



International Distribution Institute

DISCUSSION PANEL 3

Limiting the amount of seller's liability for damages arising from the sales contract

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Topics to be discussed

- Contractual limitation of liability: (Limited) role of the CISG
- Drafting contractual limitation of liability clauses: Recommendations and challenges
- Validity of limitation of liability clauses

Contractual limitation of liability: (Limited) role of the CISG

- CISG allows for contractual limitation of liability:

Art. 6 CISG

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

- validity of limitation of liability clauses not governed by the CISG:

Art. 4 CISG

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage; [...]

- ⇒ validity to be assessed under applicable domestic law
- ⇒ but: indirect relevance of CISG in this context

Interpretation of contractual limitation of liability clauses

- The interpretation of contractual limitation of liability clauses in CISG contracts is governed by the CISG's interpretation rules:

Art. 8 CISG

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*

Clause no. 2

Buyer's remedies are limited to the replacement or repair of defective goods, excluding any compensation for damages («escluso qualsiasi risarcimento di danni»).

Is the clause well-drafted? Is it valid?

(Clause from contract between German seller and Italian buyer
CISG-online 562)

Clause no. 3

«THE EQUIPMENT BEING SOLD ON AN «AS, WHERE IS» BASIS AND WITH ALL FAULTS. EXCEPT AS SET FORTH HEREIN, THE SELLER MAKES NO REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE EQUIPMENT, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND EXPRESSLY DISCLAIMS LIABILITY AND SHALL NOT BE LIABLE FOR LOST PROFITS OR FOR INDIRECT, INCIDENTAL CONSEQUENTIAL OR COMMERCIAL LOSSES OF ANY KIND.»

Is the clause well-drafted? Is it valid?

(Clause from contract between U.S. seller and Canadian buyer
CISG-online 1776)



Clause no. 4

«Seller's warranty is strictly limited to the purchase price of the product sold or the service provided.»

Is the clause well-drafted? Is it valid?

(Clause from contract between French seller and U.S. buyer)

Clause no. 5

«If the customer by a business with final payment by LOC (letter of credit) after the confirmation of order drawn by him two days ago don't present no valid LOC, so he has to pay to the seller compensation at the rate of at least 25% of the total sum inclusive of all costs.»

Is the clause well-drafted? Is it valid?

(Clause from contract between German seller and Chinese buyer

CISG-online 5362)

Clause no. 6

«Seller's liability for hidden defect is excluded [or: is limited to the purchase price].»

Is the clause well-drafted? Is it valid?

(Clause from contract between French seller and U.S. buyer)

Clause no. 7

«(3) To the extent legally permissible, the Seller's liability, irrespective on what legal basis, for indirect and consequential damages (including, without limitation, lost profits, loss of goodwill, losses caused by business interruption and frustrated expenses) shall be excluded. The foregoing shall not apply with respect to the Seller's liability for third party claims raised against the Purchaser, also if they relate to damages referred to in the preceding sentence. Attorney's fees and other legal costs incurred by the Purchaser (including in connection with the defence against any third party claims) shall be recoverable to the extent reasonably deemed necessary and appropriate by the Purchaser. Any damage claims of the Purchaser shall be limited to an aggregate amount equal to [...] % of the net purchase price.»

Is the clause well-drafted? Is it valid?

(Clause for CISG contracts from a contract drafting manual)

Clause no. 1

«Seller's liability for defective products for any damage is excluded.»

Is the clause well-drafted? Is it valid?

(Clause between French seller and a German buyer)

Clause no. 8

«1. Buyer's sole remedy in case of a lack of conformity is to demand that Seller, at Seller's choice, repairs or replaces the Contract Product. Article 46 CISG is excluded.

2. [...]

3. Buyer's right to damages, irrespective of its legal basis, is excluded, except in cases where Buyer proves intent or gross negligence of the Seller.

4. [...]

5. The overall liability of Seller under this Sales Agreement is capped to [amount or the Purchase Price].»

Is the clause well-drafted? Is it valid?

(Clause for CISG contracts from another contract drafting manual)