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WARRANTY DISCLAIMERS AND EXCLUSION OF LIABILITY CLAUSES

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1. EDITORS' COMMENTS

Keeping with our theme of addressing common issues faced by international commercial practitioners, for this issue we asked our contributors to address issues relating to warranty disclaimers and exclusion of liability provisions. These provisions generally provide that:

- (a) the supplier disclaims all implied warranties imposed by law;
- (b) the supplier's liability excludes various types of damage (consequential, lost profits, special, indirect and incidental damages);
- (c) the purchaser's remedies are expressly limited to:
 - (i) in the case of goods, replacing the goods acquired or returning the goods acquired in exchange for the price paid;
 - (ii) in the case of services, the amount paid by the acquirer.
- (d) the warranty period provided by the supplier is limited to a set number of days or months after delivery (often as short as possible).

In relation to the points above, we asked our contributors to address the following questions:

- Would an exclusion/limitation as set out above be enforceable?
- If not, would a court deem the clause void or would it have the power to amend it so as to make it enforceable? If it is void or unenforceable, are there any other penalties or consequences for including such provision in the contract?
- Would the position change in the case of consumer relationships, franchise agreements or where the parties have different bargaining strengths?

Once again, the contributions are all of excellent quality. We are confident they will give you practical guidance when dealing with matters in the jurisdictions analyzed. (Florian did not contribute to this paragraph).

Finally, we are accepting suggestions for our next newsletter. Just e-mail Fabiano Deffenti (fdeffenti@cmted.com) or Florian S. Jörg (fjoerg@frieep.ch).

Fabiano Deffenti and Florian S. Jörg
Editors

2. FRANCE

The particularity of French law regarding limitation of liability clauses is that it can never quite be known, until the court rules on same, whether they are enforceable. Indeed, the validity of such clauses depends on different criteria of which some are unknown at the time the clauses are drafted. These criteria are amongst other things the legal grounds that will be chosen by the party claiming damages, or determined by the capacity of each party to the agreement (whether they are professionals or consumers), their specific knowledge and the nature of the damages suffered. The rule is thus the uncertainty of the status of limitation of liability clauses.

The rules governing warranty clauses and limitation or exclusion of liability clauses vary depending on the grounds used to claim a breach:

- When the liability is incurred under general contractual law and in any case whatsoever, such clauses will be valid between professionals, unless the breach amounts to wilful misconduct or gross negligence, or the clauses would result in the exclusion of all of the debtor's liability regarding the very purpose of the agreement or in the event of bodily harm.
- When the liability is for latent/hidden defects (article 1641 of the French Civil Code), the clauses will be valid only between professionals of the same expertise (which is strictly interpreted by the Courts). As a result, such clauses are almost never upheld. One does not contract with its competitors! Note that a latent defect is one which is inherent

to the product though discovered after the sale and which limits its use or renders it impossible.

When liability results in lack of safety,¹ the clauses will be valid between professionals, but only with regard to damages to the movables intended for professional uses.

The validity of these clauses depends also on the capacity: they cannot be enforced against a third party. Vis-à-vis consumers, they cannot create, to the detriment of the consumer, a significant imbalance between the rights and obligations of the parties.²

Finally, notwithstanding the above, some damages will never be compensated so that if the agreement is governed by French law, it is not necessary to exclude them expressly from compensation. Such is the case for punitive damages, exemplary damages and indirect damages. Consequential damages are unknown to French law; when used in an agreement, such wording must be defined. However, losses of profits, loss of revenue, or any other type of loss or costs suffered are considered direct damages.

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3. MEXICO

In the commercial context, Mexican law provides that merchants may “obligate themselves in the manner and terms that it appears that they wanted” to accept.³ Thus, in a contract between merchants, the parties would be generally free to agree to an “as is” sale in which the seller disclaims all warranties and/or limits the damages that an aggrieved party would seek. The one exception to this rule would be a clause in which the parties agreed to accept certain remedies in lieu of filing a court action, since the Mexican courts have held that the right to file a court action cannot be waived as a matter of public policy.⁴

In the consumer context, the situation is somewhat different. The Mexican Federal Consumer Protection Law and other laws offer certain protections to consumers, defined as natural persons or certain small companies, and the courts have held that these protections trump the general freedom of contract principles contained in the Civil Code. These protections include an obligation on the part of sellers to offer minimum warranties on certain products, and the requirement that any adhesion contract be registered with and approved by the Federal Consumer Protection Agency, which can reject warranty disclaimers or exclusion of liability clauses that are unfair to the consumer.

