

# Public Procurement

## Liability Cap Regulatory Scan across EU Member States

ZEPOS & YANNOPOULOS



# Contents

## 3 Executive Summary

## 4 About Lex Mundi

5 Lex Mundi Equisphere

## 6 Overview of responses

7 Participating firms

10 Breakdown of responses

## 11 Country-specific responses

12 Austria

13 Belgium

14 Bulgaria

15 Croatia

16 Cyprus

17 Czech Republic

18 Denmark

19 Estonia

20 Finland

21 France

22 Germany

23 Greece

24 Hungary

25 Ireland

26 Italy

27 Latvia

28 Lithuania

29 Luxembourg

30 Malta

31 Netherlands

32 Poland

34 Portugal

35 Romania

36 Slovakia

37 Slovenia

38 Spain

40 Sweden



2 Please be advised that the information set forth in this report is intended only as a general overview of the law. This report is not intended to constitute legal advice or a tax opinion, and no conclusions may be inferred from or are implied by the statements or discussions contained herein. Readers requiring legal advice should not rely on this report as an alternative to the engagement of local counsel and should consult with the Lex Mundi member firm in the relevant jurisdiction. Please note that this report refers to laws and regulations in force on June 30, 2023, and is subject to change by future legislation.

## Executive Summary

**We are pleased to present the enclosed regulatory scan covering inquiries relating to liability caps in public contracts across the EU member states, within the context of the Lex Mundi 30-minute free advice policy.**

Zepos & Yannopoulos is a long-standing member of Lex Mundi, the world's leading network of independent law firms, with members in over 125 countries.

Through Lex Mundi, we are able to provide high-level responses to the two following queries across the EU member states:

1. In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?
2. If permitted, is it customary for public contracts to include such clauses?

We trust that this report demonstrates the global reach and local expertise of Lex Mundi. Founded in 1989, over its three decades Lex Mundi has evolved far beyond being a law firm network with a superior agglomeration of top-tier, indigenous law firms in over 125 countries. In addition to powerful local capabilities, Lex Mundi member firms have a long track record of providing coordinated advice to, and building deep partnerships with, multinationals with operations across the globe.

As a next step, we look forwards to presenting our findings during a virtual meeting with you and answering any questions you might have on the responses outlined in this report.



**Dimitris Zepos**  
Managing Partner  
Zepos & Yannopoulos  
[d.zepos@zeyya.com](mailto:d.zepos@zeyya.com)



**Jenny Karlsson**  
Lex Mundi  
Head of Legal and Director  
[jkarlsson@lexmundi.com](mailto:jkarlsson@lexmundi.com)

# Lex Mundi Introducing your Global Network

**At Lex Mundi our aim is to empower you to create an ideal, bespoke, multinational law firm, tailored exactly to your requirements.**

The building blocks of Lex Mundi are 150 leading independent law firms spread across the globe. Member firms are selected and regularly reviewed based on top-tier, full-service capability, first-in-class legal skills and top-notch client service.

Lex Mundi firms have a long history of working together to collaborate on complex, multi-jurisdictional matters.

In addition, member firm lawyers stay up to date on legal practice and market standards across jurisdictions through regular practice groups meetings and know-how sharing activities.

As indigenous firms in their home jurisdictions, firms possess in-depth market knowledge and relationships throughout government, courts and the business community.

Equisphere gives clients seamless access to multiple Lex Mundi member firms anywhere in the world, delivering visibility, consistency and value on a scale unavailable elsewhere.



**150+**  
Member firms



**700+**  
Offices



**22,000+**  
Lawyers



**125+**  
Countries

## Lex Mundi Equisphere™ Defined

**Equisphere is designed to minimize the typical challenges that corporate counsel face when working with law firms across jurisdictions—resulting in less firefighting, gatekeeping, missed deadlines and unexpected costs.**

Led by our Global Markets team, Equisphere is a smarter way to manage cross-border legal advice by using an Agile-Kanban methodology as a more reliable way to stay aligned with your requirements and objectives while avoiding unnecessary delays and costs.

Our solution allows clients to create multinational teams of lawyers, tailored exactly to their requirements, and to access them in the simplest way possible.

