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Consequential Loss Clauses in the Energy Sector: An international guide

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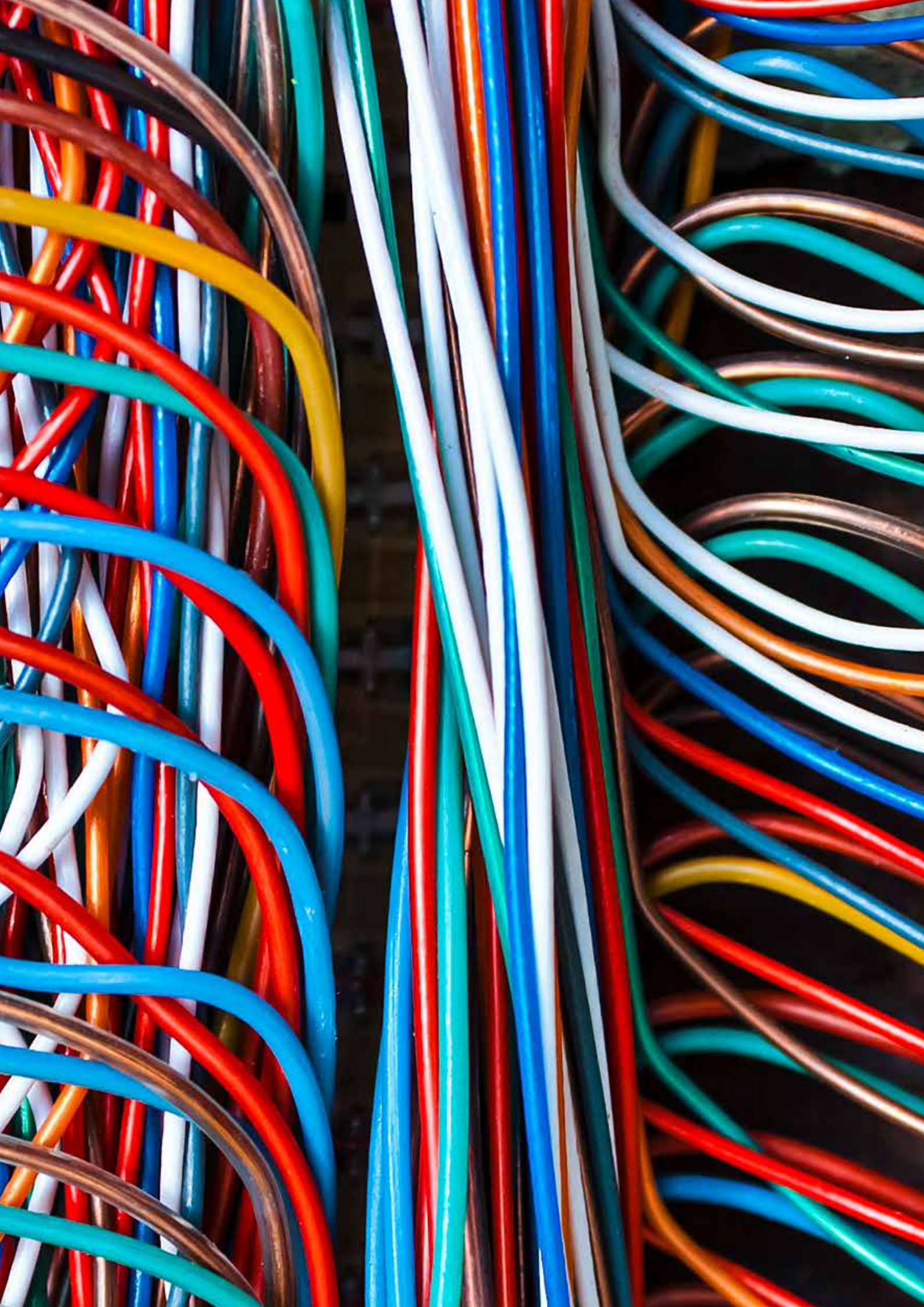

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Introduction

"Consequential loss" exclusion clauses are widely used in energy industry contracting. They are also widely used in other industries, such as the construction industry. However, the negotiation and drafting of such clauses does not always attain the level of scrutiny that is afforded to other contractual provisions.

CMS Guide to Consequential Loss Clauses in the Energy Sector

CMS has carried out a survey of "consequential" loss exclusion provisions across 41 jurisdictions with a specific focus on their use in the energy industry (**'Consequential Loss Guide'**).

It is apparent from the Consequential Loss Guide that in every country surveyed there are doubts about the scope of the meaning of the words "consequential loss" when used in such clauses.

Drafting of substantive exclusion clauses

Examples of these widely used clauses:

1. The BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil, used in global oil sales, states *…" … in no event, … shall either party be liable to the other … in respect of any indirect or consequential losses or expenses …".*
2. The FIDIC Silver Book provides: *"Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under …"*
3. The Shipbuilders' Association of Japan standard form shipbuilding contract states: *"The BUILDER shall have no responsibility or liability for any other defects whatsoever in the VESSEL than the defects specified in Paragraph 1 of this Article. Nor the BUILDER shall in any circumstances be responsible or liable for any consequential or special losses, damages or expenses including, but not limited to, loss of time, loss of profit or earning or demurrage directly or indirectly occasioned to the BUYER by reason of the defects specified in Paragraph 1 of this Article or due to repairs or other works done to the VESSEL to remedy such defects".*

Arbitration clause "double lock" exclusions

In addition, some of the international model form agreements also have "consequential loss" exclusions in the arbitration clause. The AIPN Model Dispute Resolution Agreement (2017) states that: *"The Parties waive their rights to claim or recover, and the [Arbitral Tribunal] [Arbitrator] shall not award, any consequential, punitive, multiple, exemplary, or moral damages …".*

The implications of such drafting might not be immediately apparent to non-aficionados of international arbitration. However, two key issues arise:

— First, if an arbitration clause requires an arbitrator *"shall not"* (or similar) award damages for consequential loss the issue arises as to whether the arbitrator lacks jurisdiction to do so. If an arbitrator lacks jurisdiction to award "consequential loss", damages awards that are not subject to appeal on error of law might otherwise be appealable on jurisdictional grounds.

— Second, as the arbitration agreement is severable it may be governed by a different law than the main body of the contract. If the main body of the contract and an arbitration clause each contain consequential loss exclusions, it is possible that different laws governing interpretation of those words could apply.

Traditional Common Law Approach

England

Sir Kim Lewison sets out, in his seminal text The Interpretation of Contracts, *"[w]here a contract excepts one party for liability for consequential loss, it will normally be interpreted as excepting him from such loss as is recoverable under the second limb of Hadley v Baxendale".*

Hadley v Baxendale (1854) 9 Exch. 341 decided that, as a matter of law, an innocent party may recover for breach of contract:

— First, losses that may fairly and reasonably be considered to arise *"naturally",* i.e. according to the usual course of things from the breach of contract (the "first limb" of *Hadley v Baxendale)*; and

— Second, such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (the "second limb" of *Hadley v Baxendale).*

It is not entirely clear at what point the second limb of *Hadley v Baxendale* became commonly referred to as "consequential loss", or the context in which this arose. However, a series of English Court of Appeal decisions confirmed the approach that "consequential loss" in a contractual exclusion clause would be considered, by English law, to mean the second limb of *Hadley v Baxendale.*

United States

As far back as 1894, the United States Supreme Court accepted *Hadley v Baxendale* as *"a leading case on both sides of the Atlantic"* concerning the recoverability of losses.

The commentary to the Restatement (Second) of the Law of Contracts explains that: *"The damages recoverable for loss that results other than in the ordinary course of events are sometimes called 'special' or 'consequential' damages. These terms are often misleading, however, and it is not necessary to distinguish between 'general' and 'special' or 'consequential' damages for the purpose of the rule stated in this Section."* It is evident from the Restatement (Second) of the Law of Contracts that in the law of most United States jurisdictions the second limb of recoverable damages is also "sometimes called" consequential loss. There is a series of United States cases that follow the traditional English approach of applying this interpretation to exclusion clauses using the words "consequential loss".

Other common law jurisdictions

Until recently, the foregoing traditional approach appeared to be settled law in most common law jurisdictions. In addition to being the law in England and most United States jurisdictions, the traditional approach appears to have been adopted at some point in most other common law jurisdictions. For example:

1. Singapore still follows the traditional English law approach.
2. India still follows the traditional English law approach.
3. Scotland's law has largely evolved in concert with that of England.
4. Hong Kong generally follows the traditional English law approach.
5. Australia used to follow the traditional English law approach until recently.

Common law: Challenging the traditional approach

The foregoing traditional approach to equating "consequential loss" in an exclusion clause to the second limb of *Hadley v Baxendale* was questioned, but not resolved, by Lord Hoffmann in *Caledonia North Sea Ltd v British Telecommunications* [2002] UKHL 4 where he reserved his position on the question as to whether "*the construction adopted by the Court of Appeal was correct".*

The traditional approach was overturned by the Victorian Supreme Court (Court of Appeal) in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26. In *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* [2013] WASC 356 the Western Australian Supreme Court went on to state that the *"natural and ordinary meaning of the words [consequential loss] begins with these words themselves, assessed in their place within the context of the [contract] as a whole".*

The English courts have not yet followed Australia. There is *obiter dicta* to suggest at least some judges are sympathetic to the Australian approach. Two recent cases that questioned the traditional approach in England are *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372 and the *Star Polaris* [2016] EWHC 2941 (Comm). However, in *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* [2020] EWHC 972 the High Court subsequently applied the traditional approach in the context of a "consequential loss" exclusion clause.

Civil law approach

As a general rule, the analysis above in relation to common law jurisdictions' approach to "consequential loss" in exclusion clauses does not readily transpose to civil law jurisdictions.

France

According to Article 1231-4 of the French Civil Code, damages for contractual breach are limited to damages that are the immediate and direct consequence of the breach. Under French contract law, establishing whether the loss is direct or indirect is a matter of causal link.

Notwithstanding the above, "consequential loss" clauses are used in contracts governed by French law. For example, the FIDIC contract wording literally translates "indirect or consequential loss or damage", as *"la perte ou le dommage indirect ou consequent"*.

French law doctrine has tried to propose definitions of consequential damage in order to conceptualise and clarify its various uses under French law. Two main meanings have been identified:

— First, a purely legal definition of consequential damage refers to "second degree" damage, i.e. which is directly even though not immediately connected to the causal event, as opposed to indirect (or remote) damage. As such "consequential loss" would be loss that is recoverable according to Article 1231-4 of the French Civil Code that the parties may elect to exclude.
— Second, the concept of consequential loss refers to economic losses. As such, consequential loss is a specific kind of intangible damage (including for instance the *lucrum cessans* under Article 1231-2 of the French Civil Code). In these circumstances, whether causation is direct or indirect is irrelevant.

As such, a case-by-case analysis is necessary, applying the above rules of interpretation, to establish the proper meaning of "consequential loss" when used in a French law contract. Therefore, the use of the words in the context of a French law contract remain problematic.

Germany
German law does not explicitly recognise the terms "consequential loss", "direct loss" or "indirect loss". Notwithstanding the above, contractual exclusions of liability clauses using German law regularly seek to exclude "consequential loss" without defining what is meant. Court decisions on the interpretation of the meaning of consequential losses are very limited in number and not always coherent.

The federal supreme court *(Bundesgerichtshof)* and a higher regional court *(Oberlandesgericht)* ruled in the 1990s that, in a contract which is subject to German law but written in English, terms such as "consequential loss", which have a specific meaning in English law, will generally be construed according to English law principles.

Whether the above rulings of the German courts would still apply today is unclear, as the underlying assumptions have been criticised by prominent scholars. An alternative approach would be to equate "consequential loss" with the concept of *Folgeschäden* (literal translation *"consequential damage"*) or *mittelbare Schäden* that has developed in German law. It is generally agreed that costs to repair (or replace) damaged property or to heal an injured person are direct losses and not *Folgeschäden* or *mittelbare Schäden* and therefore not excluded as consequential loss.

Lusophone jurisdictions
Portugal, Brazil and Angola do not have the concept of "consequential loss" embedded within their legal framework. However, the concept remains widely used in exclusion clauses.

Under Articles 562 and 564 of the Portuguese Civil Code ('**PCC**'), a party causing loss or damage to another has the obligation to compensate the injured party for damage suffered *("danos emergentes")* and loss of profits *("lucros cessantes")* that the non-defaulting party probably would not have suffered if the breach of contract had not occurred. The position is substantially the same in Articles 562, 563 and 564 of the Angolan Civil Code ('**ACC**') and Article 402 of the Brazilian Civil Code ('**BCC**').

The terms "indirect" and "consequential" are generally used interchangeably. This, perhaps, is a result of a common law drafting tradition. Although indirect loss is not defined by the PCC, ACC or BCC, it is widely understood to mean loss that is indirectly caused by the breach as a matter of causation. As there is only an obligation to pay damages for "direct loss", it is arguable that such an exclusion adds nothing to the position at law. Although many in the industry associate the term with "*lucro cessante*" (loss of profit) there is no obvious jurisprudence to support this approach.

Latin America (excluding Brazil)
The words "consequential loss" have no given or recognised meaning in Peruvian, Colombian, Chilean or Mexican law. Article 1558 of the Chilean Civil Code; Article 2110 of the Mexican Federal Civil Code, Article 1321 of the Peruvian Civil Code and Article 1613 and 1616 of the Colombian Civil Code state that only "direct damages" resulting from a breach of contract may be claimed.



As a consequence, there is uncertainty as to how an exclusion of "consequential loss" should be treated in meaning or effect. In the Colombian energy sector "consequential loss" is often associated with *"lucro cesante"* (loss of profit). However, it should not be assumed that it will be given that meaning as there is no clear jurisprudence on the issue. In Chile and Peru, it seems likely that "consequential loss" will most likely be associated with "indirect damage", which is not recoverable in law in any event. However, again, there is no clear jurisprudence on the issue.

Asia Pacific

On the basis of the above analysis, it might be assumed that civil law jurisdictions in the Asia Pacific region follow civil code jurisdictions elsewhere. However, the issue is more complex.

Article 416 of the Japanese Civil Code allows a party to seek *"damages which arise from any special circumstances if the party should have foreseen such circumstances".* This wording has its origin in the second limb of Hadley v Baxendale. It is not clear from jurisprudence whether "consequential loss" in an exclusion clause would be equated to such special circumstances (or damages).

In turn, the South Korean Civil Act is modelled on the Japanese Civil Code. As such, the conceptual approach of *Hadley v Baxendale* has also made its way into South Korean law through the concept of "special loss". Absent clear jurisprudence, Korean law will be faced with the same conundrum as Japanese law as to whether "consequential loss" should mean the second limb of *Hadley v Baxendale* or something else.

China takes an entirely different approach. As with many other civil law jurisdictions, the words "consequential loss" in China have no attributed legal meaning. Whilst its use should be avoided, it is possible that it would be given a wide interpretation to include loss of profits in all material types.

Conclusion

In addition to the above, the Consequential Loss Guide also covers a variety of associated issues such as the relationship between the words "consequential loss" and the scope of other heads of loss also excluded by the clause.

The Consequential Loss Guide demonstrates that the governing law will have an important impact on the construction and interpretation of a consequential loss exclusion clause, so careful thought should be given to using model form clauses in jurisdictions where the concept does not readily translate.

The authors would like to thank the numerous lawyers at CMS that contributed to the Consequential Loss Guide.

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Angola

1. Do the words "consequential loss" have a given meaning in law?

Angolan law does not give a specific meaning to "consequential loss" and Angolan courts do not acknowledge the concept as a particular category of losses. The same is true for indirect loss.

According to articles 562, 563 and 564 of the Angolan Civil Code ('**ACC**'), the obligation to compensate a party shall be assessed with a view to compensating the non-defaulting party for the losses that would not have occurred, if the breach of the contract had not taken place. If applicable, such compensation shall include the damages suffered *("danos emergentes")* and loss of profits *("lucros cessantes").*

Nevertheless, when determining if a certain loss is recoverable, the courts often require that the breach of contract emerges as a condition *sine qua non* of the loss and that this condition is appropriate to produce the loss. This is an issue of causation.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The expression "consequential loss" is commonly used in international contracts and in contracts under the scope of common law. As a result, Angolan contracts often include contractual exclusion of liability clauses that include the term "consequential loss".

It is very common to find clauses excluding "consequential loss" as well as "indirect loss" in oil and gas sector contracts, or in contracts entered into between Angolan incorporated companies and international companies:

Example 1
"X shall not be liable for any claim for any consequential loss, including loss of profits, injury to business reputation and/or loss of business opportunities, unless such loss arises in connection with an Indemnified Loss;"

Example 2

"Limitation of Liability. In no event will Service Provider or any other Affiliates, including any of their shareholders, directors, officers, fiduciaries, controlling persons, employees and agents be liable to the X or any of their Affiliates, shareholders or Affiliates of shareholders for any indirect, special, incidental or consequential damages, including, without limitation, lost profits or savings, whether or not such damages are foreseeable, or for any third party claims (whether based in contract, tort or otherwise), relating to, in connection with or arising out of this Agreement, including, without limitation, the technical assistance to be provided by Service Provider, or for any act or omission that does not constitute gross negligence or wilful misconduct or in any event in excess of the fees received by Service Provider hereunder."

The ACC arguably provides that clauses where an innocent party renounces remedies for breach of contract in advance, such as the right to be compensated, shall be considered null and void. The validity of these clauses is, however, a controversial topic.

In broad terms, pursuant to the principle of autonomy and freedom of contract, the validity of these clauses shall be accepted, if the exclusion or limitation of liability does not constitute a breach of duties imposed by public order provisions. Also, the applicability of these clauses is limited to situations where the breach of contract was not caused by wilful misconduct or gross negligence. The limitation or exclusion of liability shall be considered valid if the losses were caused due to slight negligence.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Even though the law and legal scholars in Angola do not attribute a given meaning to the words "consequential loss", these words are frequently used in contracts to signify indirect or derivative damages.

The expression is used to express damages that can be interpreted as an indirect cause of the breach of a contract.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Under Angolan case law, there is no identified case that has dealt with the interpretation of consequential loss clauses.

The general principles of the interpretation of contractual declarations, under Angolan law, provide that:

(i) a declaration of contractual intent shall have the meaning that any standard recipient of a declaration, placed in the position of an actual recipient, may deduce from the behaviour of the declarant, unless he or she cannot reasonably rely upon such behaviour;

(ii) whenever the recipient knows the actual will of the declarant, the declaration made shall be interpreted in the light of that will;

(iii) in case of doubt the declaration shall have the meaning that is the less grievous for the grantor – in non-valuable contracts (gratuitous contracts), or that ensures a better balance of the considerations – in valuable contracts (onerous contracts);

(iv) in formal contracts the declaration shall not be valid if its meaning does not correspond to the wording of the contract, albeit imperfectly expressed; however, its meaning may be valid if it corresponds to the real will of the parties and the reasons determining the form of the contract do not oppose such validity.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No case was identified showing a direct connection between the granting of an injunction or of a specific performance order and the presence in the contract of a limitation or exclusion of liability clause.

In this sense, according to the Angolan Civil Procedural Code, a party seeking an injunction needs to establish that:

(i) the party has a claim against the other party.
(ii) there is a well-grounded risk of suffering a damage.
(iii) the damage will be severe and difficult to repair.
(iv) the damages caused by the granting of the injunction do not considerably exceed the losses to be prevented by the injunction.

While assessing requirement (iii), there is no reason why the court should not take into consideration the existence of the limitation or exclusion clause. However, there is no specific jurisprudence on the issue.

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Australia

1. Do the words "consequential loss" have a given meaning in law?

Yes.

Australian law follows the approach taken by the English courts to the assessment of damages set out in the case of *Hadley v Baxendale*[1] that stated recoverable losses were:

— Losses arising naturally (i.e., according to the usual course of things) from the breach of contract itself – generally referred to as "direct losses" or the "first limb of *Hadley v Baxendale*"; and
— losses that may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it – generally referred to as "consequential" or "indirect losses", or the "second limb of *Hadley v Baxendale*".

The words "consequential loss" were taken to mean losses that *"may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"* (commonly referred to as the "second limb of *Hadley v Baxendale"*).

However, please see Section 3 below in relation to the use of the words "consequential loss" in contracts.

[1] See *Hadley v Baxendale* [1854] EWHC J70 at [341].

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The oil and gas industry frequently uses model form contracts such as those prepared by the Association of International Petroleum Negotiators ('**AIPN**') and AMPLA.

The AIPN model forms define and exclude "consequential loss", as part of a defined term "Consequential Loss". However, the AIPN has also published a 'User's Guide' for use in Australia[2] (the '**AIPN User's Guide**'). That guide provides as follows in respect of the defined term for "Consequential Loss":

"In light of recent case law, it is uncertain how Australian Courts will interpret the meaning of 'consequential loss' going forward. Attention is drawn to the following cases which highlight that parties should carefully consider the drafting and intended extent of coverage of the term 'consequential loss': Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd [2008] VSCA 26; Regional Power Corporation v Pacific Hydro Group Two Pty Ltd (No 2) [2013] WASC 356 and Macmahon Mining Services v Cobar Management [2014] NSWSC 502."[3]

The approach taken by the Australian Courts is discussed in Section 3 below.

However, and interestingly, the AMPLA model form Joint Operating Agreements[4] define and exclude *"Excluded Loss"*, which do not use the words "consequential loss" and means:

***"Excluded Loss** means any one or more of:*

a. *loss or damage arising out of Petroleum reservoir or formation damage, or any production delay, interruption to or loss of, or any inability to produce, deliver or process, Petroleum;*
b. *loss or damage incurred, or liquidated or pre-estimated damages or penalties of any kind whatsoever borne or payable under or in connection with any contract for the sale, processing, storage, transportation, or other disposal of Petroleum;*
c. *loss, or anticipated loss, of use, profit or revenue, loss of business reputation, business interruption of any nature, loss of opportunity, loss of anticipated savings or wasted overheads;*
d. *exemplary or punitive damages; or*
e. *any loss or damage arising from special circumstances that are outside the ordinary course of things".*

As with most AMPLA model form documents, alternative and optional clauses are also available; there are two alternative definitions of "Consequential Loss" (one refers to "consequential loss" in the definition, the other does not).[5] However, in the explanatory note to the Alternative and Optional Clauses for the Model Joint Operating Agreement, users are referred to the AIPN User's Guide, which (as set out above) contains a cautionary statement regarding the use of the term "consequential loss".

[2] User's Guide for Adapting: The 2012 AIPN Model Form International Operating Agreement for use in Commonwealth Waters and/or Coastal Waters, Offshore Australia, Second Edition, published 3 December 2015.

[3] See page 6.

[4] Model Petroleum Joint Operating Agreement, Approved Version 1 and Model Petroleum Exploration Joint Operating Agreement, Approved Version 1, both of which were published on 9 November 2011

[5] These are:
"Consequential Loss means indirect or consequential loss, damage, loss of production, loss of revenue, loss of use, loss of contract, loss of goodwill or loss of profit, including any such loss or damage suffered by a Participant or the Operator as a result of a claim by any other person against a Participant or the Operator. Consequential Loss means any loss, damages, costs, expenses or liabilities caused (directly or indirectly) by any of the following arising out of, relating to, or connected with this agreement or the operations carried out under this agreement: (i) reservoir or formation damage; (ii) inability to produce, use or dispose of Petroleum; (iii) loss or deferment of income; (iv) punitive damages; or (v) other indirect damages or losses whether or not similar to the foregoing."

In the construction sector, the model forms that are routinely used do not contain clauses excluding consequential loss (although such forms are routinely amended).[6]

However, the NEC4 Engineering and Construction Contract, while not yet among the most common standard forms of contract in use, has gained significant popularity where a more balanced risk allocation is desired. It includes an exclusion for consequential loss at X18.2 (as set out below), however it does not define consequential loss:

"The Contractor's liability to the Client for the Client's indirect or consequential loss is limited to the amount stated in the Contract Data".

Based on the above, it can be seen that more recent model forms, designed specifically for use under Australian law, seem to avoid using the words "consequential loss" in exclusion clauses. For example, the AMPLA model form Joint Operating Agreements use "Excluded Loss"[8] (It seems that the last exclusion in the AMPLA model form Joint Operating Agreements definition of "Excluded Loss" covers the second limb of *Hadley v Baxendale* without using the words "consequential loss".) However, international model forms used in Australia continue to use the term (albeit with a note of caution as to how the words "consequential loss" may be interpreted by the Australian Courts).

6 The usual standard forms are Australian Standard General Conditions of Contract: AS2124, AS4000, AS4300 and AS4902.

7 NEC4 Engineering and Construction Contract.

8 Perhaps amusingly, although the AMPLA model form Joint Operating Agreement avoids the use of the words "consequential loss" in its drafting (unless the alternatives are elected), it does not in its own disclaimer that disclaims: "AMPLA accepts no responsibility for any loss, cost or expense arising from the use of this Model Exploration JOA and shall not be liable in any manner whatsoever for any direct, incidental, consequential, indirect or punitive damages arising out of the use of the Model Exploration JOA, or any errors or omissions in its contents."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Historically, Australian law followed a line of English Court of Appeal authorities that suggested that, where used in a contractual exclusion or limitation clause, the words "consequential loss" would be taken to mean the second limb of *Hadley v Baxendale* (absent further definition).

However, the English approach came under criticism from the Victorian Supreme Court (Court of Appeal) in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*.[9] In that decision, the court took the view that the English authority appeared to be flawed, since *"the true distinction is between 'normal loss' which is loss that every plaintiff in a like situation will suffer, and 'consequential losses', which are anything beyond the normal measure, such as profits lost or expenses incurred through breach"*.[10]

The court cited with approval a passage from McGregor on Damages (in which the authors criticised the English approach), which proposed that the *"conception of consequential loss should be restored to 'the natural meaning of which commercial and legal usage in exclusion clauses has long since robbed it"*.[11]

The observation was subsequently made that it was possible to read the *Peerless* decision in one of two ways. First, that it was intended to replace the traditional approach to reading "consequential loss" in an exclusion clause to mean the second limb of *Hadley v Baxendale* with "a rigid touchstone of the 'normal measure of damages' and which always automatically eliminates profits lost and expenses incurred";[12] second (and alternatively), that the judge was simply *"construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole"*.[13]

It is this latter approach which was taken to be the correct approach (and what had likely been intended in the *Peerless* decision) in the decision of the Western Australian Supreme Court in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* [2013] WASC 356. In its judgment, the court went on to state that the *"natural and ordinary meaning of the words [consequential loss] begins with these words themselves, assessed in their place within the context of the [contract] as a whole"*.[14]

This is the approach to be taken in relation to limitation or exclusion clauses generally, as encapsulated in the earlier High Court decision of *Darlington Futures Ltd v Delco Australia Pty Ltd* ('**Darlington Futures**'), in which the Court held as follows:

"the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity. (…) the same principle applies to the construction of limitation clauses".[15]

[9] *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26. Arguably, the position changed in 1986 when the High Court of Australia established that the meaning of an exclusion or limitation clause was to be "determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole" – see Darlington Futures Ltd v Delco Australia Pty Ltd [1986] HCA 82. This was the view of the Western Australian Supreme Court when, in 2013, it came to consider the meaning of "consequential loss" as of 1994 (that being the point in time that the agreement under consideration was executed, and which one of the parties argued was the relevant point in time for determining what "consequential loss" meant; that party also argued that it was well understood in 1994 amongst lawyers and legal draftsmen, that the term "consequential loss" when used in a contractual exclusion or limitation of liability clause, meant the class of contractual losses recoverable under the second limb of Hadley v Baxendale). Nevertheless, it was not until the 2008 Peerless decision that an appeal court considered the meaning of "consequential loss" directly.

[10] Ibid at [87].

[11] Ibid at [90].

[12] *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356 at [96].

[13] *Alstom Ltd v Yokogawa Australia Pty Ltd&Anor* (No 7) [2012] SASC 49 at [285].

[14] *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356 at [97].

[15] *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at [16].

In Darlington Futures, the court also stated that *"[t]he terms of exception clauses must sometimes be read down if they cannot be applied literally without creating an absurdity or defeating the main object of the contract … But such a modification by implication of the language which the parties have used in an exception clause is not to be made unless it is necessary to give effect to what the parties must be understood to have intended"*.[16]

Although it is now generally accepted that the term "consequential loss" should be given its natural and ordinary meaning, the courts continue to grapple with its meaning.

By way of illustration, in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*,[17] the court stated as follows:

"To limit the meaning of indirect or consequential losses and like expressions, in whatever context they may appear, to losses arising only under the second limb of Hadley v Baxendale is, in my view, unduly restrictive and fails to do justice to the language used. The word "consequential", according to the Shorter Oxford English Dictionary means "following, especially as an effect, immediate or eventual or as a logical inference". That means that, *unless qualified by its context, it would normally extend, subject to rules relating to remoteness, to all damages suffered as a consequence of a breach of contract.* That is not necessarily the same as loss or damage consequential upon a defect in material where other remedies are also provided".[18]

That approach may be contrasted with that taken in *GEC Alsthom Australia Ltd v City of Sunshine,*[19] in which the court stated that in legal parlance the expression "consequential loss" was understood to connote "a loss at a step removed from the transaction and its immediate effects".

There is therefore a degree of uncertainty as to what meaning will be attributed to the words "consequential loss" in contractual exclusion clauses (in the absence of such a term being clearly defined).

16 *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 citing a statement by statement by Walsh J (Barwick CJ&Kitto J agreeing) in *H&E Van der Sterren v Cibernetics (Holdings) Pty Ltd* (1970) 44 ALJR 157, 158.

17 [2012] SASC 49 at [281].

18 *Alstom Ltd v Yokogawa Australia Pty Ltd&Anor* (No 7) [2012] SASC 49 at [281].

19 (FCA, 20 February 1996, unreported, Library No BC9600288, 20 February1996), as referred to in by Kenneth Martin J in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356 at [109]

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause will be construed on its own merits (following the approach set out in Darlington Futures).

However, the following considerations are relevant to interpreting a "consequential loss" clause:

- It is from the contractual wording, read in context, that the parties' intentions must be ascertained.
- The court *"should not impose a strained construction upon an exclusion clause, but should give effect to the intentions of the contracting parties who are capable of protecting their interests and deciding how to allocate risks".*
- A commercial instrument should be given a commercial interpretation.
- As to when it will be appropriate to construe a clause *contra proferentum,* this should *"apply only when ambiguity remains after all other avenues of construction have been exhausted."*
- Arguments seeking the application of general rules or principles (for example, that limitation or exclusion clauses are generally not to be construed to apply to wilful and deliberate breaches of contract, or so as to defeat the main object of the contract) are, in and of themselves, likely to be of limited persuasion. Rather, the correct approach is that the nature and scope of a limitation or exclusion clause should be *"determined by reference to its proper construction rather than by the application of [a] suggested general rule."*

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

In an application for an injunction, consideration of whether or not damages will be an adequate remedy forms part of the court's inquiry as to whether the balance of convenience favours the granting of the injunction. As to the question of whether or not a consequential loss exclusion clause will be relevant in assessing the adequacy of damages in such circumstances, it appears that the answer is 'yes', although the issue has been given only limited judicial consideration.

The English Court of Appeal decision of *AB v CD,* (in which the English Court decided that in circumstances where a limitation clause exists in a contract, justice will tend *"to favour the grant of an injunction to prohibit the breach in the first place"*) has been referred to on at least two occasions by Australian courts:

- The matter of *Kaperskey Lab UK Ltd v Hemisphere Technologies Pty Ltd*[25] concerned an injunction to prevent the plaintiff from taking any action or step pursuant to a notice of termination of a distributorship agreement. Under that agreement, the defendant had limited recourse to damages, which the defendant submitted should be taken into account by the court in exercising its discretion as to whether to grant the injunction. The defendant cited the decision in *AB v CD* in support of its position. However, the court was not satisfied that the English case was relevant, stating as follows:

[20] *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 citing a statement by statement by Walsh J (Barwick CJ & Kitto J agreeing) in *H&E Van der Sterren v Cibernetics (Holdings) Pty Ltd* (1970) 44 ALJR 157, 158.

