



International Federation of Consulting Engineers
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Limitations of Liability

A FIDIC Briefing Note prepared by Business Practice Leadership Committee Risk and Liability Task Group

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LIABILITY

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Aim and Introduction

The aim of this briefing note is to provide consultants with a high-level overview of the subject. It is not an exhaustive review of the subject matter and is not a substitute for obtaining legal advice. FIDIC recommends that consultants liaise with FIDIC Member Associations in the jurisdiction of the project to understand the local law and conditions of the market.

Risk management is a key component for any consultant. There are many ways to manage project risks, whether legal, commercial, or technical. One of the ways in which consultants can protect themselves against the financial consequences of being sued is by taking out Professional Indemnity (PI) insurance. Due to restrictions and uncertainties in the insurance market, however, consultants may find themselves underinsured or worse, uninsured in the event of a claim. Therefore, consultants should also manage their risks through other means, for instance, through limiting their liability in their contracts.

How to limit liability in a contract?

One of the most common methods of limiting liability in contracts is by including a financial cap on the consultant's overall liability. It is intended to work by limiting the consultant's financial exposure under the contract to an aggregate amount in respect of all liability (whether in respect of direct or consequential losses) although the precise nature of the financial cap will depend on the wording used. There may be, however, restrictions with regards to such clauses:

- Certain risks cannot be excluded or limited from the contract as a matter of law, for example, personal injury, death, fraud or (in certain jurisdictions) deliberate default or reckless or wilful misconduct by the defaulting party or damages for death or personal injury.
- The 2017 FIDIC contracts also state that the limitation of liability does not apply where there has been gross negligence.
- The governing law of the contract could affect the interpretation and effect of the limitation of liability clauses of the contract.
- Finally, the interplay between waiver of consequential damages provisions and limitations of liability should be considered.

Other ways of limiting a consultant's risk in a contract include restricting the types of loss recoverable (or the remedies available) or by imposing a time limit for claims (if this is permissible in a particular jurisdiction).

Note, however, that liability in relation to claims cannot be excluded or restricted in the absence of a contract between the parties. In such a case, therefore, the consultant's liability is unlimited. It is vital therefore, that a written contract is in place for all projects.

Enforceability

Limitations of liability clauses are useful only if they are enforceable. Enforceability turns on questions of contractual interpretation, case law, statute, reasonableness, and public policy. These may have varying levels of application depending on the jurisdiction.

In general, parties to a contract are free to negotiate limitation of liability clauses. Courts have refused, however, to enforce such provisions where:

- The provision was ambiguous.
- The parties' intentions were not clearly expressed.
- One party had unequal bargaining powers or a higher level of sophistication.
- There was a public policy or statute prohibiting the enforcement of the provision.

In order to increase the success of a limitation of liability clause, the following points should be noted:

- Make sure that the clause is clear and conspicuous (for instance, setting the clause in bold print or underlined or otherwise place the clause apart from the rest of the text on the page on which it appears so that the other party is aware of its existence).
- Use clear and concise language, making sure that the clause is concise and unambiguous as it relates to the contract as a whole.
- Discuss the clause with your client and negotiate to avoid ambiguity.
- Retain drafts of revisions (keep drafts of any revisions made to the limitation of liability clause so that you have proof that the clause was negotiated).

- The limit of liability should not exceed the level of PI insurance that you are contractually obliged to maintain under your agreement,

FIDIC approach

FIDIC contracts aim to maintain a reasonable balance between differing objectives of the contracting parties, each of whom will wish to limit his own liability whilst being entitled to receive full compensation for default by the other.

FIDIC contracts address limitation of liability in Sub-Clause 17.6 (in the 1999 edition) and Sub-Clause 1.15 (in 2017 edition) in two ways:

- By expressly excluding the parties' liability in connection with the contract in respect of certain types of losses (with some exceptions mentioned in the contract).
- By limiting the contractor's liability to an amount which is to be stated in the Particular Conditions (with some exceptions as set out in the contracts).

Summary

- Consultancies do not possess unlimited funds. A cap on their liability therefore gives clients as well as consultants a degree of certainty they would not otherwise have should a claim arise.
- Limiting liability in contracts is an effective way for consultants to protect themselves from risk exposure and should be considered, in addition to other risk mitigation measures.
- Generally, the interpretation and effect of limitation of liability clauses are dependent on the treatment of limitation and exclusion clauses under the particular governing law of the contract.
- Certain liabilities cannot be excluded or limited as a matter of law, for instance, personal injury, death, or fraud but the specifics will be dependent on the specific country.
- Limitation of liability clauses should be drawn to the attention of the other party to the contract. Preferably it should be discussed and specifically agreed. If this is done, it is much more difficult for the other party to successfully challenge the limitation clause in court.
- Liability cannot be excluded or restricted in the absence of a written contract.
- In the light of increasing restrictions on PI cover, consider the inclusion of sub-caps for issues such as asbestos and fire safety, within the limitation of liability.

About FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.

Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members. Today, FIDIC membership covers over 100 countries of the world.

FIDIC Member Associations operate in over 100 countries with a combined population in excess of 6.5bn people and a combined GDP in excess of \$30tn. The global industry, including construction, is estimated to be worth over \$22tn. This means that FIDIC member associations across the various countries are worth over \$8.5tn.



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