Since its inception, Equisphere has been used by a wide range of clients for legal matters around the world, including appointment to various global legal panels:

- M&A and Cross-Border Investments
- Business Expansion into new markets
- Regulatory advice related to industries
- Data Privacy and Cybersecurity matters
- Compliance and investigations
- Cross Border Restructurings

Equisphere solutions are always tailored to the unique requirements of each client and engagement.



# Overview of Responses

## Participating Firms (1)

Jurisdiction	Member Firm	Are liability caps in public contracts permitted?	If permitted, are they customary?	Reference
Austria	<u><a href="#">CERHA HEMPEL Rechtsanwälte GmbH</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Belgium	<u><a href="#">Liedekerke</a></u>	Yes	No	<u><a href="#">here</a></u>
Bulgaria	<u><a href="#">Penkov, Markov &amp; Partners</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Croatia	<u><a href="#">Divjak Topic Bahtijarevic &amp; Krka</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Cyprus	<u><a href="#">Chrysostomides Advocates &amp; Legal Consultants</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Czech Republic	<u><a href="#">PRK Partners</a></u>	No	N/A	<u><a href="#">here</a></u>
Denmark	<u><a href="#">Kromann Reumert</a></u>	Yes	No	<u><a href="#">here</a></u>
Estonia	<u><a href="#">COBALT Law Firm</a></u>	Yes	No	<u><a href="#">here</a></u>
Finland	<u><a href="#">Roschier, Attorneys Ltd.</a></u>	Yes	Yes	<u><a href="#">here</a></u>

## Participating Firms (2)

Jurisdiction	Member Firm	Are liability caps in public contracts permitted?	If permitted, are they customary?	Reference
France	<u><a href="#">Gide</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Germany	<u><a href="#">Noerr</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Greece	<u><a href="#">Zepos &amp; Yannopoulos</a></u>	Yes	No	<u><a href="#">here</a></u>
Hungary	<u><a href="#">Nagy És Trócsányi</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Ireland	<u><a href="#">Arthur Cox</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Italy	<u><a href="#">Chiomenti</a></u>	Yes	No	<u><a href="#">here</a></u>
Latvia	<u><a href="#">Ellex Klavins</a></u>	Yes	No	<u><a href="#">here</a></u>
Lithuania	<u><a href="#">Ellex Valiunas</a></u>	Yes	No	<u><a href="#">here</a></u>
Luxembourg	<u><a href="#">Arendt &amp; Medernach</a></u>	Yes	No	<u><a href="#">here</a></u>

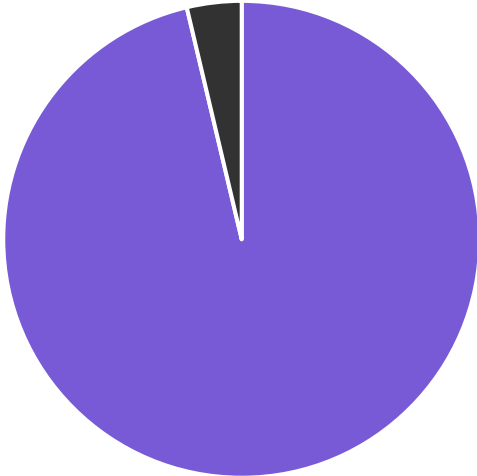


## Participating Firms (3)

Jurisdiction	Member Firm	Are liability caps in public contracts permitted?	If permitted, are they customary?	Reference
Malta	<u><a href="#">Ganado Advocates</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Netherlands	<u><a href="#">Houthoff</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Poland	<u><a href="#">Wardynski &amp; Partners</a></u>	Yes	No	<u><a href="#">here</a></u>
Portugal	<u><a href="#">Morais Leitão, Galvão Teles, Soares Da Silva &amp; Associados</a></u>	Yes	No	<u><a href="#">here</a></u>
Romania	<u><a href="#">Nestor Nestor Diculescu Kingston Petersen</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Slovak Republic	<u><a href="#">Cechova &amp; Partners</a></u>	Yes	Yes	<u><a href="#">here</a></u>
Slovenia	<u><a href="#">ŠELIH &amp; PARTNERJI LaFirmw</a></u>	Yes	No	<u><a href="#">here</a></u>
Spain	<u><a href="#">Uría Menéndez</a></u>	Yes	No	<u><a href="#">here</a></u>
Sweden	<u><a href="#">Advokatfirman Vinge KB</a></u>	Yes	No	<u><a href="#">here</a></u>

