Corporate & Commercial

CDH INCORPORATED

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SOUTH AFRICA

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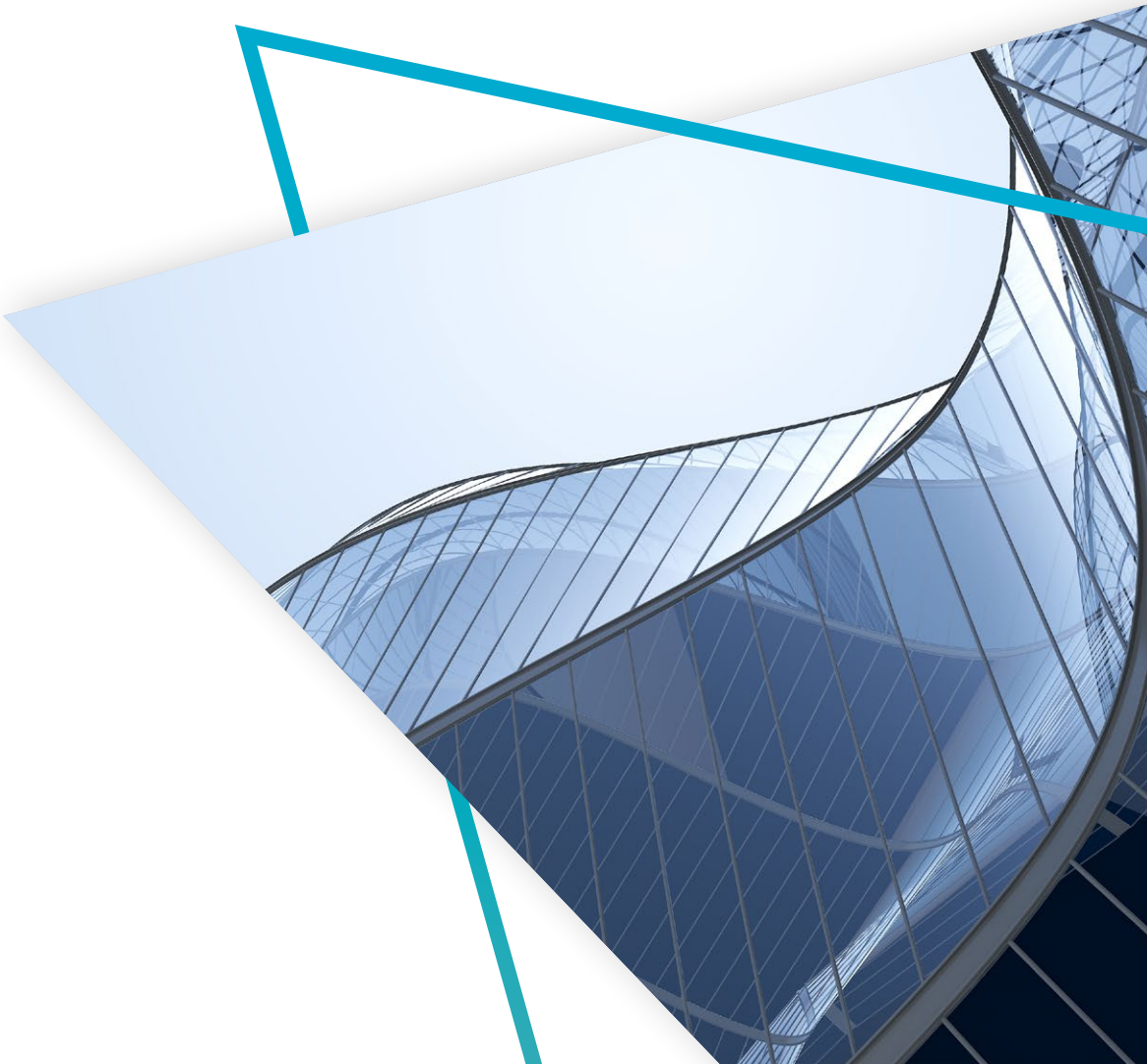