[21] [2012] SASC 49 at [281].

[22] *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor* (No 7) [2012] SASC 49 at [281].

[23] (FCA, 20 February 1996, unreported, Library No BC9600288, 20 February1996), as referred to in by Kenneth Martin J in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356 at [109]

[24] (FCA, 20 February 1996, unreported, Library No BC9600288, 20 February1996), as referred to in by Kenneth Martin J in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356 at [109]

[25] [2016] NSWSC 1476

- *"I am not satisfied that case is on all fours with these proceedings. It is authority for the proposition that a provision in a contract limiting recovery of damages is not an agreement to excuse the performance of the primary obligation of the contract. I do not regard it as authority for the proposition that a clause limiting the recovery of damages entitles an applicant for an injunction to claim that damages would be an inadequate remedy.*

- *On the other hand, the plaintiff submits that the parties agreed to a regime; they struck a commercial bargain; and the defendant should live with that bargain, having regard to the obvious profits that were made between the parties over the years. Prima facie the plaintiff's submission seems to have force. However, in the circumstances of this case I will take into account the fact that there is limited recourse for the defendant in any claim for damages, if the termination is valid."*[26]

— In the matter of *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [No 2][27], the party seeking an injunction submitted that the effect of an exclusion clause (which excluded liability for indirect or consequential loss or damage) was such that lost profits and special damages would be irreversible, such that if it were to be confined to its legal remedies of debt or damages, that would not be just in all the circumstances. In its observations on the law, the Court of Appeal of the Western Australian Supreme Court referred to the decision of *AB v CD*. Ultimately, the Court distinguished *AB v CD*, deciding that in the case before it, the contractual limitation on damages did not point to or give rise to any inadequacy in the claiming party's legal remedies.[28] However, the correctness of the approach taken in *AB v CD* seems to have been accepted.

It remains to be seen whether *AB v CD* will be followed in future cases before the Australian courts.

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[26] [2016] NSWC 1476 at [23] and [24].
[27] [2017] WASCA 76.
[28] [2017] WASCA 76 at [169].

Austria

1. Do the words "consequential loss" have a given meaning in law?

The wording "consequential loss" itself does not explicitly exist under Austrian law. Nevertheless, Austrian law uses the concept of *Folgeschäden* (literal translation "consequential damage") to define damages which do not result directly from the damaging act, but only arise indirectly from an infringement of legal rights. However, as *Folgeschäden* is not explicitly defined in the Austrian Civil Code ('**ABGB**'), there is no clear and uniform demarcation of what specific damages fall under the definition of *Folgeschäden*. The existence of *Folgeschäden* has to be assessed casuistically – a myriad of decisions of the Austrian Supreme Court provide guidance here. Examples include: damages for loss of earnings due to a cessation of operations caused by construction errors of a building or machine (the damage in the building/machine itself caused by the construction error would be direct damage under Austrian law[1]); or the occurrence of water damage or mould due to a faulty renovation of a building[2].

In order to be recoverable, *Folgeschäden* must pass the general test of adequate causation and must result from an unlawful and culpable damaging act. The general prerequisites for the recoverability of damages (including *Folgeschäden*) are set out in Sections 1293 et seq. of the ABGB and are heavily influenced by numerous Austrian Supreme Court decisions which, although not binding, are generally followed in the lower courts.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, an exclusion of "consequential losses" in contracts is commonly used in Austria in a variety of industries including, but not limited to, energy. The precise wording of such exclusions varies and is mostly dependent on the nature and the size and importance of the contract. While extensive liability limitation regimes are found in elaborate contracts that, in most cases, clearly define which damages shall be recoverable and which shall be excluded, some examples of language used in more basic contracts in the energy sector include:

— Energy contract: Liability for indirect damages and consequential damages, regardless of the legal basis on which they are based, as well as for loss of profit is excluded. *(Die Haftung für mittelbare Schäden und Folgeschäden, gleich auf welcher Rechtsgrundlage diese beruhen, sowie für entgangenen Gewinn wird ausgeschlossen.)*
— EPC contract: Liability for consequential damages, especially loss of production and loss of profit, is excluded by mutual agreement. *(Die Haftung für Mangelfolgeschäden, insbesondere Produktionsausfall und entgangenen Gewinn, wird einvernehmlich ausgeschlossen.)*

1 OGH 25.10.1994, 1 Ob 599/94.
2 OGH 29.1.1985, 5 Ob 1/85 and 5 Ob 2/85.

In business-to-business contracts, an exclusion of liability: (i) for intent is void; (ii) for slight negligence is permissible; and (iii) for gross negligence is generally permissible if it is not extremely unjust or immoral *(sittenwidrig)*. Such immorality applies to cases of "blatant gross negligence" *(krass-grobe Fahrlässigkeit)*. The same is generally applicable to business-to-consumer contracts, with the exception that an exclusion of liability for gross negligence on the part of the business is void.

Often companies also stipulate such limitations of liability in general terms and conditions *(Allgemeine Geschäftsbedingungen)*. In business-to-business transactions, clauses on the exclusion or limitation of liability are generally only effective to the extent that their conclusion or application in a specific case is not extremely unjust or immoral *(sittenwidrig)*. In a 2017 decision[3] the Austrian Supreme Court held that in a business-to-business transaction the following exclusion of liability clause in the general terms and conditions: *"claims for damages in any case only cover the pure repair of damage, but not consequential damage and loss of profit"* is legally permissible, because there was no complete exclusion of liability, but only a limitation of liability to the direct loss *(Positiver Schaden)*. In this specific case, the court held that such clause was not immoral against the backdrop of a mutual business transaction. In practice, however, it is advisable to check liability exclusions (of any kind) for their legal admissibility in the specific case. In business-to-consumer transactions the transparency requirement of Section 6 para 3 of the Austrian Consumer Protection Law *(Konsumentenschutzgesetz)*, which stipulates that unclear or incomprehensible clauses in general terms and conditions are invalid, must additionally be considered.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As the term "consequential loss" itself is not explicitly defined under Austrian law, the meaning attributed to the words "consequential loss" depends on the interpretation of the specific contractual clause(s). Furthermore, there are currently no decisions by the Austrian Supreme Court on the meaning of "consequential damages" in contracts which are subject to Austrian law but written in English. Hence, a case-by-case determination of the exact meaning of such a limitation clause in the context of the specific contract is required.

Contractual interpretation rules are laid out in Sections 914 et. seq. of the ABGB. The primary focus of contractual interpretation is to determine what the true intent *(Absicht der Parteien)* of the contractual parties at the time of the signing of the contract was. In order to find out the parties' intentions any evidence may be used. In practice, evidence produced by witnesses who participated in negotiating the contract, email correspondence, memos or draft versions of the contract are often used for this purpose. If the true intention of the parties cannot be determined, the ambiguity rules of Section 915 of the ABGB will apply. According to these rules, ambiguous clauses in any legal transactions carried out for consideration (of any sort) are interpreted to the disadvantage of the party who introduced such clauses. In the case of gratuitous legal transactions, any ambiguous clauses are to be interpreted in the way that results in a lesser burden to the obligor pursuant to Section 915 of the ABGB.

[3] OGH 07.06.2017, 3 Ob 82/17f.

As mentioned above, Austrian law uses the concept of *Folgeschäden* (literal translation "consequential damage") to define damages which do not result directly from the damaging act, but only arise indirectly from the infringement of legal rights. As the concepts of *Folgeschäden* and "consequential losses" appear to overlap, courts in Austria might refer to the meaning of *Folgeschäden* when deciding on the exact meaning of "consequential losses".

Due to a lack of a statutory definition for the English term "consequential damages" or any relevant case law on that issue, it is therefore not possible to pinpoint the exact meaning of the term in a uniform definition. For this reason, parties should – and in high value contracts drafted in English language this is market standard already – define "consequential loss" (i.e. concisely list the losses and/or damages which fall under the exclusion of liability).

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

In high value contracts it has become standard to specifically describe the types of losses that shall be excluded (i.e. by adding a list of all such losses) and/or to add Austrian legal terms in brackets to the English wording.

In order to determine the exact meaning of these other types of losses listed in a contract written in English governed by Austrian law, the contractual interpretation rules laid out in Sections 914 et seq of the ABGB are to be used. As outlined above, the primary focus lies in the determination of the true intent of the contractual parties at the time of the signing. If the meaning remains ambiguous, the ambiguity rules of Section 915 of the ABGB are applied.

If the list of excluded damages is exhaustive, courts would likely treat damages that are not expressly excluded as recoverable (even if other comparable damages are excluded). Therefore, careful drafting of contractual exclusion of liability clauses is essential.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

A mere exclusion of liability for consequential losses does not have an impact on non-damages claims. However, in many cases contracts also stipulate other exclusions of liability.

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Brazil

1. Do the words "consequential loss" have a given meaning in law?

No. The words "consequential loss" have no given or recognised meaning in Brazilian law.

The Brazilian Civil Code ('**Code**') sets out the legal position regarding damages for breach of contract.

According to Article 402 of the Code, a party causing loss or damage to another has the obligation to compensate the other party for its loss. Financial damages are split between actual damages *("danos emergentes")* and any loss of profits *("lucros cessantes")* which includes future loss that can reasonably be expected to flow from the breach.

Under Article 403 of the Code, a party may only be compensated for losses and loss of profits caused by direct and immediate effect *("por efeito dela direto e imediato")* of the breach. This is not a reference to foreseeability as, under Brazilian law, there is no test for foreseeability to recover damages. The obligation on an offending party to compensate another for damages depends on: (i) conduct; (ii) the occurrence of the damage; and (iii) causation between the conduct and damage in question.

Brazilian law has no independent concept of "consequential" or "indirect" loss when dealing with recoverable losses. There is some uncertainty around the meaning of indirect loss, as it is not defined in the Code. The general understanding is that indirect losses are those that are caused by a secondary circumstance, outside the responsibility of the party responsible for the damage.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Contracts in the energy industry include exclusion of liability clauses that seek to exclude loss for "consequential loss", and/or more usually, "indirect loss". Indirect damages are excluded under Brazilian law. However, loss of profit is considered a "direct damage" which is why it is often also expressly excluded.

Oil and gas industry

There is no official model form contract for oil and gas projects in Brazil. Some examples of typical clauses often included in FPSO charter agreements, offshore services contracts and other industry agreements include:

Example 1
"None of the PARTIES shall be responsible before the other PARTY for indirect damages and/or loss of profit, whether totally or partially, which are the result or have any relationship with the AGREEMENT, including, without limitation, loss relating to the production, profits, advance of profit, ownership rights, mineral exploration rights, business.

However, the limitation provided for in clause 13.17 above is not applicable to the events of liability to any of the PARTIES for consequential damage and/or loss of profit caused to THIRD PARTIES."

Example 2
"Notwithstanding any provision to the contrary of this AGREEMENT, the liability of the PARTIES or their affiliates shall be limited to direct damages according to the Brazilian Civil Code and applicable legislation, excluding loss of profit and indirect damages."

Example 3
"Consequential Damages – Neither Party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Contract, and each party shall protect, defend and indemnify the other from and against all such Claims from any member of its Group as defined in Clause 14(a). "Consequential damages" shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance whether direct or indirect and, whether or not foreseeable at the date of this Contract."

Example 4
"Neither PARTY shall be responsible before the other for indirect damages and/or loss of profits, whole or in part, which result or is connected with this Agreement, including, but not limited to, production losses, profits losses, anticipation of profits, property rights, mineral rights or any business. This limitation shall not apply to wilful misconduct or fraudulent acts."

Example 5
Petrobras contracts include the following clause:
— *"From the execution date of this AGREEMENT, the liability of PETROBRAS and the CONTRACTOR for losses and damage shall be limited to the direct damages according to the Brazilian Civil Code and applicable legislation, excluding loss of profits and indirect damage, and the direct damage shall be limited to USD 20m (twenty million dollars) per event and consequences thereof, converted into Reais (RD) by PTAX for sale of US Dollars into national currency, published by the Central Bank of Brazil, on the last business day immediately preceding the day of the payment of such damage."*

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

In Brazilian law there is no clear meaning attributed to "consequential loss" when used in a contractual context. In addition, the law does not attribute a clear meaning to "indirect loss" when used in a contract.

When using "consequential loss" or "indirect damages" these terms should be clearly defined in the contract. The general understanding is that indirect losses are those that are not directly caused by the conduct of the party responsible for the damage, but are caused by a secondary circumstance.

If no definition is provided, there is no clear jurisprudence on how a court or tribunal should approach attributing a meaning to the words. The general position is that indirect damages are not recoverable.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no jurisprudence from the Brazilian courts that helps with the interpretation of consequential loss clauses. However, decisions concerning clauses dealing with limitation or exclusion of liability would be relevant.

There are some decisions regarding general exclusion of liability clauses. The Brazilian Courts place importance on the contractual terms agreed between the parties, equality in the parties' bargaining power, and freedom of contract.

The Brazilian Courts have found that a contract is void if the limitation or exclusion of liability impairs the main object of the contract.[1]

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is no jurisprudence that suggests that the existence of a consequential loss clause or a limitation of liability clause will mean that an application for injunction is more likely to succeed. Generally, Brazilian Courts can award an injunction to prevent a breach from occurring, including in relation to contracts containing limitation clauses (such as an "indirect damages" clause).

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[1] Apelação Cível N° 28239, Segunda Câmara Cível, Tribunal de Alçada do RS, Relator: Adroaldo Furtado Fabrício, Julgado em 31/08/1982; 1° TACIVSP – Processo: 39082-9/00 – Proc. Princ.: 39.082-489.433-7/2 – Resp. – São Paulo – Rel. Min. Nilson Naves – 9-11-94 – Decisão: por maioria; Ac.: Resp. 29121/SP – Órgão Julgador: t. 3 – 3ª T. Rel. Min. Waldemar Zveiter – 16-12-92; TRF-3 – APELAÇÃO CÍVEL AC 5408 SP 0005408-29.2004.4.03.6105

Bulgaria

1. Do the words "consequential loss" have a given meaning in law?

Bulgarian law does not recognise the term "consequential loss".

Under Article 82 of the Obligations and Contracts Act ('**OCA**'), damages cover the *"losses suffered and the loss of profit as far as they are a direct and immediate consequence of the non-performance and could have been foreseen upon the arising of the obligation. However, if the debtor has acted in bad faith, he shall be liable for all direct and immediate damages."*

Under Article 82 of the OCA, Bulgarian legal doctrine outlines the distinction between two types (heads) of losses:

1. Losses which are a direct and immediate consequence of the breach and which are, generally speaking, recoverable.
2. Losses that Bulgarian doctrine assumes to be "indirect". Unlike the legal term "direct and immediate", used in the OCA, "indirect loss" is not a legal term and is rarely used. However, its meaning, as elaborated by legal theory, is that these are losses which are not a typical and normal result of a particular event; they are a product of chance. Nevertheless, they are still part of the chain of events and there is a link of causality between the event and the losses, albeit an indirect one.[1] This interpretation is corroborated by case law.[2]

Therefore, the second head of loss – known as indirect loss and which is more akin to "consequential loss" – is only recoverable to the extent that it is expressly contractually recognised between the parties. It will not usually be a recoverable head of loss by law.

[1] Angel Kalaidjiev, Law of Obligations, Sibi, Sofia, 2010, 415-416

[2] Decision No 296/5.11.2013 of Supreme Court of Cassation under civil case No 48/2013; Decision No 245/31.07.2017 of Supreme Court of Cassation under commercial case No 3625/2015

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

It is possible for wording including "indirect loss" (not "consequential loss") to be inserted into clauses for exclusion or limitation of liability in documents such as insurance policies, and waivers. However, this wording is not used very often.

Most large-scale projects in Bulgaria are procured and/or advised by international players. Most are completed in line with international standards such as FIDIC, and the project documents and agreements are usually governed by English law. For this reason, the term "consequential loss" can be found in contracts relating to Bulgarian projects that are not subject to Bulgarian law.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

"Consequential loss" is not used in Bulgarian contractual documents; it is usually used in agreements governed by English (or other) law.

The usual meaning ascribed to "indirect loss" in Bulgarian contracts is loss which is not a direct and necessary consequence of the harmful event or contractual breach, and is not a typical or normally occurring result. These are losses which are not a typical and normal result of a particular event; they are a product of chance. Nevertheless, they are still part of the chain of events and there is a link of causality between the event and the losses, albeit an indirect one.

Large utility companies – such as the national gas operator (Bulgartransgaz), the national electricity company, transmission system Operator, – do not typically include clauses for exclusion of "indirect loss". Instead, they tend to limit their clauses to damages occurring as a direct and immediate consequence of the breach, thus reiterating the wording of Article 82 OCA and its focus on direct loss.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Where clauses cover "direct and indirect losses", they are likely to be interpreted as the totality of potential losses being covered.

This interpretation is likely for a number of reasons. Bulgarian legal doctrine recognises several interpretation techniques including literal interpretation, systematic interpretation, and logical interpretation. Under these principles, a Bulgarian court would approach the wording at its literal level until it reaches a satisfactory meaningful outcome. The use of a conjunction such as 'and' would lead the court to conclude that "indirect loss" should be considered as loss which is an extension to direct and immediate harmful consequences. Therefore, from a linguistic, logical, and contextual point of interpretation, the court would identify each head of loss in juxtaposition to the rest of the heads of loss and would identify a meaning of its own for each phrase or concept.

The court's most likely would be that indirect loss is causally linked to the harmful event but is not an immediate (typical) consequence of it.

This reading would be corroborated by the established understanding of the legal doctrine and the case law that the concept of "indirect loss" is a type of loss that is caused by a particular event but is an extraordinary outcome of it.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Bulgarian law, case law and legal doctrine adopt a strict view on claiming damages which goes beyond direct and foreseeable consequences. For instance, Bulgarian courts are still very reluctant to award damages for loss of profit. Therefore, the impact of clauses covering "indirect loss" (or "consequential loss") is yet to be seen and tested in the courts. Moreover, it is not likely to be recognised for the purposes of claims which are not damages claims.

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Chile

1. Do the words "consequential loss" have a given meaning in law?

No. The legal term "consequential loss" has no given or recognised meaning in Chilean law.

Chilean law only recognises three classes of damages caused by breach of contract: direct loss *(damnum emergens),* loss of profit (covers future losses and loss of profits), and moral damages.

All these damages must be a direct result of breach of contract, in accordance with article 1558 of the Chilean Civil Code ('**Code**'), or a wrongdoing, under articles 2314 and 2329 of the Code.

Therefore, Chilean law does not consider consequential losses or indirect damages derived from breach of contract to be reparable.

The general understanding is that indirect losses are those caused by a remote circumstance, not attributable to the defaulting party. Indirect loss is an issue of causation rather than foreseeability. Losses caused indirectly do not fall within the three classes of damages and are not recoverable in damages.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Despite its lack of recognition in Chilean law (see 1. above), commercial agreements (e.g. SPA, SHA, EPC, etc.) generally include exclusion of liability clauses for "consequential loss".

These agreements typically include clauses similar to the following:

"The Indemnitor's liability is limited to direct actual damages only, such direct actual damages will be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived. No Indemnitor shall be liable for any claim for indemnification pursuant to Sections 8.2 or 8.3 for any consequential, incidental, punitive, exemplary or indirect damages, loss of profits, moral damages or other business interruption damages".

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Chilean law lacks a meaning attributed to "consequential loss", so the definition of this term depends on the context of the contract and the intention of the parties.

In general, parties understand "consequential loss" to be similar to indirect loss. None of those damages are subject to compensation under Chilean law, as they are not direct causes of breach of contract.

If the parties do not define "consequential loss" in the contract, the MOU or other negotiation documents, it is highly probable that the law will deny compensation for these damages, because it is not a type of damage recognised in Chilean law. In this respect, the "consequential loss" clause may be interpreted as merely reinforcing the position at law that indirect losses may not be the subject of a claim for damages.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

We are not aware of any decision of the Courts of Chile or national arbitration related to the interpretation of "consequential loss" clauses in the context of a contract.

The Chilean Civil Code does not have special rules for the interpretation of limitation or exclusion of liability clauses. However, doctrine maintains that these clauses must be interpreted narrowly, due to their exceptional nature with respect to the general principle of liability.

In Chilean Contract Law, the parties are free to include in the contract any provision related to an exclusion of damages, with some exceptions. For example, exclusion of damages may not include: provisions that exempt the breaching party from all liability in cases of damages related to the physical integrity or the inherent rights of the person; liability in cases in which the breaching party committed wilful misconduct or gross negligence; waiving the liability of a breaching party who committed unlawful acts or committed breach of statutory duties.



5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

It is unlikely that a consequential loss exclusion clause would have an impact on non-damages claims.

In Chilean law, damages claims are independent of the legal actions related to non-damages claims, as a consequence of breaching a contract.

Chilean law recognises at least three remedies in cases of breach of a contract: specific performance of the contract; termination of the contract for specific circumstances; and compensation of damages in accordance with article 1489 of the Chilean Civil Code.

Therefore, consequential loss exclusion clauses would have no impact on non-damages claims of this nature.

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China

1. Do the words "consequential loss" have a given meaning in law?

As the general term "consequential loss" is typically one of common law, there are many meanings that may be attributed to it worldwide but that would cause confusion under the civil law jurisdiction of the People's Republic of China ('**PRC**'). For instance, the use of English terminology when discussing PRC law causes ambiguity, especially the *Hadley v Baxendale*[1] "consequential losses" definition in relation to "special circumstances". Such terminology should be avoided and has no place in Chinese law.

Article 113 of the 1999 Contract Law of the PRC ('**PRC contract law**') provides that the measure of damages shall be *"the amount of compensation for losses [which] shall be equal to the losses caused by breach of contract"*, which includes *"benefits receivable after the performance of the contract"* provided that such damages *"shall not exceed the probable losses caused by breach of contract which was foreseen or ought to have been foreseen by the breaching party at the time of conclusion of the contract."* The term "consequential loss" is, therefore not legally defined under statute law and is not recognised under the laws of the PRC. Instead, PRC law stipulates that recoverable loss must be foreseeable or ought to have been foreseeable to result in any damages stemming from a breach, in the sense that a causal relation between the breach of contract and the damages must exist. Thus, recoverable "consequential loss" under PRC law would need to have a causal relation to the breach in question to fall within the scope of Article 113.

In accordance with the 2009 Explanation of the PRC Contract Law issued by the Legal Committee of the Standing Committee of the National People's Congress ("the Explanation"), the recoverable scope of loss should be stipulated under the relevant laws or be agreed by both parties. If there is no stipulation under law or in an agreement, all losses may be deemed recoverable, including what is traditionally known as "indirect" losses. The Explanation provides that an "indirect" loss in this context refers to the loss of a foreseeable acquirable benefit, which can be considered in this context as "consequential loss."

The Explanation goes on to stipulate that the test of foreseeability is based on the same principles as provided under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods ('**CISG**'), whereby *"damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."* Article 74 sets out three limbs to the foreseeability test:

1. that the subject of the foreseeability requirement shall be the breaching party.
2. that the time to determine foreseeability of loss shall be the point of conclusion of the contract, rather than the time of breach of the contract.
3. that, under the relevant facts the breaching party knew or ought to have known, that the foreseeable loss was a possible consequence of a breach of the contract.

The 2009 Guiding Opinions of the Supreme Court on Several Issues Concerning the Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation ('**Guiding Opinions**') provides further clarification under Article 9 as to what losses fall within a foreseeable acquirable benefit, including losses of production profits, losses of operational profits and losses of resale profits.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Subject to certain limitations, an exclusion of liability clause may be enforceable under the general principle of freedom of contract in PRC law.

The only current limitation to exclusion of liability clauses under contract law is covered by Article 53 of the PRC Contract Law, which provides that a contractual provision would be invalid if it purports to exclude liability for physical injury to the other party or excludes property damage to the other party as a result of deliberate intent or gross negligence. By not expressly stating that indirect or consequential losses cannot be excluded in a contract, it can be implied under PRC law that such exclusion clauses, save for the exceptions above, are permitted.

In the case of *(2018) Jing 02 Min Zhong No. 4810*, the judges of the Second Intermediate People's Court of Beijing Municipality of the PRC dismissed the appellant's claim that *"pure commercial losses are beyond the protectable scope of PRC civil law"*, ruling that *"there is no rule under PRC civil law expressly prohibiting the claim for pure commercial losses"*. An exclusion of liability clause would therefore be helpful in ensuring that such losses are excluded should the courts find that the "pure commercial loss" in the respective transaction or matter falls within the scope of recoverable loss.

The *Model Form Confidentiality Agreement (version 2007)* published by the Association of International Petroleum Negotiators is often used by Chinese parties when conducting cross-border M&A in the oil and gas industry. This model form document includes a template exclusion of liability clause that excludes *"loss of profits, or incidental, consequential, special, or punitive damages, regardless of negligence or fault"*. However, this model contract is based on the laws of England and Wales and therefore would not be the best indicator for how typical Chinese exclusion of liability clauses are structured.

In light of the above, it would be advisable for a company looking to insert an exclusion of liability clause that excludes "consequential losses" to ensure that it uses terms accepted under PRC law. This would mean that, in order to cover all bases of loss with little ambiguity, the exclusion of liability clause should refer to excluding losses that were foreseen or ought to have been foreseen with a causal link to the breach – including foreseeable acquirable benefits such as loss of production, operational and resale profits, in accordance with the Guiding Opinions.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As explained above, "consequential loss" is not a defined term under PRC law, but is most often interpreted as "foreseeable acquirable benefit". Given that interpretation, if "consequential loss" is included in an exclusion of liability clause, this would typically involve excluding losses of profit, production, operational or resale profits.

The exclusion clauses should be fact-specific. Only foreseeable losses are recoverable under PRC law. Therefore, the exclusion of liability clause would only seek to exclude foreseeable losses. Any unforeseeable losses would be unrecoverable under Article 113 of the PRC Contract Law.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The general requirements on exclusion of liability clauses can be found under Article 53 of the PRC Contract Law. It provides that the following exclusion clauses in a contract shall be null and void:

— those involving personal injury to the other party.
— those involving property damage to the other party as a result of deliberate intent or gross negligence.

The courts do not construe the potential heads of loss in respect of the types of loss, but they would calculate the actual amount of the total recoverable damages. Exclusion of liability clauses can therefore contain exclusions for all heads of losses, including foreseeable and causal losses, other than those mentioned in Article 53, as there is no *de facto* reasonableness test on exclusion of liability clauses contained within the PRC Contract Law.

In the event of ambiguity as to the scope of agreed exclusions, there are no specific legal rules or approaches to construe the exclusion clauses, apart from the general rules of PRC law on how to construe contractual clauses. According to Article 142 of the General Rules of the PRC Civil Law, the meaning of an expression of intent that is made to a certain party shall be interpreted according to the literal meaning of words used and in combination with the relevant articles, nature and purpose of the act, usual practices, and the principle of good faith.

As a special rule applicable to general terms and conditions ('**Standard Clauses**'), under Article 40 of the PRC Contract Law, if a party uses Standard Clauses to exempt itself from its liabilities, increase the liabilities of the other party or exclude the primary rights of the other party, the term shall be null and void.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There are two kinds of injunctions under PRC law: the preliminary injunction and an injunction during or after court proceedings.

In accordance with Article 101 of the PRC Civil Procedure Law, a preliminary injunction shall be issued by a competent relevant People's Court prior to filing a lawsuit or applying for arbitration, upon application of an interested party. To fulfil the requirements of a preliminary injunction, the circumstances must be urgent and the lawful rights and interest of the interested party shall be irreparably damaged if the preliminary injunction is not issued.

Article 100 of the PRC Civil Procedure Law provides parties with an avenue to obtain an injunction during court proceedings. Parties may be granted an Article 100 injunction if they are unable to enforce a judgment which is to be or has already been granted or if they have suffered further damage.

The Article 100 injunction may prevent a party from selling property or it may order or prohibit certain conduct. The people's court may also order an Article 100 injunction, despite receiving no application to do so, if it deems that the circumstances are necessary.

According to Articles 100 and 101 of the PRC Civil Procedure Law, the court will issue an injunction in only two circumstances: 1) where an interested party whose legitimate rights and interests, due to an emergency, would suffer irreparable damage if the party fails to petition for property preservation promptly; or 2) where the judgment may become impossible to enforce or if the judgment may cause damage to a party because of the conduct of the other party.

The fact that an innocent party suffers from a loss that was excluded will not constitute an urgent circumstance or frustration to enforcement. It is therefore very unlikely that the innocent party would succeed in getting an injunction from the court.

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Colombia

1. Do the words "consequential loss" have a given meaning in law?

No. The words "consequential loss" have no given or recognised meaning in Colombian law. It is not even found in the Civil Colombian Code ('**Code**').

Damages caused by breach of contract are regulated in article 1613 of the Code. Compensatory damages are split between actual damages *(daño emergente)* and loss of profits *(lucro cesante).* According to article 1614 of the Code, actual damage is the prejudice or loss that comes from not having fulfilled the terms of the contract, and loss of profit is understood to be the profit that is not received as a result of failing to perform the terms of the contract.

Article 1616 establishes that if wilful intent cannot be attributed to the party in breach of contract, the party at fault shall be liable for the damages that were foreseen or could have been foreseen at the time the contract was entered into. This article also provides that when damages were incurred with wilful intent, the party at fault will be responsible for all the damages that arose as an *immediate or direct consequence* of not having fulfilled the terms of the contract.

The Code does not provide a list of characteristics of the damage which enable the innocent party to sue. Nevertheless, Colombian jurisprudence has clarified that in order to be recoverable, the damages must be:

— true;
— claimed by the person who suffered the loss; and
— lawful.

Despite the fact that consequential loss is not covered by Colombian legislation, it is generally understood as a loss flowing from the breach – as opposed to the breach itself.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Although consequential loss does not have a meaning in Colombian legislation, this type of term is widely used in the hydrocarbon and energy industry. Some examples of model contracts containing consequential loss clauses include:

Example 1
"Neither party shall be liable to the other in any case and under no other circumstance for any indirect, special or consequential damages".

Example 2
"Indirect damages: Neither party will respond to the other for indirect, consequential or loss of profit"

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Colombian legislation has not attributed any meaning to the words "consequential loss". The meaning given to the terms that reference consequential loss therefore depends on how they are defined in the contract.

The clauses discussed above show that "consequential loss" is widely understood in the energy sector to equate to all types of loss of profit *(lucro cesante),* as defined in Colombian Civil Law. However, this is not a meaning attributed by Colombian law.

Loss of profit is a term developed by judicial interpretation. A widely accepted definition is: *"the loss of profit not only includes the suppression of the income of money or things to the patrimony of the victim but also the suppression of all type of benefit that stops receiving, as long as it is susceptible of being evaluated pecuniary".*

When the term "consequential loss" is used, its meaning should be clearly defined in the contract. Pursuant to article 1616 of the Code, only direct damages are recoverable. Therefore, absent of a definition, the judge may interpret the will of the parties differently to what they intended when they entered into the contract.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no jurisprudence that refers to consequential loss clauses. However, Colombian legislation has a developed regime on limitation of liability clauses. [1]

Freedom of contract underpins Colombian civil law. The Code expressly authorises contracting parties to modify the liability regime of their business. However, this is not an absolute freedom – it has always been subject to the general limits of contractual autonomy, especially public order, good custom and good faith. [2]

The courts will always deem a clause excluding liability for breaches with wilful intent as invalid as this is strictly forbidden under the Code. [3]

[1] There are limitations liability clauses widely admitted by Colombian judges as those that determine quantum or a maximum amount for repairing in case of valid breach of the contract or any of its obligations; or those that establish a specific modality for the repair. *(Judgment C-309 of 1996, C-663 of 1996, C-448 of 2002, C-1008 of 2010 of the Constitutional Court).*

[2] The interpretation of the contracts is enshrined in articles 1618 to 1624 of the Civil Code. The two guiding principles that emerge from these provisions are:
1. The search for the common intention of the parties *(communis intentio or voluntas spectanda).*
2. Contractual good faith.
However, the task of finding the true intention of the contracting parties is the traditionally subjective approach, in contrast to the objective approach, which seeks to privilege the external or declared will of the parties in the contract.
National jurisprudence has indicated that the subjective prevails over the objective, based on the idea that the principle of the search for the real will of the contracting parties is fundamental within hermeneutical work and that the other principles and rules are subsidiary.

