SQUIRE PATTON BOGGS

Compare and Contrast
Effectiveness of Risk Allocation Clauses in the US

First things first – Although this section covers the US generally, there is no single "US law" covering contractual risk allocation issues. Each of the 50 US states has its own discrete laws governing commercial contacts and those laws can vary significantly from one state to the next. This section gives some broad comments on the law as it generally stands across a number of different US states. One should always check with local counsel in the specific state whose law governs the contract in question, as there is no "one-size-fits-all" approach to contractual risk allocation in the US. This section also covers construction contracts in the traditional sense, i.e. contracts for the supply of services rates than goods, and so does not consider application of the Uniform Commercial Code to any risk allocation measures.

General principles – A contract clause that limits the liability of one party to another will commonly be valid and enforceable in the US, although such clauses are construed narrowly against the party seeking to rely on them. There are, however, a number of exceptions where such clauses will be invalid, either due to statute or on public policy grounds. Statutory restrictions on such clauses are particularly prevalent in relation to construction contracts and consumer protection. While these exceptions to enforceability vary from state to state, at a high level it can be said that the following clauses will be found void and unenforceable:

- Clauses which attempt to limit damages for gross negligence, intentional wrongdoing, fraud or willful and wanton misconduct
- Clauses which are unconscionable (either through the circumstances surrounding their adoption or the fairness of the clause itself) or the result of a significant inequality of bargaining power

Conspicuousness – In some states, certain limitation clauses, particularly those couched in terms of an indemnity in favor of a party against its own negligence, will only be effective if they pass the test of being "conspicuous." What does that mean? There is no uniform, bright-line test, but examples of drafting that has satisfied the conspicuousness test include a clause in "ALL CAPITALS," when the remaining contract text is in sentence case. (As an aside for the non-US lawyers, that is why you will often see certain clauses in US contracts written in all-caps – it is an enforceability issue.) As a practical tip, it has been held that if a clause is printed in such a small font that it is illegible, it does not matter how much it stands out from the remainder of the document, it will not operate as a valid limitation or exclusion.

Specific examples – The US position on enforceability of some of the more commonly encountered risk allocation terms is as follows:

Risk Allocation Mechanism	Position in the US
(a) Caps on liability	For the most part contractual caps on liability will be enforced across the US states, subject to the general principles set out above.
(b) Exclusions of liability	A full exclusion of a recognized category of liability (such as indirect and consequential loss) will also generally be enforceable, subject to the same exceptions set out above. However, when faced with such an exclusion the courts in a number of US jurisdictions will construe such clauses narrowly and strictly against the party seeking to rely on them.
(c) Use of indemnities	Indemnity provisions are used commonly in US commercial contracts to provide a contractual remedy beyond the right to seek contribution for another party's negligence at common law. Indemnity clauses will generally be enforceable, although the courts will construe a contractual indemnity strictly against the party seeking to take the benefit of it and the terms of the indemnity must be clear and unambiguous. Subject to statutory restrictions (which are prevalent in the construction sector), a clause providing for a party to be indemnified against its own negligence will generally be valid, but must be expressed in plain and unmistakable terms within the four corners of the contract.

(d) Use of time bar provisions	Subject to modification by statute, parties are generally free to establish contractual limitations on commencing proceedings that are shorter than the limitation periods otherwise imposed by law, provided that such periods are not so unreasonably short so as to be contrary to public policy. State statutes will often expressly forbid clauses that seek to reduce the limitation period below a floor set by legislation (often two years). Some states prohibit any contractual reduction of the applicable limitation statutes.
(e) Exclusive remedies provisions	Exclusive remedy clauses will generally be upheld in the US, although there are certain limitations and mandatory drafting in certain contexts – e.g. for the sale of consumer products.
(f) Acceptance of work	A clause may provide that the owner, by accepting and occupying the work, waives all claims against the contractor. Such clauses are capable of being enforced in certain jurisdictions, although a common pre-condition is that the owner accepted the work with knowledge of existing defects.

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