

NEC Secondary Option X18

Limitation of Liability

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GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

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2



Contractual Liability

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3



Background

Contracts give rise to both rights and obligations on the parties, which may be derived from either express or implied terms.

The parties are required to undertake certain actions to complete their performance obligations under the contract.

Where performance is insufficient to fulfil a contractual obligation then this constitutes a breach of contract.

Many contract forms provide for specified remedies in the event of particular breaches.

There may be other possible remedies, however, which sit 'outside' of the contract, including under the law of tort.

A legal remedy, in the form of damages, could extend to a significant value, depending upon what the breach is and its consequent effects.

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4

Liability



But how far does a 'loss' continue for?

The following tests were established in the 'landmark' case of *Hadley & Anor v Baxendale & Ors* (1854) EWHC Exch J70;

- Losses that '*arise naturally from the breach*' or were in 'the reasonable contemplation of both parties' when the contract was made,
- Losses arising from '*special circumstances*' are only recoverable if aware at the time of contract.

These tests were refined in *Victoria Laundry* (1949) with a '*reasonably foreseeable*' test for '*special circumstances*' and *The Heron II* (1969) which replaced this with a '*probability test*', in that the event was '*not unlikely to result*' from the breach.

A ruling in the *Achilleas* (2009) suggested a new test, although in the *Sylvia* (2010) the House of Lords reviewed '*all case law at length*' and concluded that the *Achilleas* was a '*particular circumstance*'.

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5

Limitation



To provide 'boundaries' for the consequences of potential risks, limitation clauses may be included within the contract terms.

Common examples of limitation clauses include the following;

- Financial cap on liability,
- Exclusion of particular 'heads' of loss,
- Time limits on claims,
- Exclusion of loss for specified risks,
- Net contribution clause,
- Providing for specific remedies,
- Restriction on 'level' of contract performance.

Notwithstanding the above 'remedies' the matter can be contained and managed by providing clear, comprehensive and unambiguous obligations and responsibilities within the contract documentation.

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6

Compliance



To be effective, a limitation clause should comply with the following;

Included in the contract

This would apply where it is unclear what the terms of the contract are, including the 'battle of the forms' situation.

Needs to expressly cover the liability in question

Clear and unambiguous wording is required to give effect, otherwise the meaning may be interpreted against the party seeking to rely upon it.

They should be obvious

A limitation clause should 'stand out' and ideally be brought to the other party's attention to give them the greatest effect.

There are also statutory requirements which need to be considered, including the Unfair Contract Terms Act 1977 (UCTA).

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7

UCTA 1977



This is the most significant statutory control and deals with;

Negligence – s2

Liability cannot be restricted or excluded for death or personal injury.

In relation to loss or damage, any such exclusion terms must be reasonable.

Contract – s3

Requirements where the contract is on one party's written standard terms, which includes the 'reasonableness' test.

Misrepresentation – s8

This is treated in the same way as negligence with any exclusion terms having to comply with the 'reasonableness' test.

The 'reasonableness' test – s11

This refers to the 'reasonableness' which was in the contemplation of the parties when the contract was made, with guidelines provided at Schedule 2 of the Act.

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8

NEC Contracts



The liabilities are set out in core clause 8, except the DRSC and FC forms.

The biggest change from NEC3 to NEC4 is that the liabilities are expressly defined rather than the 'supplier' assuming a 'catch all' position, as follows;

'... the risks which are not carried by the ('purchaser') are carried by the ('supplier').'

This 'generic' position under NEC3 applied to the ECC, ECS, TSC and SC forms, with the PSC form worded differently.

The 'short form' NEC contracts contain limitation and exclusion clauses within core clause 8 as follows;

- ECSC – 82.4,
- ECSS – 82.4,
- PSSC – 84.1,
- TSSC – 82.4,
- SSC – 84.1, 84.2, 84.3.

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9



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10

NEC Suite



Secondary option X18 was added under NEC3 and can now be found in the following NEC4 forms of contract:

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Term Service Contract (TSC),
- Term Service Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Supply Contract (SC),
- Design Build and Operate Contract (DBOC),
- Alliance Contract (ALC).