[3] Under Article 1522 of the Colombian Civil Code, the forgiveness of a future wilful intent is not admissible.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

If the judge determines that the clause is valid, it is possible that the repair of the consequential damages may be denied. There is no jurisprudence that suggests that the existence of a consequential loss clause increases or lessens the probability of an injunction being granted. Colombian judges will examine the content of the claim on a case-by-case basis to determine if an injunction proceeds or not. This study will always be done by the judge, regardless of the existence or absence of a consequential loss clause.

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Croatia

1. Do the words "consequential loss" have a given meaning in law?

The words "consequential loss" do not have a given meaning in Croatian law.

The Croatian Civil Obligations Act (the '**COA**') provides for three types of damage that are recoverable in contractual and non-contractual relations:

1. ordinary damage *(obična šteta);*
2. loss of profit *(izmakla korist);*
3. non-pecuniary damage *(neimovinska šteta)*.

Ordinary damage and loss of profit are sometimes jointly referred to as "pecuniary damage".

Although all three types of damage are recoverable, contractual claims have an additional requirement of foreseeability of the damage at the time of entering into an agreement. The court will consider whether the damage was foreseeable as a possible consequence of the breach, taking into account the facts that the party in breach knew or should have known .

In the event of fraud, intentional non-performance, or non-performance as a result of one of the party's gross negligence, the innocent party is entitled to recover the total damage (i.e. not only foreseeable damage), notwithstanding the special circumstances that caused the damage.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Since the term "consequential loss" has no given meaning in Croatian law, its use in contractual exclusion of liability clauses in agreements governed by Croatian law could lead to legal uncertainty. Nevertheless, "consequential loss" is sometimes used in contractual exclusion of liability clauses. The terms "indirect damage/loss" and "loss of profit" are usually used in contractual exclusion of liability clauses.

For example, the draft Production Sharing Agreement ('**PSA**') proposed by the Croatian Government as a part of the bidding documentation for granting licences for onshore exploration and production of hydrocarbons, contains the following provisions:

— *"Except for Environmental Damage, the Investor or its Affiliates shall in no event be liable to the Government under this Agreement for indirect damage, including, but not limited to the loss of opportunity, i.e. loss of profit.*

— *For the avoidance of any doubt, the Republic of Croatia shall in no event be liable to the Investor under this Agreement for indirect damage, including, but not limited to the loss of opportunity, i.e. loss of profit."*

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The meaning attributed to the words "consequential loss" depends on the interpretation of those words in a contractual exclusion clause.

There is no clear jurisprudence regarding the interpretation of the words "consequential loss" as this term is not commonly used in Croatian law. It would most likely be regarded as a type of "indirect loss", but there are also no clear guidelines on the interpretation of "indirect loss".

The term "indirect loss" has been encountered in:

— jurisprudence concerning product liability cases prior to the implementation of the Product Liability Directive 85/374 in the COA (i.e. prior to 1 January 2006). The courts distinguished between the "direct" loss (on the defective product) and "indirect" loss on buyer's goods, other than the product itself, caused by the defect in the product.
— jurisprudence concerning the contracts in which the parties defined direct and indirect loss.
— articles by legal scholars who discuss whether "loss of profit" should be considered "direct" or "indirect" loss – there are different opinions in the legal literature.

Consequently, parties should define "consequential loss" or "indirect loss" in the contract if those terms are to be used in exclusion clauses.

The COA defines "loss of profit" (Croatian: *izmakla korist*) as a type of damage recoverable under Croatian law. The term "loss of profit" is also not defined, but, unlike "consequential loss", there is some helpful jurisprudence for this term.

On a general note, parties cannot exclude or limit liability when acting with intent or gross negligence *(namjera ili krajnja nepažnja)*. Exclusion or limitation of liability clauses for negligence *(obična nepažnja)* can be contested if these clauses result from a monopoly position exercised by the breaching party or from unequal relations (bargaining power) between the contractual parties.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause is construed in accordance with the rules on interpretation of contracts provided by the COA. If a provision is clear – i.e. if there is no ambiguity as to its meaning – there is no need for interpretation and the provision applies as it reads. If a provision is unclear, the following criteria are taken into account:

— the common intention of the parties.
— principles of the law of obligations.
— fair balance of parties' performances.
— if the provision is part of the terms and conditions drafted by one of the parties to the agreement, the rule of *contra proferentem* will apply and it will be construed in favour of the other party.

The COA outlines the principles governing contractual relations – for example freedom of contract, good faith, the duty to fulfil one's contractual obligation *(pacta sunt servanda)*. These principles are deemed mandatory by Croatian jurisprudence, therefore the courts consider those principles on their own motion, in parallel with the examination of the contractual and statutory provisions governing certain contracts.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

According to the Enforcement Act 2012, when seeking an interim measure *(privremena mjera)* for securing non-monetary claims, besides the requirement to establish a credible non-monetary claim, the applicant must also show (i) the existence of threat that the debtor would otherwise prevent or significantly deter the settlement of the claim; or (ii) that the measure is necessary to prevent threatened violence or irreparable damage.

If a court considers the consequential loss exclusion clause (or other limitation/ exclusion clause) to be evidence of potential irreparable damage that would occur as a result of breach of a contract, this clause might have an impact on the non-monetary claim for performance of a contractual obligation. Nevertheless, there is currently no jurisprudence that illustrates this position.

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Czech Republic

1. Do the words "consequential loss" have a given meaning in law?

Czech law does not recognize the term "consequential loss" or any similar term such as "indirect loss".

Under Section 2913(1) of the Civil Code, a party in breach of contract shall compensate the other party for losses resulting from the breach of contract. In other words, the obligation to compensate losses only arises if there is a causal link between the breach of contract and the damage caused by the breach. Unless agreed otherwise, compensation for losses shall also cover so called loss of profit. In case of a dispute, the injured party carries the burden of proof and the courts usually require that the causal link is proven beyond reasonable doubt.

The Czech legal doctrine adds that losses may only be recovered to the extent that they have been foreseeable for the party in breach at the date of the contract. According to one of the underlying theories, the reason is that a party should be able to evaluate the relevant risks before it concludes a contract and to adequately prepare for such risks (e.g., by arranging for insurance). Consequently, the obligation to pay damages resulting from a breach of contract should be limited by what the party in breach could foresee when the contract was made (and what it could have protected itself against by exercising the appropriate level of diligence).[1] Several cases of unforeseeability have been described in case law, including a loss resulting from an extraordinarily high contractual penalty or a bonus payable to the claimant upon completion of works. In this context it is generally recommended that parties to a contract notify each other of all extraordinary circumstances which may lead to losses that would normally be unforeseeable for the other party.

[1] Hulmak and others: The Civil Code: Commentary VI. Obligations law. Special part (Sec. 2055-3014). C. H. Beck 1st ed., 2014, pages 1565–1576.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

English terms "indirect loss" and "consequential loss" are generally used rarely in legal documents governed by Czech law.

However, in Czech law contracts where the template has been taken from an English law document, the use of "indirect loss" and "consequential loss" is not unusual. Therefore, the terms "indirect loss" or "consequential loss" are sometimes taken over into the Czech contracts governing local transactions.

Since the terms "indirect loss" and "consequential loss" are not recognized by Czech law (see above), it is generally recommended to either refrain from using them altogether, or to include a precise and descriptive definition of the relevant term in the given legal document. Not doing so may create significant interpretational problems and room for dispute over the recoverability of a particular damage.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

"Consequential loss" is rarely used in Czech law governed contractual documents (see above). Legal literature and case law do not often use the term as both rather work with the general foreseeability concept (see above). Without a precise definition of the term included in the contract, its interpretation is unclear.

The meaning attributed to the words "consequential loss" would depend on the interpretation of the particular contractual clause within the broader context of the contract in which the clause is used.

General principles of interpretation set out in the Civil Code would need to be used. In particular, expressions of will should be interpreted according to the intention of the acting party if the other party was aware or must have known of such an intention. If the party's intention cannot be ascertained, the typical interpretation of a hypothetical person in the position of the person against whom the intention was expressed is decisive. Past dealings between the parties, circumstances preceding the conclusion of the contract, as well as subsequent behaviour of the parties would be taken into account when interpreting the words of the particular contract.

Importantly, unless agreed otherwise, if a term is used which allows for various interpretations, in the case of doubt it is to be interpreted to the detriment of the person who used the term first. If, for example, one of the parties comes up with a first draft of a contract which includes an undefined term "consequential loss", it would likely be interpreted to its detriment in a later dispute.

Consequently, parties should define "consequential loss" or "indirect loss" in the contract if those terms are to be used in exclusion clauses.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no generally accepted definition or concept of consequential loss in Czech law or case law apart from the phrase "lost profit" which is sometimes used alongside "consequential loss". "Lost profit" is defined in the Civil Code as "what a party has lost" as a result of the breach. According to case law, lost profit may only be recovered if it is proven that, without the breach, the value of the assets of the injured party would have been increased. A mere probability of future increase of the value of assets is not enough.[2]

The above principles of contractual interpretation would apply to interpreting words used alongside "consequential loss" where their meaning is not defined in Czech law.

[2] Decision of the Czech Supreme Court No. 25 Cdo 3586/2006.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Generally, we would not see a clear link between the exclusion clauses and non-damages claims (such as the court granting preliminary injunctions intended to prevent a breach of contract, which could lead to excluded consequential losses from happening in the first place). However, this is not specifically governed by Czech law and no relevant case law exists. Czech courts have a high level of discretion when awarding preliminary injunctions (they can do so whenever the relations between the parties need to be preliminarily regulated in advance of the main decision). It is, therefore conceivable that the courts would take into account the general context of the contract, including exclusion clauses, when awarding preliminary injunctions.

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England

1. Do the words "consequential loss" have a given meaning in law?

In English law, there are, as a general rule, two types of recoverable loss for a breach of contract: "direct loss" and "consequential loss". All other losses are considered "remote" and unrecoverable.

This approach originated in the mid-19th Century case of *Hadley v Baxendale*[1] that stated recoverable losses were:

— losses arising naturally (i.e., according to the usual course of things) from the breach of contract itself – generally referred to as "direct losses" or the "first limb of *Hadley v Baxendale*"

— losses that may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it – generally referred to as "consequential" or "indirect losses", or the "second limb of *Hadley v Baxendale*".

The second limb of loss in *Hadley v Baxendale* covers situations where there is knowledge of *"special circumstances"* at the time of the contract and a party has therefore been put on notice of a type of *"exceptional loss"*,[2] which would not arise in the usual course of things, that by reason of that notice it has effectively undertaken to bear in the event of a breach.

As such, the scope of "consequential loss" in the meaning given in *Hadley v Baxendale* is narrow and highly fact-specific.

[1] (1854) 9 Exch. 341.

[2] *Per Blackburn J in Horne v Midland Railway* (1873) LR 8 CP 131 at 141.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Exclusions for "consequential loss" are widely used in the energy industry and in other sectors.

In the oil and gas industry, the Association of International Petroleum Negotiators, Oil & Gas UK and LOGIC model form contracts routinely contain exclusions for consequential loss that are governed by English law. Two notable points concerning these model form contracts are:

— "Consequential Loss" is usually defined in the model form contract, to give it a meaning decided by the parties.

— Although "Consequential Loss" is defined in the model form contract, one of the losses excluded in these definitions or clauses is usually "consequential loss" (undefined). For example, *"'Consequential Loss' means any indirect or consequential loss howsoever caused …"* (Oil and Gas UK model form Joint Operating Agreement).

The power industry in the UK also uses exclusions of consequential loss. For example:

Paragraph 6.12.4 of the Connection and Use of System Code ('**CUSC**') excludes liability between parties to the CUSC for: (i) any loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill; and (ii) *"any indirect or consequential loss"*.

Clause 64.8 of the Contract for Difference Standard Terms and Conditions (Version 2) for the second allocation round between a low carbon electricity generator and the Low Carbon Contracts Company ('**LCCC**'), a government-owned company, introduced as part of the Electricity Market Reform, excludes liability for any *"special, indirect or consequential loss including any such loss which constitutes loss of use, loss of goodwill, loss of profit or loss of revenue, in each case incurred by the other Party in respect of any breach of the terms of the Contract for Difference or any other CfD Document"*.

Clause 19.1.1 (b) of the Backstop Power Purchase Agreement ('**BPPA**') that would be entered into between a supplier and an eligible generator under the United Kingdom Offtaker of Last Resort scheme uses near-identical words to those in clause 64.8 of the LCCC.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The traditional approach of English law is that where a contract exempts one party from liability for "consequential loss", it will normally be interpreted as exempting it only from loss that is recoverable under the second limb of *Hadley v Baxendale*.

There is settled Court of Appeal authority that a clause which excludes liability for "consequential loss" (or "indirect loss") (undefined) only, excludes liability only for damages falling within the second limb of *Hadley v Baxendale*.[3] As set out above, this is a relatively narrow category of loss.

That traditional approach has more recently been questioned by the courts. In *Transocean Drilling UK Ltd v Providence Resources plc,*[4] the Court of Appeal considered that:
"The expression 'consequential loss' has caused a certain amount of difficulty for English lawyers, mainly as a result of attempts to define its meaning in the interests of commercial certainty [citing the leading Court of Appeal decisions for the traditional approach] …
It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents.[5]

The High Court has also recently noted, in a case concerning a "consequential loss" exclusion, that decisions concerning particular contracts (or clauses) do not create binding precedent *(stare decisis)* in relation to other contracts on different terms.[6]

The meaning of the words "consequential loss" in exclusion clauses has not been clearly, or satisfactorily, resolved by the courts since the Court of Appeal questioned the traditional approach in *Transocean Drilling UK Ltd* v *Providence Resources plc*.

A direct attempt to overcome the traditional approach was recently made in *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd*.[7] However, whilst accepting the need to give the words "indirect" and "consequential" their natural and ordinary meaning, in the context of the agreement as a whole and the relevant factual matrix, the court applied the traditional approach of equating "consequential loss" with the second limb of *Hadley v. Baxendale*.

It may be that the correct modern approach, when the legal authorities are viewed as a whole, is that the use of the words "consequential loss" in a contract in respect of recoverable damages (absent definition) will be presumed to mean the second limb of *Hadley v Baxendale*. However, that is a presumption about the parties' use of language. It is not binding legal precedent to be slavishly applied. Further, the presumption is simply a pointer to a logical and common sense meaning of the words that it will yield if an analysis of the contract suggests a different approach is correct.

[3] Examples of which include: *Millar's Machinery v David Way* (1934) 40 Com Cas 204 , at 210; Croudace v Cawoods [1978] 2 Ll Rep 55 , at 62; British Sugar plc v NEI Power Products Ltd (1997) 87 BLR 42 , at 48–51; Deepak v ICI [1999] 1 Ll Rep 387 , at paras 88–93; and Hotel Services v Hilton International [2000] BLR 235 (CA) at paras 7–8 and 14–20. The view is shared by Lewison, The Interpretation of Contracts (6th ed.), para. 12.14.
[4] [2016] EWCA Civ 372.
[5] [2016] EWCA Civ 372 [15]; [100]-[101]. It is notable that this is a similar observation to that of Lord Hoffmann in Caledonia North Sea v British Telecommunications [2002] CLC 741; [2002] BLR 139 (HL)
[6] *Star Polaris LLC v HHIC-Phil Inc* [2016] EWHC 2941 (Comm).
[7] [2020] EWHC 972.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause will be construed on its own merits.

Where a clause refers to other potential heads of loss, arguments can arise over whether these should be taken to be sub-categories of "consequential loss", so that the scope of the exclusion is not expanded, or treated as additional types of "direct" (first limb of *Hadley v Baxendale*) loss that should be excluded beyond "consequential loss".

There is extensive jurisprudence concerning such arguments that have been fought out through the English courts. Although the English courts have not been consistent on the correct approach, the following considerations are relevant to interpreting a "consequential loss" clause:

1. the parties are free to agree any exclusion. If a clause clearly excludes a loss, English law will simply apply the clause.
2. the starting point to decide whether a clause excludes a loss is to consider the natural and ordinary meaning of the words.
3. if there is more than one natural and ordinary meaning, English law will consider the contract as a whole, the background to the contract and potential commercial results of rival interpretations to seek to ascertain the clause's true meaning.[8]
4. there are certain 'canons' or principles of construction that may assist in the event of ambiguity, although these are not consistently applied by the courts:
   a. if the clause is ambiguous and potentially one-sided, the law might construe the contract *contra proferentem*. However, the Court of Appeal has questioned whether such an approach is permissible where parties have equal bargaining power.
   b. the principle in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* that there is a presumption that neither party to the contract intends to abandon any remedies for breach which clear words are required to rebut.[9]
   c. the *ejusdem generis* principle that where a list of words has some common characteristic the general words that follow them ought to be limited to the same genus.
   d. the *nudum pactum* principle that a contract should not be construed to be a bare promise by removing all remedies for breach.

Issues that have historically resulted in disputes over the scope of "consequential loss" exclusion clauses concerning whether "direct losses" are also excluded are:

— the impact of the word "other" in conjunction with the words "consequential loss"
— the impact of the word "including" in conjunction with the words "consequential loss"
— use of parenthesis.

The above have resulted in disputes as they are prone, as a matter of grammar, to result in more than one potential interpretation if not used carefully.

[8] *Wood v Capita Insurance Services Limited* [2017] UKSC 24.
[9] [1974] A.C. 689, 717H.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Yes. In *AB v CD,*[10] the Court of Appeal decided that in circumstances where a limitation clause exists in a contract, justice will tend *"to favour the grant of an injunction to prohibit the breach in the first place"*.

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[10] [2014] EWCA Civ 229.

France

1. Do the words "consequential loss" have a given meaning in law?

The notions of consequential, special, incidental or punitive damages traditionally do not belong to the French civil and/or commercial law. Their use in contracts subject to French law often raises difficulties and uncertainties, if they are not very precisely defined by the parties.

French civil law does not give a specific meaning to consequential damage and consequential loss. However, these terms are currently not completely unknown under French law.

French civil law traditionally distinguishes between (i) direct and indirect damage and (ii) tangible and intangible damage.

The distinction between direct and indirect damage

According to Article 1231-4 of the Civil Code, the indemnification of a contractual breach shall be limited to damages which are the immediate and direct consequence of the breach. Therefore, the indirect costs are only indemnified if, and insofar as this results from an agreement between the offender and the victim.

Under French contract law, the question of whether the prejudice is direct or indirect is a matter of causal link. Therefore, a prejudice directly caused to a party should be qualified as "direct" under the meaning of Article 1231-4 of the Civil Code. Conversely, indirect damages are the damages which are too far from the chain of the circumstances to be linked to the breach, as well as indirect victims which are damaged by rebound.

Even though the principle is rather simple, no objective definition allows to determine in advance, with absolute certainty, which prejudice shall be considered as direct or indirect by the courts: it depends on the context of the contract, on the parties, and on the breach itself.

The distinction between tangible and intangible damage

Pursuant to Article 1231-3 of the Civil Code, the indemnification resulting from a contractual breach is limited to breaches that were expected or could have been expected at the execution date (this is obviously different in tort). However, it is not limited to tangible damage: loss of profit, which is intangible, is for instance included. That said, it is always possible to agree on the exclusion of intangible damage, especially when formally signing a contract before the damage occurs.

This difference between tangible and intangible damage is not defined by law. Historically, a distinction was set between tangible damage *(préjudice matériel)* and psychological damage *(préjudice moral)*. The concept of intangible damage is relatively new and comes from insurance practice, rather than from laws or regulations. It is now more widely used in contractual practice, also due to the use of templates drafted under English Law, even though no harmonised definition exists. The contracts therefore usually list examples.

In view of case law resulting from practice and legal doctrine, it seems that tangible damage under this meaning is typically defined as damage to property – meaning the costs to make good this damage. Conversely, any damage which does not fall within this definition should normally be considered to be intangible damage.

Not every kind of loss can be recovered under French law and compensation is limited by virtue of articles 1231-3 seq. of the Civil Code, as interpreted by the French courts and as set out below:

— the loss must be certain – the loss suffered and the lost profit must be certain and not hypothetical – this does not exclude future losses that are certain nor missed opportunities, provided it can be demonstrated that there was a real opportunity;
— the loss must be foreseeable – article 1231-3 of the Civil Code limits the recoverable damages to losses which have been foreseen or foreseeable by the parties when entering the contract (save in case of fraud); and
— the loss to be recovered can be limited by the parties – compensation must be limited to the amount provided for in the contractual limitation of liability clause unless it is manifestly excessive or derisory.

Under construction law, the terms *"dommages consécutifs"* are sometimes used by the doctrine, in order to designate the damage to equipment resulting from a defect affecting the solidity of the construction works and which are covered as accessory damage under the legal decennial guarantee. In this respect, both tangible and intangible damage may be indemnified, as damage accessory to the decennial guarantee, subject however to the demonstration of a direct link of causality between the disorder affecting the works and the damage. The damage resulting in disturbance of possession may also be included in this respect.

There is therefore, no general theory of consequential loss or consequential damage under French law, neither from civil law which does not conceptualise these terms, nor from specific laws. The latter, even though they use these terms, do not define them – or they do so by reference or with different meanings, sometimes as a synonym for indirect damage, otherwise in order to designate a damage which, even though direct, is an accessory damage.


2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The energy sector uses the notions of consequential loss or consequential damage in contractual practice. This comes from common law practitioners and templates, by habit more than as a result of a true analysis under French law, as seen above. Nonetheless, the practice is there and, when a contract is already executed with a reference to consequential loss, the will of the parties must be analysed in order to determine its meaning under French law in the context of this contract, according to the methods set out by the Civil Code for the interpretation of contracts, based upon the common intention of the parties, rather than on the wording of the clause (Article 1188 of the Civil Code).

Apart from these uses that do not help define the term other than by reference to indirect damage, consequential damage is most often used in the insurance sector, which is logically standardised and internationalised. This sector will therefore, make use of these terms and the concept attached to them, by mimicry. However, this must be carefully dealt with, because insurance is a very specific sector, and insurance policies usually multiply the examples attached to the concept: in practice, the insurers, the insured and the courts will refer to the specific events listed by the policy rather than trying to define a concept of indirect damage or indirect loss.

Examples of contracts in French law using the words consequential loss or indirect loss include:

Example 1: Clause 1.15 of the Red Book of the 2017 FIDIC Suite
"Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under […]"

Example 2 – production sharing contract
"The Company and the Partner reciprocally waive any recourse against each other for property damage and any indirect loss or non-material damage resulting therefrom. It is further agreed that the Company and the Partner will obtain from their respective insurers the waiver of the exercise of their right of subrogation against the other Party; the Company and the Partner will indemnify each other for the consequences of any failure of an insurer to comply with this obligation."

Example 3 – production sharing contract
"The Contractor will take all the necessary action to achieve the objectives of the Contract and give reasonable compensation to Third Parties for any direct damage which it, its employees, contractors or subcontractors and their employees, while carrying out their activities under the Petroleum Operations, may cause, by its or their negligence, to their person, to their property or to their rights. The Contractor will be civilly liable for all losses or damages suffered by Third Parties due to its or their errors, fault or negligence and shall bear the cost of all compensation and damages payable."

Example 4 – production sharing contract
"It is understood that the Parties will meet as soon as possible after the notification, by one of the Parties, of the occurrence of force majeure and will make reasonable efforts to provide, by mutual agreement, solutions to address the non-performance of the obligations affected by the force majeure and to limit the damages suffered by all the Parties and thirds due to the occurrence of the force majeure. In any case, no Party may be held liable for indirect damages."

Example 5 – service contract
"The Company cannot be held responsible, for any reason whatsoever, for direct or indirect damages suffered by the Client resulting from the performance of the contract.

The responsibility of the Company cannot be sought, in particular, for loss of profit or operating loss. In any case, the compensation by the Company for the loss suffered by the customer may not exceed the amount of the remuneration referred to in article 5 hereof."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The doctrine has tried to propose definitions of consequential damage in order to conceptualise and clarify its various uses under French law. Two main meanings have been identified.

First, a purely legal definition of consequential damage refers to "second degree" damage, i.e. which is directly even though not immediately connected to the causal event, as opposed to indirect (or "remote") damage. Pursuant to this definition, consequential damage would designate a damage which is directly the consequence of an event, and more specifically the necessary consequence of the first, immediate, damage, and which results from this first damage.

Second, under a more economic approach, the concept of consequential loss refers to economic losses. Legally, this economic definition means that a consequential loss is a specific kind of intangible damage (including for instance the *lucrum cessans* under Article 1231-2 of the Civil Code), notwithstanding the causality of the damage – direct or indirect. This is usually the meaning of the "consequential loss" in industrial contracts,[1] which are extensively used in the energy sector.

Under a similar approach, consequential damage can also refer to the indemnification of benefits and advantages that the victim lost, as a consequence of his contractor's breach. That is to say that the indemnification of consequential damage aims at reinstating the victim to a situation equivalent to the contractual situation, had this breach not occurred.

FIDIC contracts, often used to build and operate the main energy installations, make use of this term in their limitation of liability clauses. See above.

[1] This is not a legal category. Just a practical notion, with specific risks and allocation of risks.

The FIDIC contract wording literally translates this reference to *"indirect or consequential loss or damage"*, as *"la perte ou le dommage indirect ou conséquent"*, which does not really help with an understanding of the term "consequential loss" under French law, since this wording amalgamates "indirect" and "consequential" damages.

The context is nevertheless important, since this clause refers to two types of damage: intangible damage, such as *"loss of any Works, loss of profit, loss of any contract"*, and *"indirect […] loss or damage"*. Under French law, these concepts are, on the one hand, intangible economic damage, and, on the other hand, indirect damage.

Generally, the approach that prevails in industrial contracts, including in the energy sector, is the exclusion of both intangible and indirect damage, and the use of the term "consequential loss" must be understood in this context of exclusion. A case-by-case analysis is nevertheless necessary, in view of the drafting of the clause as a whole and subject to the interpretation that may be given based upon the common intention, that may often result from the minutes of the negotiations (especially when successive versions have been exchanged by email between the parties).

In any case, it makes sense to seek to avoid non-French law terms such as "consequential loss" in French law contracts. Instead, reference should be made to French legal terms, or at least to a list of examples, or ideally a comprehensive list of damages, rather than just importing common law concepts that might become confusing, or even ambiguous, since the parties may have different interpretations without having shared them before the execution of the contract.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Usually, the clauses excluding or limiting the liability of a party exclude both indirect damage/loss and intangible damage/loss.

In contracts where the indemnification of consequential loss is excluded, the indemnification of indirect damage is usually also excluded in the contract, even though this is already the principle under French civil law. The same exclusion is often provided for intangible damage and, in particular, for economic losses such as loss of profit or loss of the use of the works subject to the contract.

As to the approach to interpreting a contractual exclusion clause excluding "consequential loss" and other heads of damage/loss, as always under French law, a case-by-case analysis is necessary. What matters for the interpretation that shall be given by the courts is the common intention, which may often result from the minutes of the negotiations (especially when successive versions have been exchanged by email between the parties).

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

We are not aware of any impact, but the lessons learnt from the experience of consequential loss remains relatively scarce, since these terms are often avoided under French law, despite the influence of common law in industrial contracts, and may not be used in judgments.

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Germany

1. Do the words "consequential loss" have a given meaning in law?

German law – unlike English or other common law jurisdictions – does not explicitly recognise the terms "consequential loss" nor the terms "direct" or "indirect loss". The terms are not defined or used in the German Civil Code (*Bürgerliches Gesetzbuch,* '**BGB**'). Losses are generally recoverable if they meet the test of adequate causation. These and other principles on the recoverability of losses are set out in Sections 249 et. seqq. of the BGB and an extensive body of court cases. Therefore, there is no concept similar to *Hadley v Baxendale* in German law, subject to the caveat below under (3.).

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Contractual exclusions of liability clauses for "consequential loss" are common in commercial contracts. The exclusion of certain types of losses along with a liability cap on recoverable losses is regularly seen in most industries. Some of these clauses only exclude certain economic or consequential losses – such as loss of profit, and loss of production – while others explicitly exclude all consequential losses, sometimes combined with a non-exhaustive list of examples and sometimes by just using the phrase "consequential loss" or "consequential and indirect losses". Despite the lack of a clear legal definition of the term "consequential loss", it is rare for such exclusions to include their own definition of "consequential loss".

Some contracts, especially for international construction projects, include a long list of examples of excluded damages in addition to the general exclusion of consequential losses, such as:

— loss of use
— loss of data
— loss of profit
— loss of production
— loss of customers or contract
— incursion of financial charges
— or for any consequential or indirect loss or damage.

In contract law and especially insurance law, a concept of – regularly excluded – consequential losses (*Folgeschäden* or *mittelbare Schäden*) has developed. However, there is no uniformly accepted definition of such losses in German law.

As a German particularity, certain restrictions on standard business terms *(Allgemeine Geschäftsbedingungen),* originally conceived as a tool for consumer protection, also apply in business-to-business transactions. The restrictions on standard business terms limit the possibility to exclude liability for damages in contracts that are based on standard business terms to a considerable extent. Non-compliance with the principles developed to a large extent by German jurisprudence will cause the invalidity of the respective provision, provided it favours the party who proposed the standard terms.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There is no generally accepted definition or concept of consequential losses.[1] Court decisions on the interpretation of the meaning of consequential losses are very limited in number and not always coherent. Decisions on the matter regularly stress the fact that there is no generally accepted definition of consequential loss, and therefore require a case-by-case determination of the parties' intent.[2]

In a limited number of cases, the federal supreme court (*Bundesgerichtshof*, '**BGH**') and a higher regional court *(Oberlandesgericht)* ruled in the 1990s[3] that in a contract which is subject to German law but written in English, terms such as "consequential loss", which have a specific meaning in English law, will generally be construed according to English law principles. The court held that the parties' use of terms that have a specific meaning in English law but not in German law hints at the parties' intent that the specific meaning shall apply to the interpretation of the contract. This would mean that *Hadley v Baxendale* principles may apply to a German law contract if written in English. Whether these rulings would still apply today is unclear, as the underlying assumptions have been criticised by prominent scholars.[4] To our knowledge, the principle has neither been used nor revoked since the 1990s.

Assuming consequential loss will be interpreted as *Folgeschäden* or *mittelbare Schäden,* it is not entirely clear which types of damages are excluded. It is generally agreed that costs to repair (or replace) damaged property or to heal an injured person are direct losses and not *Folgeschäden* or *mittelbare Schäden* and therefore not excluded as consequential loss. Beyond that, courts tend to look at the parties' intent when signing the contract to establish which damages are excluded as consequential.[5] In a court ruling, the BGH stated that direct losses are losses that were to be expected as evident consequence of a breach according to the usual cause of things. In that case, interest payments due to increased financing costs were considered to be direct damages as they were considered to be an evident consequence of the breach.[6] This concept seems similar to the first limb of *Hadley v. Baxendale.* However, the similarity should not be over-interpreted, as courts stress their case-by-case approach to determine direct and consequential damages. In another case, BGH decided that statutory interest payments were not considered to constitute excluded indirect losses whereas higher interest damages were considered to be consequential losses.[7]

It is therefore difficult to state which damages would likely be excluded under German law as "consequential damages".

