

# Commercial Update

## Limiting your liability in contracts is fundamental

In our last few updates, we have discussed liability for a breach of contract. You may recall that under common law, subject to a few restraints (causation, remoteness and mitigation), liability for damages for a breach of contract is unlimited. The situation is even worse under a contractual indemnity, which, amongst other things, removes the common law restraints and thus truly imposes a completely unlimited exposure on the indemnifying party.

However, there is certainly something you can do to limit your liability in contracts. It is generally acceptable and legitimate for parties to limit their liability for a breach of contract in the contract itself. This is because unlimited liability under general law or indemnities is often commercially unacceptable to some or all parties to the contract. There is nothing in the general law or, with limited exceptions related to consumer protection, in legislation to stop parties from limiting their liability in contracts.

### Let's summarise a few key principles of exclusions and limitations of liability:

1. People commonly seek to exclude liability for so-called "consequential" or "indirect" losses in contracts. The idea is that one party should not be liable for the other party's losses related to their specific operation, e.g. their loss of profit or loss of contract. Unfortunately, "consequential" and "indirect" losses do not have a reliable legal meaning. Therefore, the parties really should turn their mind to what specific losses they would like to exclude their liability for. Here is a typical example of an exclusion clause that specifically addresses common types of "consequential" or "indirect" losses:

"Notwithstanding any other provision of the contract, neither party shall have any liability to the other party, whether for breach of contract, under indemnity, in tort (including for negligence) or on any other basis in law or equity for loss of production, profit, revenue, contract or for any financing costs or increase in operating costs or for any consequential or indirect loss"

2. In addition to excluding liability for "consequential" or "indirect" losses, the parties should consider limiting all other liability to an agreed amount. For example, it's not unusual for a supplier to seek to limit its overall liability to the value of the contract. The idea here is that the risk should be commensurate with the reward. It is also common to limit liability to the extent of insurance coverage, although this approach is inherently problematic (we will discuss it in our next update).
3. In our last update, we also mentioned that an alternative way of limiting liability is to agree to liquidated damages if a particular breach occurs. If such liquidated damages are specified in the contract, they are in lieu of general (unlimited) damages.

**For more information or for assistance in preparing, reviewing and negotiating any contracts, please contact Stanislav Roth at Source Legal, email [stanislav.roth@sourcelegal.com.au](mailto:stanislav.roth@sourcelegal.com.au).**