly on the particular breach in issue as determining the applicability of the exclusion to the entire agreement – if Virgin Mobile had breached the agreement (in other situations), the court felt that EE could have made a meaningful recovery for some losses in other situations, or would have been afforded other remedies, notwithstanding the exclusions; and
- construing clause 34.5 as excluding all loss of profit claims is supported by other provisions in the TSA – the term "*loss of profits*" was used interchangeably with "*anticipated profits*" in the clause 34.5 carveout, and indirect or consequential losses were separately excluded.

In particular, the court explored the application of the rules on construction to exclusion clauses and confirmed the textual approach that has underpinned its approach in recent years, namely that:

- exclusion clauses are to be construed according to the ordinary methods of contractual interpretation – the principle of freedom of contract requires the court to respect and give effect to the parties' agreement[11];
- in construing an exclusion clause, the court will start from the assumption that in the absence of clear words the parties did not intend to derogate from the rights and obligations established by common law[12];
- the more valuable a right, the clearer the language must be to give effect to it – lack of clarity should be resolved against the party seeking to exclude the liability[13];
- strained interpretations should not be applied to a clause that has a clear meaning[14]; and
- that said, if the effect of the exclusion is to defeat the main object of the contact so as to render the agreement effectively a "*mere declaration of intent*", it will not be interpreted to have that effect, even if that is the literal meaning of the words.[15]

In his leading judgment, Zacaroli LJ concluded that it was correct to find that the terms of the exclusion clause applied to EE's claim and that this conclusion was not to be rejected on the basis that it is uncommercial, given it was part of a carefully drafted agreement allocating risk between the parties, who were still left with valuable contractual rights enforceable by specific performance, injunction or damages based on wasted expenditure.

It should be noted, however, that Phillips LJ dissented in this case, noting that "*anticipated profits*" was not *clearly* meant to cover lost contract revenue and that in the absence of a positive obligation on Virgin Mobile to use EE's services, the exclusivity provision in clause 10 was Virgin Mobile's "*key contractual obligation*" giving effect to the contractual bargain – he felt that it would be "*surprising if the parties intended that VM could breach (it)...without incurring liability to pay EE damages*".

In his reasoning, there were multiple potential interpretations of the exclusionary wording. In such a case, the court "*is entitled to prefer the construction which is consistent with business common sense*"[16] and the court is entitled to apply the presumption that neither party to a contract intends to abandon any remedies for a breach arising by operation of law – any words used to rebut this assumption must be clear. Taken together, Phillips LJ felt that the exclusion did not operate in the same way as laid out by Zacaroli LJ.

So, where does this leave us currently? Together, these three judgments leave us with the following position:

(a) Liability exclusions will be interpreted applying the natural and ordinary meaning, and (if necessary) narrowly, particularly where the effect of the exclusion or limitation would be extreme;

(b) Determining the loss of bargain and the 'thing' that is lost will be a fundamental precursor to determining possible liability;

(c) The importance of the distinction between expectation loss and reliance loss needs to be properly understood, especially in order to address properly the allocation of liability under the contract (by reference to the specific subject matter of what ought to be delivered);

(d) Types of expectation loss and reliance loss cannot be 'gamed' in order to fall within (or without) liability drafting; and

(e) Drafting needs to be clear and precise – the primary focus of the courts will be to look at the words on the page, not the subjective understanding of the parties at the point they entered into the contract. As a result, parties should consider using explicit drafting to make clear where something is – or is not – intended to be claimable and ensure that terms like "loss of profit", "loss of revenue" and "loss of anticipated savings" are used clearly and consistently.