[1] See BGH verdict of 20 July 2011 docket number IV ZR 75/09 published NJW 2011, 3648, 3648; OLG Düsseldorf, verdict of 21 September 2018 docket number 4 U 101/17 published VersR 2019, 159 infra 40.
[2] See BGH verdict of 20 July 2011 docket number IV ZR 75/09 published NJW 2011, 3648, 3648; OLG Düsseldorf, verdict of 21 September 2018 docket number 4 U 101/17 published VersR 2019, 159.
[3] BGH verdict of 2 December 1991 docket number II ZR 274/90 published NJW-RR 1992, 423, 425, OLG München verdict of 22 September 1993, docket number 7 U 2175/93 published TranspR 1993 433, 434; see also Freudenberg, ZIP 2015, 2354.
[4] Staudinger/Magnus ROM I VO, Art. 12 infra. 30.
[5] See for example BGH DB 1994, 2073.
[6] BGH verdict of 8 June 1994 docket number VIII ZR 103/93 published NJW 1994, 2228, 2229.
[7] BGH verdict of 20 July 2011 docket number IV ZR 75/09 published NJW 2011, 3648, 3648.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Due to uncertainty about the type of damage that would actually be covered by an exclusion of consequential damages, at least in high value contracts parties often aim to specifically describe the types of losses they wish to exclude, most often by including a list of examples.

As a general rule, each exclusion will be interpreted on its own in a first step with the aim of establishing the parties' intent at the time of signature of the contract. Courts are free to hear witnesses to establish what the parties intended. There is no parol evidence rule restricting proof of contract interpretations. In case of ambiguities, there is *no contra proferentem* rule, as a general principle. However, standard business terms *(allgemeine Geschäftsbedingungen)* will generally be interpreted to the detriment of the party proposing their inclusion in the agreement, §305c para.2 BGB.

If there is a long list of excluded damages, courts would – if there are no signs of a deviating intent by the parties – tend to treat the list of excluded damages as mutually exclusive. Damages that are not expressly excluded if other comparable damages are excluded would likely be treated as recoverable unless the list was structured as a non-conclusive description of consequential losses. Therefore, careful drafting of the exclusion can avert such risk, at least partially.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No, German law generally allows an action for specific performance irrespective of the extent to which damages would or would not be recoverable.

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Hong Kong

1. Do the words "consequential loss" have a given meaning in law?

Yes. The meaning of "consequential loss" under Hong Kong law is similar to that under English law, following the *Hadley v Baxendale*[1] categories of recoverable loss for a breach of contract.

As held in *Hadley v Baxendale,* recoverable losses for a breach of contract would be:

— direct losses, arising naturally as a result of a contractual breach (first limb of the rule in *Hadley v Baxendale*); and/or
— indirect or consequential losses, arising as may reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of the breach (second limb of the rule in *Hadley v Baxendale*).

In the second limb, the claimant must prove two things to recover consequential loss. First, he must prove that the party in breach had actual knowledge of the special circumstance that gave rise to the damage that did not arise in the usual course of things or that it was within his contemplation. Second, he must prove that it was reasonable to regard the party in breach as having assumed contractual responsibility for that type of loss[2]. Hence, whether or not a particular loss would constitute "consequential loss" is highly fact specific and would be subject to remoteness of damage considerations.

Recently in Hong Kong, the above principles of consequential loss decided by the English courts have been restated and adopted as representing the law in Hong Kong in the Court of Final Appeal case of *Richly Bright International Ltd v De Monsa Investment Ltd.*[3]

[1] (1854) 9 Exch 341
[2] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48
[3] (2015) 18 HKCFAR 232

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. "Consequential loss" is a term frequently used in contractual exclusion of liability clauses, in many commercial sectors in Hong Kong, from land/property and construction to energy, oil and gas, shipping and other sectors.

Example 1[4]
"In any event, the Seller's obligation hereunder shall not exceed the direct expenses incurred for the removal and replacement of the Products, and shall not include any consequential or indirect damages, including, without limitation, demurrage claims, loss of opportunity or loss of profit. Should the Buyer remove the Products without the prior consent of the Seller, all such costs incurred in doing so shall be for Buyer's account."

Example 2[5]
"The liability of Insurers shall be restricted to the cost of repair or replacement or reinstatement of such damaged services and shall not extend to cover any consequential loss resulting from the interruption of the service."

There is no official model form of contract for oil and gas projects subject to Hong Kong law. The forms of contract used are often the pro forma contracts of a particular company, or pro forma industry templates with riders and/or logical amendments.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

In contractual exclusion clauses, the term "consequential loss" would generally be interpreted as the type of loss as defined in the second limb of the rule of *Hadley v. Baxendale*. There is no jurisprudence in any Hong Kong Court that questions this approach.

What would constitute "consequential loss" would depend on factors such as:
— the express definition of "consequential loss" in a relevant contract (if any).
— the wording of the relevant contractual exclusion clause.
— a *prima facie* assumption about what parties might be taken to have intended when the contract was entered into[6].

Under Hong Kong law, whether or not the exclusion clause would be considered valid or effective would also depend on the reasonableness of the clause, subject to the reasonableness requirement set out at section 3 of the Control of Exemption Clauses Ordinance (Cap. 71).

In determining the reasonableness of a standard exemption clause, the relevant considerations include the strengths of the parties' bargaining positions, the other party's knowledge of the clause and the reality of the other party's consent to that clause[7].

The reasonableness test is easier met when the parties have equal bargaining power. For example, for an exemption clause to be effective, the general rule is that the clause must be incorporated into the contract at the time the contract is made. It is insufficient to put forward the clause at a later stage. However, according to the commentary in *the Annotated Ordinances of Hong Kong,* if the parties are of equal bargaining power, in the same line of business and with knowledge that the exemption clauses are common in that business, those terms may be regarded as being incorporated into an oral contract.

[4] General Terms and Conditions of Sea Trader International Ltd (a limited company registered in Hong Kong)
[5] Employees' Compensation Insurance Policy and Contractors' All Risks Insurance Policy
[6] Ibid 2
[7] Annotated Ordinances of Hong Kong. LexisNexis Hong Kong

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

First, the law would construe the clause by reference to the natural and/or literal meaning of the words used. In line with the *contra proferentem* principle, a clause is to be construed strictly against the party who introduced it and seeks to rely on it. A party seeking to rely on an exclusion clause must show that it was incorporated as a term of the contract, which usually involves the taking of reasonable steps to bring it to the notice of the other party. Clear wording is necessary for a party to escape liability for breach of an obligation fundamental to the contract.

Second, the law would consider the intention of the parties at the time the contract was made[8]. In *The Achilleas*[9], it was held by Lord Hoffmann that liability for damages should be founded upon the objectively ascertained intention of the parties.

In *Richly Bright International Ltd v De Monsa Investment Ltd*, Tang PJ agreed with Lord Hoffmann and held that *"since all contractual liability is voluntarily undertaken, liability for damages must be founded upon the intention of the parties, gathered upon the construction of the contract as a whole, construed in its commercial background"*.[10]

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Generally, no. However, any English or Commonwealth case law precedents stating otherwise could be persuasive before the Court. Ultimately, each case would be decided on its merits.

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[8] Ibid 2
[9] Ibid 2, at 31
[10] Ibid 2, at 126

Iran

1. Do the words "consequential loss" have a given meaning in law?

No, the words "consequential loss" are not defined in Iranian law.

Under Iranian law, the key legislation dealing with damages are the Iranian Civil Procedure Code 2000 ('**Civil Procedure Code**') (as amended) and the Civil Code of 1928 (with subsequent amendments) ('**Civil Code**').

The Civil Procedure Code

Based on a well-established doctrine under Iranian law, parties to a contract are only responsible for foreseeable damages naturally arising from the breach of contract in the ordinary course of events. The Civil Procedure Code requires a direct causal link between the breach and the loss arising from that breach.

Article 515 of the Civil Procedure Code, Note 2, provides that *"[d]amages arising from loss of non-profit (adam o-naf'a) shall not be recoverable. While the recovery of damages for the delay in payment is recoverable in statutory instances."*[1] Liquidated damages clauses, which may include an element of loss of profits, are recognised under the Civil Procedure Code.

According to Article 520 of the Civil Procedure Code, the injured party must prove that the immediate cause of the loss was failure or delay in performing a contractual obligation, or non-delivery of goods contracted for. This provision in Article 520 is generally taken to mean that only direct losses are recoverable.

The Civil Code

The position regarding consequential loss under the Civil Procedure Code may be compared to the position in the Civil Code.

[1] *Adam-o-naf'a* does not have a clearly defined meaning in Iranian law. However, in simple terms, loss of profit is divided into two categories: "materialised non-profit" (*adam-o-naf'a Mohaghagh*) and "probable non-profit" (*adam o-naf'a Mohtamal*). The difference between "materialised non-profit" (*adam-o-naf'a Mohaghagh*) and "probable non-profit" (*adam o-naf'a Mohtamal*) is that "materialised non-profit" (*adam-o-naf'a Mohaghagh*) relates to a loss of profit where the requirements for generating the intended profit already materialised and if it was not for the other party's action or omission, it would be more probable than not that the profit would have been generated. By contrast, "probable non-profit" (*adam o-naf'a Mohtamal*) happens where if it were not for the other party's action, the profit could probably have been expected to accrue. The commonly held view is that Article 515 of the Civil Procedure Code should solely apply to probable non-profit because, the argument further goes, it is the only logical way to resolve the inconsistencies between this article and the Criminal Procedure Code and other legal principles in the Iranian legal system under which a claim for damages for loss of (materialised) profit appears to be permissible.

Article 331 states that anyone who causes property to be destroyed shall replace it with its equivalent or pay its equivalent value. The offending party will also be held responsible for any depreciation in value.

As a result of the above, there is thought to be a conflict in relation to the recoverability of loss of profits under the Civil Procedure Code and the Civil Code.

The view held by the majority of Iranian jurists and judges is that Article 515 of the Civil Procedure Code must be interpreted narrowly so that its application will be limited to *"likely realisable profit"*. Based on this view, damages for *"possibly realisable profit"* should be recoverable pursuant to Article 211 of the Civil Code.[2] However, the approach of the courts is not always consistent. For instance in 2016, a lorry owner did not succeed in his appeal for damages for loss of profit. He was prevented from getting his lorry back from customs due to an illegal directive by Iranian customs and was unable to transport goods as a result of this (i.e. a loss consequential upon the performance of another contract).[3]

The position of the Iranian arbitrators is also worth noting. In arbitration, there is a difference between the approach adopted by domestic tribunals and international arbitral awards. In domestic arbitral awards, the tribunals have typically rejected claims for loss of profits due to the interpretation of the Civil Procedure Code. For instance, in a domestic arbitration case brought against Eni Company,[4] a car rented by Eni was damaged and it was not returned to the owner on the agreed date. This resulted in the owner of the car missing a subsequent contract to rent the car to someone else. The owner of the car claimed for the cost of repair and the loss of profit for the cancellation of the second contract. The arbitrator awarded the cost of repairing the car but rejected the claim for loss of profit (i.e. a loss consequential upon the performance of another contract). The arbitrator found that there should be a causal relationship between the action of the defendant and the loss claimed. Moreover, the loss of profit whilst the car was being repaired, which deprived the owner of the *"likely realisable profit",* is an instance of *adam o-naf'a* which is not recoverable under the Civil Procedure Code.

The compensation awarded for loss depends on the following four conditions:

1. The loss suffered must be evident. This involves a requirement for decisiveness so that there is no doubt that future loss was suffered and that the loss is not speculative or imaginary.
2. The loss must be direct. If there is no direct causal relationship between incurred losses and adverse action, the loss cannot be compensated.
3. The loss must be permanent. It is a commonly accepted doctrine in Iranian civil liability jurisprudence that the aim of compensation is to restore the injured party to the position that it would have been in had it not been for the breach.
4. The loss must be foreseeable at the time of the act or omission that caused the loss: The requirement of foreseeability arises from the principle that a foreseeable loss arising from a party's breach can be attributed to the party who had foreseen or should have reasonably foreseen the loss. However, if the loss arises from an unforeseeable event, then the loss cannot be attributed to any party.

[2] Verdict No. 89/9/8909975112401285-27, case No. 891187 court No. 29 Public Court, Mashhad
[3] Verdict No. 1610 dated 2016 Jan 29, appeal court No. 6, Tehran
[4] Award Number: 36/D/237/9/89

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, there are some examples of energy contracts that use the words "consequential loss":

Iranian Petroleum Contract
"Neither Party shall be liable to the other Party for any indirect or consequential loss or damage arising out of or resulting from the performance or breach of the Contract, including any loss of revenues or profit."

Energy Conversion Agreement
"Unless and to the extent expressly set forth in the Contract, neither Party shall have any liability to the other Party (i) for indirect or consequential loss or damage however arising, or (ii) for loss of profit or loss of revenue."

General terms and conditions of Oil and Gas contracts
"Any loss or damage to oil, or any property of Seller or of any other person and also damages resulting from any type of pollution caused by the vessel, during breathing, loading and unearthing shall be borne by the Buyer."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There are significant differences in the meaning attributed to "consequential loss" in Islamic and Iranian law. This has led to ambiguity in the interpretation of the term. Consequential damages can be interpreted to mean that the damages arise out of: *"likely realisable profit"; "possibly realisable profit";* or loss of non-profit *(adam o-naf'a).*

Given the requirements of Article 221 of the Civil Code and the lack of clarity in Iranian law on the meaning of the words "consequential loss", the most reliable way to ensure that indirect losses or "consequential losses" are excluded by the contract is to agree on the scope of those liabilities in the contract using recognised Iranian law concepts.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The notion of consequential loss under the Civil Code is based on the establishment of "fault". The interpretation of 'fault' is defined by Articles 951, 952 and 953. In principle, "fault" is an infringement on the rights of others. Pursuant to the Civil Code, "fault" encompasses encroachment and negligence. "Fault" is thus a critical element for civil liability under Iranian law.

There is no specific contractual interpretation rule in relation to exclusion clauses. However, some general rules such as the meaning of the words, the intention of the parties, the circumstances and situations in which the contract has been signed will be applied. Also, such clauses will be construed in favour of the party that was not involved in drafting them.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

In Iran, monetary compensation is the most usual form of compensation for civil and contractual liability. The judge will usually follow the remedies provided under the contract in question. This approach arises as a result of Article 230 of the Civil Code which states that:

"If in a transaction it is stipulated that in case of failure the defaulting party should pay to the other a sum of money as compensation, the judge may not sentence him to pay more or less than the sum he has bound himself to pay."

Special court orders in the form an injunction or temporary relief are only granted where the court is convinced that such measures are necessary to prevent the plaintiff from suffering a loss. Where the loss is purely speculative, e.g., consequential loss (possible-not-profit of the type explained under footnote 1) or if excluded by the contract, the court would not be willing to grant such measures. By contrast, where the loss is an actual loss and it has not been expressly excluded by the contract, or the loss is of the type that, by law, cannot be contractually excluded, then the court would be more likely to grant interim measures to protect the plaintiff from such loss.

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Iraq

1. Do the words "consequential loss" have a given meaning in law?

No. The term "consequential loss" has no given or recognised definition under Federal Iraqi law.

In general, the legal position regarding damages is provided in the Iraqi Civil Code No. 40 of 1951 as amended ('**Civil Code**'). Pursuant to the Civil Code, compensated damages are inclusive of lost profit and are the result of a liability in tort or contract.

Liability depends on: (i) the contractual breach or the unacceptable/unlawful act; (ii) the occurrence of the damage; and (iii) the causal link between the breach/act and the damage in question (which is understood to be a direct link). The occurrence of the damage is an important leg in the determination of liability. For example, even in the case of contractually agreed compensation, the defaulting party can be released from this compensation obligation if no damage arose from the relevant default.

The Civil Code does not contain an explicit definition of what constitutes direct and indirect damages. However, it is understood that direct damages include damages (including lost profit) which *naturally arise* from the contractual breach or the unacceptable/unlawful act

As a statutory rule, unless otherwise agreed between the parties, contractual liability covers damages that are direct (i.e. occurring naturally) and normally foreseeable by the parties at the time of concluding the contract (even if such damages are not explicitly listed in the contract). In practice, the foreseeability of damages could be subject to the discretion of the court. Damages that are deemed normally unforeseeable at the time of concluding the contract are excluded from compensation, except where otherwise contractually agreed or where the damages – or lost profit – was caused by gross negligence and wilful misconduct.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The use of consequential loss exclusion clauses is mostly seen in the Iraqi oil and gas industry.

Government contracts awarding oil and gas exploration, development and production rights in Iraq mainly include the Federal government's Technical Service Contracts and Development and Production Service Contracts ('**Federal Services Contracts**'), and the Kurdistan Region Government's ('**KRG**') Production Sharing Contracts ('**PSCs**'). In principle, both the Federal Service Contracts and PSCs include exclusion of liability clauses including "consequential loss" and/or "indirect loss". The Federal Services Contracts are commonly governed by Iraqi law, whereas the KRG PSCs are governed by English law.

Some examples include:

Example (Federal Services Contracts)

"[U]nder no circumstances shall Contractor, its Affiliates or Operator be liable to [Regional Oil Company], its Affiliates or any third party, for consequential or indirect damages, losses, expenses or liabilities, loss of profit, loss of production, reservoir or formation damage or other losses whether or not similar to the foregoing and howsoever arising." (TSC, Article 24.4).

"[U]nder no circumstances shall Contractor, its Affiliates or Operator be liable to [Regional Oil Company], its Affiliates or any third party, for consequential or indirect damages, losses, expenses or liabilities, loss of profit, loss of production, punitive damages, business interruption, reservoir or formation damage or other losses whether or not similar to the foregoing and howsoever arising whether under the Contract, in tort or at law." (TSC, Article 24.4).

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The principle of freedom of contract prevails in Iraq, provided it does not apply to terms that are legally prohibited or prejudicial to public order and morals. Consequential loss (and exclusion thereof) could be recognised in principle in contracts concluded under Iraqi law provided the term is well defined in the contract. Proper drafting would be required to avoid any ambiguity around whether or not loss of profit is considered to be consequential loss in exclusion clauses. In principle, as mentioned under question 1, where loss of profit is naturally occurring and normally foreseeable by the parties at the time of contract, it is likely to be considered to be direct/non-consequential loss (unless otherwise contractually agreed).

Although this is not clearly settled under Iraqi courts' jurisprudence, it is likely that the term "consequential loss" could be understood under Iraqi law to mean (unless otherwise contractually agreed) loss that:

(i) does not arise naturally (in the usual course of things) from the contractual breach; or
(ii) was not normally foreseeable by the parties at the time of contract.

In contrast, direct loss recognised under Iraqi law includes *naturally occurring* damages and lost profit provided such loss was *normally foreseeable* by the parties at the time of entering into the contract. Therefore, in our opinion, the determination of whether or not loss of profit falls within the scope of indirect/consequential loss would be subject to whether such loss:

(i) is naturally occurring; and
(ii) was normally foreseeable at the time of contract (unless otherwise contractually agreed).

If one of the foregoing two criteria is not met, then the relevant lost profit would be considered indirect/consequential loss.

In practice, based on the foregoing, a contractual exclusion which makes reference only to consequential loss is likely to be interpreted by local courts to be a mere reflection of the statutory exclusions (i.e. the contractual clause would likely do nothing more than what the Civil Code does). However, we are not aware of comprehensive Iraqi court precedents that could provide reliable guidance in this respect and regulate the right of contractual parties in agreeing to indirect loss provisions.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no clear jurisprudence from the Iraqi courts that assists with the interpretation of consequential loss clauses. In principle, the Iraqi courts place importance on the principle of freedom of contract and subsequently the contractual terms agreed between the parties would be accepted, provided they are not legally prohibited or prejudicial to public order and morals.

In interpreting the contract, Iraqi courts would seek to discern the intention of the parties and would rely on the meaning as relevant in the context of use, which should take precedence over the specific wording and sentence-structure used by the parties. Any contract ambiguity shall be interpreted in the interest of the innocent party, subject to any commonly accetped industry practice.

We believe that other heads of loss alongside consequential loss would be subject to the test described under question 3 above to determine whether such loss is direct or not; i.e. direct loss should be (i) naturally occurring and (ii) normally foreseeable by the parties at the time of making the contract. Unless otherwise contractually agreed, any loss that does not meet the foregoing test would be excluded from the scope of liability based on the Civil Code. However, clauses excluding liability for illegal acts are considered null.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

It is unlikely that consequential loss exclusion clauses have an impact on non-damages claims. There is no clear Iraqi jurisprudence in this respect. The innocent party to a contract could still be entitled to seek an order for specific performance of the contractual obligations by the party in breach of the contract. The Civil Code establishes a statutory obligation for the performance of obligations as agreed in the contract where this is possible. If performance cannot be possibly or suitably made by any party other than the relevant obligor, the court may impose a monetary penalty to force the obligor into performance. Monetary compensation may be paid to the innocent party in lieu of such performance if such performance would cause hardship to the obligor.

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Israel

1. Do the words "consequential loss" have a given meaning in law?

The Israeli legal system in general, and Israeli contract law in particular, cannot be categorised as part of one unified legal family (eg common law or civil law). Israeli law is a unique mixed jurisdiction. Although Israeli contract law (namely: legislation, court rulings[1] and jurisprudence) is based on civil law, common law and Jewish law, it is an autonomous system.

In order to establish whether the words "consequential loss" have a given meaning in law, it is necessary to consider the position both under legislation and with reference to court rulings.

Israeli legislation

The words "consequential loss" do not appear in any Israeli statute. Therefore, these words do not have a specific given meaning under Israeli statute law.

The relevant statute which deals with delimitation of damages for breach of contract is the Contracts (Remedies for Breach of Contract) Law 1973 ('**Remedies Law**'). Section 10 provides as follows: *"The injured party is entitled to compensation for the damage caused to him by the breach and its consequences and which the person in breach foresaw or should have foreseen, at the time the contract was made, as a probable consequence of the breach."*

This provision therefore stipulates four cumulative conditions which must be met in order for the injured party to be entitled to the right to compensation due to breach of contract: first, damage caused by the breach; second, causation between the damage and the breach; third, foreseeability of the damage due to the breach; and fourth, the extent of the damage.

Section 10 of the Remedies Law lays down two delimitation tests: causation and foreseeability. The causation test restricts the application of the foreseeability test: in delimiting the damage, the court will first determine which damages were caused by the breach. Following the application of the causation test, the court will then determine, in relation to the damages caused by the breach, which damages were also foreseeable. Compensation will be awarded only in respect of such damages which pass both tests.

1 Section 20 of the Basic Law: the Judiciary provides that (a) the rule established in a court shall guide a court of a lower level; and (b) the rule established in the Supreme Court shall bind every court, save for the Supreme Court.

The following rules, established in the provision of Section 10 of the Remedies Law, assist in the application of the foreseeability test:

1. In contrast to the rule laid down in *Hadley v Baxendale,*[2] the court is concerned only with what was foreseen or foreseeable by the party in breach (and not what may reasonably be supposed to have been in contemplation of both parties).
2. Foreseeability is subject to an objective test: damage which a reasonable person is expected to have foreseen, which will be assessed by the court. Where the damage should have been foreseen, it matters not whether it was in fact foreseen. Conversely, where the damage was in fact subjectively foreseen, it matters not whether it should have been foreseen.
3. Foreseeability, both actual and potential, is determined in relation to the time the contract was made, and in accordance with the factual data known at the time, or which should have been known, to the party in breach. Subsequent events will not be taken into account in applying the foreseeability test.
4. Actual foresight has an objective aspect: compensation will be awarded against the party in breach in relation to damage foreseen as a probable, and not only as a certain, consequence of the breach. The objective determination of the probability of the damage resulting from the breach applies to both actual and potential foreseeability.

Israeli court rulings

The words "consequential loss" have not been defined by the courts. Therefore, these words do not have a specific given meaning under case law. However, please see Section 3 below in relation to the use of the words "consequential loss" in contracts.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Contracts governed by Israeli law sometimes seek to exclude or limit the scope of the right to compensation for "indirect" and/or "consequential loss".

The energy industry has recently gone through a process of liberalisation. In turn, liberalisation has resulted in market structures and contracting on the basis of international model form agreements and concepts. Experience suggests that "consequential loss" exclusions have appeared and proliferated as part of this process.

Example clauses are as follows:

— In respect of an agreement relating to a construction project: *"… neither Party, nor its officers, directors, agents, employees, or affiliates, shall be liable to the other Party, its subsidiaries, affiliates, officers, directors, agents, employees, successors or assignees, for claims for incidental, 'indirect or consequential damages' of, or in any nature connected with or resulting from, performance or non-performance of this Contract, including, inter alia, claims for loss of profit or revenue, loss of use of equipment, and cost of capital or return on capital irrespective of whether such claims are based upon warranty, negligence, strict liability, contract, operation of law or otherwise …"*

— In respect of a power purchase agreement: *"Neither party shall be liable to the other party for 'indirect or consequential loss or damage', or punitive damages or indirect costs or expenses or loss of profits, loss of production, loss of revenue, loss of contracts, or loss of personal injury or damage to property …"*

— In respect of a gas sale and purchase agreement: *"The Buyer shall not be liable to the Sellers and the Sellers shall not be liable to the Buyer for any 'indirect (which includes loss of profit and business interruption claims), consequential', exemplary or punitive losses or damages."*

[2] (1854) 156 ER 145.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There is no developed jurisprudence of the Israeli courts on the meaning of "consequential loss" when used in the context of exclusion or limitation clauses in contracts. Every contract and clause will be construed on its own merits, and in accordance with the general principles of interpretation.

The main rule of contractual interpretation is stipulated in section 25(a) of the Contracts (General Part) Law 1973 as follows: *"A contract shall be interpreted in accordance with the presumed intention of the parties as it appears therefrom and as appearing from the circumstances. However, if the intention of the parties is clearly implied from the language of the contract, the contract shall be interpreted according to its language".*[3]

The test applied is an objective test of reasonableness: the intention of the parties, who are assumed to be reasonable, is determined objectively in accordance with the language of the contract and the external circumstances of the case.[4]

Although the distinction between direct and indirect losses has been considered most often in insurance contracts, it seems likely that the court will adopt the same approach in energy cases. See C.A. 3577/93 *Phoenix Insurance Co. v Mariano,* PD48(4)70,83-84 and C.A. 78/04 *Hamagen Insurance Co. v Gershon* (Nevo, 2006). The Israeli courts have distinguished direct loss from indirect or consequential loss as follows:

1. Direct loss is the loss arising naturally in the normal course of events from the breach of contract itself. It is the first manifestation of the harm to the injured party's wellbeing, which can be identified and separated from the other damages for breach that arise after it.
2. Indirect or consequential loss, on the other hand, is damage to the injured party's wellbeing that has been rolled over from the initial damage but is not an integral part of it. This loss is a separate and later link in the causation chain that begins with the act of the breach.

However, it is not apparent whether the meaning attributed in insurance law would have an application in the different context of exclusion or limitation clauses.

[3] Although there is no official English translation of the amended Section 25(a), this translation is widely accepted.

[4] This proposition was established in the landmark case of *State of Israel v Aprofim Housing and Promotions Ltd* CA 4628/93 and positively applied in *The National Insurance v Sahar Insurance Co.* PD 65(2)563.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause will be construed on its own merits (applying the rules of contract interpretation set out in Section 3 above).

In addition, section 25(b) of the General Contracts Law provides as follows: *"Where a contract is capable of different interpretations, and one of the parties had precedence over the other in the formulation of its terms, an interpretation against the formulating party is preferable to an interpretation in his favour."*

As a result, the law now stipulates that an ambiguity in the contract giving rise to two equally reasonable interpretations, will be interpreted against the party who drafted the contract and in favour of the other party. The justification for this provision rests on the principle that a person is responsible for his or her actions. As in the case of English law, from which the rule was adopted, Israeli courts have applied the rule primarily in the context of standard contracts (especially insurance contracts), where the party drafting the contract is usually also the stronger of the two parties in the transaction.

Section 25(b) is broader than the *contra stipulatorem* rule and does not refer only to cases in which the contract was entirely drafted by one of the parties, but also applies to situations where one of the parties had precedence in the formulation of the terms of the contract.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Upon the occurrence of an anticipatory breach, the injured party is entitled to the remedies under the Remedies Law, as if the breach had occurred already. The contract is regarded as breached, backdating the performance of the contract and the right to any remedy to the date of the anticipatory breach.

The first alternative of anticipatory breach is a subjective one, sometimes referred to as repudiation or renunciation. It occurs when the party in breach indicates his intention not to perform the contract or when circumstances show that he is unwilling to perform it. The second alternative of anticipatory breach is an objective one, sometimes referred to as disablement performance. It pertains to a situation where it is apparent that the other party will be unable to perform the contract.

However, these remedies will likely result in damages. It is unlikely that the courts will require performance by restraining a breach from occurring. Also, there is no existing court jurisprudence to suggest that any exclusion or limitation on the innocent party's right to damages would alter this position.

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Italy

1. Do the words "consequential loss" have a given meaning in law?

The notion of "consequential loss" is unknown in the Italian legal system. There is, therefore, a degree of uncertainty around its meaning and over the legal consequences of its inclusion in limitation of liability clauses in commercial contracts.

Nonetheless, even though "consequential loss" is not recognised in the Italian Civil Code ('**ICC**'), its legal boundaries may be found in relation to the ICC's legal provisions regarding damages for breach of contract.

In general, Article 1218 ICC provides that the party that does not fulfil its contractual obligations (either because it does not perform its obligation or its performance is not as agreed or unreasonably delayed), is liable for damages vis-à-vis the other party, unless it proves that the non-performance or delay was due to the impossibility of performance for a cause not imputable to it.

The ICC lays down the criteria for assessing monetary compensation for breach of contract. The compensation must take into account:

— not only the "actual damage" borne by the party *(danno emergente)* but also the "loss of profit" *(lucro cessante),* insofar as they are a *"direct and immediate consequence of the non-performance"* or delay (Article 1223 ICC).
— only the damages which were "foreseeable" when the relevant contract was executed, to the extent that the breaches are not due to wilful misconduct of the breaching-party (Article 1225 ICC).

The *"direct and immediate"* requirement laid down by Article 1223 ICC does also apply to determining the monetary compensation arising from tort liability.

Moving from the above distinction between *"danno emergente"* and *"lucro cessante",* the Italian Supreme Court *(Corte di Cassazione)* has adopted an extensive interpretation of the above-mentioned *"direct and immediate"* requirement.[1] Specifically, with reference to damages arising from contractual and tort liability, the Supreme Court ruled that *"compensable damage"* includes both:

[1] See, among others, Italian Supreme Court, no. 11609/2005.

— "direct damages", meaning all those damages that are direct consequences from the unlawful event
— "indirect damages" meaning all those damages that are not direct consequences of the unlawful conduct, provided that they occur as a *"normal effect"* of said unlawful conduct according to the so-called *"theory of causal regularity"*.[2] In other words, indirect damages can be compensated only if, according to the appreciation of the man of ordinary diligence, they are likely to occur as a consequence of the unlawful conduct.

Moreover, whilst the Supreme Court has acknowledged the compensability of the general category of indirect damages as long as they fall within the theory of causal regularity, the notion of "consequential loss" is very rare in Italian case-law and it usually refers to indirect damages in insurance claims. Therefore, most likely Italian courts will construe the term "consequential loss" as an "indirect damage/loss".

