

Research Article

CONSENSUAL TERMS MODIFYING CONTRACTUAL LIABILITY IN THE LIGHT OF UAE LAW: A COMPARATIVE STUDY WITH FRENCH LAW

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ABSTRACT

Background: *In the context of UAE law, this study explores the legitimacy and application of terms that modify contractual liability, drawing a comparative analysis with French law. Contractual terms are essential in shaping agreements, reflecting the parties' expectations and strategies for managing future risks. Since the 19th century, these terms have evolved significantly due to industrial growth and an increase in civil liability disputes. They are designed to limit or exclude a party's liability in the event of a contract breach, offering a mechanism for risk management and economic cost estimation.*

The paper differentiates between terms that directly address liability and those pertaining to the initiation of liability lawsuits. It examines various clauses, including guarantee clauses, terms that reduce liability, and penal clauses that establish fixed compensation amounts to incentivise contract performance. Additionally, contemporary legal frameworks, including both French and UAE laws, increasingly impose restrictions on contractual freedom to protect vulnerable parties, such as consumers and employees, by prohibiting certain terms and granting judges the authority to invalidate unfair clauses.

The study analyses UAE legal texts in comparison with French jurisprudence to clarify the UAE legislator's perspective on the legitimacy of terms.

Methods: *This study aims to conduct a comparative analysis of Emirati and French laws on modifying contractual liability by analysing primary and secondary sources such as legal texts, judicial decisions, and commentaries. It examines legislative approaches and judicial interpretations, aiming to identify similarities, differences, and areas for UAE legal reform. Inductive reasoning is used to derive broader principles, assessing the effectiveness and fairness of both legal frameworks and considering key differences and guiding principles.*

Results and conclusions: *To define the parties' rights and responsibilities, the parties must agree upon clear and explicit terms that define the damage scope, compensation limits, and exceptions to the contract. Even though these terms are common and regulated, the courts play a significant role in interpreting them, posing legal challenges when unclear. In the UAE, the Civil Transactions Law permits such terms under contractual freedom but lacks clarity on their legality, leaving judicial discretion under Article 206. Other UAE laws explicitly invalidate these terms, aligning with international standards. Post-2016, French law also invalidates terms that remove essential obligations. It is recommended that the UAE legislator clarify its stance on these terms within civil transactions, aligning with other UAE laws, to clearly specify what conditions are acceptable.*

1 INTRODUCTION

Contractual terms are crucial in the formation of a contract, as they interlink to realise the contract's intended effects, reflecting the parties' satisfaction with the expected contractual outcomes. This significance renders these terms a fertile area for study and research.

A contract acts as the primary instrument in civil and commercial transactions, encapsulating the parties' expectations and strategies for managing future risks. Consequently, the significance of contractual terms that modify liability is clearly recognised. Notably, comparative laws, such as those of England and France, have integrated these terms in various forms, thereby gaining acceptance within these laws.¹ Historically, these terms began to evolve substantially in the nineteenth century in response to the sharp increase in disputes related to civil liability. This increase was primarily driven by significant industrial growth in communities and advancements in transportation, leading to more accidents and, consequently, more victims.²

Contract terms are the specific provisions and stipulations that constitute the agreement between the parties. These terms define each party's rights, responsibilities, and obligations, including express terms, implied terms, conditions, and warranties. On the other hand, "modifying liability" refers to specific provisions within a contract that alter a party's standard legal liability. These terms are intended to limit, exclude, or extend the liability that would normally apply under general law and include clauses such as exclusion clauses, limitation clauses, indemnity clauses, and force majeure clauses.

Such terms are defined as contractual conditions designed to limit or exclude the liability of the party responsible for causing damage or loss resulting from the execution of the

1 Cécile Le Gallou, 'Les Clauses Limitatives et Exclusives de Responsabilité dans les Contrats d'Affaires Anglais' (2019) 176 *Revue Lamy Droit Civil* <<https://publications.ut-capitole.fr/id/eprint/34444>> accédé 10 juillet 2024.

2 Marie Leveneur-Azemar, *Etude sur les Clauses Limitatives et Exonératoires de Responsabilité* (LGDJ 2017) 3.

contract. They are widely used in commercial contracts to set the boundaries of the parties' liability towards one another and are often a focal point of negotiation to establish the limits of their future responsibilities. Given that the contractual liability system in jurisdictions adhering to civil law traditions is not deemed a matter of public order, it is presumed that parties have complete autonomy to structure the consequences of non-performance or compensation methods contractually.

The primary goal of these terms is undoubtedly to protect the responsible party in the event of disputes by limiting the scope of liability in cases of contract breaches. These terms offer significant protection, shielding the responsible party from potentially excessive financial losses in the future. Furthermore, this contractual technique is recognised as a method of risk management and economic cost estimation for business transactions or future investments by reducing the potential financial liabilities of an economic activity. Its utility is also evident as it serves as a powerful negotiation tool in commercial deals. By agreeing to include these terms in a contract, both parties achieve legal certainty that reduces the perceived risks associated with commercial activities.

It is crucial to differentiate between contractual terms that relate directly to liability itself and those pertaining to the initiation of a liability lawsuit. The first type addresses what can be claimed by the victim's creditor, while the second type focuses on the procedures for accessing legal remedies through a liability lawsuit.

Various terms modify contractual liability, and these can be categorised into several types. The first type is the guarantee clause, which asserts the debtor's responsibility by imposing a guarantee obligation, holding them liable for performance regardless of any circumstances or obstacles. This is akin to a guarantee clause in force majeure events.

The second category includes terms that alleviate liability, aiming to define the scope of the debtor's obligation or mitigate or exclude their guarantee obligation. The objective in both instances is to lessen the debtor's liability. Still, the key difference lies in that the first type specifies the debtor's commitment itself, defining its scope from the outset as if the debtor's result-oriented obligation were transformed into a means-oriented obligation by a contractual term. The second type addresses the consequences of the debtor's failure to fulfil their obligation, either by reducing the extent of the guarantee or excluding it entirely, such as by establishing a fixed ceiling for compensation through a contractual clause.

Another type that modifies contractual liability is the penal clause, which sets a specified amount for compensation to motivate the debtor to fulfil the contract.

In light of the evolving dynamics within contractual relationships, especially concerning the working class and consumers, laws pertinent to these issues have shifted towards restricting contractual freedom to safeguard the weaker party, whether consumers or workers. Consequently, such laws explicitly prohibit certain terms and endow judges with broad discretionary power to classify them as unconscionable, thereby ruling them invalid.

This paper addresses a crucial question: What is the legitimacy of terms modifying contractual liability in UAE law? To answer this, this study employs an analytical approach, examining UAE legal texts to elucidate the stance of the UAE legislator on these terms.

2 METHODOLOGY

This study employs a comparative legal analysis methodology, specifically comparing Emirati and French law regarding contractual terms that modify liability. The study is designed to provide a comprehensive understanding of the legislative approaches and judicial interpretations in both jurisdictions. As a result of this approach, it will be possible to identify similarities, differences, and potential areas for legal reform in the UAE.

Data collection involves both primary and secondary sources:

- Legal Texts: Analysis of the UAE Civil Transactions Law 1985 and relevant French legal codes (e.g., the French Civil Code).
- Judicial Decisions: Examination of key court rulings from the UAE and France that interpret and apply laws related to contractual terms modifying liability.
- Legal Commentaries and Treatises: Review of scholarly articles, books, and commentaries discussing the interpretation and application of contractual liability modification terms in both legal systems.
- Legislative History: Exploration of the historical development of the relevant laws to understand the legislative intent behind their formulation.

As part of the analysis, an inductive reasoning approach is adopted, beginning with specific legal texts and judicial decisions and progressing towards broader legal principles and interpretations. In addition to assessing the effectiveness and fairness of the legal frameworks in both jurisdictions, the study will also employ a critical analysis. There are several key questions to consider:

- 1) In what ways do the UAE and French laws differ in their approach to modifying contractual obligations?
- 2) What are the underlying principles that guide these legal frameworks?
- 3) What effect do these differences have on the enforcement and fairness of commercial contracts?

3 THE TENTATIVE POSITION OF THE UAE LEGISLATOR IN THE CIVIL TRANSACTIONS LAW

The UAE Civil Transactions Law of 1985 regulates civil relations and financial transactions within the United Arab Emirates,³ covering general provisions related to civil rights and obligations. This law provides the legal framework for regulating transactions between individuals and companies within the state. It specifically governs obligations and contracts concerning their initiation, termination, the types of contracts, the necessary conditions for their validity, the consequences of contracts, methods of enforcement, and provisions related to specific contracts such as sales, leasing, and partnerships, as well as civil liability including the foundations of such liability, provisions for compensation resulting from harmful acts, and liability resulting from the use of objects or the guardianship of animals.

Despite the comprehensive scope of legal relationships addressed by the UAE Civil Transactions Law, it remains silent regarding terms that modify contractual liability. However, it contains texts upon which judges can rely to assess the legitimacy of these terms, which we will explore sequentially.

French legislators pay particular attention to contract clauses that limit or modify the parties' civil liability. Civil contractual liability and the contractual clauses that relate to it are governed by the French Civil Code. In French law, contractual freedom is a fundamental principle. Parties are free to determine the content of their contract, including any clauses relating to liability. It should be noted, however, that this freedom is subject to strict limits, particularly to protect the most vulnerable parties and maintain public order.

Under certain conditions, restrictive clauses or exclusions of liability are permissible. Article 1170 of the Civil Code, issued following the 2016 Contract Law Reform, 4 states "every condition which deprives the essence of the fundamental obligation of the debtor is considered unwritten."

Furthermore, Section 1231-3 specifically prohibits clauses that limit or exclude liability for serious or tortious errors. As a result, a party cannot waive its responsibility for an intentional error or gross negligence.⁴

3.1. The Silence of the UAE Legislator on Terms Modifying Contractual Liability

Under this section, we will examine the conditions of contractual liability in the UAE Civil Transactions Law and the absence of treatment by the UAE legislator of the issue of terms modifying contractual liability under this law.

3 Federal Decree Law no (5) of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates' [1985] Official Gazette UAE 158 <<https://uaelegislation.gov.ae/en/legislations/1025>> accessed 10 July 2024.

4 Leveneur-Azemar (n 2) 215.

The UAE legislator has not provided an explicit definition of contractual liability but rather implies it through various provisions of the UAE Civil Transactions Law,⁵ leaving room for jurisprudential interpretation. Contractual liability is a penalty imposed on anyone who breaches their obligations arising from a valid contract, whether through non-performance or delay in performance.⁶ It is also defined as a failure to meet the obligations incumbent upon a person or the non-performance of an obligation originating from a contract.

To establish contractual liability, a set of conditions must be met, which the injured party can then use to seek judicial redress for compensation. Firstly, there must be a contractual relationship between the parties. The basis of contractual liability is a duly formed contract between the contracting parties. This contract must be complete in all essential elements, as it is inconceivable for contractual liability to arise without a formal contract between the parties. It is important to note that a contract is an agreement between two or more wills to create a legal effect, whether to establish, transfer, modify, or extinguish an obligation.⁷ According to the UAE Civil Transactions Law, the legislator defines a contract in Article 125 as “the connection of an offer made by one of the contracting parties with the acceptance of the other, and their agreement in a manner that establishes its effect on the subject matter and entails an obligation on each of them towards the other. It is permissible for more than two wills to coincide to produce a legal effect.” This definition clarifies that a contract is a concurrence of the contracting parties’ wills, manifested as an offer by one and tied with the acceptance by the other, thus effectuating the contract and imposing obligations on each party.

Secondly, the contract must be valid. More than having a contract exist between the parties is required for liability to arise; the contract must also be valid. For a contract to be deemed valid, it must be complete in all essential elements and meet the conditions of validity, failing which it is void or voidable. Once declared void or annulled, its effect ceases, and no contractual liability arises from its breaching.⁸ The UAE legislator outlines the pillars of a contract through Article 129 of the aforementioned law, stating that the parties must mutually agree on the fundamental elements, the subject matter of the contract must be realistic and specified or specifiable, and it must be permissible to deal in, in addition to the cause of the obligations arising from this contract being lawful.

The conditions of contract validity include the parties’ contracting capacity and the absence of defects in their will. Article 157 of the Civil Transactions Law states that every person is deemed capable of contracting unless their capacity is removed or restricted by law. Through Article 85, the legislator specifies the age of majority is attained upon completing twenty-one lunar years, at which point a person enjoys full capacity and can exercise all rights afforded by law. Article 87 further clarifies, “Anyone who has reached the age of discernment

5 Federal Decree Law no (5) of 1985 (n 3).

6 Damin Salman Al-Mu’ayta, ‘The Legal Framework for Exempting Agreements from Contractual Liability’ (Master’s thesis, Graduate School Mutah University 2015) 6.

7 *ibid.*

8 Pierre Mallet and Hala Nassar, *General Theory of Obligation* (Dar Al-Nahda Al-’Ilmiyyah 2024) 176.

but not the age of majority and anyone who has reached the age of majority but is prodigal or negligent is considered to have limited capacity, as determined by law.” The age of discernment is set at seven years, as stated in Paragraph 3, Article 159.

For a non-discerning minor, all actions are void, as indicated in Article 158. In contrast, for a discerning minor, actions that are financially beneficial actions are valid, purely harmful actions are void, and actions that benefit and harm require the guardian’s consent within the legal limits of permissible actions or the minor’s consent upon reaching the age of majority, as outlined in Article 159 of the Civil Transactions Law.

To ensure the contract’s validity, as previously mentioned, the parties’ will must also be free from defects that may vitiate it. Defects of consent include duress, gross deception, and being mistaken. Duress is addressed in Articles 176 to 184 of the Civil Transactions Law, gross deception in Articles 185 to 192, and being mistaken in Articles 193 to 198 of the same law. Therefore, should the contract be subject to annulment or cancellation, its effects cease, and contractual liability does not arise, nor may the parties request a guarantee in this case.

Thirdly, contractual obligations must not be breached, causing damage to the creditor. Once a contract is validly formed, fulfilling all its conditions and essential elements, it establishes obligations for the contracting parties. Each party is then obligated to fulfil these obligations, and any failure or delay in doing so triggers contractual liability, enabling the aggrieved party to seek legal redress.

Contractual liability arises only when contractual obligations are breached. It is inconceivable to have such liability without either a total or partial non-fulfilment of the contract. It should be noted that the damage suffered by one of the contracting parties must be caused by the other party’s failure to fulfil their obligations, encompassing all obligations, whether primary or ancillary.⁹ Consequently, there must be a contractual fault committed by one of the parties, manifested in the complete or partial failure to fulfil their contractual obligations, delay in their fulfilment, fulfilling them at a location not agreed upon, or fulfilling them in a manner not consistent with the contractual agreement.¹⁰

This contractual fault must result in damage to the other party in the contract, which can be defined as the harm that affects a person when a legitimate interest of theirs is impaired or when a right of theirs is violated.¹¹ Damage is not presumed; that is, the mere occurrence of a fault does not necessarily imply damage, as a fault can occur without causing any harm. Damage can be either material, affecting a person’s body or property, or moral, affecting a

9 Nadia Mohamed Mustafa Qazmar, ‘Limits of Contractual Liability in the Context of the Obligation to Exercise Care and to Achieve a Result’ (2019) 7(48) Middle East Research Journal 381.

10 Mallet and Nassar (n 9) 185.

11 Mohamed Sabri Al-Sa’di, *The Clear Reference in Explaining Civil Law: General Theory of Obligations, Sources of Obligation, Contract and Unilateral Will: A Comparative Study in Arab Laws* (4th edn, Dar Al-Huda 2006) 314.

person's reputation, honour, emotions,¹² or esteem. According to the UAE Civil Transactions Law, Article 293 acknowledges moral damages and permits claims for compensation for such harm. Furthermore, Article 283 specifies that compensation for damage must be for direct damages; however, if the damage occurs indirectly, the legislator requires that the action be deliberate or intended or that the act (i.e., the fault) directly leads to the damage.

To complete the elements of contractual liability, a causal relationship between the contractual fault and the damage must be established. Contractual liability is only realised when these three elements are present. It is possible for a contractual fault to occur and damage to be sustained by the contracting party, but without any causal relationship between them. That is, the damage suffered by the aggrieved contracting party is not related to the fault committed by the other party; therefore, it is inconceivable for the party in breach of their obligation to be held contractually liable for damage that their fault did not cause. Thus, contractual liability arises only with the presence of these three elements. It should also be noted that if force majeure prevents a debtor from fulfilling their obligation, this will negate contractual liability. The debtor bears no contractual liability if the cause of the damage is an external factor, which could be force majeure, a sudden accident, the creditor's own fault, or the fault of a third party.¹³

According to French civil law, contractual liability is governed by the principles outlined in the French Civil Code. It occurs when one party fails to fulfil their contractual obligations, causing harm or loss to the other party. This concept is rooted in the broader doctrine of obligations, which encompasses both contractual and tortious obligations. To establish contractual liability under French civil law, certain conditions must be met. To prove a breach of contract and claim compensation,¹⁴ these conditions must be met. The following are the main requirements:

- A valid contract must exist between the parties.
- A contractual obligation must be breached: There must be a breach of one of the specific obligations outlined in the contract. It can be a total or partial failure to perform, or an improper performance of the contractual obligation.
- There must be damage to the other party as a result of the breach. Depending on the type of damage, it may be material (such as financial losses) or moral (such as psychological or reputational damage).
- There must be a causal link between the breach of contract and the damage suffered by the other party. Therefore, the damage must be a direct result of the breach of contract.

12 Ahmed Muflih Abdullah Al-Khawaldeh, 'Exemption from Contractual Liability: A Comparative Study between Jordanian and Egyptian Civil Law' (Doctoral thesis, Faculty of Higher Legal Studies, Amman Arab University for Graduate Studies 2008) 5-6.

13 Al-Sa'di (n 12) 318.

14 Marie Malaurie-Vignal, *Droit de la responsabilité civile* (8e edn, LGDJ 2019) 325.

- In the absence of a justifiable cause for the breach, such as force majeure or unforeseen events, contractual liability cannot be established.
- The injured party must seek compensation for the damages suffered as a result of the breach of contract. Typically, damages are sought through a legal action.

According to French civil law, contractual liability is governed by a number of provisions in the Civil Code. Article 1231-1 of the Civil Code states that “anyone who breaches a contract is liable for damages caused by that breach.” Articles 1217 to 1231-7 provide detailed rules on compensation and the consequences of breaching contractual obligations.

The UAE Civil Transactions Law does not explicitly authorise specific contractual terms modifying liability. Some legal commentators argue that the UAE legislator has permitted the alteration to contractual liability rules based on Article 383 of the Civil Transactions Law. This article states:

“Unless otherwise provided by law or stipulated in the agreement, a debtor who is required to preserve a thing, to manage it or to act with prudence in the performance of their obligation must bring to the performance thereof the care of a reasonable person, even if the object in view is not achieved.”

Based on this article, proponents argue that since the legislator allows parties to agree on a standard of care different from that of a reasonable person, it implicitly accepts contractual terms that modify liability rules, whether by mitigation or intensification.¹⁵ However, this analysis does not establish a general rule for the legislator’s acceptance of modified liability terms because it pertains only to agreements regarding the parties’ obligations and not to mitigate liability effects. This text suggests flexibility in the level of care but does not imply that parties can set the amount of compensation; for instance, it relates solely to the ability to mitigate or intensify obligations.

Others contend that the UAE legislator has embraced the perspective of Islamic jurisprudence, which does not allow agreements to modify the provisions of guarantees in contractual liability and liability based on harmful acts. Thus, no provision permits the alteration of guarantee provisions in contractual liability. Contracting parties are confined to establishing the contract but do not determine its consequences, as the prerequisites of contracts are legislated acts. For example, a sale necessitates the transfer of ownership from the seller to the buyer and the buyer’s obligation to pay the price. The role of contracting parties is limited to freely entering into the agreement in a legally recognised form, with the effects and rulings ensuing from legislative will.¹⁶ Furthermore,

15 Al-Shehabi Ibrahim Al-Sharqawi, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (4th edn, Al-Afaq Al-Mushriqah 2014) 230.

16 Mohamed Boukmach, ‘The Effect of Artificiality in Restricting the Principle of Will in Islamic Jurisprudence: A Comparative Study’ (2012) 13 *Journal of Research and Studies*, University of El Oued 131.

an agreement to modify liability provisions is viewed as a condition that contravenes the contract's nature and is therefore invalid.¹⁷

We concur with the second opinion, as the explanatory note of the Civil Transactions Law clarifies that the obliged party must specifically perform their obligation; if not, a judge will enforce them to do so. Refusal to comply constitutes disobedience, warranting disciplinary measures to ensure compliance and the enforcement of property seizures by legitimate means to settle the debt.¹⁸ Consequently, mitigating or exempting from liability conflicts with the principles of Islamic jurisprudence, which underpin the provisions of the UAE Civil Transactions Law, making these rules inviolable.

As a consequence of the 2016 amendment, the French legislator adopted the position of French jurisprudence, established a general standard for these types of conditions, and deemed any condition that deprived the debtor of its essence as if it had not been drafted in accordance with Article 1170 of the Civil Code. For example, French jurisprudence considered the condition that exempts the carrier from compensation in the event of loss of the subject of the contract of carriage to be invalid due to the fact that this condition renders the carrier's basic obligation useless, as though the carrier is exempting himself from fulfilling his original obligation¹⁹.

It is important to note that in the UAE, there is no explicit legislative guidance regarding terms modifying liability, which can result in several legal uncertainties. There can be significant implications for parties entering into contracts within the jurisdiction if this silence is not addressed. Here are a few potential implications:

1. Challenges related to interpretation.

It may be difficult for courts and arbitrators to interpret and enforce terms modifying liability without clear statutory provisions. Inconsistent judgments can result in a lack of predictability for contracting parties. In interpreting liability clauses, courts have a wide degree of discretion, which may result in varying outcomes depending on the perspective of different judges. The absence of legislative clarity might necessitate a greater reliance on case law, which can evolve and may not provide immediate or comprehensive guidance.

2. Uncertainties associated with contract drafting.

There may be uncertainty regarding the enforceability of liability-modifying terms when parties draft contracts. Legal ambiguity can result in ambiguous contract terms since parties may not know how to limit or exclude liability in a way that will be upheld by the courts in

17 Abdel Nasser Al-Attar, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (2nd edn, UAE University 2000) 252.

18 Ministry of Justice of the UAE, *Explanatory Note of the UAE Civil Transactions Law* (Ministry of Justice 2015) 392.

19 Case no 93-18.632 (Court of Cassation, Cass Com, 22 October 1996).

the event of a dispute. To minimise risks, parties may incur higher legal costs when drafting and negotiating contracts to ensure that liability clauses are clear and enforceable.

3. An increase in disputes and litigation.

Legislative uncertainty may increase disputes and litigation as parties contest the meaning and enforceability of liability-modifying clauses. Uncertain legal standards can result in prolonged disputes, as parties may be more inclined to litigate to resolve ambiguities. A higher number of lawsuits can result in higher litigation costs and resource expenditures for all parties involved.

3.2. The Role of the Judiciary in Assessing the Legitimacy of Modified Contractual Liability Terms

In the absence of explicit legislative provisions in the UAE Civil Transactions Law, the UAE judiciary has had the opportunity to articulate its position on this issue. In some decisions, the Federal Supreme Court and the Dubai Court of Cassation have recognised the freedom of contracting parties to modify the rules of contractual liability. However, these decisions do not establish a stable judicial direction,²⁰ and, thus, it cannot be asserted that the judiciary has adopted a general rule accepting agreements that modify contractual liability terms.

Despite the judiciary's non-definitive stance, judges can evaluate the contractual terms on a case-by-case basis to determine their legitimacy.

Article 206 of the Civil Transactions Law states:

“A contract may include a suitable condition which confirms its terms, admitted by custom or usage, beneficial to one of the contracting parties or others unless it is prohibited by the legislator or contrary to public policy or morals, in which case the condition is void, but the contract remains valid except where the condition is the prime motive of contracting and, in this case, the contract shall also be void.”

This article provides criteria for determining which contractual terms may be enclosed into a contract and which may not, which we will explore in detail.

The UAE judiciary can consider terms that modify contractual liability by utilising Article 206 of the Civil Transactions Law, accepting those conditions that meet the criteria described in this article, which we will analyse in order:

- A. **The judiciary may approve a contractual term that modifies contractual liability if a legal provision permits it.** In such cases, the condition is valid because it is explicitly sanctioned by law, as seen with the sales contract conditions based on trial

20 Case no 494 of Legal Year 2017 (Dubai Court of Cassation, Civil Cassation, 4 January 2018) pt 1, 25; Case no 68 of Legal Year 15 (Federal Supreme Court, Civil and Commercial Circuit, 14 December 1993) pt 3, 1530.

under Article 494 of the Civil Transactions Law and the non-compete clause in Article 10 of Decree-Law No. (33) of 2021 on regulating labour relations. An example concerning liability is found in the second paragraph of Article 307 of the Commercial Transactions Law, which permits carriers to fully or partially exempt themselves from liability for delays.

- B. The judiciary may accept a contractual term that affirms the purpose of the contract.** These terms support the contract's objectives and facilitate its execution, essentially aligning with the obligations stemming from the contract. For instance, the main goal of a sales contract is the payment of the price and delivery of the sold goods; therefore, any term that expedites part of the payment, allows instalment payments or requires the seller to deliver the item in a specific manner, or extends the warranty for hidden defects to a year, is considered permissible. Therefore, it is argued that terms modifying contractual liability do not typically align with the contract's purpose as they aim to circumvent the expected outcomes when contractual obligations are unmet, leading UAE judges to likely reject such terms for not conforming to the contract's intended purpose.
- C. The judiciary may accept a contractual term that modifies contractual liability when it is suitable for the contract.** This term should align with the intended purpose of the contract and be suitable for achieving the intended interests within the contract.²¹ For example, requiring a guarantor to finalise the contract or reviewing the financial documents of a business before completing the contract is acceptable. However, terms that oppose the contract's purpose, such as prohibiting the use of the sold item or disallowing the sale of mortgaged property to satisfy a debt, are deemed invalid. Again, UAE judges would likely dismiss terms modifying contractual liability that solely serve one party's goals or prevent the debtor from assuming responsibility when breaching contractual obligations, as contracts are intended to be executed according to the agreed legal terms, and provisions that obstruct this execution are inappropriate.
- D. The judiciary may accept a contractual term that modifies contractual liability if it is consistent with customs and traditions.** Customary practices are as binding as explicitly stipulated conditions according to Article 50 of the Civil Transactions Law and among traders per Article 264 of the same law. If a contractual term reflects common custom or tradition, such as the implicit renewal term of the contract upon silence, it is considered valid. In this situation, a judge may accept certain contractual terms modifying liability if the custom supports them.
- E. The judiciary may accept a contractual term that modifies contractual liability if it provides a benefit to one of the contracting parties or others.** The relevant benefit here is not the assumed benefit for which the term is set – as no one includes a term without anticipating some benefit – but rather an additional advantage not inherently provided by the contract. For instance, a sales contract requires the seller

21 Al-Attar (n 18) 183.

to deliver the property immediately upon contract completion, which does not inherently permit the seller to remain on the property for a specified period post-sale. The seller may stipulate staying on the property for a period after the sale to manage their affairs, which would be beneficial for the seller. Similarly, if the seller conditions the continued exploitation of sold land for a year before its transfer to the buyer, and the buyer agrees, this too can be seen as beneficial. Here, the judiciary might also approve contractual terms modifying liability if they find the additional benefits acceptable under the law and specific dispute circumstances.

A UAE judge will find themselves compelled to reject the validity of modified contractual liability terms through the application of Article 206 of the Civil Transactions Law when such a contractual term falls within the scope of terms that the law does not permit to be included in a contract.

Firstly, terms explicitly are prohibited by the law. These are provisions that the legislator has expressly forbidden in contracts, such as the invalid arbitrary terms mentioned in relation to insurance contracts in Article 1028 of the Civil Transactions Law, the invalidity of a term exempting a carrier from liability for the loss of goods under the transportation contract according to Article 307 of the Commercial Transactions Law, the invalidity of a term exempting a commission agent from liability for bodily injuries to a passenger according to Article 347 of the Commercial Transactions Law, and the invalidity of a term exempting a lessor from a warranty against eviction and hidden defects according to Article 775 of the Civil Transactions Law.

Second, terms contravene public order and morals. These are contractual terms that prescribe alternative dispute resolution methods different from those provided in the Civil Procedures Law,²² or those that alter the rules of territorial jurisdiction of the courts, as well as terms involving bribery to finalise a specific contract.

According to Article 206 of the Civil Transactions Law, the principle is that the contract remains valid, and only the term is void, except in one case where the entire contract is voided if the term was the motivation for entering into the contract. That is if the reason for the contract is the term itself. If the term is not permissible, the reason for the contract does not exist, and thus the contract is not concluded. For instance, if a seller imposes an invalid condition on a buyer, such as exempting themselves in the contract from the warranty for hidden defects, and then the buyer challenges the validity of the term, the outcome depends on the seller's intention when setting the term. If the seller was indifferent to fulfilling their obligations with or without this term, then the contract remains valid, and the term is void. However, if their intention was not to enter the contract without this term, the entire contract is void.

22 Federal Decree by Law no (42) of 2022 'Promulgating the Civil Procedure Code' [2022] Official Gazette UAE 737 <<https://uaelegislation.gov.ae/en/legislations/1602>> accessed 10 July 2024.

Judicial precedents affirm that the review of contractual terms and the assessment of whether a contract may incorporate them is a substantive issue that lies within the discretion of the trial judge.²³ The general and flexible wording used in drafting Article 206 of the Civil Transactions Law grants the judge broad discretionary power to determine whether the term affirms the requirement of the contract, suits it, or benefits one of the contracting parties.

For example, if the term involves exempting the debtor from compensation in cases of fraud and gross negligence, this term would be considered void because the second paragraph of Article 383 of the Civil Transactions Law explicitly states the invalidity of such a term, stating, “under all circumstances, the debtor remains liable for fraud or gross negligence.” This is an application of Article 206 of the Civil Transactions Law.

Article 1170 of the Civil Code provides that “any clause which deprives the debtor’s essential obligation of its substance is deemed unwritten.” This text applies, in particular, to clauses limiting and exonerating liability. Unless the clause contradicts the scope of the commitment entered into, by emptying the essential obligation of its substance, a clause limiting liability relating to an essential obligation of the debtor is not prohibited. A clause may only be set aside if it deprives the creditor of any consideration or if it deprives the essential obligation of all substances.

Following the 2016 amendment, the role of French jurisprudence can be characterised as follows:²⁴

1. To neutralise the effects of an exonerating or limiting liability clause, several legal grounds may be invoked.
2. For a clause to be effective, it must be clearly drafted and accepted by the contractor.
3. For contractual liability clauses to be enforceable, they must be explicitly stipulated in the contract and accepted by the co-contractor.

A clause in Article 1119 of the Civil Code provides in this sense that “the general conditions invoked by one party have effect only if they have been brought to the attention and accepted by the other party.” Thus, clauses must be inserted in the contract documentation and be legible. If a clause appears on an invoice, it is valid only if it can be proven that the party against whom it is enforced was aware of it beforehand and consented to it.

In the context of ongoing business relationships, several jurisdictions have been able to deduce this consent from the fact that the co-contractor did not challenge the reference to the limitation of liability clause in previous documents. However, in cases of gross or willful misconduct, such clauses do not apply.

23 Case no 372 of Legal Year 24 (Federal Supreme Court, Civil and Commercial Circuit, 26 March 2005) pt 1, 605.

24 Pierre Catala (ed), *Les obligations* (Daloz 2020) 450-500.

According to Article 1231-3 of the Civil Code, an exonerating or limiting clause of liability is neutralised in the event of gross or willful misconduct, and the creditor may then claim full compensation for their losses.

4 THE EXPLICIT POSITION OF THE UAE LEGISLATOR

While the UAE legislator has adopted an undefined position regarding the validity of consensual terms modifying contractual liability clauses within the framework of the Civil Transactions Law (broadly allowing the judiciary to intervene and assess the legality and legitimacy of these terms), contrarily, it has taken a clear and explicit position in other legal texts. Several other UAE legislations explicitly confirm the illegitimacy of contractual terms that modify liability, emphasising the protection of parties' rights and preventing circumvention of the fundamental legal rules that govern contractual obligations and liabilities. We will explore this topic sequentially.

4.1. Within the Scope of Consumer Protection Law

Consumer protection legislation serves as a cornerstone of modern legal frameworks. Adopted across various nations for multiple fundamental reasons, it enhances market stability and ensures equity among contracting parties. These laws prioritise the protection of consumer rights, addressing prevalent unfair or deceptive commercial practices such as false advertising, price manipulation, or the distribution of low-quality goods and services.²⁵ Consequently, consumer protection legislation provides essential legal protection for consumers against such malpractices, ensuring they receive accurate and complete information about products and services. Moreover, these laws bolster market confidence by establishing clear regulations governing the relationship between consumers and suppliers.

When consumers are aware that their rights are protected and compensation is assured in the event of damage, it boosts their confidence in commercial transactions, thereby stimulating market activities and fostering increased consumption and investment. Additionally, these laws aim to promote social justice, recognising that consumers often find themselves in a less advantageous position compared to suppliers and large corporations with regard to resources, legal knowledge, and technical expertise. Therefore, consumer protection laws strive to balance these relationships by providing consumers with effective legal tools to defend their rights and interests, enhancing social justice and preventing exploitation of the weaker party by the stronger. Furthermore, these legislations encourage fair competition, enhance public health and safety, and adapt to economic and technological advancements.

25 Malaurie-Vignal (n 15) 20.

In line with comparative legislation models, the UAE legislator has addressed the permissible contractual terms in consumer contracts. Article 21 of the Federal Law No. (15) of 2020 on Consumer Protection²⁶ prohibits suppliers from incorporating any contractual terms that could harm the consumer, declaring any term that exempts the supplier from any obligations outlined in this law as null and void. Additionally, Article 34 of the Cabinet Resolution No. (66) of 2023 regarding the Executive Regulations of the Federal Law No. (15) of 2020 on Consumer Protection²⁷ confirms that any condition absolving the supplier from liability or any of their obligations towards the consumer under the law is void, whether or not these terms appear in contract templates, invoices, documents, or other materials related to the transaction.

This provision particularly nullifies any conditions that eliminate or reduce the consumer's right to compensation when the supplier fails to meet their obligations, as well as any term that causes the consumer to waive any rights provided under the Consumer Protection Law, and any term that inappropriately limits the consumer's rights against the supplier in cases where the supplier fails to fully or partially fulfil their obligations or performs them inadequately. This law also prohibits any term that compels the consumer, in the event of failing to meet their contractual obligations, to compensate the supplier in a manner disproportionate to the actual damages incurred due to the non-fulfilment of those obligations, as well as any condition that absolves the supplier of responsibility for the goods during the provision of the service.

Similarly, Article R 212-1, 6, of the French Consumer Code states that any clauses in contracts between professionals and consumers that aim to remove or reduce consumer's right to compensation in the event that a professional's failure to fulfil their obligations are presumed abusive and therefore prohibited.

4.2. Within the Scope of Commercial Laws

Transportation contracts, in their various formats, are ripe for modified liability terms, as transportation companies often seek to exempt themselves from liability or lessen it in scenarios involving human injuries or material losses during the transportation of people or goods or even when delays occur in delivering individuals or goods to their destinations. Given the frequent adoption of these terms by transportation companies, legislators in various jurisdictions have established controls and stipulations for the use of these contractual terms. The UAE legislator has explicitly and directly regulated the application of these terms in several legal texts, which we will examine in detail sequentially.

26 Federal Law no (15) of 2020 'On Consumer Protection' [2020] Official Gazette UAE 690(ann) <<https://uaelegislation.gov.ae/en/legislations/1455>> accessed 10 July 2024.

27 Cabinet Resolution no (66) of 2023 'Concerning the Executive Regulations of Federal Law no (15) of 2020 Concerning Consumer Protection' [2023] Official Gazette UAE 755 <<https://uaelegislation.gov.ae/en/legislations/2157>> accessed 10 July 2024.

The UAE legislator, in Article 175 of the Federal Decree-Law No. (43) of 2023, concerning Maritime Law,²⁸ holds carriers accountable for the loss or damage of goods from the time of receipt until delivery to the rightful recipient. This responsibility persists unless the carrier can demonstrate that all reasonable measures to prevent such damage were taken or that it was impossible to take such measures. Additionally, carriers are liable for any damage or loss resulting from fires if it can be shown that the fire was caused by negligence or error on the part of the carrier, their agents, or employees or if these parties failed to take necessary fire prevention or control measures. Furthermore, carriers are liable for any harm to live animals being transported if it can be proven that the carrier or their representatives were negligent in following the shipper's instructions regarding transportation.

The application of civil liability provisions under the general rules of the Civil Transactions Law has led to a mitigated liability for maritime carriers because they often include contractual terms that reduce their liability. Generally speaking, the judiciary upholds these terms as valid based on the principle of contractual freedom.²⁹ However, to prevent abuse of such provisions by carriers, the legislators have explicitly prohibited these terms and declared them void under certain circumstances.

Article 179 of the Maritime Law stipulates that any condition in the bill of lading or any other document that exempts the carrier from liability for loss or damage of goods arising from their legal obligations is considered null and void. This includes any clause that waives liability, transfers rights from insurance on the goods to the carrier, limits the period during which the carrier is liable, reduces the timeframe for filing claims following a denial, or any other term that relieves the carrier of the responsibility to provide compensation for damages.

The stance of the UAE maritime commercial legislation is consistent with the international consensus that generally invalidates agreements that exempt maritime carriers from liability, except in certain cases specified by UAE legislation in Article 280 of this Law. This article permits parties to negotiate liability terms in specific circumstances such as coastal navigation or when the nature of the goods, their shipping conditions, or exceptional transport circumstances justify a special agreement, or when there is an agreement to transport goods on the deck, and the transportation is conducted in this manner. However, these agreements must not violate public order and must not exempt the carrier or their agents from obligations arising from the transport contract. There must be a bill of lading, and the agreements must be recorded in a non-negotiable receipt.³⁰

28 Federal Decree Law no (43) of 2023 'Concerning the Maritime Law' [2023] Official Gazette UAE 760 <<https://uaelegislation.gov.ae/en/legislations/2138>> accessed 10 July 2024.

29 Mustafa Kamal Taha, *Fundamentals of Maritime Law* (2nd edn, Al-Halabi Law Publ 2012) 239.

30 Helu Abdulrahman Abu Helu, 'The Effects Arising from the Legal Nature of the Maritime Carrier's Liability on Including an Exemption Clause' (2014) 11(1) *Journal for Sharia and Law Sciences*, University of Sharjah 205.

Article 270 of the Federal Decree-Law No. (50) of 2022 Promulgating the Commercial Transactions Law³¹ defines a transport contract as an agreement in which the carrier, for a fee, commits to transport a person or item from one location to another using their own means. All land transportation activities are deemed commercial under Article 6 of the Commercial Transactions Law if they meet the criteria for professionalism and business elements, irrespective of whether the carrier is a natural or legal person, owns or leases the transport means, and regardless of whether the carrier is a public or private legal entity.³²

The Commercial Transactions Law directly and explicitly addresses contractual terms that modify liability, distinguishing between two types of terms.

The first type involves conditions related to exemptions from liability. Article 307 states:

“Each term that relieves the carrier of liability for the total or partial destruction or damage of the item shall be null and void. Further, each term that relieves the carrier of such liability, if created by the actions of its affiliates, shall be null and void. Each term that binds the consignor or the consignee, in any capacity, to pay all or part of the expenses of the carrier’s liability insurance shall be equivalent to the relief of liability.”

Accordingly, carriers cannot impose contractual terms that exempt them from liability in cases of total or partial loss or damage, whether due to their own actions or those of their employees. They are also prohibited from imposing conditions that require the consignor or the consignee to bear any insurance expenses related to the carrier’s liability.

The second type involves conditions relating to the amount of compensation. The UAE legislator has permitted carriers in Article 308 and subsequent articles of this law to establish contractual terms that specify the amount of compensation applicable to both total and partial destruction of the item. However, these conditions must satisfy the following requirements:

- The condition must be consensual, meaning it has been agreed upon by both parties of the contract.
- The consignee must demonstrate that they have incurred damage; otherwise, they are not entitled to any compensation if the carrier can prove that the consignee did not suffer any harm.
- The condition must be documented in writing.
- The agreed compensation must not be nominal, and the determination of whether the condition is nominal is subject to the discretion of the court adjudicating the dispute.
- The failure of the carrier to fulfill their obligation must not result from intentional fraud or gross negligence on their part or that of their affiliates.

31 Federal Decree Law no (50) of 2022 ‘Concerning Promulgating the Commercial Transactions Law’ [2022] Official Gazette UAE 737(ann 1) <<https://uaelegislation.gov.ae/en/legislations/1610>> accessed 10 July 2024.

32 Omar Fares, *Introduction to Commercial and Business Law* (Dar Al-Nahda Al-’Ilmiyyah 2022) 122.

It is important to note that if the damage value is less than the agreed compensation, the judge may reduce this amount so it aligns with the actual damage value. Conversely, if the damage exceeds the agreed compensation, no more than the agreed value can be claimed unless it is proven that the carrier or their affiliates committed fraud or gross negligence. In such cases, the carrier is obligated to provide full compensation for the damage.

Furthermore, the UAE legislator has stated in Article 334 of this law that any term fully or partially exempting the carrier from liability for any physical harm inflicted on the passenger is invalid. Moreover, any condition that obliges the passenger to pay all or part of the insurance expenses against the carrier's liability is considered a waiver of responsibility.

In French law, particularly concerning goods transport contracts, Article 133-1 of the Commercial Code holds the carrier responsible for the loss of transported goods, except in cases of force majeure. Any clause to the contrary clause in a consignment note, tariff or other document is considered void.

As far as maritime transport contracts are concerned, Article L. 5422-15 of the Transport Code provides that "any clause having the direct or indirect object or effect [...] of shielding the carrier from liability defined by the provisions of Article L. 5422-12 is null and void."

5 CONCLUSIONS

Consensual terms modifying contractual liability are pivotal in protecting the rights and responsibilities of contracting parties. The precise drafting of such terms is crucial in determining their effectiveness, necessitating that they be clearly and explicitly written. These terms must accurately define the scope of the damages covered, the maximum limits of compensation, and the exceptional circumstances that do not fall within these terms.

Terms modifying contractual liability serve as an essential legal instrument in commercial contracts, delineating the extent of liability for a party unable to meet their contractual obligations. Despite these terms being common in contractual practices and regulated by many laws, courts continue to play a vital role in interpreting and applying them. Implementing these terms introduces several legal challenges concerning their validity and the extent of their interpretation, especially when the terms used are ambiguous or imprecise. Additionally, proving fault or negligence, particularly in cases of personal injury or death, adds to these challenges.

Contractual liability, which obliges a debtor to compensate the creditor for breaches of contract, acts as an appropriate remedy for such failures. However, it is sometimes possible for a contract to include a condition that modifies the terms of contractual liability, either reducing the debtor's obligation or entirely exempting them from liability, potentially leading to a cap on the amount of compensation or a full exemption.

Although the UAE Civil Transactions Law is founded on the principle of contractual freedom, allowing for the inclusion of contractual terms that alter civil liability provisions, this law remains silent on the legality of these terms, leaving room for the judiciary to selectively intervene and assess their legality after examining each case on its merits. The study reveals that the UAE judiciary has not established a consistent position on the legality of these terms; instead, it accepts them in a few isolated decisions. Consequently, the UAE judge possesses broad discretionary power to assess the legality of these terms through the application of Article 206 of the Civil Transactions Law.

In contrast, following the 2016 amendment, French law, aligned with French jurisprudence, has taken a clearer stance. It deems any contractual condition that removes the essential obligation from its basic content invalid. The French judiciary has a decisive role in determining whether these conditions are legal, requiring that they be stipulated clearly and explicitly, and that the parties involved are free from intentional or serious errors.

While the UAE legislator has been unclear regarding these terms within the framework of the Civil Transactions Law, its position has been more explicit under other laws, such as the Consumer Protection Law, the Commercial Transactions Law, and the Maritime Law, which explicitly state the invalidity of these terms in multiple legal articles. The UAE legislator's position aligns with comparative legislation and the international consensus on the invalidity of agreements that exempt from liability in matters related to consumer protection and all forms of transport contracts.

Similarly, the French legislator has stipulated the invalidity of conditions that exempt or limit liability, aligning with the approach taken by the Emirati legislator.

The study recommends that the UAE legislator explicitly clarify its position on consensual terms modifying contractual liability within civil transactions. It suggests introducing a provision similar to those in the Consumer Protection Law or the Commercial Transactions Law, which would clearly specify the circumstances under which such terms are permissible and those under which they are not.

To address the legal uncertainties and challenges arising from the UAE legislator's silence on terms modifying liability, it is crucial to advocate for an amendment to the UAE Civil Transactions Law. This amendment should explicitly address these terms and reflect the clarity found in the UAE Consumer Protection Law as well as the UAE Commercial Transactions Law. The following elements should be included:

- Provide a clear definition of terms modifying liability, including exclusions, limitations, and indemnification clauses.
- Ensure that liability-modifying terms are expressly stated and conspicuous in the contract to be enforceable.
- Incorporate principles of fairness and reasonableness to prevent abusive or excessively one-sided terms.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНСЕНСУАЛЬНІ УМОВИ, ЩО ЗМІНЮЮТЬ ДОГОВІРНУ ВІДПОВІДАЛЬНІСТЬ У СВІТЛІ ЗАКОНОДАВСТВА ОАЕ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ЗАКОНОДАВСТВА ФРАНЦІЇ

П'єр Маллет*, Хала Нассар

АНОТАЦІЯ

Вступ. У контексті законодавства ОАЕ це дослідження вивчає легітимність і застосування умов, які змінюють договірну відповідальність, за допомогою проведення порівняльного аналізу з законодавством Франції. Договірні умови мають важливе значення для формування угод, адже відображають очікування сторін і стратегії управління майбутніми ризиками. З 19 століття, ці умови зазнали значних змін у зв'язку зі зростанням промисловості та збільшенням кількості спорів про цивільну відповідальність. Вони призначені для обмеження або уникнення відповідальності сторони у разі порушення контракту, і пропонують механізм управління ризиками та економічної оцінки витрат.

У статті розрізняються умови, які безпосередньо стосуються відповідальності, та ті, що стосуються подання позовів про відповідальність. У ньому розглядаються різні положення, включно з гарантійними положеннями, умовами, що зменшують відповідальність, і штрафними положеннями, які встановлюють фіксовані суми компенсації для

стимулювання виконання контракту. Крім того, сучасні законодавчі рамки, зокрема Франції та ОАЕ, дедалі більше накладають обмеження на договірну свободу для захисту вразливих сторін, таких як споживачі та працівники, за допомогою заборони певних умов і надання суддям повноважень визнавати несправедливі положення недійсними.

У дослідженні проаналізовано юридичні тексти ОАЕ у порівнянні з французьким правом, щоб уточнити позицію законодавства ОАЕ щодо легітимності умов.

Методи. Метою цього дослідження є проведення порівняльного аналізу законів ОАЕ та Франції щодо зміни договірної відповідальності, який здійснювався за допомогою аналізу первинних і вторинних джерел, таких як юридичні тексти, судові рішення та коментарі. У ньому розглядаються законодавчі підходи та судові тлумачення для того, щоб виявити подібності, відмінності і можливі напрямки для реформування законодавства ОАЕ. Індуктивне міркування використовується для виведення ширших принципів, оцінки ефективності та справедливості обох законодавчих основ і врахування ключових відмінностей і керівних принципів.

Результати та висновки. Для того, щоб визначити права та обов'язки сторін, сторони повинні узгодити чіткі та однозначні умови, які визначають обсяг збитків, ліміти компенсації та винятки за договором. Незважаючи на те, що ці умови є загальними та регламентованими, суди відіграють значну роль у їх тлумаченні, що створює правові проблеми, якщо вони нечіткі. В ОАЕ Закон про цивільні правочини дозволяє такі умови згідно з договірною свободою, але немає чіткого пояснення щодо їх законності, тож залишається право на розсуд суду відповідно до статті 206. Інші закони ОАЕ прямо визнають ці умови недійсними відповідно до міжнародних стандартів. Після 2016 року французьке законодавство також визнає недійсними умови, які усувають основні зобов'язання. Рекомендується, щоб законодавство ОАЕ роз'яснило позицію щодо цих умов у межах цивільних угод, узгодивши їх з іншими законами ОАЕ, щоб чітко визначити, які умови є прийнятними.

Ключові слова: договірна відповідальність, законодавство ОАЕ, управління ризиками, гарантійне положення, захист прав споживачів.