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Two Reminders of The Importance of Clear Drafting: PA(GI) & Drax

Minding Your Business on **September 25, 2023**

Two of the most common queries Proskauer's UK litigation team is asked to advise upon are (i) the interpretation and scope of indemnities and (ii) liability caps. Over the summer, the English Courts handed down two judgments that focus on the interpretation of such provisions. These cases serve as a useful reminder of the importance of (1) clear drafting, (2) consistent drafting throughout a contract, and (3) fully considering all relevant risks at the outset of negotiations.

English law takes an objective approach to contractual interpretation. This means that the first – and often last – question a Court asks itself is this: *what is the natural and ordinary meaning of the words used in context?* In a freely negotiated commercial contract between parties of equal bargaining power, who each had legal advice, a Court seeks to enforce the parties' agreed allocation of risk as expressed on the page, even if this appears to be a bad bargain. A Court will search for business common sense only if the words are ambiguous.

Parties allocate risk in contracts in several ways. Two recent cases looked at two of these methods – a contractual indemnity and a limitation of liability clause – in judgments that emphasise the importance of clear drafting and express terms.

In *PA(GI) Ltd v Cigna Insurance Services (Europe) Ltd*, the clause under scrutiny was an indemnity in an agreement for the sale and purchase of insurance operations. The issue was whether or not the broadly worded clause on its natural and ordinary meaning indemnified negligent acts even where there was no express reference to negligence. The Defendant's argument was that the clause should not extend to cover negligence, and it would not have agreed to assume responsibility for the relevant negligence or other wrongdoing of the Claimant or its agent, especially where such a liability might be open-ended, and the indemnity did not contain any words, let alone clear words, that suggested otherwise.

The Claimant instead argued that the parties were free to make their own bargains and allocate risk as they think fit, and that the word "negligence" did not have to be used expressly for it to be included in an indemnity. This argument was supported by the fact that the risks of negligent mis-selling of insurance policies were public knowledge before the acquisition took place. The judge ruled that the liabilities for negligent mis-selling accordingly fell within the interpretation of the indemnity on its natural and ordinary meaning other than where such liabilities arose as a result of fraud or dishonesty (including deceit), which were excluded on public policy grounds.

Drax Energy Solutions Ltd v Wipro Ltd concerned the interpretation of a limitation of liability clause contained in an MSA for the provision of software services. The Court was asked to interpret whether the limitation of liability provided for a single aggregate cap for the defendant's liability for the claimant's aggregated claims, or multiple caps with a separate financial limited applying to each of the claimant's claims.

The Claimant argued the 150% liability cap applied to each and every separate claim (interpretating "*claim*" as a cause of action and arguing the word "*total*" was effectively unnecessary boilerplate language); the Defendant, that one 150% liability cap applied (arguing that "*claim*" here meant "*liability*" and relying on both the phrase "*total liability*" and the absence of language referring to "each claim" or similar).

The Court favoured the Defendant's interpretation, following the rules of contractual interpretation and declining to employ any special rules of interpretation when dealing with exclusion or limitation clauses. This interpretation also, in the Court's view, made more commercial common sense.

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