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, agreements in the energy industry (as well as in other industries) often include exclusion of liability clauses that seek to exclude, among others, any liability related to loss of profit and/or indirect or consequential damages/loss. Examples include:

Example 1 (Energy sector)
"Seller and Seller Affiliates shall not be liable to Buyer in any circumstances for any loss of profits, loss of contracts, loss of use, loss of data or consequential or indirect loss nor […] for any loss or damage of any kind whatsoever, howsoever arising, claimed against or suffered by Buyer"

Example 2 (Energy sector)
"Neither Party shall be liable to the other whether by way of indemnity or in contract or in tort (including negligence), for any loss of revenue, profit, anticipated profit, use, production, product, productivity, facility downtime, contract, business opportunity or indirect or consequential damages of any nature (excluding any Liquidated Damages) and each Party shall release, protect, defend, indemnify and hold the other Party harmless from and against such claims, demands and causes of action, irrespective of the cause"

Example 4 (Energy sector)
"Neither Party shall be liable to the other, whether in contract, tort, strict liability or otherwise, for loss of production, loss of use, loss of goodwill or reputation, loss of savings or profit, loss of revenue, loss of contract, or for any indirect loss or damage suffered by the other Party. For the avoidance of doubt, the foregoing is without prejudice to the Seller's liability to pay pre-agreed liquidated damages and the foregoing exclusion of liability shall not apply to and shall therefore not serve as an exclusion or limitation of liability (i) in relation to any indemnity obligations of the Seller or (ii) in the event of gross negligence or wilful misconduct"

[2] See, among others, Italian Supreme Court, no. 12564/2018; Italian Supreme Court, no. 23719/2016; Italian Supreme Court, no. 15274/2006; Italian Supreme Court, no. 6474/2012; Italian Supreme Court, no. 4852/1999.

Example 5 (Energy sector)
"The Contractor shall not be liable in any respect to Enel for any indirect or consequential damages and in particular for damages resulting from the failure and/or delayed and/or defective production (including damages resulting from contracts between Enel and third parties) and for Enel's loss of profits"

Example 6 (Energy sector)
"In no event shall either Party be liable to other Party for any of special consequential or liquidated damages, whether such damages arise out or are a result of breach of this Agreement, tort (including negligence), strict liability or otherwise"

Example 7 (Industrial sector)
"In any event, the Supplier will not be liable vis-à-vis the Buyer for any indirect or consequential losses, loss of profit, costs or damages (whether or not foreseeable), such as, but not limited to, loss of contracts and business opportunities"

Example 8 (Industrial sector)
"Except for death or personal injury caused by it and its Affiliates and for its and its Affiliates' willful misconduct or gross negligence, neither party nor its Affiliates will ever be liable for (a) damages for loss or corruption of data or Cyber Attacks, (b) loss of anticipated profits, production, use and contracts and costs incurred including without limitation for capital, fuel, power and replacement product, or (c) incidental, consequential, indirect or punitive damages"

Example 9 (Energy sector)
"The Purchaser shall not be liable to the Supplier for damages such as loss of profit, loss of profits, loss of products, loss of contracts suffered by the other party for any reason, consequential damages and indirect damages"

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

If no express definition is provided, Italian courts are most likely to construe the term "consequential loss" as an "indirect damage/loss".

The general understanding is that:

— indirect damages/losses are those that are indirectly caused by the conduct of the party responsible for the damage (as explained in 1 above).
— indirect damages/losses are recoverable as long as they fall within the theory of causal regularity – i.e. they qualify as a normal/probable consequence of the unlawful conduct (see par. 1 above).
— clauses excluding indirect damages/losses are valid only in relation to damages caused by negligence *(colpa lieve),* while, according to Article 1229 ICC, any limitation of liability for damage caused by wilful misconduct *(dolo)* or gross negligence *(colpa grave)* is null and void and, therefore, unenforceable by Italian courts. In addition, the exclusion of indirect/consequential damages is not effective in case of death or personal injury.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The approach of Italian courts vis-à-vis any contractual exclusions of heads of loss is based on the following reasoning:

— as described in 1 above, both direct and indirect damages that are consequences of the breach, on the basis of a judgment of probable verification, can be compensated.
— the parties might agree on a limitation of liability clause excluding the compensation of certain categories of losses.
— limitations of liability clauses are, nonetheless, effective and enforceable in case of death or personal injuries and/or if they exclude the party's liability for damages caused by wilful misconduct or gross negligence.
— as a general principle, limitations of liability clauses may never be construed in a way to endanger fundamental rights or public order provisions. In this regard, there has been controversy regarding so-called "punitive damages", which are typical in the US contract law system and are awarded in addition to actual damages, in certain circumstances, when the party's behaviour is found to be especially harmful. Indeed, the Italian Supreme court recently overturned settled case-law that was against punitive damages, stating that – even though they cannot be awarded in the first place by an Italian court – under certain conditions a judgment issued by foreign courts granting the payment of punitive damages may be enforceable in Italy[3].

If the limitation of liability clause complies with the above requirements and limitations, the courts are likely to enforce it.

[3] See Italian Supreme Court, no. 16601/2017, where the Court stated that the Italian legal framework already provides for remedies that have a punishing function (such as Article 96(3) ICC) and that punitive damages may not harm Italian public order as long as: (i) the foreign legal provisions applied by the court entrust the latter with the power to award punitive damages based only on typical and predictable circumstances; (ii) the amount due is not attributed to the complete discretion of the court; and (iii) the ruling itself sets general requirements of legality, typicality, and predictability.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

The provision of limitation of liability clauses may be relevant in relation to the option of asking a court for a preservation seizure order *(sequestro conservativo),* which has the effect of freezing the defendant's assets up until a decision on the merits has been reached by the court.

The claimant seeking a preservation seizure order needs to prove that (i) a title for the monetary claim vis-à-vis the defendant exists *(fumus boni iuris),* and that (ii) there is a concern that the claimant will be unable to or will have substantial difficulties in the enforcement of its claim – at a later stage – if such order is not made *(periculum in mora).*

If there is no entitlement to damages due to a limitation on liability, it may not be appropriate to preserve assets to cover that non-existent liability. As such, a clause excluding the liability of the party for indirect/consequential damages could, in fact, have the effect of preventing a party from obtaining such a measure in relation to consequential/indirect damages because of the lack of title for claiming a monetary compensation for this head of loss.

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Japan

1. Do the words "consequential loss" have a given meaning in law?

The words "consequential loss" do not appear in the Japanese Civil Code ('**Code**') or any other statutes. Therefore, these words do not have a specific given meaning under Japanese statutory law.

The relevant provision in the draft bill of the Code was initially drafted to incorporate the concept of "direct loss" and "consequential loss," which originated in the English case of *Hadley v. Baxendale* (1854) 9 Exch. 341. Even at that point, the draft bill used the terms *"ordinary loss"* and *"special loss".* During the legislative process, the draft bill relating to "special loss" was amended. Consequently, the Code provides as follows:

"Article 416
(1) *The purpose of the demand for the damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.*
(2) *The obligee may also demand the compensation for damages which arise from any special circumstances if the party should have foreseen such circumstances."*

Furthermore, after the enactment of the Code, the interpretation of that Article by jurists was strongly influenced by German law. In particular, Japanese jurisprudence was swayed by the concept of requiring reasonable causation between a breach of contractual obligations and the alleged damages.

Therefore, one should be careful not to equate "special loss" with "consequential loss" without careful consideration.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Under Japanese law, it is possible for parties to agree to exclude the parties' liability for "consequential loss" and/or "special loss" via a contractual exclusion of liability clause. However, the specific terms "consequential loss" and "special loss" are not often utilised in various standard forms of contract used in the domestic energy sector.

For example, the General Conditions for Construction Contracts, published by the Private Sector Standard Contract Form Committee, is widely used for domestic private sector projects. The General Conditions do not have a limitation or exclusion of liability clause, and therefore neither the words "consequential loss" nor "special loss" appear in this standard form of contract.

On the other hand, the ENAA General Conditions for Domestic Plant Construction Work, published by the Engineering Advancement Association, is sometimes used for domestic plant construction projects. Whilst the ENAA General Conditions do not use the words "consequential loss" or "special loss", there is an exclusion clause which excludes the parties' liability for lost profits, business losses, losses for non-performance of the plant, losses of materials, indirect losses, and other similar losses.

With regard to international energy projects, Japanese contractors tend to use (or incorporate clauses from) an international standard form contract such as the FIDIC forms of contract. In these contracts, the words "consequential loss" generally appear in the exclusion of liability clauses.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

When interpreting a contract, Japanese courts seek to ascertain the real and actual intentions of parties to the contract. The courts are likely to construe the wording of the relevant provision in a rational way, taking into consideration relevant issues such as the plain meaning of the language of the provision, consistency with other provisions as a whole, and the context surrounding the creation of the contract.

In light of this traditional approach taken by the courts, as well as the parallels between "special loss" versus "ordinary loss" in the Code and"consequential loss" versus "direct loss" in the original English case, it is likely that the words "consequential loss" in an exclusion clause will be construed in most cases as having the same meaning as "special loss" under the Code, unless there are special circumstances to support an alternative interpretation.

In addition, it is worth noting that according to the case law, "special loss" can be compensated where the breaching party had knowledge of, or was reasonably able to foresee, circumstances that could cause such "special loss" as at the time of the breach of contractual obligation.

However, the delineation of "ordinary loss" from "special loss" is highly dependent on the specific facts of each case. For example, an issue that has arisen previously in relation to "special loss" is where the price for the subject of the contract increases sharply for extraordinary reasons. In certain circumstances, the courts have categorised the loss that would ordinarily have arisen as a result of a breach (absent the extraordinary event) as "ordinary loss" and the additional loss attributable to the extraordinary event as "special loss".

Ultimately, the courts will look to the nature of the relationship of the contracting parties and the context around the creation of the contract, rather than on any strict rules or formulae.

In light of these complexities, it is prudent for parties to clarify what kinds of losses will be classified as "special loss" or "consequential loss" in an exclusion clause, as the ENAA General Conditions enumerate several categories of losses that can be covered by an exclusion clause.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Whilst Japanese courts normally respect the wording of the relevant provision, as discussed in the response to question 3 above, when the courts find that the language of the relevant clause is ambiguous, contradictory, or unreasonable, they become more liberal in construing the clause apart from its language to find the actual and reasonable intention of the parties. In such cases, the courts are likely to attach additional meaning to the original language of the clause and/or to omit parts of the clause to make the clause work more reasonably and consistently as a whole.

Therefore, it is difficult to generalise about the courts' attitude in deciding the meaning of other heads of loss stipulated alongside "consequential loss" in an exclusion clause. However, when it comes to commercial contracts entered into between parties having sufficient knowledge and experience in commercial activities, the courts are likely to put more weight on (among other issues) the exact wording of the relevant clause, as well as consistency with other clauses in the contract as a whole.

For instance, if other heads of loss are enumerated in a contract, but it is unclear what the parties intended for that enumeration to achieve, depending on the construction of the contract in question, a court might find that the other heads of loss are merely enumerated examples or sub-categories of loss to be included in "consequential loss." In that case, the court will probably not expand the scope of the exclusion clause. On the other hand, if the language of the relevant clause clearly shows that the parties intended for other heads of loss to be added to the scope of exclusion of liability in addition to "consequential loss," it is possible that the court will construe these other heads of loss as being covered in addition to "consequential loss" by the exclusion clause, thereby expanding the scope of the exclusion.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Under Japanese law, the courts may issue provisional injunction orders to preserve the status quo. The requirements for this type of order are to demonstrate a *prima facie* case, showing (1) the existence of a legitimate right and/or interest to be preserved and (2) the necessity for the issuance of the court's order to protect that right. For the second requirement, the claimant must demonstrate *prima facie* that material damage will be caused if a provisional injunction order is not given.

If the contract in question contains a consequential loss exclusion clause, it is likely that the party seeking the injunction will be prevented from using the "consequential loss" (which is attributed the meaning of "special loss" in most cases) to demonstrate that material damage would arise if the provisional injunction order is not issued.

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Mexico

1. Do the words "consequential loss" have a given meaning in law?

No. Under Mexican law, the term "consequential loss" has no specific legal meaning.

The Mexican Federal Civil Code ('**Code**') outlines the legal position regarding damages. Article 2110 of the Code foresees awarding of both direct *(daños)* and incidental *(perjuicios)* damages for breach of contract.

The Mexican Supreme Court has stated that whilst the law does differentiate between the words *"daños"* and *"perjuicios",* they both refer to a loss of profit for the affected party. The difference lies in their scope:

— Direct loss *(daños)* refers to the detriment, damage, loss or impairment on a thing or person infringed by a guilty party, either through wilful intent/deceit *(dolo),* gross negligence *(culpa)* or unforeseen circumstances *(caso fortuito).*
— Incidental loss *(perjuicio)* refers to loss of profit as a direct consequence of the breach or noncompliance with contractual obligations.

Damages claims are awarded by a judge and the aggrieved or injured party must prove: (i) the quantum of damages being sought for direct/incidental loss, and (ii) the direct causal link between the loss and the damage caused by the breach of contract.

Given that the Code and Mexican legislation is silent on "consequential loss" as a concept, there is no express prohibition against including such clauses in contracts. However, as clauses giving rise to damages for consequential/indirect loss may result in damages against a party that are not a direct and the immediate result of a breach, as stipulated by the Code, enforcement by Mexican courts is unlikely.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The term "consequential loss" is rarely used in contractual exclusion of liability clauses because, if included, the relevant provision may be deemed null and void by Mexican courts. The Code and Mexican jurisprudence establish that damages must be a direct and immediate consequence of the breach; any other type of clause regarding indirect loss is unlikely to be enforced by judges and therefore serves little purpose in contractual arrangements.

More commonly, "damages" is widely used either to explicitly state that damages will apply, or to exclude damages as judicial recourse for a breach of contract.

It is common practice in Mexico to explicitly include in contractual agreements that damages will be awarded to an innocent party for any breach of contract. In some instances, the contract will provide for specific heads of loss that will give rise to damages. Therefore, the principle of "consequential loss" (or "special loss") is not used in standard form contractual agreements.

It is possible for parties to add an exclusion clause stipulating that there will be no damages awarded for the breach of contract. Contracts can also stipulate that certain specific damages will not be awarded in the event of breach of contract.

In the energy sector, there are various template contracts (in force as of January 2019) issued by regulatory bodies which include general provisions on damages and provide for exclusion of damages.

Oil & Gas Industry

Example 1 – Production Sharing Contract with the National Hydrocarbons Commission

"Failure to comply with their obligations under this Contract, in the event that in such cases there is a contractual penalty[1], the amount of damages and/or losses shall be limited to the amount of the contractual penalty concerned."

Example 2 – Licence Agreement with the National Hydrocarbons Commission

"… the Contractor shall pay to the Nation, through the Fund, the corresponding contractual penalties or, if applicable, the losses and damages that the Nation incurs as a DIRECT OR PROXIMATE result of the noncompliance …"

Example 3 – LNG Purchase Contract with PEMEX

"The damages caused by either party to the other or to third parties as a result of negligence, wilful deceit or bad faith will be the responsibility of the party at fault … Under no circumstances shall the parties be liable for indirect damages of any nature, punitive damages or consequential damages that are not proximate/immediate."

Power Industry

Example – Electricity Transmission Management Contract

"Unless otherwise expressly stated elsewhere in this Contract, the Parties shall only be liable for Direct Damages, so that any other damage shall be, if applicable, the responsibility of the party which caused the damage."

[1] *Pena convencional*

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

If no definition of "consequential loss" is provided, the courts will follow the rules of interpretation of the Mexican Commercial Code and the Code. If the relevant clause is drafted to explicitly include consequential loss as a head of damages, the courts are likely to: (i) interpret this as an incidental damage clause awarding only damages that arise as a direct and immediate consequence of the breach; or (ii) consider the clause null and void because such consequential damages are not foreseen under Mexican law.

Article 78 of the Mexican Commercial Code and Article 1851 of the Code (of secondary application in this context) stipulate that:

— in the first instance, contracts will be interpreted literally (strict interpretation) according to the ordinary meaning of the words or as defined by the dictionary.
— if such interpretation fails or is unclear, a subjective interpretation applies by which the focus is on the subjective intention of the parties in executing the relevant contract.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Article 1840 of the Code states that parties to a contract may stipulate a fixed penalty for certain breaches of contract *(pena convencional)*. If the parties include such a stipulation, a party claiming for damages may only do so based on the agreed fixed penalties, as it is understood that the damages were already contemplated in the provisions covering default penalties. The damages are pre-quantified to avoid costly and complex damages calculations at trial.

Fixed penalties can be claimed and awarded without having to prove any actual damages. A breach of contract that corresponds to an agreed fixed penalty is enough for the affected party to make a claim (Article 1842 of the Code).

It is important to note that there is a legal ceiling for fixed penalty clauses. According to Article 1843 of the Code, a fixed penalty cannot be higher either in value or quantity than the value or quantity of the contract's principal subject matter or consideration.

If consequential loss is included along other heads of loss (i.e. a *pena convencional* or direct/incidental loss), the courts would deem the consequential loss clause null and void, because either: (i) a fixed contractual penalty was established, therefore making incidental loss unclaimable; or (ii) the Code explicitly states that the parties will be liable for incidental loss, thus making any other head of loss claim invalid.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Consequential loss exclusion (or inclusion) has no impact on non-damages claims under Mexican law.

Non-damages claims, such as injunctions and specific performance, are awarded in limited circumstances in commercial disputes. Even if such a judgment was awarded, it would not preclude a party from claiming one of the available heads of damages.

Article 1949 of the Code states that the affected party of a breach may choose between demanding the fulfilment of the contractual obligation or terminating the contract, along with any direct and immediate damages the breach may have caused the affected party. Furthermore, the affected party may opt for court-ordered termination if demanding fulfilment proves to be an ineffective remedy.

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The Netherlands

1. Do the words "consequential loss" have a given meaning in law?

No. The words "consequential loss" have no given or recognised meaning in Dutch law.

The Dutch Civil Code ('**DCC**') stipulates that damages that are payable pursuant to the law, such as damages in connection with a breach of contract, may consist of financial damages and so called "other damages". Dutch law does not recognise punitive damages.

Financial damages (*vermogensschade*) are suffered losses as well as lost profits. Other damages that can also qualify for compensation as financial damages are:

— reasonable costs to prevent or limit the damage which could be expected as a result of the breach;
— reasonable costs for the determination of the nature and scope of the damage; and
— reasonable costs incurred in obtaining extra-judicial payment.

Other damages (*ander nadeel*) consist of immaterial or emotional damages. A legal basis for this form of compensation is given in the DCC. Such damage may qualify for compensation when:

— the damage is intentional;
— a person suffered physical injury (or reputational damage); and/or
— the memory of a deceased is harmed.

There is no difference between direct and indirect damages under Dutch law. In principle, damage that is connected in such a way to the breach that it can be allocated and is seen as a consequence of the breach will be compensated (*causaal verband*). Parties are – to a large extent – free to deviate from this main rule.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. In contracts used in the industry, "consequential loss" is often explicitly excluded.

Please see the examples below:

Example 1

"The Unit Operator shall not, except in its capacity as an owner of a Percentage Interest, be liable for, and each Party shall to the extent of its Percentage Interest indemnify the Unit Operator against, all loss and damage arising, whether directly or indirectly, out of the performance, non- or mis-performance by the Unit Operator of its obligations hereunder, and against any and all actions, costs, claims, damages or demands arising in connection therewith, except in the case of any actions, costs, claims, damages or demands aforesaid arising out of the Wilful Misconduct of the Unit Operator PROVIDED THAT such exception shall not extend to any consequential loss and damage which, for the purpose of this Agreement, shall include but not be limited to, loss or damage arising out of postponement or interruption of production, inability to produce Unit Substances, loss of profit, loss of revenue or loss of use thereof or any loss in the nature of the foregoing."

Example 2

"Neither Group shall be liable to the other for consequential losses including, without limitation, damages through loss of production, loss of profits or income, loss of business or business expectations or loss of contract irrespective of Gross Negligence and or Wilful Misconduct."

Example 3

"Gross Negligence and or Wilful Misconduct means, in relation to a person, an intentional and conscious, or reckless, disregard by the person's directors, supervisors or management employees or by any agent or contractor of the person acting in a supervisory or management capacity for that person, of any of the provisions of this Agreement or of good oil and gas field practice, but shall not include any error of judgment or mistake made by any such director, supervisor or such employee, agent or contractor, in the exercise, in good faith, of any function, authority or discretion conferred upon that person under this Agreement; and for the purpose of this definition "person" means any company, firm, partnership, association or body corporate."

Example 4

"The Operator shall not be liable to any Party hereto for any damage or loss resulting from Joint Operations conducted hereunder, unless such damage or loss results from its gross negligence ("grove schuld") or wilful misconduct ("opzet") and provided that in no case shall the Operator be liable to any Party for any consequential loss or damage such as any loss of oil or gas or loss of profit or any loss under any contract. The expression "gross negligence or wilful misconduct" shall be deemed not to include any omissions, errors or mistakes made by any such officer, director or employee in the exercise in good faith of any authority or discretion conferred upon the Operator under this Agreement."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Dutch law does not define consequential loss. The court will have to interpret the meaning of an exclusion of consequential loss provision. See below under 4.

Dutch law adheres to the doctrine of freedom of contract (although not included in the DCC), meaning parties may freely enter into contracts and are free to agree on whatever terms or wording desirable, albeit within the bounds of the law and subject to the principle of reasonableness and fairness. It is recommended that the term "consequential loss" is clearly defined in the contract, so that no discussion can arise about the intentions of the parties and to leave little room for interpretation for a court. See examples under 2.

Note that an exclusion of liability clause invoked in the event of wilful misconduct (*opzet*) or gross negligence (*grove schuld*) may be voided by the court as violating the Dutch legal principle of reasonableness and fairness. The same applies to an agreed cap on liability in the case of wilful misconduct or gross negligence.

The principles of reasonableness and fairness (*redelijkheid en billijkheid*), must be taken into account when interpreting and executing agreements under Dutch law (Section 6:2 DCC). This principle may influence the interpretation of a contract:

— either by supplementing the contract in case of a contractual gap (the so-called supplemental function of the reasonableness and fairness principles); or
— by correcting the effects of the contract (the so-called corrective function of the reasonableness and fairness principles). Wilful misconduct and gross negligence are generally excluded from clauses on exclusion or limitation of liability as invoking such a clause in the event of wilful misconduct or gross negligence may violate the principles of reasonableness and fairness.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Generally, the different types of losses are set out as examples of consequential losses and are construed as such.

With regard to the interpretation of such clauses, under Dutch law not only is the wording of a contract decisive in determining the rights and obligations of parties, but so too is the context and meaning that parties could reasonably give to a certain contractual provision when entering into the contract. Subject to extensive case law, the mere wording of a contract may not have to be decisive to determine the legal effect of the contract. Even if the wording of a contractual clause may seem grammatically clear, the key question is what meaning the parties could have reasonably given to the clause in the specific circumstances at the time of entering into the contract and what they could reasonably expect of each other in this respect. In answering these questions, all relevant factors should be taken into account, including, amongst others, the knowledge of the parties, the reasonable expectations of the parties and their social position. However, in cases of commercial contracts (and especially if these have been drafted with the assistance of legal advisors) the court tends to place great emphasis on the linguistic meaning of a clause.

The court will also check whether invoking the clause violates the principle of reasonableness and fairness (if the clause is invoked in the event of gross negligence or wilful misconduct). Please note that because of the freedom of contract that is granted to parties, the court will generally be reluctant to apply the corrective function of the reasonableness and fairness principle (see above under 2), especially in cases of business-to-business contracts.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No. The existence of a consequential loss clause or a limitation of liability clause will not necessarily mean that an application for a non-damages claim is more likely to succeed. Dutch law generally allows an action for specific performance of an obligation (contractual or non-contractual) against another party, irrespective of whether there are other remedies available, as long as performance is possible.



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Republic of North Macedonia

Republic of North Macedonia

1. Do the words "consequential loss" have a given meaning in law?

The term "consequential loss" is not defined and does not exist under the Law on Contract and Torts of North Macedonia ('**MLCT**').

The MLCT provides for three types of damage that are recoverable in contractual and non-contractual relations:

i. ordinary damage;
ii. loss of profit; and
iii. non-pecuniary damage.

Ordinary damages and loss of profit are sometimes jointly referred to as "pecuniary damage". In relation to ordinary damages and loss of profit, the MLCT stipulates that the injured party has the right to compensation for the ordinary damage, and is also entitled to compensatory damages. The amount of damages is determined by value at the time of the court decision. When assessing the amount of the lost benefit, the profit that could reasonably be expected, which the injured party had been prevented from earning, by the harmful action or omission of the damaging party, is taken into account. If the damage arises from an intentional crime, the court may award compensatory damages for an amount corresponding to the damage suffered by the innocent party.

The MLCT provides that the party has a right to non-pecuniary damages in cases of violation of personal rights.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Although in some agreements the term "consequential loss" is being used, it could lead to legal uncertainty since this term is not defined under Macedonian law. However, the term "loss of profit" is usually used in contractual exclusion of liability clauses.

For example, the draft Electricity Supply Contract ('**ESA**') proposed by one of the largest electricity suppliers in N. Macedonia, stipulates the following provision for the limitation of liability:

"Unless otherwise agreed in writing by the Parties and to the extent permitted by law, neither Party shall be liable to the other for any exemplary, punitive, indirect, including (inter alia) loss of profit or income and costs of purchased or exchanged power other than as set out in Article 9, for any claims arising out of this Agreement."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The meaning attributed to the words "consequential loss" depends on the interpretation of those words in a contractual exclusion clause. There is no clear practice regarding the interpretation of the words "consequential loss" as this term is not commonly used in Macedonian law. The usual rules of interpretation stipulated in the MLCT apply. Namely, in interpreting the disputed provisions, the literal meaning of the expressions used should not be accepted, but the common intention of the parties should be explored, and the provision should be understood in accordance with the principles of the MLCT. Unclear provisions in the contract should be interpreted in order to achieve a fair contractual relationship.

On a separate note, according to the MLCT, parties cannot exclude or limit liability when acting with intent or gross negligence.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

As a principle, the MLCT determines that parties are free to regulate their relationship within the limits of what is allowed by the law. In this context parties are free to regulate exclusion of liability clauses, provided that general rules on obligations are complied with. This includes the basic principle of conscientiousness and fairness.

However, according to the MLCT, contractual provisions shall be null and void if they are contrary to the principles of conscientiousness and fairness, impose obvious misunderstandings in the mutual agreement between the parties, and create an opportunity that may cause damage to the co-contractor or endanger the achievement of the contract. Additionally, if there is uncertainty over the provision, the standard rules on interpreting limitation of liability clauses stipulated in the MLCT would apply (see above).

There are no special rules on the interpretation of limitation or exclusion of liability clauses.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

As consequential loss is not recognised or commonly used in contracts governed by Macedonian law, its practical usage has limited scope. It is possible that if a court considers that the consequential loss exclusion clause excludes a claim for damages, then the clause may impact non-monetary claims for performance of contractual obligations.

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Oman

1. Do the words "consequential loss" have a given meaning in law?

The words "consequential loss" are found in Omani law, but they are not given a clear definition.

The legal position regarding harmful acts is addressed in the Omani Civil Code (as promulgated by Royal Decree 29/2013) ('**Code**').

According to Article 176 of the Code,[1] a party causing loss or damage to another has the obligation to compensate the other party for its loss, even if the party causing loss or damage is "*lacking discretion*" (i.e. not a reasonable person). If the loss is *direct* then compensation is required, even in the absence of reckless conduct. However, if the loss is *consequential,* then compensation shall be subject to the presence of reckless conduct. Hence, parties can recover for consequential loss, as long as the conduct which caused the loss is reckless and can be linked to the loss or damage.

Although the Code differentiates between direct and consequential loss, there is some uncertainty and disagreement around the meaning of "consequential", as it is not defined in the Code itself.

[1] Article 176 of the Code states the following:
"1. A party causing loss to another party shall compensate the other party for its loss, even if the party causing loss is lacking discretion.
2. If the loss is direct, it shall be compensated even in the absence of recklessness, and if the loss is consequential then compensation shall be subject to the presence of reckless conduct."

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Exclusions for "consequential loss" are widely used in many sectors in Oman, including the power, energy and other sectors.

Oil and gas

The concession granting instrument for upstream activities in Oman is an exploration and production sharing agreement ('**EPSA**'). Although EPSAs are not standardised, usually they include a gas sales agreement in agreed form (appended to the EPSA), which defines *"Consequential Loss"* and includes exclusion of liability clauses that seek to exclude loss for *"Consequential Loss"*. The definition of consequential loss is agreed amongst the parties and usually one of the losses listed in such definition is *"consequential loss"* (undefined). For example:

*"10.2 Notwithstanding any other provision of the GSA [Gas Sale Agreement], neither Party ("**Initial Party**") shall be liable to the other for any Consequential Loss suffered howsoever caused and even where the same is caused by Wilful Misconduct or Gross Negligence, negligence or breach of duty (statutory or otherwise) on the part of the Initial Party.*

*'**Consequential Loss'** shall mean any special indirect or consequential loss or damage and any loss of income or profits or business opportunity."*

Power

Usually in Omani power and water purchase agreements, the term "Direct Loss" is defined and "Consequential Loss" is defined as any loss that does not constitute a direct loss.

Example 1

"Consequential Loss means any loss or damages suffered or incurred by a party which does not constitute Direct Loss.

Direct Loss means:

(a) for the Generator:

- *any loss of Electrical Energy Charges and/or Deemed Electrical Energy Charges properly due to it pursuant to the terms of this Agreement; and/or*
- *any loss or damage sustained or incurred by it as a direct result of damage to property or personal injury; and*

(b) for the Buyer:

- *any excess Electrical Energy Charges and/or Deemed Electrical Energy Charges paid by it to the Generator hereunder; and/or*
- *any loss or damage sustained or incurred by it as a direct result of damage to property or personal injury.*

30 Liability
Save to the extent specifically provided otherwise in this Agreement, neither party shall be liable to the other party for any Consequential Loss suffered by such other party as a result of the first party's breach of this Agreement, save to the extent that such Consequential Loss was suffered or caused by the Wilful Default of such first party.

Each party shall indemnify the other party (and its Affiliates and Contractors and its and their respective directors, officers, employees and agents) from and against any and all Direct Loss suffered by the other party which is a direct result of the first party's failure to perform or breach of this Agreement."

Example 2:
***"Direct Loss** means:*

(a) for the Project Company:
- *any loss of Water Output Charges and/or Capacity Charges properly due to it pursuant to the terms of this Agreement; and/or*
- *any loss or damage sustained or incurred by it as a direct result of damage to property or personal injury; and*

(b) for the Buyer:
- *any excess Capacity Charges and/or Water Output Charges paid by it to the Project Company hereunder; and/or*
- *any loss or damage sustained or incurred by it as a direct result of damage to property or personal injury.*

29 Liability
***29.1** Save to the extent specifically provided otherwise in this Agreement, neither party shall be liable to the other party for any Consequential Loss suffered by such other party as a result of the first party's breach of this Agreement, save to the extent that such Consequential Loss was suffered or caused by the Wilful Default of such first party."*

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Although the Code refers to consequential loss, there is no clear meaning attributed to the words when used in a contractual context and left undefined. Therefore, when using terms such as "consequential loss" or "indirect damages" they should be clearly defined in the contract.

The general understanding is that consequential losses are those that are not directly caused by the conduct of the party responsible for the damage but that are caused by a secondary circumstance (i.e. indirectly caused). In other words, it is an issue of causation. Usually damage or loss that does not fall within the defined scope of a *"Direct Loss"*, will be construed as "consequential loss".

Given that the Code is relatively new (from 2013), there have been no claims for consequential loss under Article 176 to date. However, in the event that no contractual definition or exclusion is provided, the court is likely to require a nexus between the conduct and the loss/damage in question, in accordance with Article 176 of the Code.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no jurisprudence from the Omani courts that assists with the interpretation of consequential loss clauses, as no such claims have been made to date. However, Omani courts are generally given judicial discretion to construe each clause on its own merits, so the approach to such a clause could potentially differ from case to case.

Article 155 of the Code states the following:
"The contract must be executed in accordance with its content and not restricted to the obligation of the contracting party as specified therein, but it may also involve whatever is deemed of its requisites according to the law, the custom and justice, and pursuant to the nature of the disposition".

On this basis, Omani courts are likely to place emphasis on the binding nature of the contract, when interpreting the relevant clause.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is no jurisprudence that suggests that the existence of a consequential loss clause or a limitation of liability clause could have an impact on non-damages claims. Although it is possible, Omani courts are usually reluctant to award an injunction to prevent a breach from occurring, including in relation to contracts containing limitation clauses (such as a "consequential loss" clause).

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Peru

1. Do the words "consequential loss" have a given meaning in law?

No. The words "consequential loss" have no given or recognised meaning in Peruvian law. However, "indirect loss" does have a recognised meaning, as explained below.

The general rule in contractual civil liability is that damages arising "directly and immediately" from the breach of obligations, are claimable.[1] Therefore, by fundamental causality, in accordance with article 1321 of the Peruvian Civil Code, the only claimable damages are "direct damages".

Conversely, "indirect damages" are considered as those that do not arise from the non-compliance of contractual obligations, meaning there is an absence of causality, which makes indirect damages not recoverable.

There are two other ways to consider "indirect damages": first, by identifying them as "moral damages"; second, as non-contractual damages by rebound. The first case does not have a given meaning under Peruvian Law, as it expressly distinguishes property damages from extra-patrimonial or moral damages. In the second case, in the field of non-contractual civil liability (torts) – as inferred from a combined and interpretative reading of articles 1984 and 1985 of the Peruvian Civil Code – the term "indirect damages" is related to the case of indirect or rebound victims, which were affected by the damage of a legally protected interest, without having immediate participation in the events (unlike direct victims). However, it should be noted that this is a conceptual classification rather than a legal one, and the rule of contractual relativity renders indirect damages inapplicable to the contractual sphere.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Peruvian law has been influenced by common law, and hence, many common law expressions and concepts are invoked when structuring and drafting contracts.

It is common for certain contracts, especially those entered into with major foreign service providers, or referring to the purchase and sale of stock, joint operation agreements ('**JOAs**'), operation and maintenance, among others, to include an exclusion for "consequential damages".

[1] However, it is necessary to differentiate "foreseeable damages", which can be envisaged when entering into certain contracts, from non-foreseeable damages, generated by the aforementioned causality. The "foreseeable damages" apply when the breach is caused by minor negligence, while "non-foreseeable" damages may be awarded when gross (or inexcusable) negligence or wilful misconduct is proven.

Some JOAs entered into between two companies regarding the operation of a certain hydrocarbons block in Peru include a clause by which consequential damages are expressly excluded. For example:

"(e) The provisions of this Section constitute the exclusive resources or remedies available to the Parties regarding the breach of any declaration, guarantee, agreement and covenant; and of any other obligation or responsibility of the Parties to this Contract, as well as to demand their compliance. In no case will there be liability for Excluded Damages".

According to the definitions section, *"Excluded Damages"* includes: all consequential, punitive, exemplary, special or indirect damages.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

If the expression "indirect damages" is used, in principle it has an innocuous or no effect as, according to Peruvian law, liability for damages arises from direct and immediate causality due to a certain breach.

"Consequential damages" can be associated with: (a) "indirect damages", which are not claimable under Peruvian law; or (b) with "remote damages", which are damages which were not reasonably envisaged when entering into the contract and also are not claimable under Peruvian law.

If indirect damages are excluded from a contract or included in a limitation of liability clause, as a synonym of "consequential damages" or "remote damages", that limitation or exclusion would be void if the breach is caused by gross negligence or wilful misconduct.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Beyond the names that the parties may give to certain concepts through the contract, it is necessary to compare the assigned meanings with the appropriate legal regime.

Civil liability for non-performance of obligations is structured under two major premises:

1. Gravity of the negligent act or omission, in the sense that the level of recoverable damages depends on whether the breach is due to minor negligence, gross negligence or wilful misconduct:
   - In the first case (minor negligence), the defaulting party is only liable for the foreseeable damages which could be anticipated at the moment of entering into the contract, either by the declarations in the agreement itself, by the nature of the contract or in response to what is reasonable under the circumstances. The liability then may be limited and even exonerated;
   - In the second case (gross negligence or wilful misconduct), there is unlimited liability for all damages, foreseeable or not, representable or not. Any agreement which seeks to exclude liability for gross negligence or wilful misconduct will be null.

2. Compensatory damages are estimated on the basis of predictability: in minor negligence, the defaulting party must compensate for the foreseeable damages. However, if there has been gross negligence or wilful misconduct, the defaulting party must legally compensate the injured party for all damages caused, regardless of whether or not they could have been foreseen.

In view of the above, an agreement that limits or exonerates liability will be valid and enforceable if the breach is merely culpable (a minor negligence). If the breach is due to gross negligence or wilful misconduct, any limitation would be contrary to the mandatory rule of unlimited liability, structured on causality as opposed to predictability.

We must also note that, as only damages arising "directly and immediately" from the breach of obligations are claimable under Peruvian law, damages that constitute a "loss of profit" must comply with fundamental causality in order to be recovered. In that sense, consequential or indirect loss of profits are not recoverable.

Other than the above there are no other rules of interpretation regarding civil contracts.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Consequential loss exclusion clauses do not have an impact on non-damages claims under Peruvian law.

Non-damages claims are based on other considerations and are subject to the discretion of the judge who will consider:

— likelihood of exercising invoked right;
— need for a precautionary measure to delay a process or danger which would have serious impact on the interest of the applicant; and
— reasonableness of the precautionary measure.

These requirements are established by Title IV of the Peruvian Code Civil Procedures, and article 15 of the Peruvian Code of Constitutional Procedures, and have been widely developed both judicially and constitutionally. An example of this may be Resolution No. 00002-2013-PCC/TC, issued by the Constitutional Court.

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Poland

1. Do the words "consequential loss" have a given meaning in law?

No, Polish law does not contain a legal definition of consequential loss. This term is also very seldom used in the judicial practice of the Polish courts and has no clear meaning in Polish judicature.

The general principles of civil liability, including tort liability and liability arising from non-performance or improper performance of a contract, are set out in the Polish Civil Code[1] ('**Civil Code**').

Fundamental limits of damages under Polish law are defined in Article 361 of the Civil Code, according to which *"a person obliged to pay damages shall only be liable for* ***ordinary effects*** *of an action or omission which the damage resulted from"*[2] *and "within the above-mentioned limits […] the redress of damage shall involve losses which the injured party has suffered [damnum emergens] as well as profits which it could have obtained, if no damage had been inflicted [lucrum cessans]".*[3]

Conduct, damage, and **ordinary causation** constitute essential prerequisites giving rise to liability for damages under Polish law. It is worth noting that a simple causation, verifiable by a regular "but-for" *(sine qua non)* test is not sufficient and needs to be followed by an assessment of its ordinariness. This assessment, made by a court in the proceedings, should be based on a thorough analysis of the facts of the case and should aim to determine whether the relationship between the action and the end result in question is usual and constitutes a normal cause of things. Both direct and indirect causes may be included in an ordinary causation and, therefore, lead to their recovery by the injured party. The remoteness of causation (direct or indirect causes) may be useful to identify direct or indirect losses, nevertheless under Polish law both such losses are recoverable provided that they are included in ordinary causation. The relationship between each cause and result needs, however, to be usual, otherwise the entire causation would not be considered ordinary and the loss (end result) would not be recoverable. As a rule any party's awareness of causation is irrelevant for the recoverability of a loss. However, it is worth noting, that in certain cases if the party causing damage knows that his or her actions will cause specific damage such party may be held liable even though the causation was not ordinary. Moreover, as Article 361 of the Civil Code is believed to be a non-mandatory provision, the parties to the contract can broaden the scope of recoverable damage by excluding the ordinary causation requirement.

1 Journal of laws 2018, item 1025, as amended.
2 Article 361 § 1 of the Civil Code.
3 Article 361 § 2 of the Civil Code.

Recoverability of a loss of profit *(lucrum cessans)* is dependent on the degree of probability that a certain profit may have been gained. According to the Polish courts, such a probability needs to be close to certainty for the loss to be recoverable.

Ordinariness of causation is not clearly defined by the Civil Code and leaves a degree of flexibility to the courts. As a result, it is not impossible that in certain circumstances a loss classified by English courts as a "consequential loss" would be recoverable under Polish law. The courts should decide on whether the causation is ordinary on the basis of any data or information available at the date of judging. This assessment, should be based on a thorough analysis of the facts of the case. The court should not limit its assessment to information available at the date of action (breach) or at the time the contract was entered into.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, we do encounter clauses excluding liability for "consequential loss" in contracts concluded in various industries, including the energy, chemistry, and metallurgy sector. Usually these clauses are based on commonly available international standards such as FIDIC. Below please find some examples of limitation of liability clauses present in the industry practice:

— *"The Parties shall be liable for due performance of their obligations under the Contract, and for damage caused by undue performance or non-performance thereof, excluding loss of profits (except as loss of profits may be included in liquidated damages hereunder), consequential damages and indirect actual losses. Consequential damages and indirect actual losses are: the damages and/or liquidated damages payable under contracts between the given Party and its contractors other than the second Party; financial costs, such as interest, bank fees, and depreciation; the claims of Financing Parties in relation to financing the Owner's business; and loss of income or loss of production"*

— *"In no event (subject to the obligation to pay liquidated damages) will the Parties be liable for indirect and/or consequential losses such as, without limitation, loss of profits, loss of income, loss of business, loss of production and/or claims from the Party's customers"*

— *"Except in cases of fraudulent actions, negligence and/or wilful misconduct by either PARTY, neither PARTY shall be liable to the other PARTY for loss of profit, loss of any contract, or for any consequential losses or damages which may be suffered by the other PARTY in connection with this CONTRACT"*

Contracts of Polish origin also do usually contain exclusion of liability clauses, but these are generally related only to loss of profit *(lucrum cessans)*. Such an exclusion of liability clause is in general considered to be sufficient when the parties wish to exclude their liability for any possible loss of profit or loss of income and, therefore, certain losses that would be classified as "consequential loss" under the laws of England and Wales can be excluded.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As there is no meaning given by Polish law to the term "consequential loss", it is recommended that each contract containing exclusion of liability clauses referring to this term defines it independently.

Unfortunately, Polish judicial practice has not developed any clear and uniform meaning for "consequential loss". Therefore, each definition agreed upon by the parties to a contract should be as descriptive and as detailed as it is possible. The same approach is recommended in relation to other heads of loss, i.e. indirect loss, special loss etc.

Nevertheless, as consequential loss is very similar to indirect loss (both are presented in opposition to direct loss), the Polish courts might somehow refer to the meaning of direct and indirect loss when deciding about consequential loss. Polish legal doctrine developed at least three concepts of direct and indirect loss. First, applying a subject criterion, a direct loss would refer to the person directly affected by it and indirect loss would affect other persons. Second, applying a causation criterion, a direct loss would refer to damage resulting from a direct causation *(causa proxima)* and indirect loss would refer to a more remote causation. Third, a direct loss may be defined as a result of a violation of a good/interest directly affected by a specific event and indirect loss would result from violation of other goods/interests of the injured party.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Lack of sufficient jurisprudence may constitute a major problem in a case of a dispute arising in relation to a contract concluded under Polish law, containing an exclusion of liability clause referring to consequential loss or other common-law-based heads of loss, and not defining this term in a detailed way.

The court's actions would still aim to establish whether there is an ordinary causation between the party's action and the end result and, with respect to loss of profit, whether probability of a profit was sufficiently high. Only after determining the scope of recoverable loss would the court try to understand the parties' intentions behind the exclusion of liability clause. As the concept of consequential loss is not based on the laws of Poland, the competent court may also decide to use the services of an independent expert specialising in common law. It is worth noting, however, that Polish legal doctrine and judicature indicate that contractual deviations from the statutory liability model cannot be interpreted extensively. The court would always need to examine what was the common intention of the parties and the aim of the contract rather than its literal meaning. If it is possible to adopt different interpretations, the court shall adopt the interpretation more beneficial for the injured party.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

As the jurisprudence of Polish courts in relation to consequential loss is very limited, it is not clear whether an exclusion of liability clause referring to consequential loss would have an impact on non-damage claims, and particularly requests for injunction.

In general, according to Article 7301 of the Polish Code of Civil Procedure[4] a request for a preliminary injunction can be made by each party or participant to proceedings, if the party/participant substantiates his or her claim and legal interest in the injunction. If a claim concerns a head of loss excluded in the contract, the other party would have the right to appeal against the injunction.

[4] Journal of laws 2018, item 416, as amended.

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Portugal

1. Do the words "consequential loss" have a given meaning in law?

The words "consequential loss" do not have a given meaning in Portuguese law, nor have the Portuguese courts elaborated or recognised such losses as a specific category of loss.

Under Articles 562 and 564 of the Portuguese Civil Code ('**PCC**'), a party causing loss or damage to another has the obligation to compensate the injured party for damage suffered *(danos emergentes)* and loss of profits *(lucros cessantes)* that the non-defaulting party probably would not have suffered if the breach of the contract had not occurred.

The PCC does not define or make a specific reference to "indirect loss". Scholars define indirect loss as loss that is indirectly caused by the breach. It is an issue of causation. As such loss is not directly caused by the breach, it is in principle not recoverable in damages.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Due to use of the term "consequential loss" in international contracts and the influence of contracts subject to common law, there are examples of Portuguese contracts that exclude consequential loss.

It is very common to find clauses excluding liability for "consequential loss" or "indirect and consequential loss" in insurance contracts and in energy industry agreements. These exclusions are also common in cases of mere negligence. Examples of typical clauses regarding this matter include:

Example 1 – Power purchase agreement
"Except as otherwise provided in this Agreement, neither Party shall be liable to the other for any indirect, special, incidental, consequential damage or economic loss, with respect to any claim arising out this Agreement, whether in contract, tort, strict liability or otherwise."

Example 2 – Engineering, procurement and construction agreement
"Neither Party shall be liable to the other by way of indemnity or the reason of any breach of the Contract or of any statutory duty or by the reason of tort (including negligence) or otherwise, for any indirect or consequential loss or any indirect or consequential damage whatsoever, or for any loss of profit, loss of use, loss of revenues, costs of replacement power, increased costs of operation, loss of production, loss of data, loss of finance, loss of opportunity or any pure economic loss that may be suffered by the other."

Example 3 – Operation and maintenance agreement
"Neither party shall be liable in any circumstances to the other party for any consequential loss however caused in connection with the performance or non-performance of its obligations under this Agreement, except if the loss is a direct result of physical damage to the installation caused by wilful default of one of the parties."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Neither Portuguese Law nor scholars define the words "consequential loss". The meaning of the words "consequential loss" is based on interpretation of the contract.

Nevertheless, "consequential loss" is often used to signify indirect or derivative damages, meaning damages that are an indirect cause of the breach of the contract.

The validity of consequential loss clauses has been the subject of debate, as the PCC considers as null and void a clause by which a non-defaulting party renounces its legal rights and remedies for breach of contract, such as the right to be compensated.

Notwithstanding their restriction in the PCC, the Portuguese courts tend to accept the validity of these clauses, under the 'autonomy of the will principle' *(princípio da autonomia privada),* if the exclusion or limitation of liability does not constitute a breach of duties imposed by public order provisions. However, the applicability of this principle is excluded from circumstances where the breach of the contract was caused by wilful misconduct or gross negligence.

In Portugal, the courts draw the line between:
(i) wilful misconduct and gross negligence; and
(ii) mere negligence.

In (i) the exclusion clauses are invalid, in (ii) those clauses are accepted. The autonomy of the will principle has the limitation of public order where the distinction between (i) and (ii) is relevant. If the losses arose due to slight negligence, the limitation or exclusion of liability will be deemed valid.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

There is no specific Portuguese case law that addresses the interpretation of consequential loss clauses.

The Portuguese courts have considered and provided guidance on the validity of contractual exclusion clauses.[1]

In relation to the interpretation of exclusion clauses, the principles of interpretation of contracts ('contractual declarations') apply, which are:

— a declaration of contractual intent shall have the meaning that any standard recipient of a declaration, placed in the position of an actual recipient, may deduce from the behaviour of the declarant, unless he or she cannot reasonably rely upon such behavior.
— whenever the recipient knows the actual will of the declarant, the declaration made shall be interpreted in the light of such will.
— in case of doubt, the declaration shall have the meaning that is the less grievous for the grantor, in non-valuable contracts (gratuitous contracts), or that ensures a better balance of the considerations, in valuable contracts (onerous contracts).
— in formal contracts the declaration shall not be valid if its meaning does not minimally correspond to the wording of the contract, albeit imperfectly expressed; such meaning may be valid, however, if it corresponds to the real will of the parties and the reasons determining the form of the contract do not oppose such validity.

[1] For instance, Case 01A3321, Supreme Court of Justice 13-02-2001; Case 087882, Supreme Court of Justice 9-05-1996; Case 10502/16.1T8PRT.P1, Oporto Second Instance Court (Tribunal da Relação do Porto) 22-10-2018 – all available in www.dgs.pt.

The parties may choose to define the term "consequential damages" in the contract, but may also choose to give examples. For example, the O&M contract clause below defines the concept of consequential loss by way of examples:

"Consequential Loss" means in relation to a breach of this Agreement any indirect or consequential loss (including, without limitation, loss of production, loss of profit, loss of revenue, loss of contract, loss of goodwill, liability under other agreements or liability to third parties) resulting from such breach and whether or not the party committing the breach knew or ought to have known that such indirect or consequential loss would be likely to be suffered as a result of such breach and includes the payment or repayment of any amounts (or any acceleration thereof) to lenders to, or creditors of, the Operator and/or the Owner from time to time (including, without limitation, to the Lenders under the Finance Documents) but excludes, for the avoidance of doubt, the cost to the Owner of obtaining the Service (or any Addition Services which the Operator has agreed to provide) from a third party".

There is no clear guidance under Portuguese law whether such examples should (i) be treated as expanding the scope of "indirect or consequential loss" to what would otherwise be considered "direct loss", or (ii) whether the words in brackets would be treated as only covering such losses so far as they were an "indirect loss" and not cover direct losses having the same description.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is no identified case law that establishes a direct connection between the granting of an injunction or of a specific performance order whenever the contract contains a limitation or exclusion of liability clause.

According to the Portuguese Civil Procedure Code, a party seeking an injunction needs to establish that:

(i) the party has a claim against the other party.
(ii) there is a well-founded risk of suffering damage.
(iii) the damage will be severe and difficult to repair.
(iv) the damages caused by the granting of the injunction do not considerably exceed the losses to be prevented by the injunction.

While assessing requirement (iii), there is no reason why the court should not take into consideration the existence of the limitation or exclusion clause. However, there is no specific jurisprudence on the issue.

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Romania

1. Do the words "consequential loss" have a given meaning in law?

There is no reference to, or definition of, the term "consequential loss" in the Romanian Civil Code ('**RCC**').[1]

In the event of a breach of contractual obligations, Article 1530 of the RCC provides a "creditor" (i.e. the innocent, or wronged, party) with an entitlement to damages that compensate it for losses caused by the "debtor" (i.e. the defaulting party, or party in breach of its obligations). Importantly, in establishing whether a loss is caused by a breach, Article 1530 confirms that the creditor is only entitled to damages for such losses that are "the direct and necessary consequence" of the breach.[2]

With regard to types of damages that are recoverable at law, Articles 1531 and 1532 of the RCC clarify that:

- the creditor is entitled to "full compensation" for the damage suffered as a result of the relevant breach.
- this includes "actual" loss suffered *(damnum emergens);* as well as deprived benefit *(lucrum cessans).*[3]
- full compensation also includes compensation for non-pecuniary damage.
- future damages shall be taken into account, and damages in connection with "loss of opportunity" arising out of a breach may also be recoverable.[4]

Further, in connection with all types of loss and damage, Article 1533 of the RCC provides that a debtor is only liable for damages that could have been foreseen as a result of the relevant breach at the time the relevant contract was executed. By way of exception, a debtor is also liable for unforeseen damages where the relevant breach was "intentional" or due to a "serious fault", akin to the concepts of gross negligence and wilful misconduct. However, such damages still need to be "the direct and necessary consequence" of the relevant breach, in accordance with Article 1530, in order to be recoverable.

1 Codul Civil din 17 iulie 2009 (Legea nr. 287/2009).
2 This (and all other translations in this chapter) is an unofficial translation.
3 Such deprived benefit may include, but is not necessarily limited to, loss of profit.
4 Damages for loss of opportunity may be recovered in proportion to the prospect of success of that opportunity (Article 1532).

The reference to "full compensation" in Article 1531 above suggests that, as long as a loss was foreseeable at the time the contract was executed, and as long as the loss arose as a direct and necessary consequence of the breach, the loss is recoverable at law, regardless of whether it falls within a dictionary definition of "consequential".

This is supported by a ruling from the Supreme Court of Justice, which found that parties to a contract were not necessarily required to expressly provide for price indexation to the inflation rate as part of a contractual price payment obligation, in order for the creditor to be entitled, in the event of breach, to compensation for both the direct loss (the contractual price), as well as the loss of benefit (updated price by reference to the rate of inflation).[5]

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Parties to a contract are free to agree to clauses excluding or limiting liability *(pacta sunt servanda),* so long as this is not contrary to public policy, accepted principles of morality, or limits imposed by law (Article 1169 of the RCC).

As a result, the entitlement to *"full compensation"* under Article 1531 of the RCC (see above) may be limited through contractual exclusion of liability clauses, except that the parties cannot limit liability for:

— damage caused by a default committed intentionally or by gross negligence; or
— damage caused to physical or mental integrity or health (Article 1355 of the RCC).

The parties can still limit liability for, for example, damage caused by imprudence or negligence.

In practice, standard contracts (such as FIDIC used in Romanian infrastructure projects[6]) or privately negotiated deeds often include clauses limiting or excluding contractual liability. Similarly, local Romanian drilling and wells services contracts are adapted from international services contracts, hence it is customary to negotiate around exclusion of liability clauses. In contrast, Romanian petroleum concession agreements are not sophisticated enough to contain exclusion of liabilities clauses. Most of the concession agreements were concluded in the late 1990s and represent the position under the Romanian Petroleum Law.

The terms "consequential" and "indirect" loss are commonly used in contractual exclusion of liability clauses, in particular in commercial contracts. In the oil and gas sector, the Romanian market will often contract on the basis of the AIPN model form Joint Operating Agreement, which includes provisions concerning "consequential loss".

[5] Supreme Court of Justice, commercial section, decision no.562/1999
[6] FIDIC sample used by Regional Directorate of Road Infrastructure Brasov.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

In the absence of contractual definition or clear jurisprudence on this issue, the meaning of "consequential loss" remains ambiguous and open to arguments from the parties.

Indirect losses are arguably those losses that do not arise as a *"direct and necessary consequence"* of a breach, such that, pursuant to Article 1530 of the RCC (see above), a debtor "will not be responsible for repairing the indirect damages that would have normally occurred without his guilty act" in any event.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The RCC maintains, as a general rule on contract interpretation, that a contact shall be interpreted according to the intention of the contracting parties.

The RCC also provides that a contract shall be interpreted in favour of the debtor (as above, the party claimed to be in breach of its obligations) *(in dubio pro debitoris),* and that contractual exception clauses shall be subject to a restrictive interpretation *(exceptio est strictissimae interpretationis).*



5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

(1) *Specific performance* – Under Article 1539 of the RCC,[7] a party to a contract is entitled to seek a court order for the compulsory performance by the defaulting party of its obligations. The order for specific performance will not affect the ability of the injured party to require the party at fault to repair the damages. A consequential loss exclusion clause, which limits the scope of recoverable damages, is unlikely to affect or restrict a party's primary obligation to remedy the contract. Hence, it is unlikely that a consequential loss exclusion clause will have an impact on this remedy.

(2) *Provisional injunction* – A provisional injunction order has the effect of preserving the *status quo* of the subject matter of the dispute up until a decision on the merits has been reached by the court, by preventing the alteration of the parties' rights that may be affected until the decision on the merits is provided. Since a provisional injunction does not relate to monetary claims, it is unlikely that a consequential loss exclusion clause, which limits the scope of recoverable damages, will have an impact on a party's right to seek this remedy.

(3) *Provisional seizure* – Under Article 951 of the RCC,[8] provisional seizure may be established in order to preserve compulsory execution against the movable or immovable assets in respect of a monetary claim, or a claim convertible into money. A provisional seizure order has the effect of freezing the defendant's assets until a decision on the merits has been provided by the court. Depending on the type of loss in question, a consequential loss exclusion clause could have the effect of negating the existence of a monetary remedy. In those circumstances, a consequential loss exclusion clause could have a negative impact on a party's right to this remedy.

[7] Article 1539 of the RCC states: *"Addition of the penalty to the execution in kind. The creditor cannot claim both the execution in kind of the principal obligation and the payment of the penalty, unless the penalty has been stipulated for non-fulfilment of the obligations in time or in the established place. In the latter case, the creditor may request both the execution of the principal obligation and the penalty, if he does not waive this right or if he does not accept the performance of the obligation without reservation."*

[8] *"Provisional seizure consists in the unavailability of the movable and/or the movable property of the debtor in possession of it or of a third party for the purpose of their recovery when the creditor of an amount of money obtains an enforceable title."*

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Russia

1. Do the words "consequential loss" have a given meaning in law?

The term "consequential loss" is not recognised by the Russian legal system and is not used in, or defined by, Russian legislation.

Article 15 of the Civil Code of the Russian Federation ('**Code**') provides that a person whose rights have been infringed is entitled to demand recovery of all losses incurred, unless a limitation on such recovery is stipulated by law or by contract. Recoverable losses would include expenses incurred (or that would have to be incurred) by that person in order to restore such rights, loss or damage to that person's property (direct loss), and lost profits which that person would have otherwise made.

The term "lost profits" under Russian law is conceptually quite close to the term "consequential loss".

The general principle is that the amount of damages (including "lost profits") recoverable should be established by the court with a "reasonable degree of certainty". However, the court cannot refuse to grant a claim for damages caused by a breach of an obligation solely on the basis that the amount of damages cannot be established with a "reasonable degree of certainty". In that case, the amount of damages will be determined taking into account the circumstances of the case, based on the principles of fairness and responsibility for the relevant breach.

Based on existing court practice in order to recover "lost profits", the claimant must prove that the defendant's alleged wrongdoing was the sole reason that the claimant did not receive the profits, and that all necessary steps were undertaken by the claimant to realise the profits.[1]

[1] Decision of the Supreme Court of Russia of 19 January 2016 # 18-KG15-237, Decision of the Supreme Court of Russia of 29 January 2015 # 302-ES14-735

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Russian law does not recognise the term "consequential loss", but under Russian law the term "lost profits" is conceptually quite similar. The words "loss of profits" is widely used in Russian law governed contracts, including exclusion or limitation of liability clauses.

It follows that the words "consequential loss" are generally not used in exclusion of liability clauses in Russian law governed contracts.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As noted above, the term "consequential loss" is generally not used in Russian law governed contracts.

However, if such a term is used in a Russian law governed contract, the general principles of contractual interpretation would apply in order to ascertain what the parties meant by such words. This means the court would give the words used their literal meaning, read in the context of the agreement as a whole. If the court cannot decide what the parties meant by interpreting the contract on an objective basis, the general intention of the parties may be inferred, having regard to all relevant information about the background to the contract, including the negotiations between the parties, the purpose of the contract and the previous relationship of the parties.

Based on existing court practice, "consequential loss" *(kosvennyie ubytki)* is normally interpreted as the Russian equivalent of "lost profits" (Supreme Court Ruling of 5 October 2017, case # 305-ЭС17-13181), unless the parties define the term differently.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Normally, the Russian courts will interpret the term "consequential loss" as "lost profits" and accordingly apply the Russian law requirements for "lost profits".

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is no specific practice in this regard because "consequential loss" is not recognised by Russian law. However, a "lost profits" exclusion clause would not have any impact on non-damages claims such as specific performance claims or interim measures.

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Scotland

1. Do the words "consequential loss" have a given meaning in law?

In Scots law, the question of recoverable damages for breach of contract is determined in principle by questions of causation and remoteness. The mid-19th century English case of *Hadley v Baxendale*[1] *('**Hadley**')* has been judicially approved and generally followed by Scottish courts and has provided the traditional common law framework for recoverable losses, with the "second limb" of the *Hadley* remoteness test often referred to as describing the term "consequential loss". That limb is narrow and highly fact-specific. For more on that approach, please refer to our *CMS Guide to Consequential Loss in the Energy Sector – England and Wales*.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. The term "consequential loss" frequently appears in exclusion clauses within oil and gas industry contracts and other energy-based reciprocal/knock-for-knock indemnities. However, although much of the industry is based in Scotland, such contracts for the energy industry very frequently include choice of law provisions which mean they are governed by English law. See our *CMS Guide to Consequential Loss in the Energy Sector – England and Wales* for details of typical model form consequential loss and exclusion clauses.

For example, there is an oil and gas industry-wide definition in the LOGIC, 2012 Mutual Indemnity and Hold Harmless Deed, which states that:

"'Consequential loss' means:

i. *consequential loss under applicable law; and*
ii. *loss and/or deferral of production, loss of profit, loss of use and loss of revenue, profit or anticipated profit (if any) whether direct or indirect, to the extent that these are not included in (i), whether or not foreseeable at the date of execution of this Deed".*

Great care ought to be taken in defining "consequential loss" and drafting exclusion clauses. The Scottish courts will uphold exclusion clauses in oil and gas contracts provided that the provisions are clear in their terms.

[1] (1854) 9 Ex 341

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There is uncertainty surrounding the meaning of the words "consequential loss" in exclusion clauses.

Although the *Hadley* decision is relevant in Scotland, and many English decisions are also persuasive for (or binding on) a Scottish court, subsequent Scottish case law has not wholly embraced the traditional English approach that "consequential loss", when used in a contractual exclusion or indemnity, means the "second limb" set out in *Hadley*.

In *Caledonia North Sea Limited v British Telecommunications Plc*,[2] *('**Caledonia**')* the House of Lords (now the Supreme Court), sitting on a Scottish case, questioned whether it would always be correct that "consequential loss", in a contractual exclusion of indemnity, should be given the meaning of the second limb of *Hadley*. The judgment in *Caledonia* indicates that Scottish law appears to have been moving away from the traditionally narrow interpretation to one that is a more contextual-based interpretation of consequential loss for a significant period of time.

It may be that the correct modern approach, when the Scottish and English legal authorities are viewed as a whole, is that the words "consequential loss" in a contract in respect of recoverable damages (absent definition) will be presumed to mean the second limb of *Hadley*. However, that is a presumption arising from the parties' use of language and not binding legal precedent. Further, such a presumption is simply a pointer to a logical and common sense meaning of the words that it will yield if an analysis of the contract suggests a different approach is correct.

Uncertainty in the judicial interpretation of "consequential loss" is capable of causing issues with clauses that specifically refer to "consequential loss", undefined, such as the LOGIC, 2012 Mutual Indemnity and Hold Harmless Deed (above).

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause will be construed on its own terms, taken in the context of the broader contract.

Where a clause refers to other potential heads of loss, arguments can arise over whether these should be taken to be sub-categories of "consequential loss", so that the scope of the exclusion is not expanded, or treated as additional types of "direct" (first limb of *Hadley*) loss that should be excluded beyond "consequential loss".

Given that Scots law appears to be moving towards a more contextual-based interpretation of consequential loss, it is possible that excluding liability for "consequential loss" may also exclude liabilities for other types of losses regardless of which *Hadley* limb they fall within, and may not necessarily exclude all losses falling within the second limb of *Hadley*. Essentially, where there are exclusion clauses in commercial contracts between sophisticated parties, the wording will be given its ordinary meaning, having regard to the context in which it is set.