# Breakdown of responses

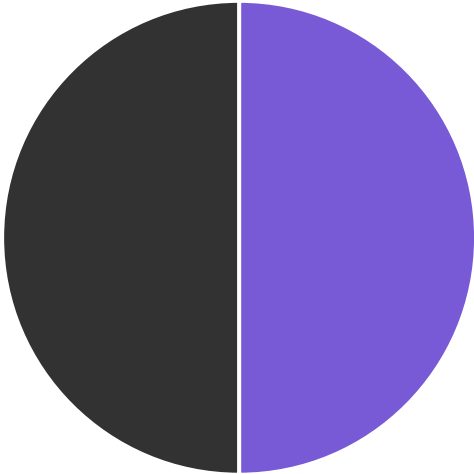
*In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of **Directive 2014/24 and 2014/25**, to include liability caps in public contracts executed with contractors?*



■ Yes ■ No

- **Yes (26)** Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden.
- **No (1)** Czech Republic.

*If permitted, is it **customary** for public contracts to include such clauses?*



■ Customary ■ Non-customary

- **Customary (13)** Austria, Bulgaria, Croatia, Cyprus, Finland, France, Germany, Hungary, Ireland, Malta, Netherlands, Romania, Slovak Republic.
- **Non-customary (13)** Belgium, Denmark, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovenia, Spain and Sweden.

# Country-specific responses

# Austria CERHA HEMPEL Rechtsanwälte GmbH



**Johannes Aehrenthal**  
Partner  
[johannes.aehrenthal@cerhahempel.com](mailto:johannes.aehrenthal@cerhahempel.com)

[View Johannes's Bio](#)

**CERHA HEMPEL**

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, it is permitted, but liabilities caused by intent or by major gross negligence cannot be limited.
2	If permitted, is it customary for public contracts to include such clauses?	Yes, with the limitation mentioned above.

# Belgium Liedekerke



**Frank Judo**  
Partner  
[f.judo@liedekerke.com](mailto:f.judo@liedekerke.com)

[View Frank's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, it is permitted.
2	If permitted, is it customary for public contracts to include such clauses?	No, it is not customary.

# Bulgaria

## Penkov, Markov & Partners



**Roman Stoyanov**

Partner

[roman.stoyanov@penkov-markov.eu](mailto:roman.stoyanov@penkov-markov.eu)

[View Roman's Bio](#)



PENKOV · MARKOV & PARTNERS

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>The Public Procurement Act, which is the main legislation governing the public procurement matters in Bulgaria, transposing the 2014 EU Public Procurement Package, does not explicitly envisage stipulations regarding any general liability cap clauses in public procurement contracts.</p> <p>However, notwithstanding the above, our recent experience on the matter in question shows that the cap of liabilities, applied by various contracting authorities, varies between 10 to 15 % of the value of the contract for procurement of construction works and supply of goods, reaching up to 20 to 30 % for services contracts.</p>
2	If permitted, is it customary for public contracts to include such clauses?	In addition, the Bulgarian Public Procurement Agency has recommended (in its latest manual good practices) that sample public procurement contracts shall envisage precisely formulated penalty clauses for liquidated damages whereby the amount of the penalty shall take into account the nature of the non-performed obligation as well as the interest of the contracting authority. In that respect, the Agency has not predetermined any fixed liability caps but rather opted to provide only instructions to the contracting authorities on the proportionality principle of the sanctions.

# Croatia

## Divjak Topic Bahtijarevic & Krka Law Firm



**Ana-Maria Sunko**  
Attorney  
[anamaria.sunko@dtb.hr](mailto:anamaria.sunko@dtb.hr)

[View Ana-Maria's Bio](#)

DIVJAK TOPIĆ BAHTIJAREVIĆ & KRKA

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Croatian public procurement provisions do not regulate this aspect of public contracts, i.e., they refer to special regulations regulating private contracts in specific sectors. In accordance with special provisions for construction, it is possible to arrange a cap for common negligence liability. However, liability for gross negligence and willful misconduct cannot be capped.
2	If permitted, is it customary for public contracts to include such clauses?	This is difficult to estimate since this largely depends on discretion of the contracting authority and the nature of the tender. However, in private contracts parties regularly agree on a cap for common negligence liability, usually up to the amount of the contractual price.

# Cyprus

## Chrysostomides Advocates & Legal Consultants



**Dimitris Papapolyviou**  
Senior Associate  
[d.papapolyviou@chrysostomides.com.cy](mailto:d.papapolyviou@chrysostomides.com.cy)

[View Dimitris' Bio](#)

**Chrysostomides**  
Advocates & Legal Consultants

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	The relevant laws and regulations which apply on public contracts do not contain a specific provision in relation to inclusion of liability caps. Therefore, the contracting authorities are at liberty to include liability caps in public contracts executed with contractors, in accordance the general contract law principles applicable in Cyprus.
2	If permitted, is it customary for public contracts to include such clauses?	Yes, liability caps are usually found in infrastructure/construction-related public contracts.



# Czech Republic

## PRK Partners



**Jaroslav Seborsky**  
Associate  
[Jaroslav.seborsky@prkpartners.com](mailto:Jaroslav.seborsky@prkpartners.com)

[View Jaroslav's Bio](#)

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>The liability of the contracting authority for an unlawful procedure, unlawful cancellation of the procurement procedure, or exclusion of the contractor from the procurement procedure cannot be limited. (Generally, in such a case, the damage suffered by the supplier may be most often in the form of lost profits from the loss of the possibility to perform the public contract, but it may also be in the form of costs incurred in vain in participating in the procurement procedure and pre-contractual liability.</p> <p>There is however option in some public contracts (public sector contracts), the contracting authority may reserve the right to cancel the award procedure and limit any rights of contractors to claim damages in connection to this cancellation.</p> <p>Should the damages be incurred in the realisation phase – i.e., after the contract was already awarded, the liability of the contracting authority for damages caused to the supplier is generally governed by the general legal regulation governing compensation for damages, which is Act No. 89/2012 Coll., the Civil Code, as amended. i.e., civil law damages category and in practice certain limitations of damages may be used. We are however not aware of this being very often the case. It should be noted, however, that the contractual limit must be set in the draft contract at the beginning (or, in the case of a change to the terms of reference, during) of the procurement procedure and cannot be set by amending an existing contract, as this would constitute an impermissible change to the commitment.</p> <p>Should the limitation of liability be placed in favour of the supplier, the contracting authority may find itself in the breach of obligations of due care and responsibilities of the responsible contracting authority (i.e., proper and efficient management of public property that may be imposed on the contracting authority by public law).</p> <p>What we are aware of is limitation of pre-contractual liability by contracting authorities (i.e., that every supplier pays his own expenses stemming from his application to the procurement procedure).</p>
2	If permitted, is it customary for public contracts to include such clauses?	As written above, we are not aware of this being very customary. We are aware of some cases, in which this may happen, but such cases are often “strategic public contract” falling under exemptions from Public Procurement Act (such as military, nuclear and similar contracts).

# Denmark

## Kromann Reumert



**Jeppe Lefevre Olsen**  
Partner  
[jol@kromannreumert.com](mailto:jol@kromannreumert.com)

[View Jeppe's Bio](#)

KROMANN  
REUMERT

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>It is permissible for the contracting authorities/bodies governed by public law, in the sense of Directive 2014/24 and 2014/25 to include liability caps in public contracts executed by contractors. That goes both ways, i.e., liability caps covering both (or either) the supplier and the contracting authority respectively</p> <p>There are no general public procurement rules in Danish law regulating clauses on liability in public contracts. Therefore, whether liability caps are permitted is regulated by Danish contract law, which in broad terms allows for freedom of contract and hence allows liability caps. However, there might be certain special legislation stating otherwise in certain specialized sectors.</p>
2	If permitted, is it customary for public contracts to include such clauses?	<p>In general, it is not customary for public contracts to include such clauses. In most public contracts, the contractors are liable in accordance with the general rule in Denmark. The general rule states that an entity (both the public authority and the private contractor) is (only) liable for damages imposed on the other party when there is a basis of liability, a documented loss and causal connection. Normally, caps are therefore not necessary.</p> <p>However, while liability caps are not used in general, they are not entirely uncommon in Danish public contracts and within certain sectors they might be used more frequently. E.g., in larger infrastructure projects where, foreign suppliers are expected and where e.g., the contractual setup is based on FIDIC. Therefore, little can be said about a general level or format of these liability caps.</p>

# Estonia

## COBALT Law Firm



**Kadri Matteus**  
Specialist Counsel  
[kadri.matteus@cobalt.legal](mailto:kadri.matteus@cobalt.legal)

[View Kadri's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, it is permitted to include liability caps towards the contractor's liability.
2	If permitted, is it customary for public contracts to include such clauses?	It is permitted; however, it is not customary. The contracts are drafted by the contracting authorities and/or bodies governed by public law and usually, they do not prefer to include liability caps.

# Finland

## Roschier, Attorneys Ltd.



**Ami Paanajärvi**  
Partner  
[ami.paanajarvi@roschier.com](mailto:ami.paanajarvi@roschier.com)

[View Ami's Bio](#)

ROSCHIER

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, it is permitted.
2	If permitted, is it customary for public contracts to include such clauses?	Yes. In the general terms and conditions for public procurements (downloadable in English <a href="#">here</a> , see particularly page 11) the liability cap is 5 times the value of the procurement. Market practice is, however, to agree on a liability capped at the value of the procurement.

# France

## Gide Loyrette Nouel

### A.A.R.P.I.



**Sarah Assayag**  
Associate  
[sarah.assayag@gide.com](mailto:sarah.assayag@gide.com)

[View Sarah's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>Under French law, public procurement contracts may contain clauses limiting the liability of both the public entity (for example, limiting the amount of compensation payable to the contractor in the event of unilateral termination by the public entity) and the contractor (for example, limiting the contractor's liability to twice the amount of fees received). However, gross negligence on the part of the contractor precludes the application of any liability limitation clause.</p> <p>Please note that, for public procurements concluded by local authority, the total waiver by the public authority of its right to bring a liability action is prohibited. Therefore, only clauses providing for an adjustment or limitation of the contractor's liability are possible, and liability exclusion clauses are illegal.</p> <p>In any case, the liability cap of the contractor must not be excessively low in relation to the loss suffered. Indeed, the French public authorities are prohibited from granting liberalities i.e. paying a sum they do not owe (or renouncing a sum they should have received).</p>
2	If permitted, is it customary for public contracts to include such clauses?	<p>Clauses limiting the amount of compensation payable to the contractor in the event of unilateral termination by the public authority are common in public procurement contracts. However, clauses limiting the contractor's liability are less common. In this respect, they are not provided for in the general administrative clauses ("<i>cahiers des clauses administratives générales</i>"), which constitute a model specifications that depend on the subject of the contract. However, the parties are free to include such clauses in their contracts.</p>

# Germany Noerr



**Julian von Lucius**  
Associated Partner  
[Julian.vonLucius@noerr.com](mailto:Julian.vonLucius@noerr.com)

[View Julian's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes. It is permissible to include liability caps in public contracts in Germany and it is customary to do so.
2	If permitted, is it customary for public contracts to include such clauses?	There are a number of standard contracts for public procurement that provide for such caps, and we routinely see them in individual cases (and negotiate them).

# Greece

## Zepos & Yannopoulos



**Athina Skolarikou**  
Partner  
[a.skolarikou@zeya.com](mailto:a.skolarikou@zeya.com)

[View Athina's Bio](#)

ZEPUS & YANNOPOULOS

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	There is no explicit regulatory provision prohibiting the inclusion of liability cap clauses in public contracts under Greek law.
2	If permitted, is it customary for public contracts to include such clauses?	Greek public contracts do not as a rule include liability caps. Whether or not a contract is awarded further to an open tender or negotiated procedure, its legal terms are as a rule unilaterally proposed by the Greek State or Greek awarding authorities / awarding bodies and generally do not include clauses introducing liability limitations, either in the form of a) waiver of damages limiting a party's exposure only to direct damages or b) liability caps. Some exceptions are noted in the field of contracts proposed by former awarding bodies, such as the privatized Public Power Corporation S.A., where liability cap provisions, either provided as a percentage of the total contractual value or a specific amount, have been exceptionally introduced.

# Hungary

## Nagy És Trócsányi



**Lúcia Detvay**  
Associate  
[detvay.lucia@nt.hu](mailto:detvay.lucia@nt.hu)

[View Lucia's Bio](#)

NAGY & TRÓCSÁNYI

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, the inclusion of liability caps in public contracts with contractors is allowed under Hungarian public procurement law.
2	If permitted, is it customary for public contracts to include such clauses?	Yes, it is.