¹ Article 1386-1 of the French Civil Code incorporating the EC Directive 85/374/CEE of July 25, 1985.

² Article L. 132-1 of the French Consumer Code.

³ Article 78 of the Commerce Code.

⁴ *Amparo en revisión* 104/94, *Semanario Judicial de la Federación*, tomo XIII, page 507, June 1994.

A seller of a good or service may choose not to offer any warranty at all (except for those products for which warranties are mandatory). However, if the seller does offer a warranty, that warranty must have a duration of at least 60 days.⁵

The Consumer Protection Law also provides that a consumer who has received a defective product may rescind the purchase contract and receive a refund, including interest, demand receipt of the good or service originally bargained for, or receive a reduction in price to compensate the consumer for the defects in the product, all at the consumer's election and without constituting a waiver of the consumer's right to seek judicial damages.⁶ Thus, neither the consumer's remedies nor the consumer's right to seek all damages that can be proven in court may be limited by contract. Further in this vein, the law provides that a choice of forum clause in favor of a foreign venue is invalid in the consumer context.⁷

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4. SOUTH AFRICA

4.1 Introduction

These clauses are governed by national laws. The common law principle that a person contracting without duress, without fraud and with a full understanding of what he is doing, may freely waive any of his rights, comes to the preliminary rescue of a party seeking to rely on an exemption clause. In interpreting such clauses, the courts adopt a very narrow and strict interpretation. Clauses which merely exclude liability “from any damage whatsoever arising” or “from whatsoever cause” are often interpreted restrictively.

The courts apply the minimum degree of effectiveness to a vague exclusion clause and exclude liability for the lowest degree of blameworthiness possible. Where a clause is ambiguous, it will be interpreted against the drafter, as the onus of ensuring that the exemption sought is clear, rests on the person relying on its protection.

When a disclaimer is contained in a notice, care must be taken in the positioning, size and prominence of such notice. When it is contained in a written document, the entire document must be given to the intended recipient.

4.2 Special relationships

(a) National Credit Act 34 of 2005

A credit agreement must not contain a provision exempting a credit provider from liability for any representation by a person acting on its behalf, or any guarantee or warranty that would, in the absence of such a provision, be implied in a credit

⁵ Article 77 of the Federal Consumer Protection Law.

⁶ Article 82 of the Federal Consumer Protection Law.

⁷ Article 90 (VI) of the Consumer Protection Law.

agreement. If a credit agreement contains such a provision, the court must sever that unlawful provision from the agreement, or alter it to render it lawful; or declare the entire agreement unlawful.

(b) Draft Consumer Protection Bill of 2006

If an agreement is in writing, any provision that purports to limit in any way the risk or liability of the supplier, is of no force unless the nature and effect of the provision is drawn to the consumer's attention before he enters into the agreement; the provision is in plain language; and the consumer has signed or initialled that provision indicating acceptance of it.

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5. SWITZERLAND

Swiss law on warranties is only partially mandatory. The general rule with respect to disclaimers is that they are only valid and enforceable if and to the extent the disclaimer is limited to liability for slight negligence. Therefore, a contracting party may not effectively exclude its liability for a breach based on intention or gross negligence.

It is disputed whether exceptions stated for specific forms of contracts prevail over this general rule or whether both rules have to be complied with. One such specific provision applies to sales contracts as follows: disclaimers by the seller which are agreed as included in the contract are valid and enforceable unless the seller has fraudulently concealed the defects of the goods sold. However, if the Product Liability Act becomes applicable, the seller is not entitled to exclude his liability for damages awarded under this statute.

To the extent the seller may legally disclaim any warranty for a sold good the seller may also limit its liability to various types of damage or may limit the purchaser's remedies to a replacement or return of the goods against reimbursement of the purchase price. Finally, the seller is also entitled to shorten the statutory warranty period.

If and to the extent the disclaimer is not enforceable for the reasons mentioned above, the clause is void. It will be replaced by the statutory warranties or modified by the court to a provision in accordance with the statutory liability. There are no other penalties or consequences for including such provision in the contract.

In Switzerland, there is only a fragmentary consumers' law and no act on franchising. No statute deals with abusive general terms and conditions. Therefore, courts only reluctantly overrule or modify general terms and conditions if their meaning is clear. Even in cases involving parties with unequal bargaining positions, courts will annul warranty disclaimers only if they conflict with general legal principles.

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