Know your limitations: Lessons from English case law on limitations of liability

Managing risk and allocating liability forms the focal (and sticking) point of many agreements, whether transactional (e.g. a sale) or relationship-based (e.g. a services agreement). A limitation of liability clause may be used to limit a party's liability in numerous ways, whether by time, amount or nature. Not only should a limitation of liability be carefully negotiated – it should also be carefully worded to ensure its interpretation aligns with the parties' agreed principles. The English case of *Drax Energy Solutions Limited v Wipro Limited* [2023] EWHC 1342 (TCC) highlighted the importance of the wording used in a limitation of liability. The similarities between the rules of interpretation in England and South Africa allow significant lessons to be gleaned from the case.

Background

Drax Energy Solutions Limited and Wipro Limited entered into a master services agreement (MSA) whereby Wipro provided software services to Drax. After numerous issues in the relationship, Drax ultimately terminated the MSA and brought several claims against Wipro. The crux of the ensuing litigation was the interpretation of clause 33.2 of the MSA, a limitation of liability provision, that stated:

> *"Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year, then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months."*

Interpreting the limitation of liability

According to Wipro's construct of clause 33.2, a single aggregate cap applied to Wipro's liability for all claims made by Drax. Drax, on the other hand, interpreted clause 33.2 as providing for multiple claims with a separate cap applying to each of Drax's claims. Three issues were considered to determine the applicable construct.

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1. The wording used

The actual words used in a clause are the cornerstone of its interpretation. Wording in clause 33.2 that favoured a single cap construct included "*Supplier's total liability to the Customer*" and "*shall be limited to*". To strengthen this interpretation, the parties could have also used wording such as "*aggregate*" and "*for all and any claims*", although they omitted to do so. On the other hand, the wording "*the claim first arose*" suggested that limitation would apply to each claim that had arisen, thereby favouring the multiple cap construct. However, if the multiple cap construct was intended to apply, the parties could have also included wording such as "*when the first [of various] claim[s] arose*" and "*per claim*" or "*per event*". Overall, the actual words used suggested a single cap construct.

2. Wording used in other clauses

The wording used in other clauses can provide context that reveals the intention behind the wording used by a party in a particular clause. Another subclause in the limitation of liability used the additional wording that clearly favoured a single cap construct. The omission of this wording from clause 33.2 may have suggested an interpretation of clause 33.2 that aligned with the multiple cap construct. However, the court was reluctant to lean too much on the context, as it found that neither of the clauses were particularly well-drafted nor did they form a coherent collection of clauses. It appeared the clauses were drafted at different times or were precedents from different agreements.

3. Commercial considerations

In both South African and English law, interpretation is an objective process that prefers arriving at an interpretation that is sensible and businesslike, while simultaneously resisting any urge to substitute the actual words used with what a judge considers to be sensible and businesslike. Drax suggested that a single cap construct would have uncommercial results in light of the relationship contemplated in the MSA. In essence, the MSA contemplated an ongoing relationship that could exist over an indefinite period of time and involve the provision by Wipro of services to more than one entity in the Drax group and also in respect of future agreed projects. However, the court found that the single cap construct was not commercially absurd or insensible, and therefore Drax's argued commercial considerations could not overturn the interpretation that was suggested by the language.

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Lessons from the Drax Energy case

The court ultimately applied the single cap construct. Given the similarities between interpretation principles in English law and South African law, it is not unimaginable that a South African court would have arrived at a similar decision. Therefore, the Drax Energy case provides the following lessons:

- Limitation of liability clauses must be worded clearly in alignment with their intended construct. Certain key words and phrases will materially affect the interpretation of the clause, and parties should be careful to include or omit them.
- All the clauses forming part of a limitation of liability provision should be cohesive and transaction specific. Mismatched or generic clauses may lead to unfavourable contradictions and vagueness during the interpretation process.
- Parties must carefully consider the commercials of the agreement when negotiating the principles of a limitation of liability. Agreements that contemplate an ongoing or indefinite relationship may require multiple caps to apply (e.g. one cap per time period) while agreements that are more transactional in nature may require a single cap to achieve a clean break. The commercials should guide the drafting, and not be relied upon to overturn the actual wording used if litigation ensues.

Roxanna Valayathum and Keagan Hyslop

Eskom clarifies the issue of *"curtailment"* for IPPs

In January 2024 Eskom published the much-anticipated addendum to the Generation Connection Capacity Assessment (GCCA) (Addendum). The Addendum was first mooted in the GCCA 2025 published in October 2023 (GCCA 2025). It is intended to provide clarity in respect of Eskom's proposal in the GCCA 2025 to use *"curtailment"* to address the challenges of limited available grid capacity faced by independent power producer (IPP) projects in the Eastern, Western and Northern Cape (the provinces).

The concept of curtailment is not new. It has been applied in power purchase agreements under Eskom's Renewable Independent Power Producer Programme, bid windows (BW) 1–6. It is a mechanism used to balance the supply and demand of energy via the national grid. This said, the definition of *"curtailment"* was amended for BW 4–6. The amendment saw the insertion of additional wording to exclude specific events or circumstances from the definition. The amended definition reads as follows:

> *"Curtailment means any instruction from the system operator to limit or reduce the energy output of the facility,* ***but excluding, for the avoidance of doubt, any such instruction given when there is a constraint on the system due to planned or unplanned maintenance, refurbishment, modification, extension or development being carried out on or to the system****"* (exclusions).

Under BW 1–6, curtailment is included in the definition of *"system event"*, in terms of which the remedies or relief available to a curtailed IPP project include the right to claim for deemed energy payment, for the energy output which could have been delivered, but for the instruction to curtail. Despite this right to claim being available for curtailing, the trigger for deemed energy payment is subject to the unavailability of the grid due to the system event being in excess of the allowable grid unavailability period (AGUP). As such, if the unavailability period arising from the system event is less than the AGUP, no deemed payment could be claimed or be payable.

A 10% curtailment allowance

Whereas for BW 1–6 curtailment was uncapped and therefore a potential revenue loss for any seller of energy output, in BW 7 the introduction of the 10% curtailment as per the Addendum, creates a cap on curtailment. In addition, the AGUP concept, before a claim for deemed energy payments arises, has been deleted. The result is that IPPs are entitled to receive deemed energy payments (not subject to the AGUP) during a system event which includes a period of curtailment. The net effect is revenue loss arising from curtailment up to the 10% threshold, but a grid unavailability period for other system events is no longer applicable.

In addition to the above, according to the Addendum, Eskom notes the following regarding curtailment:

> *"i. Curtailment is defined as the controlled reduction of the output of renewable energy plants as a system operator response to transmission capacity constraints.*

Eskom clarifies the issue of *"curtailment"* for IPPs

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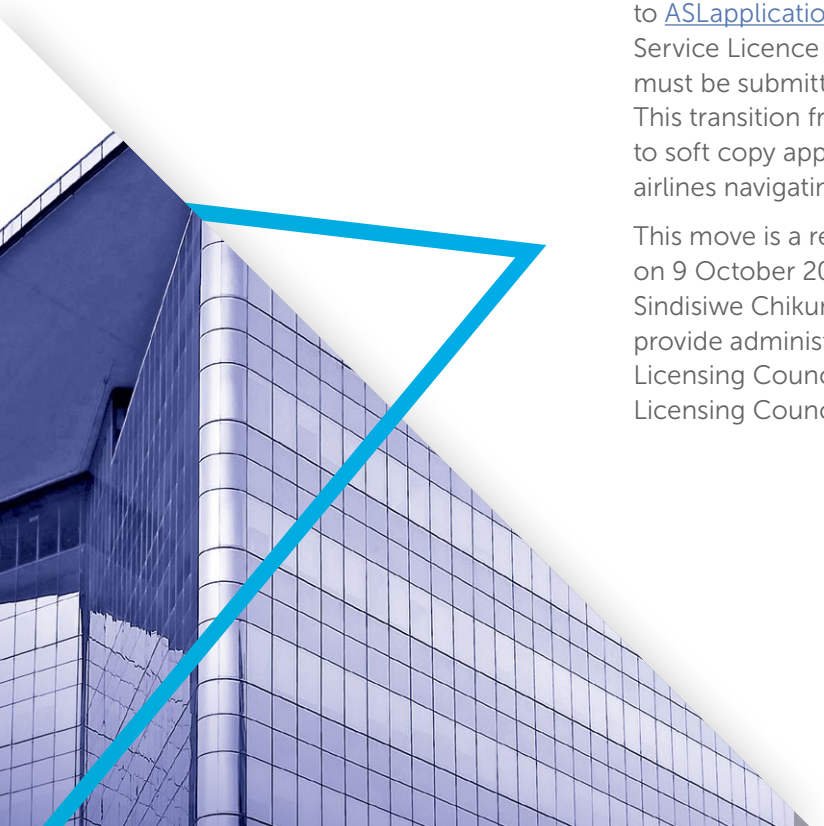
ii. When the grid limit is reached, any further increase of generation in the supply area leads to grid congestion. In such cases, and in order to remove the congestion, generation has to be reduced. Curtailment therefore maximises use of the existing grid and increase generation connection capacity..."