[2] [2002] UKHL 4

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Limitation and exclusion clauses will be given effect in Scots law if clearly and unambiguously drafted. Depending on their terms, they may therefore be relevant to non-damages claims. For example, adequacy of damages is a factor to be taken account of in a claim for interdict or interim interdict (as part of the balance of convenience test) so that the exclusion of consequential loss could potentially play into any claims for such a remedy.

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Serbia

1. Do the words "consequential loss" have a given meaning in law?

No, Serbian law does not contain a legal definition of consequential loss. This term is also seldom, if ever, used in the judicial practice of the Serbian courts and has no clear meaning in Serbian judicature.

The words "consequential loss" do not have a given meaning in Serbian law.

The Serbian Law on Obligations ('**LO**') provides essentially two main types of damage that are recoverable in contractual and non-contractual relations:

— pecuniary damage, which can be:
  - ordinary damage *(obična šteta)*;
  - loss of profit *(izmakla korist)*; and
— non-pecuniary damage *(neimovinska šteta)*.

Although all types of damage are recoverable, contractual claims have an additional requirement of foreseeability of the damage at the time of entering into an agreement. The court will consider whether the damage was foreseeable at the time of the conclusion of the contract as a possible consequence of the breach, taking into account the facts that the party in breach knew or should have known.

In the event of fraud, intentional non-performance, or non-performance as a result of one of the party's gross negligence, the innocent party is entitled to recover the total damage (i.e. not only foreseeable damage), notwithstanding the special circumstances that caused the damage.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Since the term "consequential loss" has no given meaning in Serbian law, it is rarely, if at all, used in contractual exclusion of liability clauses in agreements governed by Serbian law as its interpretation and application could lead to legal uncertainty.

When used, the term "consequential loss" is used in contracts with foreign elements concluded in certain industries, including the energy, chemistry, and metallurgy sectors. For instance:
"Except in cases of fraudulent actions, negligence and/or wilful misconduct by either PARTY, neither PARTY shall be liable to the other PARTY for loss of profit, loss of any contract, or for any consequential losses or damages which may be suffered by the other PARTY in connection with this CONTRACT."

Contracts of Serbian origin also usually contain exclusion of liability clauses, but these are generally related only to "indirect damage/loss" and "loss of profit" (see below). Such an exclusion of liability clause is in general considered to be sufficient when the parties wish to exclude their liability for any possible loss of profit or loss of income.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

The meaning attributed to the words "consequential loss" depends on the interpretation of those words in a contractual exclusion clause.

There is no clear jurisprudence regarding the interpretation of the words "consequential loss" as this term is not commonly used in Serbian law. It would most likely be regarded as a type of "indirect loss", but there are also no clear guidelines on the interpretation of "indirect loss" apart from court jurisprudence, which is not always reliable as it is heavily focused on the interpretation of the term within the given facts of the case. Consequently, it is highly advisable for parties to define "consequential loss" or "indirect loss" in the contract if those terms are to be used in exclusion clauses.

The meaning of the term "indirect loss" has been encountered in:
— the Law on postal services[1], Special Rules in of Freight Forwarding Companies[2] etc;
— various jurisprudence concerning the contracts in which the parties defined direct and indirect loss;
— various articles by legal scholars who discuss whether "loss of profit" should be considered "direct" or "indirect" loss – there are different opinions in the legal literature.[3]

The LO defines "loss of profit" as a type of damage recoverable under the law. The term "loss of profit" is also not defined but, unlike "consequential loss", there is some helpful jurisprudence for this term.

On a general note, parties cannot exclude or limit liability when acting with intent or gross negligence *(namera ili krajnja nepažnja)*. Exclusion or limitation of liability clauses for negligence *(obična nepažnja)* can be contested if these clauses result from a monopoly position exercised by the breaching party or from unequal relations (bargaining power) between the contractual parties.

[1] Law on postal services (Official Gazette of RS no. 77/2019), section on Responsibility of postal operator
[2] Special Rules in of Freight Forwarding Companies (Official Gazette of RS no. 99/2018), section on Responsibility of freight forwarder
[3] Commentary on the Law on Obligations. [Slobodan Perovic; Dragoljub Stojanovic, D.; Slavko Carić; et al]

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Each clause is construed in accordance with the rules on interpretation of contracts provided by the LO.

If a provision is clear – i.e. if there is no ambiguity as to its meaning – there is no need for interpretation and the provision applies as it reads. If a provision is unclear, the following criteria are taken into account:

— the common intention of the parties;
— principles of the law of obligations;
— fair balance of the parties' performance; and
— if the provision is part of the terms and conditions drafted by one of the parties to the agreement, the rule of *contra proferentem* will apply and it will be construed in favour of the other party.

The LO outlines the principles governing contractual relations – for example freedom of contract, good faith, and the duty to fulfil one's contractual obligation *(pacta sunt servanda)*. These principles are deemed mandatory by court jurisprudence and the court approaches those principles on their own motion, in parallel with the examination of the contractual and statutory provisions governing certain contracts.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

According to the Law on Enforcement and Security, when seeking an interim measure *(privremena mera)* for securing non-monetary claims, besides the requirement to establish a credible non-monetary claim, the applicant must also show:

— the existence of threat that the breaching party would otherwise prevent or significantly deter the occurrence of a breach; or
— that the measure is necessary to prevent threatened violence or irreparable damage.

If a court considers the consequential loss exclusion clause (or other limitation/exclusion clause) to be evidence of potential irreparable damage that would occur as a result of breach of a contract, this clause might have an impact on the non-monetary claim for performance of a contractual obligation. Nevertheless, there is currently no jurisprudence that illustrates this position.

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Singapore

1. Do the words "consequential loss" have a given meaning in law?

Yes. The Singapore courts have taken the traditional English law approach, and construed the phrase "consequential loss" as confined to the loss or damage falling within the second rule in *Hadley v Baxendale,*[1] i.e. losses that do not naturally flow from the breach in the ordinary course of events but may reasonably be supposed to have been in the contemplation of both parties at the time of entering in the contract.[2]

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. The words "consequential loss" are used frequently in contracts concerning various industries in Singapore.

The oil and gas industry governed by Singaporean law will ordinarily use the usual model form contracts that are used in the industry globally, such as the Association of International Petroleum Negotiators and LOGIC model form contracts that routinely contain exclusions for "consequential loss".

Consequential loss is also excluded in contracts in the power sector. For example, a contract for the delivery and sale of natural gas excluded "consequential losses" which was defined as *"loss or deferment of profit or anticipated earnings or savings, loss of goodwill, loss of use, business interruption, increased cost of working and wasted effort or expenditure, together with all reasonable legal costs associated with the exclusion of such heads of loss from recoverable losses in relation to the Agreement."*

In the construction sector, international projects carried out in Singapore may use more bespoke contracts or amended forms of international standard form contract, such as the FIDIC[3] form of contract which excludes liability for consequential loss. The model forms used in local projects, however, do not usually contain clauses excluding consequential loss.[4]

1 (1854) 9 Exch. 341.

2 The Singapore Court of Appeal in Singtel Telecommunication v Starhub Cable Vision Ltd [2006] 2 SGCA 5 *('Singtel v Starhub')* at [59]; the Singapore High Court in Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2013] SGHC 117 *('Transocean v Burgundy')* at [30]. See CMS Annual Review of developments in English oil and gas law (2016 Edition), page 31.

3 International Federation of Consulting Engineers. The 1999 FIDIC Red Book provides that *"neither Party shall be liable to the other for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract …"*

4 The usual standard forms used for Singapore Government sector work, such the Singapore Institute of Architects' (SIA) Building Contract form, the Public Sector Standard Conditions of Contract (PSSCOC), and the Real Estate Developers' Association of Singapore (REDAS) form of contract do not contain clauses excluding consequential loss.

Having said that, the standard terms of a rental agreement by a Singapore Ministry of Manpower approved tower crane provider excludes the owner's *"liability and responsibility for any direct or consequential loss suffered by the Hirer in consequence of any downtime, stoppage of work, compliance with any order or directive from any judicial or governmental authority or by reason of any loss injury or damage suffered by any person from the presence of the Equipment or the delivery possession use operation removal dismantling or return of them or from any defects in the Equipment."*[5]

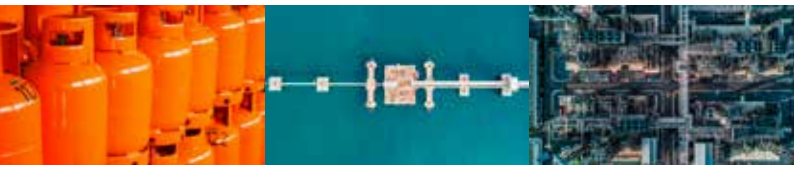
3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

If no specific definition is provided, the words "consequential loss" in exclusion clauses will normally be interpreted as exempting the party from loss that would otherwise have been recoverable under the second limb of the rule in *Hadley v Baxendale*.[6] The Singapore Court of Appeal in *Singtel v Starhub* held that that the purpose of a clause that excludes contractual claims for indirect and consequential losses is *"to exclude liability in contract for losses which can only be recovered under the second limb of the rule in Hadley v Baxendale"*.[7]

This approach has been adopted by the Singapore High Court in subsequent cases: *see Transocean v Burgundy* and *Kay Lim v Soon Douglas*. Also, based on this line of authorities the same narrow meaning should be given to the words *"any indirect or consequential loss however caused or arising"*.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The courts will interpret an exclusion clause to apply in its *"most natural interpretation"*.[8] Further, in *Transocean v Burgundy,* the Singapore High Court accepted that parties may delineate in their contract how "consequential loss" is to be defined.[9] This may include specific categories of loss that might otherwise be considered direct loss under the first limb of *Hadley v Baxendale* and would not be excluded if "consequential" and/or "indirect loss" were used undefined by the parties.[10]



[5] See Kay *Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2012] SGHC 186 *('Kay Lim v Soon Douglas').*
[6] *Singtel v Starhub* at [59] to [62].
[7] *Singtel v Starhub* at [59.]
[8] *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26 *('PH Hydraulics'),* at [146]
[9] *Transocean v Burgundy* at [31].
[10] See also *Kay Lim v Soon Douglas,* where Quentin Loh J stated *obiter* that in the context of building and construction contracts, what may seem in nature to be consequential loss in other contracts, may actually be direct loss or loss falling within the first rule in *Hadley v Baxendale* (such as damages for delays to work on a critical path may fairly and reasonably be considered as arising naturally and in the usual course of things and were not "consequential loss").

However, there are also some relevant rules of interpretation:

— In Singapore, exemption clauses are construed strictly. In order for a party that is otherwise liable to exclude or limit its liability or to rely on an exemption, it must do so in clear words. Any ambiguity or lack of clarity will be resolved against a party relying on the clause.[11]

— The application of such clauses will be restricted to the particular circumstances which the parties had in mind at the time they entered into the contract. For example, in *Hong Realty Pt Ltd v Chua Keng Mong ('**Hong Realty**'),*[12] the Singapore Court of Appeal found the factual circumstances at the time the respondent agreed to the exclusion clause in a storage contract, exempting the appellants from liability from the negligence and default of their servants, to be central to its decision on the operation of the clause.[13] In *Singtel v Starhub,* the Singapore Court of Appeal referred to *Hong Realty* in deciding that the exclusion clause did not extend to a particular method of transmitting cable television signals that had not been under consideration at the time the contract was entered into, and could not be taken to exclude liability for such act.

[11] The Singapore Court of Appeal in *Singtel v Starhub,* at [52], referring to Lord Hobhouse in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [144].

[12] [1994] 2 SLR (R) 90.

[13] Any intervening act that occurred after the contract had been entered into will be considered as altering the circumstances in the exemption clauses which ordinarily apply, and would not have been within the contemplation of the parties. Leaking pipes, caused by the appellants' negligence in carrying out piping works after the contract had been entered into, had damaged the respondents' goods that were stored at the appellants' warehouse. The Court of Appeal held that at the time of contracting, it could not have been within the contemplation of either of the parties that the exemption clauses would apply in circumstances other than those in which the warehouse was in prior to the intervening event, i.e. the piping works. Had the leakage been caused by some patent defect in the warehouse, the Court of Appeal had no doubt that the exclusion clauses would be applicable. Prior to the piping works, which the trial judge had found to be an intervening event, the warehouse was a fit place for storage. As a result of the intervening works, the Court of Appeal found that the storage area was unfit as a proper place for storage of goods, and in the circumstances, the exclusion clauses could not operate to relieve the appellants of liability.

3. In interpreting a contractual term, the Singapore courts will utilise the modern "contextual" approach as set out by the Singapore Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*.[14] The court may admit evidence in relation to the particular circumstances referred to above in interpreting the term if the evidence is relevant, reasonably available to all contracting parties and relates to a clear or obvious context, which go towards proof of what the parties objectively ultimately agreed. The court will consider the essential attributes of the document being examined and will be more restrained in its examination of standard form contracts and commercial documents.

4. Where the clause provides a list of excluded losses, the clause will ordinarily be read *ejusdem generis,* and *"construed in the light of the overall genus of losses contemplated in the clause"*.[15]

In order to exclude direct losses or losses that fall within the first limb of *Hadley v Baxendale* from the scope of the exclusion clause, the courts are in agreement that clear and explicit language is required. However, the interpretation of the clauses by the courts is a highly fact-sensitive exercise and therefore may not necessarily produce consistent outcomes.[16] Parties are advised to carefully consider the type of losses they wish to exclude and explicitly exclude them – instead of, for example, relying on words such as "other" or "or" or the use of parentheses in defining the term "consequential loss".

[14] [2008] 3 SLR 1029, and as refined in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd.* [2013] 4 SLR 193. In Singapore, the admissibility of evidence of background knowledge etc as an aid to contractual interpretation is governed by statute, namely the Evidence Act. Such evidence can only be admitted to interpret the contractual term, and not to contradict, vary, add to or subtract from the contractual terms.

[15] *Transocean v Burgundy* at [33]. See also *Singtel v Starhub* at [63] and [64];

[16] In *Singtel v Starhub,* at [63] and [64], the Court of Appeal, in construing a clause that purported to exclude liability in *"indirect, incidental, consequential, or special damages (including … lost revenues, or lost profits)"* held that only where lost revenue is indirect or consequential is it excluded. The Court of Appeal referred to the English case *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals & Polymers Ltd ('Deepak Fertilisers')* [1999] 1 Lloyd's Rep 387, which purported to rule out liability for *"loss of anticipated profits … or for indirect or consequential damages"*. The Singapore Court of Appeal held that the crucial difference between the exclusion clauses in *Deepak Fertilisers* and in *Singtel v Starhub* is that in *Deepak Fertiliser,* loss of profits was explicitly excluded in addition to all indirect or consequential loss due to the use of the word "or".
In *PH Hydraulics,* the Court of Appeal found that the phrase *"any consequential or indirect losses … including but not limited to loss of profits …"* in an exclusion clause that excluded loss of profits.
In *Transocean v Burgundy* at [33], Tay Yong Kwang J held that despite the use of the word "or" in defining the term Consequential Loss, *"the ostensibly broad scope of the phrase* 'any loss of or anticipated loss of … profit' *should be limited by the context and could not be read in literal terms as a blanket exclusion for any loss that may be labelled as either party's loss of profit."* Loss of profit was thus not excluded in *Transocean v Burgundy.*

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is no jurisprudence directly on point, but if the exclusion clause clearly limited the recoverable damages for breach of contract, and subject to all the considerations stated above and all the criteria in granting an injunction being fulfilled,[17] there is no reason why the courts would not issue an order preventing the occurrence of a breach of the contract or for specific performance of the contract.[18]

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[17] In order to determine whether an interlocutory injunction should be granted, the test set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 is applicable, i.e. whether "there is a serious question to be tried" and "that the balance of convenience lies in favour of granting an injunction".

[18] The case of *AB v CD* [2014] EWCA Civ 229 may be relevant and have persuasive authority on the Singapore courts.

Slovakia

1. Do the words "consequential loss" have a given meaning in law?

In Slovak law the term "consequential loss" is not explicitly regulated. This term is neither regulated by the Act No. 40/1964 Coll., Civil Code as amended (the '**Civil Code**') nor by the Act No. 513/1991 Coll., Commercial Code as amended (the '**Commercial Code**'), which otherwise generally govern the recoverability of loss and damage in contract law.

The following terms are used in relation to the type of damage that is recognised in Slovak law: "actual damage"; "loss of profit"; and "non-material damage".

"Actual damage" is considered to be monetary damage, which consists of the reduction in value of the existing assets of the injured party and/or costs spent in order to remedy the situation or to offset the consequences resulting from it.

"Loss of profit" is understood as the loss incurred by the injured party by the loss of the reasonably expected profit gained in the ordinary course of business. Pursuant to the Commercial Code, the injured party may, in lieu of actual lost profits, claim compensation for profits made in fair business on terms similar to the terms of the breached contract within the sphere of activities in which the injured party conducts business.

"Non-material damage" is harm in the personal sphere of the injured party. The remedy does not seek to restore or provide financial compensation to the injured party for the actual monetary or material damage, but rather constitutes a certain fair alleviation of the abstract non-monetary and non-material consequences of the harm suffered.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Since the term "consequential loss" has no given meaning in Slovak law, it is also not used in contractual exclusion of liability clauses. The terms that are generally used in contract clauses are called the "exclusion of losses" or "loss of profit" clauses and do not include the term "consequential loss".

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There is no generally accepted definition or concept of consequential loss. The meaning attributed to the words "consequential loss" would depend on the interpretation of those words in a contractual exclusion clause.

There is no clear jurisprudence regarding the interpretation of the words "consequential loss" as this term is not commonly used in Slovak law. It would most likely be regarded as a type of "indirect loss", but there are also no clear guidelines on the interpretation of "indirect loss".

Consequently, parties should define "consequential loss" or "indirect loss" in the contract if those terms are to be used in exclusion clauses.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Lack of sufficient jurisprudence may constitute a problem in disputes arising in relation to a contract concluded under Slovak law containing an exclusion of liability clause referring to consequential loss or other common-law-based heads of loss, where the term is not defined in a detailed way.

Slovak legal doctrine indicates that contractual deviations from the statutory liability model cannot be interpreted extensively. The court would always need to examine what was the common intention of the parties and the aim of the contract rather than its literal meaning.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No, Slovak law generally allows an action for specific performance irrespective of the extent to which damages would or would not be recoverable.

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Slovenia

1. Do the words "consequential loss" have a given meaning in law?

No, the words "consequential loss" do not have a given meaning in Slovenian law.

The Slovenian Obligations Code *(Obligacijski zakonik,* '**OZ**') recognises the following types of damage as recoverable in contractual relations:

— ordinary damage *(navadna škoda)* – a diminution of property;
— loss of profit *(izgubljeni dobiček)* – a prevention of the appreciation of property, whereby only the profit that could justifiably have been expected given the normal course of events or given the special circumstances, but could not be achieved owing to the injurer's action or omission, shall be taken into consideration.

The OZ does not explicitly distinguish between direct and consequential damage or loss. However, it imposes liability on the party breaching the contract for damage incurred relating to assets of the innocent party because of a breach of contract. Under the respective provision, physical damage caused to any other property of the innocent party due to a material defect, affecting the subject of a contract, can be claimed by the innocent party. Such damage is classified as reflex (i.e. indirect) damage *(refleksna škoda)*.

When claiming the damage for breach of contract, the reimbursement of ordinary damage and loss of profit is limited to the extent that the debtor should have reasonably expected upon breach of contract as a potential consequence of the breach, considering the facts that were known or ought to have been known at the time of the breach.

In the event of fraud, intentional non-performance or non-performance owing to gross negligence, the creditor is entitled to claim the total damage incurred due to breach of contract (i.e. not only expected damage), irrespective of whether the debtor knew of the special circumstances that caused the damage or not.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

The words "consequential loss" are not commonly used in agreements governed by Slovenian law, as the term is not explicitly recognised and has no given meaning under Slovenian law.

Nevertheless, contractual exclusion of liability is common in commercial contracts in all industries including in the energy sector. The parties mostly exclude certain types of losses along with a liability cap. In addition, fairly often these clauses exclude loss of profit *(izgubljeni dobiček)*, or loss of income due to breach of contract. Moreover, the parties also exclude damages by referring only to damages recognised by statutory law (e.g. reasonably predictable and direct damage) or by including a list of examples of excluded loss (in addition to the general exclusion), such as:

- loss resulting from liability for employees
- damage to property
- product liability
- loss of profit
- loss of customers
- punitive damages
- lost profit
- damages to reputation or goodwill.

Alongside the exclusion of a type of damage, the contractual exclusion of liability clauses can also determine the maximum amount of compensation for damage incurred due to a breach of contract. These contractual provisions can be challenged, however, if the amount stipulated is clearly disproportionate to the damage or if it is stipulated differently by law for an individual case.

Nevertheless, no contractual exclusion of liability for intent or gross negligence can be agreed between the parties. Such a provision would be considered null and void. However, the court can also annul a contractual exclusion of liability for slight negligence if such an agreement derives from the breaching party's monopoly position or in any way from the unequal nature of the relationship between the parties.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As the term "consequential loss" is not explicitly recognised and has no given meaning under Slovenian law, no clear jurisprudence regarding the interpretation of the term exists.

In general, consequential loss is excluded from the legally recognised loss as set out under energy-related contracts governed by Slovenian law. For example:

— *Loss or Losses shall mean losses, liabilities, obligations, damages and reasonable costs and expenses (including, without limitation, reasonable attorneys' fees), but for avoidance of doubt excluding punitive damages, lost profit, damages to reputation or goodwill and consequential or indirect damages.*

The types of damage that may be excluded under a contractual exclusion clause including the words "consequential loss" would be decided by a court considering the following criteria:

— Should the breaching party reasonably expect the damage upon breach of contract as a potential consequence of the breach, considering the facts that were known or ought to have been known at the time of the breach;
— Existence of adequate causation, as interpreted by Slovenian practice and theory; and
— Common purpose (i.e. business interest) of the contracting parties pursued by the exclusion clause.

Each clause would therefore be interpreted on case-by-case basis. However, the following types of damage would most likely be excluded in any case:

— Reflex damage *(refleksna škoda)* – damage incurred to any other property of the innocent party due to a material defect affecting the subject to a contract;
— Trust damage *(škoda zaradi zaupanja)* – damage resulting from any property disposition of the innocent party, which was made based on the trust that the subject of a contract is defect-free or that the breaching party fulfilled the contract without default (e.g. transport costs, storage costs, installation costs). Trust damage is a type of an indirect damage and can only be claimed under the liability for material defect; and
— Ordinary damage *(navadna škoda)* and loss of profit *(izgubljeni dobiček)* if it meets the above criteria.

It is therefore difficult to state which damages would likely be excluded under Slovenian law as "consequential loss" and existing case law does not provide a clear interpretation of the term. The parties should thus explicitly define what meaning shall be attributed to the words "consequential loss" when using them in a contract. If they want to exclude recovery of specific damages, such as loss of profits and additional expenditure caused by an initial breach, they should make this clear either in the definition of "consequential loss" or by specifically excluding these losses separately.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Pursuant to the OZ, each contractual clause is to be applied as it reads. The meaning intended by the parties is of primary importance when interpreting the content of individual contractual clauses. Should the parties wish to use a term in the contract which is not explicitly recognised by law, it is therefore advised that they explicitly define its meaning.

If a clause includes a term explicitly recognised by law, the statutory meaning assigned to it shall apply unless the parties did not explicitly define otherwise. In the event that the term "consequential loss" used in a clause is not explicitly recognised by law and was also not explicitly defined in the contract and the parties to the contract attached different meanings to it, the court would apply the mandatory interpretative rule of the OZ. This rule stipulates that when interpreting contentious contractual terms, their literal meaning is not necessarily decisive, rather a common purpose (i.e. business interest) of the contracting parties ought to be pursued and the provision understood in accordance with the principles of the law of obligations set out in the OZ. In this case, the court would conduct an evidentiary process to determine what the parties actually agreed upon and whether the agreement meets the principles of the law of obligations (i.e. equality of participants in obligations, the principle of conscientiousness and fairness, due diligence, the prohibition of abuse of rights, the principle of equal value duty, prohibition of injury).

Where the substance of the contract is not the result of mutual negotiation and the contract was concluded in pre-printed content or the contract was otherwise prepared and proposed by one party, the unclear provisions should be interpreted in favour of the other party. The rule is intended to benefit the weaker party and intervenes in cases where the stronger party "forces" its will on the other party by excluding the possibility of modifying a pre-arranged contract.

Considering the foregoing, the meaning of the term "consequential loss" and any other heads of loss included in a clause alongside consequential loss, would differ on a case-by-case basis. Given the above rules, the court could attach a different meaning to it in each case.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

Generally, they do not. Under Slovenian law a non-damages claim (i.e. claim for performance of specific obligation) does not depend on the occurrence of damage or the extent of caused damage. However, the case law on this topic is not settled.

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South Korea

1. Do the words "consequential loss" have a given meaning in law?

The term "consequential loss", strictly speaking, is not a legal term used in Korean law. This expression does not appear in the Korean Civil Act ('**KCA**'), nor have the Korean courts given this phrase a particular and conclusive meaning.

However, there is a concept of "special loss" under Article 393(2) of the KCA.[1] It is worth noting that, historically, the terms "ordinary loss" and "special loss" used in Articles 393 (1) and (2) of the KCA each derive from Articles 416 (1) and (2) of the Japanese Civil Code, which in turn are known to have incorporated the concepts of direct loss (limb 1) and consequential loss (limb 2) set out in *Hadley v Baxendale* (1854) 9 Exch. 341.

Hence, although Korea does not have a concept of "consequential loss", it does have a concept of "special loss".

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

In the Standard Form for Construction Contracts (issued by the Korean Ministry of Land, Infrastructure and Transport), which is widely used for Korean domestic projects, there is no exclusion or limitation of liability clause. The phrase "consequential loss" (or "special loss") is not used in this standard form.

However, it is possible for the parties to add an exclusion clause as a special condition to this standard form under which liability for "consequential loss" may be excluded, although this is unusual in practice.

With respect to international projects, Korean contractors often follow or incorporate international standard forms (e.g. FIDIC forms) to their contract in which the words "consequential loss" are used in an exclusion or limitation of liability clause.

[1] Article 393 (Scope of Compensation for Damages) of the KCA states as follows:
(1) The compensation for damages arising from the non-performance of an obligation shall be limited to ordinary loss.
(2) The obligor is responsible for reparation for loss that has arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

It is likely that the Korean courts would construe the term "consequential loss" in an exclusion clause to have the same meaning as "special loss" under Article 393(2) of the KCA. It is reasonable to assume that the Korean courts will take into consideration the historical background and meaning of "special loss" (which derives from consequential loss) when construing the term "consequential loss" in an exclusion clause.

To the extent that "consequential loss" under Korean law is construed as "special loss" (under Article 393(2) of the KCA), the meaning of special loss needs to be ascertained. "Special loss" refers to "loss arising from individual or specific circumstances of either party to a contract."[2] This is different to the term "ordinary loss" which the Korean Supreme Court defines as *"in the absence of special circumstances, a loss which in the notion of general transactions or in light of the experience of the public at large is considered to arise normally as a result of a certain type of breach of contract."*[3] In practice, determining which type of loss falls under "ordinary loss" or "special loss" is a highly fact-specific task.

It should be borne in mind that if an exclusion clause is included in a standardised contract governed by Korean law which has been drafted or prepared by one party for the purpose of using the contract form with multiple parties, the Act on the Regulation of Terms and Conditions ('**ARTC**') applies. In such case, the ARTC mandates that such contract must be interpreted in light of good faith and fairness.[4] Further, the contract must be construed in favour of the customer if the meaning of the terms and conditions is not clear (*contra proferentem*).[5] If the ARTC applies, the Korean courts could, depending on the circumstances of each particular case, interpret the term "consequential loss" in an exclusion clause in a very strict and narrow way.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The general principles governing contract interpretation under Korean law are:

i. natural interpretation – the true and subjective intention of the parties underlying a contract provision.
ii. normative interpretation – engaged when natural interpretation fails, is where the objective meaning given to a contract is explored.
iii. supplementary interpretation – used as a gap-filling device under which the parties' common understanding of a certain matter is considered even if this has not been stipulated in the contract.

It should be noted that a special principle of construction applies to exclusion clauses under Korean law – the principle of "strict interpretation".[6] Strict interpretation generally refers to narrow interpretation, especially when the language of the exclusion clause is unclear or ambiguous.

It follows that specific heads of loss stipulated in an exclusion clause alongside consequential loss will likely be construed on their own merits in accordance with the contract interpretation principles set out above.

If, as stated in section 3, an exclusion clause is included in a standardised contract to which the ARTC applies, principles such as good faith, fairness and *contra proferentem* may be further engaged for the construction of an exclusion clause. In that case, the Korean courts could interpret the language of the clause in an extremely narrow manner.

[2] See Korean Supreme Court Judgment 2013Da66904 dated 27 February 2014; Korean Supreme Court Judgment 2009Da24842 dated 9 July 2009.
[3] Ibid
[4] ARTC, article 5(1).
[5] ARTC, article 5(2).
[6] Korean Supreme Court Judgment 93Da3103 dated 26 October 1993.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

4. **Specific performance:** Under Article 389(1) of the KCA, a party to a contract is entitled to seek an order from the court under which the breaching party to the contract is mandated to specific performance of its contractual obligation.[7] This remedy concerns the performance of a party's primary obligation under the contract (seeking damages would relate to a party's secondary obligation under the contract). A consequential loss exclusion clause, which limits the scope of recoverable damages, is unlikely to affect or restrict a party's primary obligation under the contract. Hence, it is unlikely that a consequential loss exclusion clause will have an impact on this remedy.

5. **Provisional injunction:** A provisional injunction order has the effect of preserving the *status quo* of the subject matter of the dispute up until a decision on the merits has been rendered by the court. A party seeking such order needs to establish that (i) a *prima facie* non-monetary claim against the other party exists, and (ii) there is a concern that a party is unable to or will have substantial difficulties in pursuing such claim if such order is not made.[8] Since a provisional injunction only concerns non-monetary claims, it is unlikely that a consequential loss exclusion clause, which limits the scope of recoverable damages, will have an impact on a party's right to this remedy.

6. **Provisional seizure:** A provisional seizure order has the effect of freezing the defendant's assets up until a decision on the merits has been rendered by the court. A party seeking such order needs to establish that (i) a *prima facie* monetary claim against the other party exists,[9] and (ii) there exists a concern that a party is unable to or will have substantial difficulties in the enforcement of its claim (at a later stage) if such order is not made.[10] Depending on the type of loss being sought by the claimant, a consequential loss exclusion clause could have the effect of negating the existence of *a prima facie* monetary claim. In those circumstances, a consequential loss exclusion clause could have an impact on a party's right to this remedy.

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[7] Article 389 (Compulsory Performance of Obligation) of the KCA states as follows:
"(1) Where an obligor fails to perform his/her obligation at will, the obligee may apply for compulsory performance thereof to a court: Provided, that this shall not apply where the nature of an obligation does not so permit.
(2)–(4) (intentionally omitted)"

[8] Article 300 (Purpose of Provisional [Injunction]) of the Civil Execution Act states as follows.
"(1) Provisional [injunction]s with regard to the objects of dispute may be effected where, if the existing situations are altered, the party is unable to exercise his/her rights, or there exists a concern about a substantial difficulty in exercising it.
(2) Provisional [injunction]s may also be effected in order to fix a temporary position against the disputed relation of right. In this case, such provisional [injunction]s shall be effected specially where intending to avoid a significant damage on a continuing relation of right or to prevent an imminent danger, or where other necessary reasons exist."

[9] Article 276 (Purpose of Provisional Seizure) of the Civil Execution Act states as follows.
"(1) Provisional seizure may be effected in order to preserve compulsory execution against the movables or immovables in respect of a monetary claim or a claim convertible into the money.
(2) (intentionally omitted)"

[10] Article 277 (Necessity of Preservation) of the Civil Execution Act states as follows.
"Provisional seizure may be effected where, unless such seizure is not effected, an execution of the judgment is impossible, or there exists a concern about the considerable difficulty in executing the judgment."

