The Guide to Damages in International Arbitration

Editor
John A Trenor

Third Edition
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Preface

This third edition of Global Arbitration Review’s *The Guide to Damages in International Arbitration* builds upon the successful reception of the first two editions. As explained in the introduction, this book is designed to help all participants in the international arbitration community understand damages issues more clearly and communicate those issues more effectively to tribunals to further the common objective of assisting arbitrators in rendering more accurate and well-reasoned awards on damages.

The book is a work in progress, with new and updated material being added to each successive edition. In particular, this third edition incorporates updated chapters from various authors and features several new chapters addressing such issues as best practices and issues in discounted cash flow models, full compensation and total reparation, and estimation of harm in antitrust damages actions.

We hope that this revised edition advances the objective of the first two editions to make the subject of damages in international arbitration more understandable and less intimidating for arbitrators and other participants in the field, and to help participants present these issues more effectively to tribunals. We continue to welcome comments from readers on how the next edition might be further improved.

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Part I

Legal Principles Applicable to the Award of Damages
Contractual Limitations on Damages

Gabrielle Nater-Bass and Stefanie Pfisterer

Contractual limitations on damages are of critical importance, allowing parties to better assess and control business risks arising from a commercial transaction. It is thus no surprise that some form of damage limitation is found in many commercial contracts today. Yet, despite their prevalence, contractual limitations on damages give rise to difficult questions that go to the heart of the legal system, such as how to balance the parties’ freedom to contract against provisions of mandatory law, and the weight to be given to the respective interests of creditors and debtors.

Contractual limitations on damages are agreements whereby the parties limit or exclude the availability of damages that would otherwise be available under statutory law. They differ from more general ‘exemption clauses’ or ‘liability limitations’ – clauses that absolve a party, whether in whole or in part, from liability under a contract or for a related tort, or that qualify that liability – in that they relate specifically, and exclusively, to damages. Clauses that go beyond a limitation of damages, for example, because they exclude the coming into being of a contractual duty in the first place, are not the subject of this chapter.

After first considering some general aspects relating to contractual limitations on damages (see ‘General Aspects of Contractual Limitations on Damages’ below) we will address the different forms that such limitations generally take (see ‘Forms of Contractual Limitations on Damages’ below). While the scope of the chapter does not allow for an in-depth analysis of how contractual limitations on damages are dealt with under different legal systems, key differences in the approaches to such limitations will nevertheless be highlighted and should be understood as red flags to keep in mind when confronted with such provisions under various applicable laws in practice.

1 Gabrielle Nater-Bass is a partner and Stefanie Pfisterer is an associate at Homburger.
2 1 Chitty on Contracts 14-001 (32nd ed. 2015).
3 Lörtscher, Vertragliche Haftungsbeschränkung im schweizerischen Kaufrecht 6 (1977).
General aspects of contractual limitations on damages

Agreements on contractual limitations on damages and their incorporation

A contractual limitation on damages needs to be agreed upon by the contracting parties. It thus requires a contractual relationship between the creditor and the debtor.⁴

As long as there is consensus on the content, provisions containing contractual limitations on damages can normally be included in a contract without further ado.⁵

In general, contract terms can also be implied, and be incorporated through the conduct of the parties. However, reading a limitation of damages into a contract on the basis of party conduct will rarely be done in practice, and requires a previous course of dealings between the parties on the same terms.⁶ In particular, mere personal relationships or the existence of goodwill will generally not suffice to assume a limitation of liability.⁷

Limitations on damages are frequently contained in general terms and conditions (GTCs). GTCs are contract terms that are pre-formulated by one party.⁸ They are only effectively included in an agreement where the contract itself refers to them.⁹ In civil law systems, the contracting party needs to have the possibility to take note of the GTCs that were pre-formulated by the other party,¹⁰ whereas in other systems it suffices for the written agreement referring to the GTCs to be signed for them to be binding.¹¹ In civil law systems, any GTC provisions that are considered so unusual that they could not reasonably have been expected will not be considered to be a valid part of the agreement and are thus invalid.¹² On the other hand, common law systems frequently require a showing of fraud or misrepresentation for a party to be able to escape the consequences of its signature.¹³ Similarly, where a party claims to have misunderstood the GTCs, it will have to satisfy the court that the document is radically different from that which the party intended to sign and that the mistake was not resulting from carelessness.¹⁴ Some civil law countries, in particular Germany, govern in detail the limitations of liability allowed in standard terms (see ‘Limits of contractual limitations on damages’ below).

