

Limitation of liability clauses, can they always be enforced?

Obligations and liabilities under the UAE's Law arise out of contracts, unilateral acts, acts causing harm (torts), acts conferring benefits and the law itself. Many individuals and corporations frequently tend to use and rely on limitation of liability clauses in all types of contracts in the UAE and other jurisdictions without any consideration of the actual validity or enforceability of such clauses.

Contractual liability in the UAE may only arise where valid contracts (this includes verbal contracts) exist between the liable party and the party who has sustained the damages. In addition, the liable party must have violated one of its obligations under the contract and as a result of this violation, there must be a harm caused to the other party.

In other words, contractual liability can only be established if the following principles are met and cannot exist in the absence of any of these principles:

- 1- There should be a wrongful act represented by non - performance, violation of the terms of a contract or delay in the performance any of the obligations under the contract by the defaulting party.
- 2- Damages must be sustained by the other party to the contract;
- 3- There must be a reasonable connection between the wrongful act of the defaulting party (the violation of the obligations under the contract – this is usually determined by the court on a case by case basis) and the damages sustained by the other party to the contract. This means that the damages sustained must be as a result of the violation of the terms of the contract.

The freedom of contract principle dictates that parties have the freedom to form contracts as they see fit, without government restriction, as they are the best judges of their own interest (provided that any contract should not be illegal, immoral or violate the rules of public order) Based on this principle, contracting parties may agree to extend or limit their liabilities under any contract in several forms. This includes fixing the amount of compensation payable by the defaulting party in advance by making reference to the same either in the contract or in a subsequent agreement (before causing the damage).

However, there are a few exemptions or limitations to the “freedom of contract” rule which many contracting parties try to rely on with a view to limiting their liabilities under all types of contracts. These limitations or exemptions include the following:

1. The court may, upon the application of either party, vary such limitation of liability clauses so as to make the compensation equal to the losses sustained, and any agreement to the contrary would be invalid.

However, if the parties to a contract agreed on the amount of the compensation payable to the party who sustained the damages after the violation of the contractual obligations, this would be considered as a new agreement or as a settlement, and in such event, the court would not intervene because the agreement in this case came after the violation and the damage.

2. The court can intervene if it was proven that the impossibility of the performance arose out of an external cause in which the obligor played no part (such as a natural disaster,

unavoidable accident, force majeure, an act of third party, or an act of the party suffering loss). However, in this case, the obligor would have to prove that this was due to an external cause.

The determination of the liability arising out of a default and determining whether or not one of the parties has violated or breached its contractual liabilities always falls under the courts' authority. However, the party who has sustained the damages as a result of breaching a contract is obliged to prove such breach and to prove the connection between the breach and the damages sustained.

3. If the party which has sustained damage has participated by his own act in bringing about or aggravating the damages, then the court may reduce the level by which an act has to be made good or order that it need not to be made good.
4. In the event of fraud or gross negligence on the obligor's part, the court may intervene.

Limitation of liability clauses will always remain subject to the provisions of the UAE law as the nature of some contracts makes them subject to specific regulations and thus, they are exempted from the general rules relating to the limitation of liability.

Given that these clauses might be extremely important in certain contracts, the parties to a contract should always seek proper advice on the validity or enforceability of these clauses in particular, and on the contracts in general, before using or relying on such clauses. In addition, the invalidity of such clauses could affect the validity of the entire contract if the clause violates the local laws or the rules of the public order and if the contract was entirely dependent on this clause.

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