



## Works despite quirks: liability cap upheld by TCC notwithstanding difficult language

In *Drax Energy Solutions Limited v Wipro Limited* [2023], the TCC upheld a contractual clause said to impose a single liability cap for all claims arising out of a master services agreement.

### Background

On 20 January 2017, Drax Energy Solutions Ltd (“**Drax**”) entered into a master services agreement (“the **MSA**”) with Wipro Ltd (“**Wipro**”) for the provision of software services (“the **Services**”).

Wipro was engaged to carry out the Services for a 5-year period through a number of statements of work which would be entered in to on specific ‘go-live’ dates for pre-agreed charges.

Following a number of missed milestones, and delayed deliveries, responsibility for which is disputed, Drax terminated the MSA on 7 August 2019 alleging repudiatory breach of contract.

### The Claim

In early September 2021, Drax issued proceedings against Wipro claiming damages in the total sum of c.£31 million for misrepresentation, quality defects, delay and losses flowing from the termination. Wipro counterclaimed c.£10 million for wrongful termination, prolongation costs and unpaid invoices.

While the main trial is set to take place in October 2024, this case dealt with preliminary issues concerning the interpretation of a limitation of liability clause in the MSA.

### The Clause

Clause 33.2 of the MSA contained a cap on liability and stated: “*Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier’s total liability to the Customer, whether in*

*contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year, then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months”.*

Clause 33.3 of the MSA also provided: “*The Supplier’s total aggregate liability arising out of or in relation to this Agreement for any and all claims related to breach of any provision of [a data protection clause] shall in no event exceed 200% of the Charges paid or payable in the preceding twelve months from the date the claim first arose or £20m (whichever is greater)*”.

Drax argued clause 33.2 imposed a *separate* liability cap on *each* of its claims/causes of action such that Wipro’s maximum liability under the MSA was c.£23 million. In contrast, Wipro contended that clause 33.2 imposed a *single* cap for all claims; and given Drax’s claims had arisen within the first year of the contract and “*150% of the charges paid or payable in the preceding twelve months*” totalled c.£11.5 million, that was Wipro’s maximum liability.

### Held

The TCC found that despite some “*linguistic quirks*” clause 33.2 of the MSA provided for a *single* aggregate cap such that Wipro’s liability to Drax was limited to c.£11.5 million for all claims.

### Did clause 33.2 of the MSA provide for a single aggregate cap, or multiple caps with a separate financial limit applying to each of Drax’s claims?

The Judge, Waksman J, determined that clause 33.2 imposed a single aggregate cap on Wipro’s liability for Drax’s claim. In doing so, the Judge drew on the key principles set out in [Triple Point Technology v PTT \[2021\]](#) (see our previous bulletin on this) and reasoned as follows:



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- The language of clause 33.2, and specifically the presence of words such as “*limited to*” and “*total liability*” supported the interpretation that a single aggregate cap applied.
  - Had the intention been to create a number of caps, the parties could have included express wording to that effect – in this case they did not do this. The absence of the phrase “*for each claim*” after the word “*liability*” also supported this interpretation.
  - Clause 33.3 contained the expression “*the claim first arose*” which meant when the *first* of the claims first arose, even though this was not explicitly stated. The same expression was contained in clause 33.2 and the same interpretation applied. This again supported the view that clause 33.2 imposed a single cap.
  - Clause 33.2 was expressly stated to be “*subject to*” clause 33.3 (set out above) which allowed for a much greater cap for only one group of claims (data protection), the liability for which “*shall in no event exceed*” £20million. It did not make sense for clause 33.2 to impose a single maximum cap of c.£11.5million if it was “*subject to*” clause 33.3 which allowed for a much greater cap for only one group of claims.
- would have been c.£132million which would have made clause 33.2 void.
- Wipro’s argument that “*claim*” meant “*liability*” was also rejected on the basis that this would mean there could never be more than one operative claim. In the present case, there were clearly four separate claims (misrepresentation, quality defects, delay and termination), albeit the claim for misrepresentation necessarily overlapped with the other claims in terms of loss.

## Analysis

This case provides a useful reminder that limitation clauses should be drafted carefully and without ambiguity.

Where a party intends a cap on liability to apply to multiple causes of action, this needs to be expressly stated. The courts will not be sympathetic to parties who fail to draft their contracts with sufficient specificity, especially in cases like this where the parties are large corporations and had sought professional advice when drafting the contract.

## If there were multiple caps, what were each of Drax’s claims to which the caps applied?

Given the Judge’s finding that clause 33.2 imposed a single cap, it was not strictly necessary for this issue to be considered. The Judge nevertheless dealt with this point and concluded as follows:

- Drax’s primary position that “*claim*” in clause 33.2 of the MSA meant “*cause of action*” was rejected. There was no evidence to support this interpretation. In fact, the consequences of Drax’s proposed interpretation would have meant the total cap applicable to the MSA

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## HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk