Anyone familiar with the business of buying or selling a company will know instantly that the process is inherently complex, extremely challenging and very expensive. This is due to the nature of this type of business, which deals with various legal and regulatory issues, numerous market and economic studies, complicated actuarial valuations, and daunting figures in financial statements and tax reports.

Hence, the engagement of professional advisers is important in order to ensure that the buyer or seller receives sound professional advice that leads to making a viable commercial decision.

The engagement of professional advisers can be quite expensive and some advisers have even charged based on a certain percentage of the transaction value. Since a lot of resources, time and money need to be spent in engaging such professionals, crucial questions must be asked: Is it fair for the professional advisers to contractually limit their liability and if so, under what circumstances?

Limiting professional advisers’ liabilities
As Mr Richard Christou, an author of a practitioner textbook on drafting commercial agreements, pointed out, “it is unrealistic of the customer to impose unlimited liability but, at the same time, not fair that the supplier should escape with no responsibility at all” (Richard Christou, *Drafting Commercial Agreements* (5th ed, 2013) at 230).

Indeed, it would not be reasonable for the client to impose an unlimited liability condition on the professional adviser as this would expose the adviser to high financial risk. In addition, such unlimited liability can be abused where the client may be looking at recovering losses incurred as a result of a failed transaction from the professional advisers.

Likewise, it would not be reasonable for the adviser to exclude all liability and not to be responsible for any fail-
It is important for both parties to draft a limitation of liability clause with precision so that the intention of the clause is clear to both parties.

Financial cap on liability

To deal with the first notion as expounded by Christou, “it is unrealistic of the customer to impose unlimited liability”, a manner to ensure that some sort of limitation is imposed without compromising fairness to the parties is to introduce a financial cap on liability for the professional advisers.

A financial cap on liability will keep both parties aware of the limit of the damages payable by the advisers to the client in the event of a claim against the advisers.

Typically, professional advisers almost always ask for a cap equivalent to the fees paid by the client. On the other hand, the client will always push for a cap based on a multiple of the fees payable (for example, the advisers to accept liability to pay damages for losses incurred arising out of the contract up to three times of the fees paid by the client).

What is a reasonable financial cap? There is no straightforward answer as this is a commercial question which should depend on the circumstances of the transaction, and bargaining power and financial capabilities of the parties. However, several factors can be taken into consideration when determining the financial cap on liability such as the risk of the transaction, the length of the engagement period (eg expected time taken for the transaction to be completed) and the type of services offered to the client (eg legal, financial, tax and actuarial services).

Of course, this is not an exhaustive list and as stated, a reasonable financial cap should depend on the circumstances of each transaction, and the bargaining power and financial capabilities of the parties.

Areas of liability in the financial cap

The second notion of Christou’s statement is “…at the same time, not fair that the supplier should escape with no responsibility at all”. A way of ensuring that the professional advisers do not limit their liability to the extent that no claim can be made against them is to be absolutely clear in the contract in respect of the areas that should be excluded from such limitation.

There are certain areas which should not be included in the list of limitation of liability and parties should refrain from imposing a financial cap on it. For example, it is impossible for the parties to put a monetary value on death, personal injury, fraud, misconduct and misfeasance. The determination of any monetary value for such areas is best left to the courts.

How do we determine these areas? These areas will depend on the law and the risk of the transaction. In this instance, both parties should work together and determine – based on the law and risk of the transaction – the areas in which liability should not be limited.

Use of clear and unambiguous wordings in drafting the limitation of liability clause

Another important point which should be highlighted is the use of clear and unambiguous wordings in drafting the limitation of liability clause. In a contractual dispute, an ambiguous clause is often open to more than one interpretation.

The court has decided that in certain areas of the law, a clause purporting to exclude or limit liability must be clearly drafted. For example, the Privy Council decided in *Canada Steamship Lines Ltd v The King* [1952] AC 292 that a clause must contain clear and express terms in order to exclude or limit liability for negligence.

In addition, it is important to note that as a general rule, the court will invoke the contra proferentum (literally meaning, “against the party putting forward”) rule when interpreting ambiguous wording in a contractual clause.

This rule essentially states that where a document or a clause contains any inconsistency or ambiguity, the court will construe “adversely to the party who proffered it for execution” (*Kandasamy v Mohamed Mustafa* [1983] 2 MLJ 85, 88). As seen here, the court will apply a strict interpretation to the limitation of liability clause if such clause is not worded properly and clearly.

Therefore, it is important for both parties to draft a limitation of liability clause with precision so that the intention of the clause is clear to both parties.

Conclusion

In conclusion, the key point in deciding the issue of limitation of liability is that both parties should ensure that any exclusion or limitation of liability is just, fair and reasonable.

The client should not expect professional advisers to provide unlimited liability and the advisers should not exclude or limit the liability to the point that they escape with no responsibility.

Furthermore, both parties should be clear on the areas in which the limitation of liability should apply. If these areas are clear to both parties at the outset of the engagement, unnecessary contractual disputes and costs may be avoided. Given the fact that the process of buying or selling a company is expensive, parties should not be burdened with further costs involving dispute of contractual terms.

Mr Razman Abdul Rahim is the Head of Legal at Avicennia Capital, the insurance holding company of Khazanah Nasional Berhad, the sovereign wealth fund of Malaysia. Mr Abdul Rahim holds LL.B (Hons) Wales, LL.M (Durham), M.Phil (Cambridge), Barrister-at-Law (Inner Temple).