[11] Interactive E-Solutions JLT v O3b Africa Ltd (2018) EWCA Civ 62

[12] Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd (1974) AC 689

[13] Stocznia Gdynia v Gearbulk Holdings (2009) EWCA Civ 75

[14] Photo Production Ltd v Securicor Transport Ltd (1980) AC 827

[15] Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd (2013) EWCA Civ 38

[16] Rainy Sky SA v Kookmin Bank (2011) UKSC 50

Responsibility for delay

Whilst the previous section of this White Paper focussed on liability clauses, it is important to appreciate that provisions dealing with liability and allocation of risk are often peppered throughout a contract.

Drafting responsibilities and dependencies

In the *TCS* case, it was critical to TCS to establish that the delays were the result of an "Authority Cause". Its argument was that its delivery was frustrated by a third-party IT hosting provider and, latterly, by the decision of DBS to abandon part of the modernisation project. DBS disputed this and claimed that the delay was on the TCS side, as a result of the modernisation software not being ready for deployment on its infrastructure.

"Authority Cause" was defined in the contract as "*any breach by the Authority of any of the Authority's Responsibilities (except to the extent that it is the result of any act or omission by the Authority to which the Contractor has given its prior consent).*"

Unfortunately, neither "Authority's Responsibilities" nor "Responsibilities" were defined, albeit they were used as capitalised terms throughout the contract. In the absence of those defined terms, the judge contrasted the use of the term "Authority Cause" with "Contractor Default", with the latter expressly extending to not just a breach of contractual obligations but also "*any default, act or omission...*".

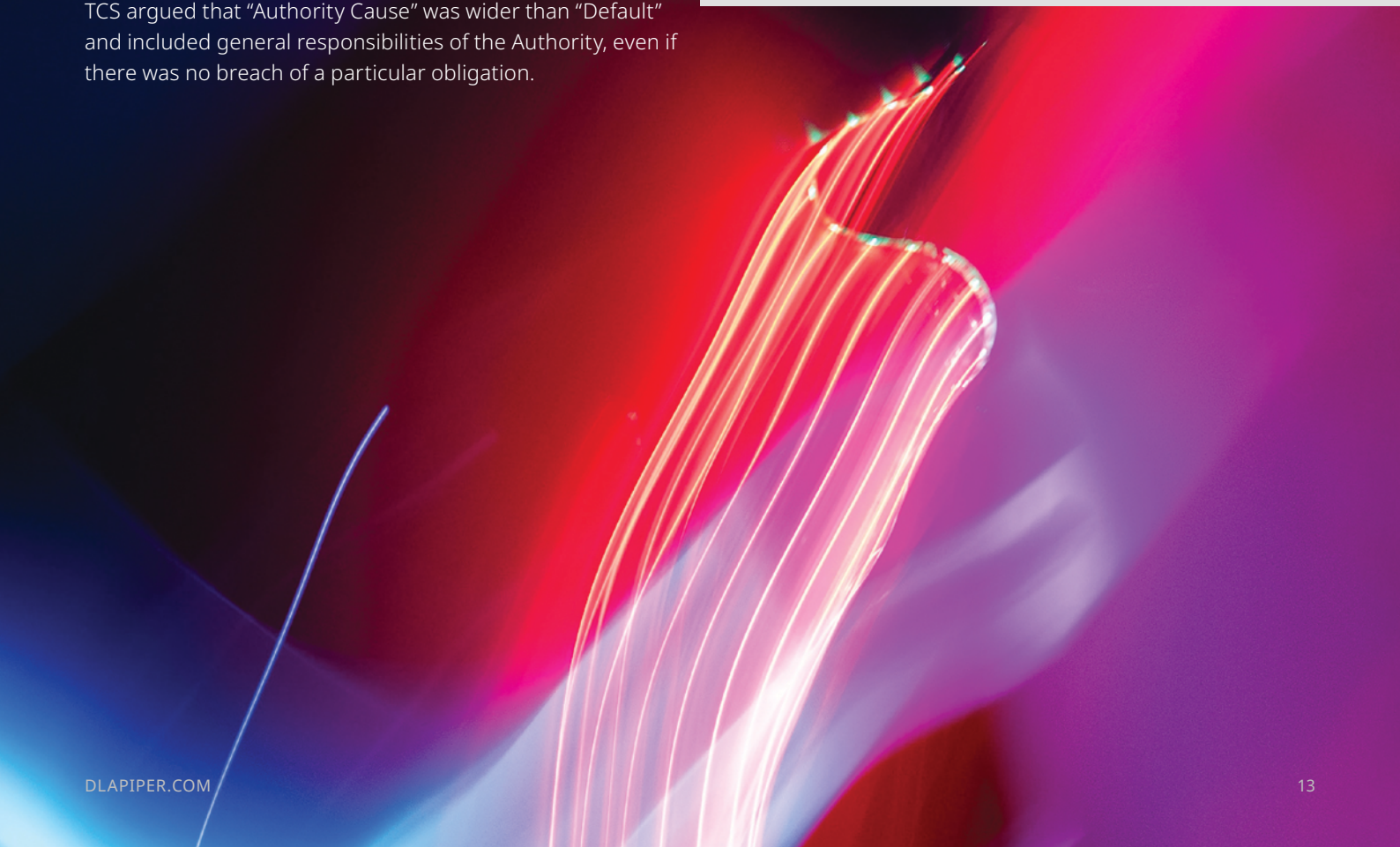
TCS argued that "Authority Cause" was wider than "Default" and included general responsibilities of the Authority, even if there was no breach of a particular obligation.