Accepting the Addendum and amendment to the definition of curtailment in the BW 7, the amended definition incorporates the exclusions. Mindful of paragraphs (i) and (ii) above, and given Eskom's view on curtailment, it may become necessary to define the exclusions more precisely to avoid a situation where a claim is made, but for a wide interpretation of the exclusions to be followed and therefore, unintentionally, the curtailment instruction included in the exclusions listed. As a result, deemed payments are thus not payable.

That said, according to Eskom, within the provinces the benefits of curtailment are significant. Time will tell whether such optimism is well founded and whether the 10% curtailment right held by Eskom (in lieu of the removal of the AGUP) constitutes a similar or reduced risk for the various stakeholders involved in such transactions, or whether it will lead to a shift in risk appetite, requiring additional mitigations tools before IPPs decide to invest in IPP programmes.

Andrew van Niekerk, Tsele Moloi and Khutso Mongadi

Skyward shift: Modernising air service licensing in South Africa



In a move geared towards enhancing the efficiency of air service licensing in South Africa, local operators' air service licence applications and foreign operators' permit applications will now be submitted electronically to the South African Civil Aviation Authority (SACAA) for processing.

As of 1 February 2024, all Foreign Operator Permit (FOP) applications must now be submitted electronically through the SACAA's newly introduced eServices portal (https://fop.caa.co.za/). Similarly, for South African operators, all domestic Air Service Licence applications and related amendments must be submitted via email to ASLapplication@caa.co.za, while international Air Service Licence applications and related amendments must be submitted via email to IASapplication@caa.co.za. This transition from the submission of physical applications to soft copy applications signifies a welcome change for airlines navigating the licensing process.

This move is a result of the Ministerial Order issued on 9 October 2023, by the Minister of Transport, Sindisiwe Chikunga, which mandates the SACAA to provide administrative support to both the Air Service Licensing Council (ASLC) and the International Air Service Licensing Council (ISLC). Additionally, it entrusts the SACAA with oversight of FOP processing, a responsibility previously held by the Department of Transport: Aviation. Undoubtedly, this development marks a pivotal shift in the regulatory landscape of South Africa's aviation industry.

Foundation for streamlined administration

The Ministerial Order was promulgated in terms of section 100 of the Civil Aviation Act 13 of 2009, section 9 of the Air Services Licensing Act 115 of 1990 and section 10 of the International Air Services Act 60 of 1993. Underpinning this directive is a four-party memorandum of understanding concluded between the Department of Transport, the ASLC, the ISLC and the SACAA which aims to establish a solid foundation for the streamlined administration of air service licensing processes.

Under the new framework, the ASLC and ISLC will continue to process and approve applications for new and amended air service licences, while the SACAA will provide vital administrative support to ensure the seamless processing of these applications. This support encompasses tasks such as receiving applications, conducting technical assessments, and publishing relevant notices within prescribed timeframes.