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⁴ Lörtscher, Vertragliche Haftungsbeschränkung im schweizerischen Kaufrecht 9 (1977).
⁵ Lörtscher, Vertragliche Haftungsbeschränkung im schweizerischen Kaufrecht 9 (1977). Common law may require an exemption clause to be expressed clearly and without ambiguity, see 1 Chitty on Contracts 14-005 (32nd ed. 2015).
⁷ For German law see Unberath, Section 276 No. 50 in: Kommentar zum Bürgerlichen Gesetzbuch: BGB (3rd ed. 2012).
⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Article 3(1). In some jurisdictions, the definition of GTCs contains an additional element requiring that the GTCs have been pre-formulated for a large number of contracts; see, e.g., German Civil Code Section 305(1) as well as Swiss law.
⁹ For German law see Becker, Section 305 No. 45 in: Kommentar zum Bürgerlichen Gesetzbuch: BGB (3rd ed. 2012).
¹⁰ For Swiss law see Kuoni, Haftungsgespräch im schweizerischen deutschen und englischen Recht para. 87 (2015).
¹¹ Mellish L J in Parker v. South Eastern Railway Co (1877) 2 C.P.D. 416.
¹² German Civil Code Section 305c(1); see also the decision of the Swiss Federal Supreme Court BGE 108 II 416 at cons. 1.
¹³ Mellish L J in Parker v. South Eastern Railway Co (1877) 2 C.P.D. 416.
Interpretation/construction of contractual limitations on damages

Contractual limitations on damages are interpreted in the same manner as other contractual provisions, with the aim being to determine the parties’ actual intent. 15 There exist a number of methods that aim to arrive at the contractual intent.

The starting point is usually the wording used by the parties, but the purpose of the agreement and the organisation of the various provisions of an agreement are also considered and may prevail over a strict interpretation of the wording. 16 For example, an exemption clause may be so broad and general in scope that to apply it literally would create an absurdity or defeat the main purpose of the contract into which the parties have entered. 17 The courts will then need to ascertain the meaning to give effect to the agreement of the parties.

In the Anglo-Saxon tradition, the contra proferentem rule (i.e., the interpretation of an ambiguous contractual provision against the party that proffered the provision) is sometimes used. 18 However, this rule ought not to be taken as the starting point and should only be used to resolve ambiguity. 19 Furthermore, the rule that exclusion clauses need to be interpreted strictly is frequently applied. 20 In Internet Broadcasting Corp Ltd and (t/a NETTV) v. MAR/LLC, 21 the High Court held that there is a presumption, which appears to be a strong presumption, against exemption clauses being construed so as to cover deliberate, repudiatory breaches. Similarly, in Bovis Construction (Scotland) Ltd v. Whatlings Construction Ltd, 22 the House of Lords ruled that a clause that limited liability should state ‘clearly and unambiguously the scope of the limitation and would be construed “with a degree of strictness”, albeit not to the same extent as an exclusion or indemnity clause’.

Special consideration is required where an agreement provides for both a warranty and limitation of liability. In such a case, interpretation of the agreement may lead to the conclusion that one of the clauses prevails, for example, where the warranty is contained in the main text of the agreement and the limitation of liability in the annexed standard terms. 23 On the other hand, where a party gives a warranty without at the same time also assuming liability for a breach of the warranty, the warranty may be considered to be consistent with the limitation of liability. 24

16 For Swiss law see Kuoni, Haftungsbegrenzung im schweizerischen deutschen und englischen Recht paras. 389 et seq. (2015).
23 See the decision of the Swiss Federal Supreme Court BGE 93 II 317 at cons. 4. See also Schwenzer, Beschränkung und Modifikation der vertraglichen Haftung 109-110, in: Koller, Haftung aus Vertrag (1998).
24 See the decision of the Swiss Federal Supreme Court BGE 41 II 437.
Burden of proof
It is for the party seeking to rely on the exemption clause to show that the clause, on its true construction, covers the obligation or liability that it purports to restrict or exclude. 25

Limits of contractual limitations on damages
Party autonomy and contractual freedom are not unlimited. Limitations of liability and of damages are a well-suited example to illustrate the boundaries placed on contractual freedom by mandatory law. Statutory limitations to contractual agreements limiting the availability of damages are common in virtually all countries.