Conversely, DBS had argued that "Authority Cause" was narrower than "Default" and that 'Responsibility' was a synonym for an 'obligation' and more precisely an Authority obligation.

The Judge accepted DBS' position that "Authority Cause" required a contractual breach of the terms of the "*carefully drafted Agreement*", stating that "*unless TCS (was) able to demonstrate an express or implied contractual obligation on DBS to have provided TCS with something, the absence of that thing cannot...be a 'breach by the Authority' of any of the 'Authority's Responsibilities' and therefore it cannot be an 'Authority Cause'*".

So, for TCS to be able to seek relief for "Authority Cause", there would need to be a breach of an explicit or implicit responsibility of DBS under the contract.

This debate highlights the importance of ensuring defined terms are in fact defined and the scope of responsibilities is clear.



Delays caused by third parties

In the *TCS* case, there was no direct contractual arrangement between TCS and the third-party hosting provider, so a key element of TCS' case was that DBS, as the customer, had responsibility for procuring the third-party hosting provider completed certain activities, such that it was effectively overseeing and managing the project and that failure to do so was an Authority Cause.

By way of an example, the contract included a provision that "*each Service Line Provider will provide advice and guidance in accordance with the Service Model in order to facilitate the smooth integration of the Services impacting other relevant Services Lines, including the integration of ICT projects…*". TCS argued that this could be construed as a warranty from DBS that it would accept responsibility for procuring equivalent performance from other 'Service Line Providers', effectively acting as a quasi-systems integrator.

The court rejected this argument, stating that "*the absence of such language is a powerful indicator that the parties' intention was not that these clauses created a warranty for the benefit of TCS…(and)….this is particularly so whether there is a specific part of the body of the Agreement which is dedicated to 'Warranties' which also excludes all warranties "(e)xcept as expressly stated in this Agreement*". The court concluded that the intent of the clauses was that TCS (as a Service Line Provider) needed to comply with them for the benefit of DBS and **NOT** that DBS (which was not a Service Line Provider) had to comply with them for the benefit of TCS.

An argument that there should be an implied term to the same effect was rejected by the court on the grounds that such an implied term was not obvious and necessary for business efficacy in a "*sophisticated contract*" such as this one.

The contract included several express warranty clauses, including at clause 9.5 an obligation on TCS to "*ensure that the services and the Contractor System integrate with the Authority System*", meaning that any implied warranty on the part of DBS would be in contradiction to express terms. Such a contradiction always kills an argument for implying a term.