# Ireland Arthur Cox



**Aaron Boyle**  
Partner  
[Aaron.boyle@arthurcox.com](mailto:Aaron.boyle@arthurcox.com)

[View Aaron's Bio](#)

ARTHUR COX

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, it is permissible to include liability caps in public contracts in Ireland.
2	If permitted, is it customary for public contracts to include such clauses?	It is usual but not always the case that contracting authorities include liability caps in such contracts.

# Italy Chiomenti



**Elio Leonetti**  
Of Counsel  
[Elio.leonetti@chiomenti.net](mailto:Elio.leonetti@chiomenti.net)

[View Elio's Bio](#)

**CHIOMENTI**

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	The current Italian Public Procurement Code (enacted by Legislative Decree 36/2023 and in force as from 1 July 2023) and the previous Procurement Codes of 2006 and 2016 do not provide for any type of liability caps or limitation of liability clauses in public contracts between public authorities and contractors. Indeed, we point out that based on a comprehensive interpretation of the provisions of the Procurement Code, the liability of contractors, subcontractors and auxiliary companies extends to all services covered by the contract, without limitation. However, according to general principles of Italian contract law, generally it could be possible to include liability caps, but this never happens.
2	If permitted, is it customary for public contracts to include such clauses?	No, such clauses are never seen in practice.

# Latvia Ellex Klavins



**Maris Brizgo**  
Associate Partner  
[Maris.Brizgo@ellex.legal](mailto:Maris.Brizgo@ellex.legal)

[View Maris' Bio](#)

Ellex Klavins

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Under Latvian law, contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, are not restricted to provide liability caps in public contracts and may do it according to Latvian Civil Law.
2	If permitted, is it customary for public contracts to include such clauses?	Please note that according to our experience it is not customary to provide liability caps in the public contracts since contract templates are always drafted by contracting authorities and are attached to tender rules and may not be negotiated or amended.

# Lithuania

## Ellex Valiunas



**Sarunas Neniskis**  
Associate Partner  
[Sarunas.Neniskis@ellex.legal](mailto:Sarunas.Neniskis@ellex.legal)

[View Sarunas' Bio](#)

Ellex<sup>®</sup> Valiunas

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>In general, there are no restrictions to impose a liability cap for public procurement contracts in Lithuanian jurisdiction. Therefore, the purchasing entity (in the sense of Directives 2014/24 and 2014/25) can decide (or the contracting parties may agree during the negotiations) to cap the civil liability either by a sum and/or exclude the contractor of indirect or/and consequential damages. In such cases, liability is usually limited to the value of the contract and to direct damages only.</p> <p>On the other hand, it is necessary to mention that there are a few exemptions from the general rule concerning civil liability limitation arising from the Civil Code of the Republic of Lithuania. An agreement of the parties upon exclusion of civil liability for damages (damage) sustained by reason of the debtor's intentional fault or gross negligence shall be null and void. It shall be prohibited to exclude or limit civil liability for impairment of health, deprivation of life or non-pecuniary damage caused to another (Art. 6.252(1) of the Civil Code).</p> <p>However, the Law on Public Procurement states that the performance of obligations of any public procurement contract must be secured by any of the security measures (default interests, penalties, performance guarantee etc.). So, one could argue that an irrationally and disproportionately low liability cap means that the performance of the obligations is not secured at all.</p>
2	If permitted, is it customary for public contracts to include such clauses?	<p>Although Lithuanian public procurement laws do not restrict agreements on limitation of liability, contracting authorities are not particularly inclined to do so. The majority of public procurement contracts does not include such clauses. However, in our experience, it is sometimes possible to establish such limitation of liability clauses in the contract, depending on the circumstances of the project. This is true especially in those projects (public tenders) where a competition is low and the contracting entity is willing to make the contract more favourable to the suppliers.</p>

# Luxembourg Arendt & Medernach



**Christian Point**  
Partner  
[Christian.Point@arendt.com](mailto:Christian.Point@arendt.com)

[View Christian's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	We are not aware of any legal provisions implementing Directives 2014/24 and 2014/25 which would in principle prohibit the inclusion of a limitation of liability clause in favour of the contractor in a public procurement contract.
2	If permitted, is it customary for public contracts to include such clauses?	In our experience, however, it is not common practice to include a limitation of liability clause in favour of the contractor in a public procurement contract.