In Germany, parties cannot agree in advance to exclude liability for unlawful intent. 26 If contained in standard terms, an agreement to exclude liability for negligence will be considered invalid in the event of a violation of essential duties. 27 Swiss law is more rigid, as it provides that any agreement purporting to exclude or limit liability for unlawful intent or gross negligence in advance is void. 28 The court also has discretion to invalidate an advance exclusion of liability for minor negligence in certain cases. 29 Even narrower restrictions exist for consumer contracts and GTCs. 30

In New York, the courts have a policy against limiting liability in contracts in cases of grossly negligent conduct as well as purely intentional wrongdoing. 31

In England, the Unfair Contract Terms Act 1977 (UCTA) restricts the operation and legality of some contract terms. The UCTA contains a number of restrictions to limitations of liability; these restrictions mainly concern the liability for death or personal injury resulting from negligence. In addition, the UCTA applies a reasonableness test, requiring that any term ‘shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made’. 32

Contractual limitations on damages that exceed the statutory limits are not effective. Depending on the applicable law and the type of contractual limitation involved, the limitation on damages may be rendered absolutely ineffective or it may be partially effective, in particular, only insofar as the term does not exceed the limits of mandatory law or satisfies the requirement of reasonableness in the common law system. There is a debate on

25 1 Chitty on Contracts 14-018 (32nd ed. 2015).
26 German Civil Code Section 276(3).
27 German Civil Code Section 307(2)(2).
28 Swiss Code of Obligations Article 100(1). Even more rigid provisions can be found in provisions governing specific types of contractual relationships, e.g., in the Swiss Product Liability Act (PrHG).
29 Namely, if the party excluding liability was in the other party’s service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official licence. See Swiss Code of Obligations Article 100(2).
31 Novak & Co v. New York City Housing Authority, 480 N.Y.S.2d 403 (N.Y.App.Term. 1984). See also California Civil Code Section 1668 (‘All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law’).
32 UCTA Section 11.
whether clauses exceeding the statutory limits shall be reduced to the extent permitted, in particular, with a view to avoid creating incentives for parties to include excessive limitation clauses. A party intending to include a limitation clause should, therefore, carefully check the statutory limits and the fate of clauses exceeding the limits.

Consequences of contractual limitation on damages

Contractual limitations on damages that are validly agreed upon and that do not go beyond the limits described above are valid and serve to limit the availability of damages. In particular, a claim for damages does not exist to the extent it has been effectively excluded. It must be carefully assessed, however, whether a contractual limitation on damages excludes only contractual damages or also tort damages. On the other hand, a primary duty to perform will not be affected by contractual limitations on damages.

Forms of contractual limitations on damages

Liquidated damages/penalty clauses

Common law jurisdictions distinguish clearly between liquidated damages and penalties. Liquidated damages are an amount contractually stipulated as a reasonable estimation of the actual damages to be recovered by one party if the other party breaches the agreement. Traditionally, courts have upheld liquidated damages clauses.

On the other hand, penalty clauses are contractual provisions that assess against a defaulting party an excessive monetary charge unrelated to actual harm. Penalty clauses are generally considered unenforceable. In the words of Atiyah:

> It not infrequently happens that contracts provide for what is to happen in the event of a breach by the parties, or by one of them. Such provisions may be perfectly simple attempts to avoid future disputes, and to quantify the probable amount of any loss. That is unobjectionable. But sometimes clauses of this kind are not designed to quantify the amount of the probable loss, but are designed to terrorize, or frighten, the party into performance. For example, a contract may provide that the promisor is to pay £5 on a certain event, but if he fails to do so, he must then