So, what does this mean for us when we draft IT contracts? The reality is that it is not a hugely surprising aspect of the decision in and of itself, as the movement to the textual approach for matters of construction has been developed from the decision in *Rainy Sky SA and others v Kookmin Bank*[17] to *Wood v Capita Insurance Services Limited*[18]. In his judgment, Constable J also referenced the principles recited by the then Chancellor Sir Geoffery Vos in *Lamesa Investments Limited v Cynergy* Bank Limited[19], including that "*where the parties have used unambiguous language, the court must apply it*" and "*if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other*".

Obligations on a service provider and dependencies on a customer must be clearly and unequivocally stated. Put simply, if something needs to be done by a party, that needs to be stated explicitly.

[17] *(2011) UKSC 50*
[18] *(2017) UKSC 24*
[19] *(2020) EWCA Civ 821*

Delay and relief notices

It is common practice in large IT contracts that, where the customer fails to meet certain contractual responsibilities, the supplier is entitled to claim relief from its liability (e.g. for any resultant delay to a milestone) by following a contractual process.

The mechanism in the TCS and DBS contract was detailed, and the notification and reporting aspects applied generally, but the provisions entitling TCS to claim relief in respect of delays due to "Authority Cause" were explicitly subject to the notification requirements. It was common ground that TCS had not served the requisite notices required under the contractual mechanism.

Therefore, the issue was the extent to which TCS may be deprived of other remedies from which it might expect to benefit under common law for extensions of time and compensation. In short, was the notice requirement a condition precedent and, if so, what was the scope of the remedies which could only be accessed by serving the contractual notice?

The judge carried out a thorough review of the authorities. This can be summarised as follows:

(a) Parties are entitled to agree that the enjoyment of particular rights is subject to complying with identified conditions;

(b) The courts will not lightly assume that they have done so but will require specific language to evidence this intention. That said, it is not necessary for the parties to use the phrase 'condition precedent' or to provide an explicit warning of the consequences of non-compliance;

(c) "*the language of obligation in relation to procedure to be complied with (e.g. 'shall') is necessary, but not sufficient*";

(d) The language of conditionality (e.g. "if… then") is likely to indicate a condition precedent, and there are several linguistic ways of achieving this; and

(e) The clearer and more feasible the process required to be complied with is, the more likely the court is to accept that it was intended as part of a condition precedent regime.

The judge concluded that the notification process was a condition precedent to TCS claiming certain relief for the delays under the contractual language. In particular, because of the clear nature of the language and the sophisticated contract, TCS' entitlement to claim liquidated damages under the contractual mechanism and general damages at common law were subject to compliance with the process. While this meant that those forms of relief were lost to TCS, the judge found that TCS' failure to follow that process did not preclude it from claiming extensions of time or from defending itself from DBS' claims, because that additional relief was not made expressly subject to the contractual mechanism.

DBS was similarly limited as to its claim for liquidated and general damages, as it too had not filed a report as a necessary pre-requisite to unlocking those remedies.

This highlights the importance of clear drafting of relief notice processes, setting out in detail the scope of any relief AND the extent to which resulting losses can be recovered by a particular party, most often the supplier. In addition, it is important that the clause itself clearly states whether it is intended to be the sole or exclusive remedy for the supplier in respect of a failure by the customer to comply with the customer responsibilities.

Conclusion

The cases noted in this White Paper reinforce the key message about taking time to consider what you want your liability related clauses to achieve and then carefully drafting them to meet that objective. These clauses will be of vital importance, not necessarily to the operation of the contract per se, but in the event of a dispute when large sums of money are likely to be at stake.

In the final analysis, the difference between getting the drafting right and getting it wrong could be very significant indeed. Furthermore, whilst the cases we have focussed on in this White Paper relate to distressed or failed IT projects, both the authorities relied on in determining them and the new authorities they have created are of much wider application to commercial contracts more generally.

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