

Count us out?

When exculpatory clauses work, and when they don't

by Marvin Huberman

Contracts often contain exculpatory provisions. Also known as exclusion, exemption and escape clauses, disclaimers, waivers, no-reliance and no-representation clauses, these contractual provisions address what's excluded from a contract or other legal obligation, confine liability to what flows from the written contract and preclude or limit liability from other sources.

Over the years, great efforts have been made in the courts to attack exculpatory provisions so as to avoid them or reduce their legal effect. Many such provisions have been successfully attacked using arguments like:

- there's been a fundamental breach of contract and, therefore, the exculpatory provision is inoperative;
- the exculpatory provision isn't applicable in the circumstances. These rules include the principles that exculpatory provisions are to be strictly interpreted and, in cases of ambiguity or doubt, the contract is to be interpreted against the person who inserted and relies on the ambiguous provision;
- the exculpatory clause is unenforceable since the party bound by it wasn't given proper notice and was unaware of its terms;
- it's unenforceable because it was misrepresented; and
- because it is repugnant to an oral collateral contract.

However, exculpatory provisions often survive an attack and are upheld and enforced by the court. A recent example of this is the case of Rankin Construction Inc. v. Her Majesty The Queen in Right of Ontario, a decision of the Ontario Superior Court of Justice released in 2013. This case involved tendering for a contract for the widening of a portion of highway 406 in the Ontario Niagara Region. The plaintiff ("Rankin"), an experienced contractor, was the low bidder but the defendant, The Crown ("MTO"), awarded the contract to a competitor with the second lowest tender price, ruling that Rankin's tender was non-compliant with the tender documents. Rankin sued MTO for damages representing its lost profits on the contract, claiming MTO breached its duties by wrong-

fully ruling its tender to be non-compliant and awarding the contract to a competitor with a higher tender price.

MTO said it could disqualify Rankin's bid because it was non-compliant with the tender documents and on the basis of an exculpatory clause in the instructions to bidders, by which Rankin waived the right to claim damages with respect of the non-acceptance of any tender. The court addressed two main issues:

- did Rankin's failure to properly disclose the value of imported steel constitute non-compliance with the tender documents?; and
- was Rankin's claim barred by the exculpatory clause in the instructions to bidders?

The court found Rankin's failure to include the imported H-Piles in its "declared value of imported steel" was non-compliance with the tender documents. For the second issue, the court considered the exculpatory clause in the instructions to bidders, which read:

"The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender, or by reason of any delay in the acceptance of a Tender, except as provided in the Tender documents."

Applying the Supreme Court of Canada's analytical framework discussed in its leading decision in *Tercon*, the court addressed the following questions:

- whether the exclusion clause applies to the circumstances, which will depend on the court's assessment of the intention of the parties as expressed in the contract;
- whether the exclusion clause was unconscionable when the contract was made, as might arise from situations of unequal bargaining power between the parties. This second issue has to do with contract formation, not breach; and
- if the exclusion is held to be valid and applicable, the court can do a third inquiry, namely, whether the court should refuse to enforce the valid exclusion clause if there's an overriding policy that outweighs the strong public interest in enforcing the contract.

The court held that on the evidence the exculpatory clause applied to the circumstances; that the exculpatory was not unconscionable at the time the Contract A was made, assuming Rankin's tender was compliant; and that there was no overriding public policy justifying the court's refusal to enforce the exculpatory clause.

The Court also concluded that, even if MTO breached the tender terms by disallowing Rankin's bid, Rankin's claim is barred by the exculpatory clause in the instructions to bidders. In this case, the exculpatory clause really worked.

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