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34 See for clauses limiting the liability in general under Swiss law, Buol, Beschränkung der Vertragshaftung durch Vereinbarung para. 230 (1996).
35 In Switzerland, a contractual limitation of damages is generally considered to also exclude tort damages. See, e.g., Schwenzer, Beschränkung und Modifikation der vertraglichen Haftung 124, in: Koller, Haftung aus Vertrag (1998); decision of the Swiss Federal Supreme Court BGE 120 II 58.
36 See for clauses limiting the liability in general under Swiss law, Buol, Beschränkung der Vertragshaftung durch Vereinbarung para. 232 (1996).
39 Black's Law Dictionary 1314 (10th ed. 2014). See also the decision of the High Court of Australia Legione v Hateley [1983] HCA 11 at 32 ("A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation").
pay £500. Now a clause of that kind is called a penalty clause by lawyers, and for several hundred years it has been the law that such promises cannot be enforced. The standard justification for the law here is that it is unfair and unconscionable to enforce clauses which are designed to act in terrorem.41

Although the parties' choice of ‘penalty’ or ‘liquidated damages’ in their contract will serve as prima facie evidence of the term actually stipulated, the expression used by the parties will not be conclusive. Rather, the court will have to determine whether the payment stipulated in fact constitutes a penalty or liquidated damages.42 To assist this task of construction, various tests have been suggested. For example, a payment obligation will be considered to constitute a penalty where the sum stipulated is extravagant and unconscionable when compared with the greatest loss that could conceivably have followed from the breach.43

There is no such general exclusion of penalty clauses in civil law countries – quite the contrary. In Switzerland as well as in Germany and Austria, a penalty can be promised for non-performance or defective performance of a contract, and unless otherwise agreed, the creditor may then compel performance or claim the penalty.44 In fact, the Swiss Federal Supreme Court has even confirmed that a contractual penalty may be agreed for the purpose of punishing one of the parties.45 The penalty is payable even if the creditor has not suffered any loss or damage.46 The parties are free to determine the amount of the contractual penalty.47 However, under Swiss, German and Austrian law, the court may reduce penalties that it considers excessive in its discretion.48

Liquidated damages and penalty clauses are thus treated differently in various legal systems. This circumstance should be carefully considered when drafting an agreement, but also later on if any such clause is in dispute.

Stipulation of a maximum amount of damages/limitation clauses

Clauses limiting the amount of damages, also called limitation clauses, are generally admissible in common law. Pursuant to Ailsa Craig Fishing Co Ltd v. Malvem Fishing Co Ltd:

> Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to

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44 Swiss Code of Obligations Article 160(1). Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation (Swiss Code of Obligations Article 160(2)).
45 Decision of the Federal Supreme Court BGE 109 II 462 at cons. 4a. See also Austrian Civil Code (ABGB) Section 1336; German Civil Code Sections 340 et seq.
46 Swiss Code of Obligations Article 161(1).
47 Swiss Code of Obligations Article 163(1).
48 Ibid.; Austrian Civil Code (ABGB) Section 1336(2); German Civil Code Section 343.
Contractual Limitations on Damages

which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.\textsuperscript{59}

There is even case law holding that the principle of strict construction is not applicable when considering the effect of clauses merely limiting damages.\textsuperscript{50} The modern view, however, seems to be that the general approach to interpretation, which is to ascertain the objective intention of the parties, also applies to limitation clauses.\textsuperscript{51} Under English law, a clause providing for a maximum amount of damages will be valid if the limitation is considered to be reasonable.\textsuperscript{52} With regard to contract terms that restrict damages to a specified sum of money, the UCTA provides that regard shall be had in particular to (1) the resources that the person seeking to restrict damages could expect to be available to him or her for the purpose of meeting the liability should it arise; and (2) how far it was open to him or her to cover himself or herself by insurance. The contract value and the turnover of the party seeking to restrict damages are also taken into consideration.\textsuperscript{53}

In civil law systems, caps on damages are generally valid, albeit only to the extent that the cap does not violate the statutory limits to limitations of damages.\textsuperscript{54} Moreover, in some civil law jurisdictions, such restrictions will be examined to ensure that they do not unduly restrict damages in such a manner as to exclude coverage of the actual damages incurred.\textsuperscript{55}

Clauses stipulating a maximum amount of damages are thus generally admissible, although they may nevertheless be subject to substantial restrictions, particularly in certain civil law systems.