Switzerland

1. Do the words "consequential loss" have a given meaning in law?

The Swiss Code of Obligations ('**CO**') does not include a definition for the terms "consequential loss", "direct loss" and "indirect loss". Under Swiss law, losses are generally recoverable if they are caused by a breach of contract or a breach of law, and if they meet the test of adequate causation. Depending on the case, there is no liability if a party can prove that no fault (intent or negligence) is attributable to it. These and other principles regarding the recoverability of losses are governed by Articles 97 *et. seqq.* of the CO.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. Contractual exclusions of liability clauses for "consequential loss" as well as for "indirect loss" are common in commercial contracts, in particular in contracts written in English. The exclusion of certain types of losses, often combined with a limitation of the liability for gross negligence and fault or with a liability cap, is common among all industries.

Certain clauses only exclude specific "consequential loss", such as loss of profit or loss of production, while others explicitly exclude all or any "consequential and indirect losses".

Some clauses just exclude any "consequential and indirect losses". Other clauses combine the general exclusion of "consequential and indirect losses" with a non-exhaustive list of examples of excluded damages, such as:

— loss of profit
— loss of income
— loss of production
— loss of customers
— loss of business opportunities
— loss of contract
— loss of use
— loss of data
— additional financial costs.

In view of the lack of a clear legal definition of the terms "consequential loss" and "indirect loss", as well as the tendency of Swiss courts to interpret these terms narrowly, it is recommended to add, in addition to the general exclusion of "consequential and indirect losses", a non-exhaustive list of those losses which the parties particularly wish to exclude (e.g. loss of production and loss of profit).

Under Swiss law, in particular in business-to-business contracts, over-reaching limitation of liability clauses will not be entirely invalid, but only limited to the extent permitted by the mandatory Swiss law.

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As mentioned above, there is no legal definition of the terms "consequential losses" and "indirect losses" and Swiss courts generally interpret these terms narrowly.

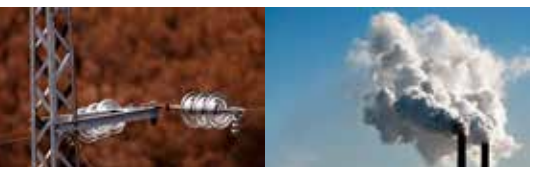
Regarding the term "indirect losses", some years ago, the Swiss Federal Supreme Court decided that the proximity of the causal link is the right criterion for distinguishing between direct and other losses.[1] However, this criterion is vague. In fact, in the case decided by the court, a pet owner bought a new parrot which suffered from a hidden disease. The parrot later infected all the other parrots owned by the purchaser and they subsequently died. According to the Swiss Federal Supreme Court, the death of the other animals qualified as a direct loss since the causal link between the disease of the purchased parrot and the infection of the other parrots was "sufficiently close".

In view of this very broad interpretation of the term "direct loss", excluding any "indirect losses" might not limit a party's liability as intended.

Regarding the term "consequential losses", the term is often used in case law and doctrine with respect to sales and work contracts, specifically with respect to the delivery of defective goods. The term refers to the damage to other goods of the purchaser which is caused by the defect of the goods delivered under the sales or work contract. Accordingly, in the example mentioned above, the exclusion of "consequential losses" would probably have excluded the liability of the seller for the death of the other parrots. With respect to other damages (e.g. a loss due to delay in delivery), the seller's liability will probably not be limited.

When it comes to agreements other than sales and work contracts, both "consequential loss" and "indirect loss", have no clear meaning. A Swiss court might conclude (as the Supreme Court did in a mandate agreement between a client and an architect[2]) that a clause excluding "indirect and consequential losses" is not sufficiently clear to go beyond the default rule of the CO, according to which liability is limited to those losses which have an adequate causal link to the damaging event.

Accordingly, if there is any doubt as to whether a particular loss will be caught by the mere exclusion of "indirect or consequential losses", a non-exhaustive list of specific categories of losses should be added to the wording.



[1] Decision no. 133 III 257 dated 28 November 2006.
[2] Decision no. 126 III 388 dated 18 July 2000.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

Due to uncertainty about the damages/losses that would actually be encompassed by an exclusion of "consequential and indirect losses", as mentioned above, parties often aim to specifically describe the types of losses they wish to exclude, often by including a list of examples.

If it is clearly stipulated that the list is not exhaustive, this should be accepted by the Swiss courts. However, for the reasons explained above, it might still be difficult to argue that, beyond the losses expressly listed, further losses fall under the categories of "consequential and indirect" losses.

In case of any ambiguity, the principle of in *dubio contra stipulatorem* applies unless a contract and its wording was duly negotiated between the parties.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No, Swiss law generally provides for an action for specific performance whether or not damages are recoverable.

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Turkey

1. Do the words "consequential loss" have a given meaning in law?

The words "consequential loss" do not have a given meaning under Turkish law. However, similar concepts and legal terms are known and used in Turkey; such as indirect loss *(dolaylı zarar)* or subsequential loss *(yansıma zarar)*.

Even these concepts and terms are not explicitly defined in the Turkish Code of Obligations No. 6098 ('**TCO**'), but rather recognised and developed in Turkey through doctrine and jurisprudence.

According to Turkish law, a compensation or indemnification *(tazminat)* requires, as a general rule, the following conditions which need to be fulfilled cumulatively: liability causing the act *(sorumluluğu doğruan fiil)*, fault *(kusur)*, causality *(illiyet bağı)* and damage/loss *(zarar)*.[1]

The term "consequential loss" may be described and recognised as an umbrella term encompassing any damage caused by direct loss. In this regard, direct loss could be described as the decrease of active acts or increase of liabilities *(fiili zarar)* as a result of a damaging event. Against this background an indirect, subsequent or consequential loss is generally recoverable if the condition of causality is met pursuant to Article 49 *et. seqq.* of the TCO.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, the words "consequential loss" are frequently used in the contractual exclusion of liability clauses in Turkey. Within the framework of the TCO, the parties may agree on the limitation or extension of their contractual liability at their own discretion. Consequently, as a general rule, parties can agree that each party may or may not be liable for consequential loss.

Furthermore, in addition to consequential loss exclusions, clauses concerning the exclusion of the contractual liability for (i) loss of profit; (ii) loss of reputation; (iii) loss of data; or (iv) loss of production are also frequently used in Turkey. Please note that such exclusion clauses usually do not define "consequential loss" or the above-mentioned terms but provide examples aiming to preclude any liabilities to the greatest extent possible.

However, such exclusion clauses shall not be invalid, unlawful or unenforceable under Turkish law. In this regard, Article 115(1) of the TCO, subtitled "Non-liability Contract Clause" *(sorumsuzluk anlaşması)*, deems contractual exclusion clauses which preclude liabilities based on (i) gross negligence and (ii) intention null and void:

[1] Oguzman/Oz, Borclar Hukuku, vol. 2, Istanbul, Vedat Kitapcilik, Ninth Edition, 2012, p.40.

Article 115 of the TCO – Non-liability Contract Clause:

"1. The contract clauses on exclusion of liability for gross fault [ağır kusur] in advance are void.

2. Any contract clauses on exclusion of obligor's liability towards the obligee for any obligations caused by service contracts in advance are void.

3. If a service, profession or art which requires specialisation can only be performed with the permission of the law or competent authority, the agreements on exclusion of obligor's liability for slight negligence in advance are void."

In practice, exclusion clauses which cover consequential losses are common in commercial contracts as well as in energy industry-related contracts governed by Turkish law, such as power purchase agreements ('**PPAs**') or energy saving contacts ('**ESCs**').

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

There is no uniformly accepted definition of "consequential loss" under Turkish law. As the term is still being developed based on doctrine and case law, it is not possible to clearly state what "consequential loss" means under Turkish law when used in a contractual exclusion clause unless it is expressly specified in the contract. Accordingly, the meaning attributed to the words "consequential loss" in contractual exclusion clauses must be determined on a case-by-case basis. In this respect the interpretation of the entire contract and the determination of the parties' real intention and will *(tarafların gerçek iradesi)* are essential in order to identify the meaning attributed to the words "consequential loss" in contractual exclusion clauses in Turkey. In the event of any doubt over the meaning of such exclusion clauses, either the contractual parties may agree on the scope and content of the clause or, in the event of a dispute, the competent court may provide a supplementary interpretation which will reflect as closely as possible the real intention and will of the contractual parties when agreeing on such an exclusion clause.

As mentioned above, "consequential loss" is an umbrella term and refers to direct losses pursuant to the TCO. In this regard, direct loss could be defined as the decrease of active assets or the increase of liabilities *(fiili zarar)* as a result of a damaging act. However, one approach would be that consequential loss may be deemed, according to Turkish law, as any damage arising from such a direct loss (e.g. loss of profit, loss of production, etc.). In a dispute, the competent court is expected to evaluate any claim within the framework of the contract and in line with the intentions of the parties when concluding the contract in question.

Furthermore, Turkey's legal system is adapted from the civil law system. The principle of stare decisis is not applicable as a general rule. For instance, the Turkish Court of Appeals *(Yargıtay)* rendered a decision, which is not accepted by some other courts, stating that the losses of third parties related to the claimant are also in the scope of indirect loss, even if the defendant does not directly cause harm to the third parties[2]. Accordingly, even though there are doctrines and case law, when deciding a case, courts are not bound by a previous decision regarding a similar case. Therefore, each case is specific to its own set of facts. This general rule under Turkish law would also apply to the meaning attributed to the words "consequential loss" in contractual exclusion clauses.

[2] Please see also the decision of Supreme Court Assembly of Civil Chamber's, Case No: 2012/17-215, Decision No: 2012/413, Date: 27.6.2012..

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The concept of "consequential loss" is not regulated or defined under Turkish law. Hence, where a clause includes other heads of loss alongside consequential loss, the legal approach – the approach of Turkish courts – is hard to predict precisely.

Under the principle of freedom of contract, if a clause includes other heads of loss alongside "consequential loss", it does not affect the effectiveness of the clause.

However, in the case of any inconsistency about the different type of losses and "consequential loss" that would be covered by an exclusion clause, each exclusion shall be interpreted on its own by considering the true intention and will of the parties at the time of signature of the contract. During this interpretation process, the competent court will evaluate every circumstance in light of the evidence submitted by the contracting parties in order to determine the extent of the exclusion clause including consequential loss and other heads of loss. In this respect, Turkish courts may appoint an independent expert or a group of experts *(bilirkişi heyeti)* in order to examine the case and submit a report regarding the respective exclusion clause.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

No, legal actions as to non-damages claims can be taken under Turkish law regardless of the existence of exclusion clauses. Therefore, consequential loss exclusion clauses will not affect the contractual obligation of specific performance *(aynen ifa)* or other non-damage claims under Turkish law.

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Ukraine

1. Do the words "consequential loss" have a given meaning in law?

No, the words "consequential loss" have no given meaning in Ukrainian legislation.

Under Article 22 of the Ukrainian Civil Code and Article 225 of the Ukrainian Commercial Code the damages recoverable at law include:

— "actual damages" *(realni zbytky)* – losses suffered due to destruction or damaging of property, as well as expenditures made to restore infringed rights.
— "lost income" *(upusschena vygoda)* – income that would have been obtained under usual circumstances if the person's right was not infringed.

To recover damages from the defaulting party the plaintiff needs to demonstrate that: (i) there has been a wrongdoing (e.g. breach of contract); (ii) the wrongdoing has led to the plaintiff suffering damages; (iii) there is a direct causal link between the wrongdoing and the damages; and (iv) the wrongdoing was the fault of the defaulting party.[1] There is a rebuttable presumption that the defaulting party is at fault, which means that the onus is on the defendant to show that he was not at fault for causing the damage.

There is no standalone concept of "consequential loss" in Ukrainian legislation. Some legal scholars sometimes refer to the concept of "indirect loss". In this context "indirect loss" is understood as loss which is related to the wrongdoing in an indirect and secondary way. In other words, "indirect loss" is the loss that lacks a direct causal link with the wrongdoing. However, "indirect loss" remains a purely theoretical concept, since the legislation does not recognise it as a standalone category of damages.

Generally, "indirect loss" is unlikely to be recovered at law. The longstanding approach of Ukrainian courts is that the plaintiff can recover damages from the defaulting party only if the damages are directly caused by the contractual breach. Lack of a direct causal link between the damages and the contractual breach precludes recovery.

The recovery of "indirect loss" based on a breach of contract (i.e. where the contract expressly provides that it is recoverable) is largely an unexplored area in Ukrainian law. There is no court practice rebutting or confirming the possibility of its recovery.

[1] Resolution of Supreme Court dated 21 May 2018 in case No 922/2310/17; Resolution of Supreme Court dated 27 March 2018 in case No 925/258/17.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes, as a matter of practice, contracts governed by Ukrainian law in energy, EPC and other industries sometimes incorporate clauses excluding liability for "consequential loss" or "indirect loss". Lost income is sometimes excluded as well. Examples of contractual terms include:

Example 1
"in no event shall any Party be liable for any […] consequential or indirect loss, cost, expense or damage."

Example 2
"[…] the liability of each Party to the other Party under or in connection with this Contract shall exclude liability for loss of profit, goodwill, business opportunity or anticipated saving and for indirect or consequential Damages."

Example 3
"Under no circumstances Party 1 shall be held liable for and shall be required to reimburse the indirect losses (including without the limitation lost profit and any consequential losses) as may be incurred by Party 2." [2]

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Ukrainian law contains no definition of the term "consequential loss" and there is no judicial guidance on how its meaning should be interpreted.

In principle, freedom of contract means that the parties may attribute any agreed meaning to "consequential loss" by clearly defining the term in the contract.

However, there is no cogent court practice regarding the interpretation or enforcement of contractual clauses dealing with "consequential loss", including clauses by which "consequential loss" is excluded from the scope of recoverable damages.

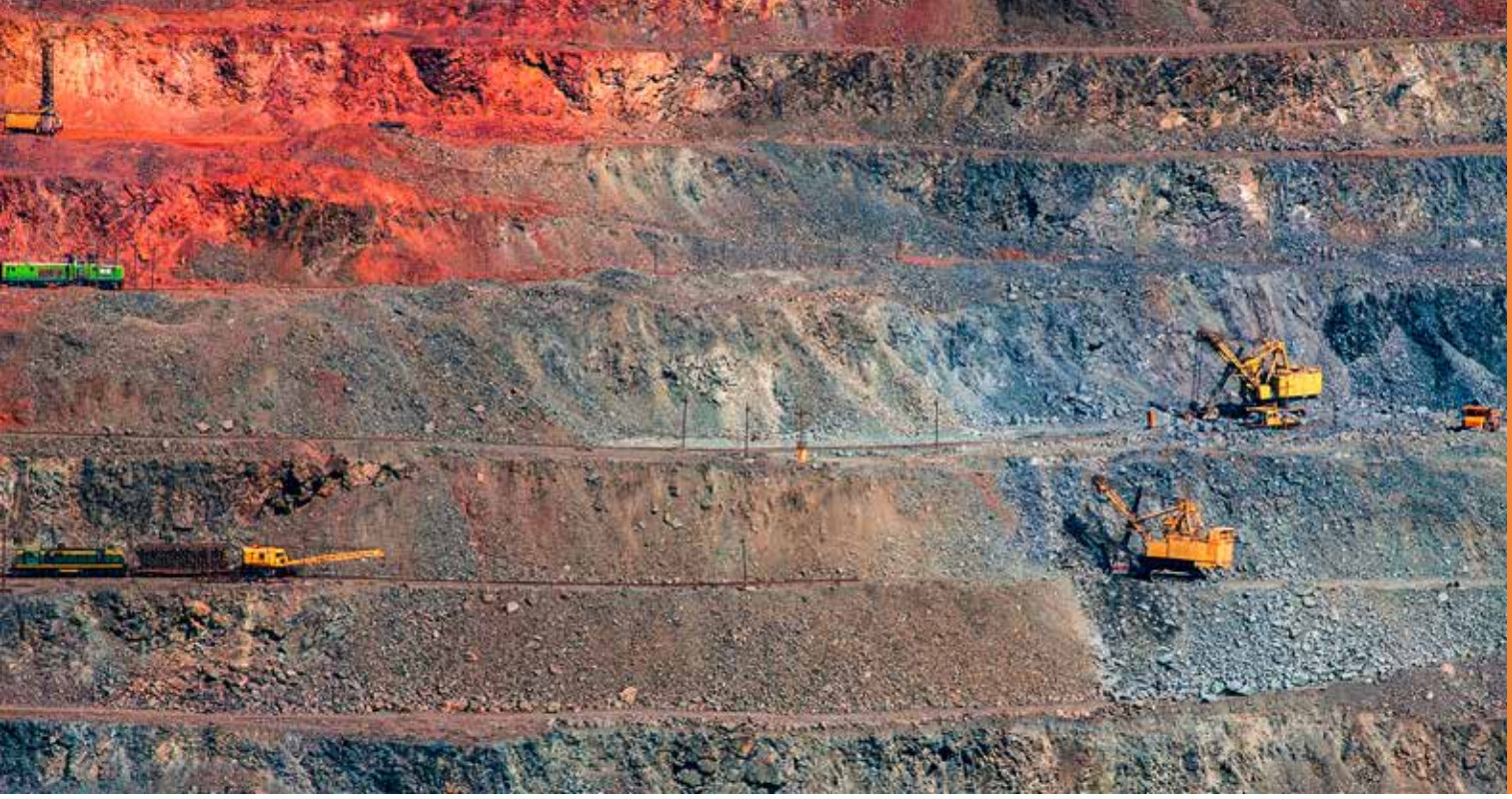
In theory, in a situation where the contract expressly excludes liability for "consequential loss", a Ukrainian court would likely refuse recovery of such loss. To substantiate such a refusal, however, the court would most likely rely on the absence of a direct causal link between the breach and the loss (which we understand is the case with "consequential loss") rather than on the exclusion of such a loss from the scope of recoverable damages under the contract.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

The legislation does not provide for any special treatment of contractual clauses listing other heads of loss alongside "consequential loss", including exclusion clauses.

Generally, under the principle of freedom of contract the parties can limit liability under the contract, by carving out certain categories of damages from the scope of recoverable damages, although there is no well-established court practice regarding the enforceability of such exclusion clauses under Ukrainian law.

[2] These are examples of contracts upon which CMS Ukraine has advised.



5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There are no laws or court practice specifically suggesting that the exclusion of "consequential loss" in a contract would contribute to the Ukrainian court's willingness to award any of the remedies typically available for non-damages claims.

In Ukrainian law there are several remedies that are broadly analogous to injunctions in the form that they are available in English law, such as:

— cessation of contractual breach.
— temporary injunctive relief from the court prohibiting the defendant from engaging in certain actions in breach of contract, pending the resolution of the dispute.

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United Arab Emirates

1. Do the words "consequential loss" have a given meaning in law?

The term is not defined under UAE law and is not treated consistently as a legal concept.

In this regard, UAE law distinguishes between direct and consequential (or indirect) harm. Article 283 of UAE Federal Law No. 5/1985 (the '**Civil Code**') provides that:

"(1) Harm may be direct or consequential;
(2) If the harm is direct, it must be unconditionally made good, and if it is consequential there must be a wrongful or deliberate element and the act must have led to the damage."[1]

Accordingly, pursuant to the Civil Code, a party that causes direct harm or loss is liable whether they acted deliberately or recklessly. However, a party that causes consequential harm or loss will only be liable if it can be shown that the party acted deliberately or wrongfully, and that those actions can be linked to the damage or loss.

Although the Civil Code appears to differentiate between direct and consequential loss, there is some uncertainty around the meaning of "consequential", as it is not defined in the Civil Code itself.

[1] Although Article 283 relates to torts, the UAE Courts of Cassation have held that the tort provisions of the Civil Code are similarly applicable to damage caused by a breach of contract.

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Exclusions for "consequential loss" are widely used throughout the UAE, including in the energy and construction sectors.

Contractual provisions that exclude consequential loss are generally enforceable under UAE law, subject to some exceptions. Article 31 of the Civil Code provides that a mandatory provision of law takes precedence over a contractual stipulation. Accordingly, and for completeness, certain types of damage cannot be excluded:

— personal harm or injury. Under UAE law, any contractual term purporting to exclude or limit liability for a harmful act to a person shall be void (Article 299 of the Civil Code);
— criminal liability;
— a harmful act i.e. a tort, including negligence (Article 296 of the Civil Code). This is a matter of public policy, to prevent people being less careful in what they do. Pursuant to Article 282 of the Civil Code, any harm done to another shall render the offender liable to make good the harm; and
— liability for fraud or "gross error" (Article 383 (2) of the Civil Code).

In addition, and in accordance with Article 880 of the Civil Code, construction contracts are subject to strict decennial liability for dangerous or structural defects that threaten a building's structure. In this instance, any attempt to exclude or limit decennial liability will be void (Article 882 of the Civil Code).

Examples of the types of clauses from infrastructure contracts are:

Example 1:
"No Party shall be liable to any other Party or Parties whether by way of indemnity or in contract or in tort for any indirect or consequential loss or damages or loss of profit, loss of use, loss of production or loss of contract or for any financial or economic loss whatever and howsoever caused."

Example 2:
"Neither party shall be liable to the other for any indirect and consequential losses or damages including loss of business and/or loss of profit."

Example 3:
"To the extent allowable under the law of the Subcontract, neither Party shall be liable to the other Party for loss of use of any Subcontract Works, loss of profit, loss of any contract, or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Subcontract other than under clause XX (Termination), clause XX (indemnities) and clause XX, provided that a liability to pay or allow delay damages shall not be considered as or be deemed to be liability for loss of profit, loss of any contract, or indirect or consequential loss or damage."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

As set out in question 1 above, the Civil Code does not provide a definition of "consequential loss".

What is meant by "consequential loss" when used in a contractual exclusion clause will then be a matter of contractual interpretation (to be applied at the discretion of the judge). To that end:

- Article 265 of the Civil Code states that if the wording of a contract is clear, it may not be departed from in order to ascertain the intentions of the parties. The intention of the parties is ascertained subjectively (unlike common law systems).
- However, in the event there remains doubt as to the true construction or interpretation of the relevant clause, Article 266 of the Civil Code provides that any doubt is construed in favour of the debtor. This is itself problematic as there can be difficulties in ascertaining who the debtor is.
- Accordingly, where contracting parties have expressly referred to "consequential loss" in an exclusion of liability clause, and clearly defined what the term includes, that definition is likely to be accepted by a court or tribunal applying UAE law unless it is considered to be unlawful or unfair. If there is debate as to the correct interpretation of the clause, the judge is likely to consider the subjective intention of the parties.
- Where consequential loss is not defined, a court applying UAE law will likely approach the interpretation of consequential loss in the manner set out in question 1.

It is therefore advisable to clearly define the term consequential loss to avoid potentially unintended interpretations.

The exceptions to enforceability in 2 (above) will also apply.

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

It is generally accepted in the UAE that the contract is the law of the parties and the courts will therefore look to uphold the contract unless it considered to be unlawful, unfair or conflicts with public policy, decency or a mandatory provision of UAE law (see Article 257 of the Civil Code).

Therefore, contracting parties are entitled to list the heads of loss which a party is entitled to recover, including alongside consequential loss.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

There is nothing in UAE law which says that the exclusion of consequential loss impacts on non-damages claims.

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United States of America

State of New York

1. Do the words "consequential loss" have a given meaning in law?

Yes. As explained below, the words relate to the second limb of the test for recoverable damages originally set out in the English case of *Hadley v Baxendale*[1] (see England Chapter) as subsequently adopted in New York law.

As far back as 1894, the United States Supreme Court accepted *Hadley v Baxendale* as *"a leading case on both sides of the Atlantic"* concerning the recoverability of losses.[2] *Hadley v Baxendale* has been *"cited with approval by the highest court in 43 states"*, including New York, and it has since been referred to by academic commentators as *"recognised in American jurisprudence as the definitive source of determining when consequential damages may be recoverable for breach of contract"*.[3]

The Restatement (Second) of the Law of Contracts broadly follows the structure of *Hadley v Baxendale* – although not articulated in entirely the same manner:

1. *"Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."*
2. *"Loss may be foreseeable as a probable result of a breach because it follows from the breach*
   a. *in the ordinary course of events, or*
   b. *as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."*

[1] (1854) 9 Exch 341.
[2] Primrose v Western Union Tel Co, 154 US 1 (1894).
[3] Diamond and Foss, 'Consequential Damages for Commercial Loss: An Alternative to Hadley v Baxendale' (1994) 63 Fordham Law Review 665.

The commentary to the Restatement (Second) of the Law of Contracts explains that *"in the ordinary course of events means: 'Such loss is sometimes said to be the 'natural' result of the breach, in the sense that its occurrence accords with the common experience of ordinary persons. The damages recoverable for such loss that results in the ordinary course of events are sometimes called 'general' damages."* It goes on to say: *"The damages recoverable for loss that results other than in the ordinary course of events are sometimes called 'special' or 'consequential' damages. These terms are often misleading, however, and it is not necessary to distinguish between 'general' and 'special' or 'consequential' damages for the purpose of the rule stated in this Section."*[4]

In relation to a buyer's damages for goods accepted in a sale and purchase arrangement, the New York Uniform Commercial Code states that "consequential damages" may be recovered in a "proper case" and that: *"Consequential damages resulting from the sellers breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise"*.[5]

2. Are the words "consequential loss" used in contractual exclusion of liability clauses?

Yes. The words "consequential loss" are widely used in exclusion clauses in the energy and other sectors. For example:

International Association of Drilling Contractors – Daywork Drilling Contract
"14.12. Consequential Damages: Subject to and without effecting the provisions of this Contract regarding the payment rights and obligations of the parties or the risk of loss, release and indemnity rights and obligations of the parties, each party shall at all times be responsible for and hold harmless and indemnify the other party from and against its own special, indirect or consequential damages, and the parties agree that special, indirect and consequential damages shall be deemed to include, without limitation, the following: loss of profit or revenue; costs and expenses resulting from business interruptions; loss of or delay in production; loss of or damage to the leasehold; loss of or delay in drilling or operating rights; cost of or loss of use of property, equipment, materials and services, including without limitation those provided by contractors or subcontractors of every tier or by third parties. Operator shall at all times be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier from and against all claims, demands and causes of action of every kind and character in connection with such special, indirect or consequential damages suffered by Operator's co-owners, co-venturers, co-lessees, farmers, farmees, partners and joint owners."

A.A.P.L. Model Form 710-2002 (Model Form of Offshore Operating Agreement)
"19.7 Damage to Reservoir, Loss of Reserves and Profit Notwithstanding any contrary provision of this Agreement, other than articles 10.8.6 and 11.8.6, if selected, no Party is liable to any other Party for damage to a Reservoir, loss of Hydrocarbons, loss of profits, or other consequential damages, damages for business interruption, or punitive damages, except to the extent that the damage or loss arises from a party's gross negligence or willful misconduct, in which case that Party shall be solely responsible for damage or loss arising from its gross negligence or willful misconduct; nor does a Party indemnify any other Party for that damage or loss."

[4] The Restatement (Second) of the Law of Contracts, 351, Comment b.
[5] 2-714 to 2-715.

North American Energy Standards Board – Base Contract for Sale and Purchase of Natural Gas

"For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages shall be the sole and exclusive remedy. A Party's liability hereunder shall be limited as set forth in such provision, and all other remedies or damages at law or in equity are waived. If no remedy or measure of damages is expressly provided herein or in a transaction, a party's liability shall be limited to direct actual damages only. Such direct actual damages shall be the sole and exclusive remedy, and all other remedies or damages at law or in equity are waived. Unless expressly herein provided, neither Party shall be liable for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages, by statute, in tort or contract, under any indemnity provision or otherwise. It is the intent of the parties that the limitations herein imposed on remedies and the measure of damages be without regard to the cause or causes related thereto, including the negligence of any party, whether such negligence be sole, joint or concurrent, or active or passive. To the extent any damages required to be paid hereunder are liquidated, the parties acknowledge that the damages are difficult or impossible to determine, or otherwise obtaining an adequate remedy is inconvenient and the damages calculated hereunder constitute a reasonable approximation of the harm or loss."

3. If so, what meaning is attributed to the words "consequential loss" in contractual exclusion clauses?

Judicial precedent on the interpretation on the meaning of "consequential loss" in contractual exclusion clauses is controversial and, arguably, not always consistent.

In New York law, there is no 'bright line' between "direct loss" and "consequential loss". Any such approach would violate the case-specific approach of New York law.

There are various New York court precedents on whether loss of profits amounts to excluded consequential loss. The distinction at the heart of many such cases decided by the New York courts is whether the lost profits flowed directly from the contract itself or were, instead, the result of a separate agreement with a non-party (see *Tractebel Energy Mktg. v.* AEP Mktg. (487 F3d 89, 109 [2d Cir2007])). In most cases the second category is considered to be "consequential loss". The logic of this approach flows from *Hadley v Baxendale*: If the loss flows specifically from a separate agreement, it will usually require some form of special knowledge (or "reason to know") of the terms of that separate contract by the breaching party to create a liability in damages for losses flowing – which makes it "consequential loss".

However, where the very nature of the contract itself establishes that the loss in question must be known to the breaching party, New York law considers loss of profits to be direct loss. For example, in *Biotronik AG v Conor Medsystems Ireland Ltd* ('**Biotronik**')[6] the New York Court of Appeal was required to consider a clause in a distribution agreement that excluded: *"any indirect, special consequential, incidental or punitive damage"*. The issue was whether a loss of profits under a separate onward sale agreement between the innocent buyer and a third party were excluded. Interestingly, the price the innocent buyer was to pay to the breaching seller was based on the pre-agreed on-sale price between the buyer and the third party. As such, the majority of the New York Court of Appeal decided the price under the separate agreement formed part of the contractual arrangements and resulted in a "direct loss" as it was a loss that ordinarily flowed from the breach.

Arguably, the reasoning in *Biotronik* would support a proposition that "consequential loss" shall be construed to mean the second limb of *Hadley v Baxendale* as restated in The Restatement (Second) of the Law of Contracts.

[6] 2014 WL 1237154 (NY 27 March 2014).

4. Where a clause includes other heads of loss alongside "consequential loss", how will the law approach such clauses?

In *Biotronik* the majority of the New York Court of Appeal took the following approach to interpreting a consequential loss exclusion clause:

1. First, does the clause specifically preclude recovery of the loss claimed, or explicitly define the item as excluded "consequential damages"?
2. Second, if not, it is necessary to consider precedent for guiding principles to assist in determining whether, under the agreement in question, the losses claimed are general ("direct") damages and therefore recoverable.
3. Third, the distinction between general and consequential/special contract damages is well defined, but its application to specific contracts and controversies is usually more elusive.
4. Fourth, New York law adopts a case-specific approach to distinguish general damages from consequential damages.
5. Finally, any distinction sourced solely from precedent should be viewed cautiously, as any attempt to establish a 'bright-line rule' violates New York law's case-specific approach.

New York law will not permit an exclusion clause that seeks to exclude liability for harm wilfully inflicted or caused by gross or wanton negligence.

5. Do "consequential loss" exclusion clauses have an impact on non-damages claims?

New York courts have the discretion to grant preliminary injunctions. The movant for such an injunction must show: (i) probability of success on the merits; (ii) irreparable harm absent the injunction; and (iii) the balance of the equities favouring the relief sought.

It is possible to see arguments as to how the existence of a "consequential loss" exclusion clause, where all of the losses suffered fell within the scope of the exclusion, might impact: the existence of "irreparable harm" and "the balance of the equities". The movant would doubtless argue that absent the injunction it may be left with no remedy, which would be "irreparable harm" and "inequitable". The party responding to the motion would doubtless argue "irreparable harm" and "inequality" cannot occur when the movant receives the remedy (or lack thereof) for which it bargained.

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