Note: the ALC form does not separate out specific liabilities.

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11

ECC – X18.1



'Each of the limits to the Contractor's liability in this clause apply if a limit is stated in the Contract Data.'

This section was added under NEC4 and clarifies the relationship between the Option and Contract Data.

This clarity will also prevent arguments where there are inconsistencies between different sections of the Contract Data.

Where a limit is not stated in Contract Data then no limit will apply to that associated liability.

This sub-clause is consistent between all of the NEC forms.

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12

ECC – X18.2



'The Contractor's liability to the Client for the Client's indirect or consequential loss is limited to the amount stated in the Contract Data.'

This sub-clause is consistent between all of the NEC contracts, except the ALC form.

This relates to the 'second limb' in the Hadley v Baxendale case.

What 'indirect or consequential loss' actually relates to will be particular to the circumstances that apply to the contract.

One difficulty seems to be how 'loss of profit' is applied and whether it constitutes a 'direct' or 'indirect' loss.

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13

ECC – X18.3



'For any one event, the liability of the Contractor to the Client for loss of or damage to the Client's property is limited to the amount stated in the Contract Data.'

This sub-clause is consistent between all of the NEC contracts, (FMC and FMS are X18.4), except the ALC, PSC and PSS forms.

This liability is specifically stated as the responsibility of the 'supplier' under core clause 8.

This should also be linked to the insurance obligations under the contract to provide consistency with the stated values.

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14

ECC – X18.4



'The Contractor's liability to the Client for Defects due to its design which are not listed on the Defects Certificate is limited to the amount stated in the Contract Data.'

The principle intent of this sub-clause applies to the ECC, ECS, PSC, PSS, FMC (X18.5), FMS (X18.5), SC and DBO forms.

This assumes that the 'supplier' has stated design responsibility under the contract.

Where secondary option X15 applies, note that the 'supplier's' responsibility for design is limited to 'skill and care'.

ECC – X18.5



'The Contractor's total liability to the Client for all matters arising under or in connection with the contract, other than the excluded matters, is limited to the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the law of the contract.'

The excluded matters are amounts payable by the Contractor as stated in the contract for

- *loss of or damage to the Client's property,*
- *delay damages if Option X7 applies,*
- *low performance damages if Option X17 applies and*
- *Contractor's share.'*

The principle intent of this sub-clause applies to the ECC, ECS, TSC, TSS, FMC (X18.6), FMS (X18.6), SC, DBO and ALC (X18.2) forms.

ECC – X18.5 (Cont'd)



This sub-clause relates to liability in relation to the following;

Contract

This would be where a liability accrues, primarily due to a breach of contractual obligations.

Tort

This would apply to a breach of a civil obligation imposed under a common law jurisdiction, which most commonly includes negligence.

Delict

This is similar to 'tort' and would essentially apply in countries which have a civil law jurisdiction rather than a common law system.

ECC – X18.6



'The Contractor is not liable to the Client for a matter unless details of the matter are notified to the Contractor before the end of liability date.'

The principle intent of this sub-clause applies to all the NEC forms (PSC X18.4), PSS (X18.4) and ALC (X18.3).

This is an important clause as liability may continue after the 'defects date'.

The 'cut off' period is set by the Limitations Act 1980 either as;

- 6 years under a 'simple contract',
- 12 years where executed as a deed.

The 6 year period may also be extended by the Latent Damage Act 1986.


The limitation periods may be shortened by agreement, subject to the 'reasonableness test' under the UCTA.



Things to Consider...

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Things to Consider...

- Does the limitation or exclusion clause satisfy the requirements of the UCTA Act 1977?
- Do the parties have equal bargaining power?
- Are any exclusion or liability clauses 'buried away' in contract documentation?
- Are they consistent with other contract requirements?
- Do they represent the parties intentions and allocation of risk?
- Check the wording of associated documentation, such as bonds, guarantees and warranties, for consistency.

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21