Exclusion of a particular damage type

Contractual limitations of damages may also limit the availability of certain types of damages.

Damages arising from death or personal injury can hardly ever be excluded. For example, under English law, the UCTA provides that ‘[a] person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence’.\textsuperscript{56} Similarly, under Swiss law, clauses excluding liability for personal injury are ineffective.\textsuperscript{57} If liability for personal injury cannot be excluded, damages for personal injury cannot – following the argument \textit{a maiore ad minus} – be excluded either. It may thus be preferable to make a reservation for damages arising out of personal injury when drafting clauses limiting the availability of damages.

\textsuperscript{52} McKendrick, Contract Law: Text, Cases and Material 445 (8th ed. 2018).
\textsuperscript{53} Ibid.
\textsuperscript{54} Decision of the Federal Supreme Court 4A_460/2013 at cons. 3.1 et seq.
\textsuperscript{55} E.g., German law, decision of the German Bundesgerichtshof BGH VIII ZR 155/99, in: NJW 2001, 292, at 295 et seq.
\textsuperscript{56} UCTA Section 2(1).
\textsuperscript{57} There is no statutory prohibition, but scholars consider that such clauses are immoral and thus invalid pursuant to Swiss Code of Obligations Article 20. Cf. Kessler, Article 41 N 2, in: \textit{Basler Kommentar} (6th ed. 2015).

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On the other hand, loss or damage that does not result directly or naturally from the breach of contract can generally be excluded, unless the limitation exceeds the mandatory limits.\textsuperscript{58} These damages are referred to as consequential damages or indirect damages.\textsuperscript{59}

Under English law, case law provides guidance with regard to what is considered a consequential loss or damage and to what extent a clause excluding consequential loss or damage is effective. For example, in \textit{British Sugar Plc v. NEI Power Projects Ltd}\textsuperscript{60} the relevant clauses provided that ‘[t]he seller will be liable for any loss damage cost or expense incurred by the purchaser arising from the supply of any such faulty goods or material or any goods or materials not being suitable for the purpose for which they are required save that the seller’s liability for consequential loss is limited to the value of the contract’. The value of the contract was £106,000, while the damages claimed for the breach were £5 million. The Court of Appeal stated that the clause simply limited the liability for loss and damage not directly arising from the breach to an amount equal to the value of the contract.

Similarly, in \textit{Deepak Fertilisers & Petrochemical Group v. Davy McKee (London) Ltd}\textsuperscript{61} the clause explicitly excluded ‘indirect or consequential damages’ and ‘loss of profits’. The court considered the lost profits as damages that flow directly from the breach. However, since the clause expressly excluded lost profits, these could not be recovered. English courts also frequently give consideration to \textit{Hadley v. Baxendale}\textsuperscript{62} to determine which damages directly follow from a breach.\textsuperscript{63} However, recent English decisions have criticised the traditionally narrow interpretation of a consequential loss exclusion and seem to favour a broader interpretation.\textsuperscript{64} For example, in \textit{Star Polaris LLC v. HHIC-PHIL INC}\textsuperscript{65} the Commercial Court considered a clause excluding ‘consequential or special losses, damages or expenses’ in a contract for the construction of a cargo ship. The court concluded that the limitation clause was intended to exclude liability for losses over and above those specifically accepted (which were limited to repair of defects and physical damage). While it remains to be seen whether the recent case law leads to a real change, the recent decisions make it clear that courts will have a close look at each contract and the circumstances of the case when construing limitation clauses.

In civil law countries, the terminology is less clear. In Switzerland, the distinction between direct and indirect damages is made on the basis of the length of the causal chain

\textsuperscript{58} E.g., under New York law, consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable, \textit{Corinno Civetta Construction Corp v. City of New York}, 502 N.Y.S.2d 681 (N.Y. 1986).

\textsuperscript{59} \textit{Black’s Law Dictionary} 472 (10th ed. 2014).

\textsuperscript{60} [1997] 87 BLR 42; [1997] CLC 622.

\textsuperscript{61} [1999] 1 Lloyds Rep 387.

\textsuperscript{62} [1854] 9 Ex. 341.

\textsuperscript{63} E.g., \textit{Jewson Ltd v. Kelly} [2003] EWCA Civ 1030.