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Skyward shift: Modernising air service licensing in South Africa

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One of the achievements following the Ministerial Order is the introduction of the SACAA's automated system, which is being rolled out through a phased approach. The first phase, initiated on 1 February 2024, focuses the processing of foreign operators' permits through the eServices portal. At a press briefing on 5 March 2024, the Minister of Transport confirmed that the next phase is underway and is aimed at automating the submission and processing of both domestic and international air service licences. In the interim, the SACAA has provided clear guidance to the industry on how air service licence applications will be processed until full automation is implemented.

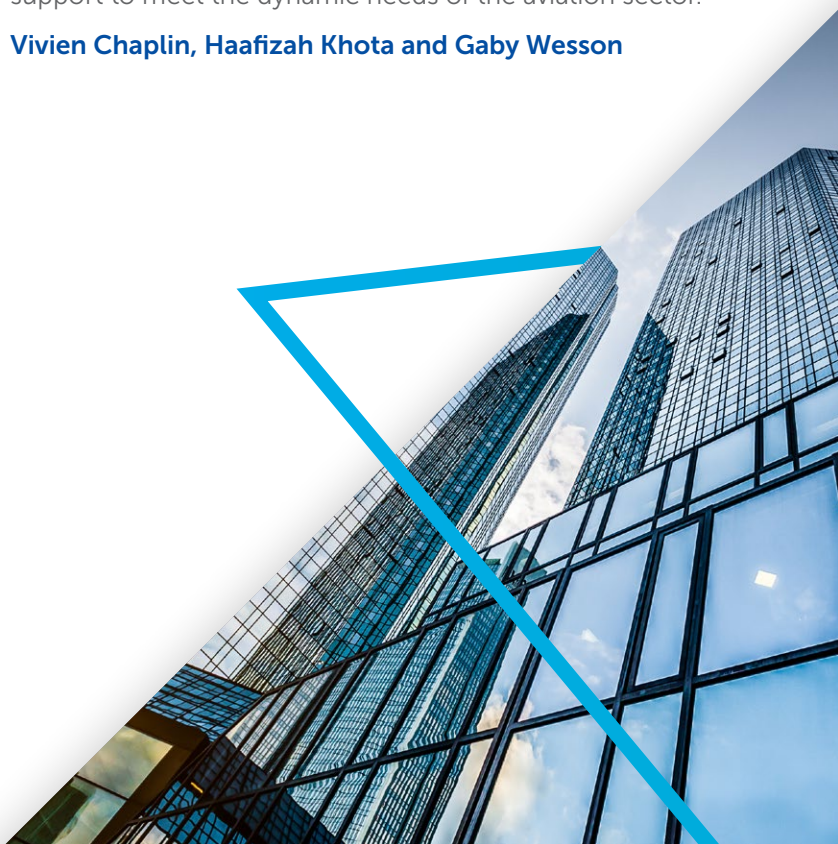
The timing of these reforms is particularly significant as the aviation sector endeavours to rebound from the adverse impacts of the COVID-19 pandemic. With South African airlines seeking to expand their international routes and the anticipation of new operators entering the airspace, it is imperative to enhance the efficiency of regulatory processes.

This advancement in air service licensing procedures marks a crucial step forward for the aviation industry, which has felt the impact of administrative hurdles and delays in recent years. The transition towards a paperless and efficient process is eagerly anticipated by airlines, promising improved workflows and processing delays.

However, it is important to acknowledge a significant procedural shift such as this can introduce new complexities. While the revamped process aims to enhance efficiency, it is expected that early-stage operational hurdles may emerge as all stakeholders adjust to the new process. Effectively managing these complexities will require adaptability and collaboration from all involved parties.

At CDH, we leverage our extensive experience and expertise to provide comprehensive guidance to air operators navigating new and existing regulatory requirements. Our services encompass assistance with air service licensing and related matters and offering sustained support to meet the dynamic needs of the aviation sector.

Vivien Chaplin, Haafizah Khota and Gaby Wesson



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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