Overall caps on liability in EPC/EPIC projects

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In EPC/EPIC contracts, overall caps on the contractor's liability are standard market practice. These caps help ensure a balanced allocation of risk and reward between the parties. This article explores how such caps are typically applied and the common exclusions that may be proposed to limit the scope of the cap.

Scope and structure of liability caps

Overall liability caps are often calculated by reference to, and sometimes also expressed as, a percentage of the contract price. Contractors often prefer a fixed lump sum for certainty on the extent of exposure, while (oil) companies often favour including a percentage, so as to include all variations and reflect the ultimate total project value. The cap level itself varies

depending on risk appetite, project specifics and prevailing market conditions.

From the contractor's standpoint, it is essential that the cap:

· Applies as an overall cap on liability under the contract and at law – not just liability for breach in the event of termination or for breaches of specific clauses.

· Serves as a total aggregate cap, not a per-event or per-occurrence limit.

However, these caps are rarely 'absolute'. The client company will typically try to insist on exclusions from the cap.

Common exclusions

(1) Indemnities (including Knock-for-Knock): Knock-for-knock indemnities covering (i) injury to personnel; (ii) damage to each party's property (other than the facility under construction); (iii) consequential losses; and (iv) pollution liability are typically excluded from the aggregate cap and each party usually obtains appropriate insurances to cover at least some of this exposure. Exclusions in respect of other indemnities should be carefully reviewed to understand the scope and impact of the proposed exclusion.

(2) Insurance compliance: Failure to meet insurance requirements is increasingly being excluded by the company from caps. Contractors should closely assess their insurance obligations and the risk of non-compliance, especially given third-party involvement throughout the project. If such an exclusion from the overall cap is accepted, contractors should ensure there is a notice and cure period to remedy any non-compliance to mitigate the risk of uncapped exposure.

(3) Abandonment or failure to perform: The company sometimes try to insist on an exclusion from the cap in respect of liability arising from (a) "*abandonment" of the works;* or (b) *failure to perform in accordance with the contract*, perhaps citing them as fundamental obligations/ termination events within the contractor's control. However, well advised contractors often resist such exclusions arguing they undermine the rationale of the limitation of liability clause which is to help ensure a balance between risk and reward for the contractor. It is, of course, precisely when there has been a failure to perform in accordance

with the contract that the contractor is exposed to the damages claim. From contractor's perspective the purpose of the limitation of liability clause is to cap that exposure.

(4) Gross negligence or wilful misconduct: Some companies may wish to exclude liability for *gross negligence* or *wilful misconduct* from the cap. Contractors should review the scope and impact of these terms carefully — see our separate articles on gross negligence and wilful misconduct. Otherwise, the cap may be undermined.

(5) Defect Remedy Obligations: Post-completion defect repairs are sometimes excluded from caps in draft contracts issued by companies. Contractors would prefer/expect to see a separate cap on such exposure, which cap is normally expected to form part of, and not be in addition to, the overall aggregate cap on liability.

(6) Taxes and Duties: Specific contractual terms typically define responsibilities for import/export duties and other applicable taxes to the party. Contractors are generally liable for import/export duties or securing applicable exemptions and indeed for other taxes applicable to them. These obligations, along with related indemnities, are usually excluded from the cap.

(7) Liens or other security interests: The contractor is commonly obliged to not permit or claim any liens or other security interest (other than permissible security) over the works or company property. Breaches of this obligation and related indemnities are often excluded from liability caps.

(8) Business Ethics: Violations of anti-bribery, sanctions, and ethics policies are common proposed exclusions from the cap. Contractors may contractually commit to complying with company's policies but may wish to try to limit any exclusion from the cap to breaches of relevant appliable laws. In addition, Contractors may wish to ensure that the exclusion from the cap only applies in respect of liability arising directly from the breach, rather than the cap being disapplied due to any breach.

(9) Fraud: Liability for fraud is usually excluded from the cap and often cannot be limited in any event under the Unfair Contract Terms Act 1977. Contractors will often accept such an exclusion provided the drafting does not go further than the applicable law on this issue.

Conclusion

Overall liability caps in EPC/EPIC contracts provide essential risk management, but their effectiveness depends on clear drafting, including with respect to any agreed exclusions from the cap. While exclusions for certain indemnities, fraud, and taxes are typical, the number of exclusions being proposed by companies continues to increase and their content / scope evolve. Contractors must be careful to ensure that the overall aggregate cap is well drafted and is not undermined by the proposed exclusions. Contractors should then consider mirroring any exclusions to the overall cap in its sub-contracts to help avoid disproportionate exposure. Well drafted aggregate caps on liability clause are crucial to achieving a fair balance of risk and reward throughout the supply chain.

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