\textsuperscript{64} See, e.g., \textit{Scottish Power UK Plc v. BP Exploration Operating Co Ltd} [2015] EWHC 2658 (Comm) (‘this unnatural interpretation of the term consequential loss is to be deprecated’); \textit{Transocean Drilling UK Ltd v. Providence Resources Plc} [2016] EWHC 2611 (Comm) (‘It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents’).

\textsuperscript{65} [2016] EWHC 2941 (Comm).
Contractual Limitations on Damages

involved. On the other hand, under German law, indirect damages are damages affecting an asset other than the object of the contract that was breached. The boundaries placed on limitations on damages by statutory law also apply to any types of damages that are excluded. For example, under Swiss law, the governing principle is that damages for gross negligence cannot be excluded. Accordingly, even if the contract excludes consequential damages, any consequential damages arising from gross negligence will still be owed. Similarly, exclusions of indirect damages under German law will be invalid to the extent that they are contained in GTCs and seek to exclude any damages arising out of a violation of essential duties.

In summary, it seems that exclusions of a particular type of damage are not an effective means of managing risk contracts subject to civil law, as these systems tend to prescribe a mandatory liability for damages arising from gross negligence or wilful misconduct. To the extent that the damages arise from simple negligence or without fault, these may be excluded as a whole, without there being a need to limit the exclusion to consequential damages. On the other hand, common law systems tend to accept exclusions of different types of damages, as long as such exclusions are reasonable, and in fact, it may be precisely the exclusion of consequential damages but not direct damages that may render an exemption clause reasonable.

Modifications with regard to other aspects

Further clauses may also have the effect of limiting damages. For example, the parties may agree to shorten the time limit for the notification of a breach of contract or shorten the statutory limitation periods to the extent permissible under the applicable law. The parties may also modify the statutory burden of proof or the standard of proof. For example, under Swiss law, an obligor who fails to discharge an obligation must make amends for the resulting loss or damage unless he or she can prove that he or she was not at fault. The parties can amend this principle by agreeing that the injured party needs to prove that the obligor was at fault, which may – as the case may be – have the effect of a limitation on damages.

These examples show that the position of the creditor may be affected by clauses modifying the modalities of liability. Such clauses, if admissible under the applicable law, may have the same effect as contractual limitations of damages in the strict sense.

Limitation of damages owed by third parties

A different issue is whether contractual limitations can operate to protect a person who is not a party to the contract.

Common law tradition generally considers that the principle of privity of contract prevents a contractual agreement from granting benefits to third parties or imposing burdens

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66 See the so-called 'parrot case' of the Swiss Federal Supreme Court BGE 133 III 257.
70 E.g., for English law, 1 Chitty on Contracts 14-003 (32nd ed. 2015). Under Swiss law, the general statutory time limitation of 10 years cannot be shortened, see Swiss Code of Obligations Article 129.
71 Swiss Code of Obligations Article 97(1).
upon them. Based on this principle, courts have traditionally considered that third parties cannot claim the benefit of an exemption clause between two contracting parties since they are not a party to said contract. These decisions have been considered to be too rigid, in particular, between businessmen. In Scruttons Ltd v. Midland Silicones Ltd, the argument was made that the contracting party, in addition to contracting on his or her own behalf, is also contracting as an agent for the third party to whom the provisions should apply. The situation has become clearer with the enactment of the Contracts (Rights of Third Parties) Act 1999. Section 1(6) of this Act provides that ‘where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.’

In civil law systems, the parties to an agreement are generally allowed to limit their liability for any loss or damage caused by an associate to whom the performance of an obligation or the exercise of a right arising from a contractual obligation is delegated. However, the majority view is that such clauses do not exclude the liability of the associate himself (based on tort, etc.).

In summary, it seems that clauses limiting damages owed by third parties tend to be more effective under common law.

Conclusion

The above explanations demonstrate that the general concepts regarding how contractual limitations of damages can be agreed, how they are interpreted, who bears the burden of proving such limitations, and the consequences of such limitations are similar even in diverse legal traditions.

On the other hand, the enforceability of contractual limitations on damages varies quite heavily between the common law and the civil law traditions. While the common law system tends to apply a reasonableness test, civil law countries generally focus on the degree of fault and consider agreements purporting to exclude liability for unlawful intent and gross negligence in advance to be ineffective. This difference is crucial for the availability of several forms of contractual limitations on damages.

Differences in the approach towards contractual limitations on damages emerge in almost all forms of such limitations on damages that have been assessed above.

Liquidated damages and penalty clauses are generally permissible in civil law systems, with the caveat that excessive penalties may be reduced by courts. On the other hand, penalty clauses, to the extent that they provide for a monetary charge unrelated to the actual harm, are considered ineffective in the common law tradition.

73 See e.g., Adler v. Dickson [1954] 3 All E.R. 397.
74 [1962] 1 All E.R. 1 at 10.
75 Swiss Code of Obligations Article 101(2). If the obligee is in the obligor's service or if the liability arises in connection with commercial activities conducted under official licence, any exclusion of liability by agreement may apply at most to minor negligence (Swiss Code of Obligations Article 101(3)). See also German Civil Code Section 278.
Stipulations of a maximum amount of damages are effective in the common law tradition if the limitation is reasonable. In civil law systems, caps on damages are only admissible if they do not restrict the damages to an extent that is not admissible under statutory law; in other words, in case of wilful intent or gross negligence, a cap may not be effective.

Clauses that exclude a particular type of damages generally face the same differences in approach. One exception to this rule are damages arising from death or personal injury, which can hardly ever by excluded. On the other hand, the common law tradition generally considers the exclusion of consequential damages to be valid, as long such exclusions are reasonable. But in civil law, exclusions of a particular type of damage do not seem to be very effective, since such limitations may not overcome the mandatory liability for damages arising from gross negligence and wilful misconduct.

A further possibility that should be taken into consideration are clauses that modify the liability with regard to other aspects, such as the statutory limitation periods, which may have the same effect as contractual limitations on damages.

With regard to limitation of damages owed to third parties, it seems that the common law tradition allows third parties to avail themselves of the contractual limitation of liability, while this may not be the case in civil law systems.

In summary, no general statement can be made about which law system is more favourable towards contractual limitations on damages. Rather, the individual contractual limitation sought or in dispute must be assessed under the applicable law. And depending on the importance of contractual limitation on damages, the law applicable should be chosen with a view to maximising the enforceability of such limitations.
Appendix 1

About the Authors

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Gabrielle Nater-Bass is a partner in Homburger’s dispute resolution group. Her practice focuses on domestic and international arbitration and litigation. She is an experienced party counsel, arbitrator and legal expert in international commercial arbitration, ad hoc and institutional (including ICC, Swiss Rules, LCIA, DIS, UNCITRAL). She also regularly acts as counsel in commercial litigations before state courts. Gabrielle Nater-Bass is listed on the panel of arbitrators of the ICC National Committee (Switzerland), the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). She was recognised by Global Arbitration Review as one of the magazine’s ‘all female top 30’ women in arbitration. She currently serves as president of the Arbitration Court of the Swiss Chambers’ Arbitration Institution (SCAI) and is a board member of the Swiss Arbitration Association (ASA). Gabrielle Nater-Bass is also a member of the International Board of the Arbitration Institute of the Finland Chamber of Commerce and the Advisory Board of ArbitralWomen (former vice president). She was invited to join the SIAC Users Council and ICDR/AAA International Advisory Committee and co-chairs the ICCA-ASIL Task Force on Damages in International Arbitration. Gabrielle Nater-Bass has authored numerous publications in the field of international arbitration and is a frequent speaker at arbitration conferences.

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Pfisterer has been recognised by *Who’s Who Legal* as one of the 10 most highly regarded ‘Future Leaders’ in arbitration (Europe – Non-Partners). She is described as a ‘technically brilliant’ lawyer (2018 ed.) and as being ‘very analytical, extremely smart and one of the most talented of the younger generation’ (2017 ed.). Stefanie Pfisterer earned her law degree from the University of Bern (MLaw, 2007) and holds a master’s degree from Harvard Law School (LLM, 2012) and a doctoral degree from the University of Zurich (Dr iur, 2012). She is the author of a number of publications in the field of dispute resolution and is a regular speaker on arbitration-related issues.

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