# Malta

## Ganado Advocates



**Clement Mifsud-Bonnici**  
Senior Associate  
[cmifsudb@ganado.com](mailto:cmifsudb@ganado.com)

[View Clement's Bio](#)

**ganado**  
*advocates*

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>There is no provision in the Maltese law transposing the EU Public Procurement Directives which in express terms does not permit the exclusion or limitation of liability. The general principle under Maltese private law is that this is possible in so far as no liability for fraud, wilful misconduct and gross negligence is limited or excluded.</p> <p>The standard terms for services contracts (not works or supplies contracts) do contain a limitation of liability clause as follows:</p> <p>“At its own expense, the Contractor shall indemnify, protect and defend the Central Government Authority and the Contracting Authority, their agents and employees, from and against all actions, claims, losses or damages arising out of the Contractor's performance of the contract provided that:</p> <ol style="list-style-type: none"> <li>1. the Contractor is notified of such actions, claims, losses or damages not later than 30 days after the Contracting Authority becomes aware of them;</li> <li>2. the ceiling on the Contractor's liability to the Central Government Authority and the Contracting Authority shall be limited to an amount equal to the contract value, and such ceiling shall not apply to any losses or damages caused to third parties by the Contractor or by the Contractor's wilful misconduct;</li> <li>3. the Contractor's liability shall be limited to actions, claims, losses or damages directly caused by such failure to perform its obligations under the contract and shall not include liability arising from unforeseeable occurrences incidental or indirectly consequential to such failure.”</li> </ol>
2	If permitted, is it customary for public contracts to include such clauses?	Please see above.

# Netherlands

## Houthoff



**Sander van den Boogaart**  
Counsel  
[s.van.den.boogaart@houthoff.com](mailto:s.van.den.boogaart@houthoff.com)

[View Sander's Bio](#)

**HOUTHOFF**

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>In the Netherlands, this is not only permitted but may – depending on the circumstances – even be prescribed. By way of explanation, we note the following. Contracting authorities must observe the principle of proportionality. In the Netherlands, this principle is detailed in the Dutch 'Proportionality Guide' ("Guide"). The Guide has been designated as a mandatory guideline which must be observed by contracting authorities. The Guide provides that contracting authorities may not demand liability which is not limited in any way. When evaluating what limitation of liability is proportional, a contracting authority must take into consideration,</p> <ol style="list-style-type: none"> <li>1. the risks which the contracting authority actually runs and</li> <li>2. the usual liability requirement in the relevant industry or for the relevant contract by nature and size.</li> </ol> <p>For more details, please refer to the <a href="#">Guide, Rule 3.9 D</a>.</p>
2	If permitted, is it customary for public contracts to include such clauses?	Yes, it is. See the answer to the question above.

# Poland

## Wardynski & Partners



**Anna Prigan**

Partner

[anna.prigan@wardynski.com.pl](mailto:anna.prigan@wardynski.com.pl)

[View Anna's Bio](#)

**WAR PAR  
DYN TNE  
SKI+ RS•**

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, Polish jurisdiction permits contracting authorities and/or bodies governed by public law (in the sense of Directives 2014/24 and 2014/25) to include liability caps in public contracts performed by contractors.
2	If permitted, is it customary for public contracts to include such clauses?	<p>Nevertheless, in Poland, it is not customary to limit the liability of contractors to any level. Consequently, the vast majority of public contracts involve unlimited liability for contractors which may significantly exceed the contract's value, in accordance with the general rules of liability for harm under the Polish Civil Code.</p> <p>The Polish Civil Code (CC) provides for two forms of recoverable damages, namely "incurred losses" and "lost benefits". Under Article 361 of the Civil Code:</p> <ol style="list-style-type: none"> <li>1. A person obliged to pay damages will be liable only for the ordinary effects of the action or omission that gave rise to the harm.</li> <li>2. Within the above-mentioned limits, in the absence of a different statutory or contractual provision, the redress of harm will involve losses incurred by the injured person as well as benefits which that person could have obtained had he not suffered the harm.</li> </ol> <p>Article 361 § 1 CC provides for an adequate causal connection test, according to which liability for damages is limited only to the ordinary effects of the action or omission from which the harm arose.</p> <p>The harm is enforceable only if it constitutes a typical sequence of actions by the person causing the harm. Jurisprudence states that a consequence is "typical" when in the given arrangement of relations and conditions, and in the ordinary course of events, the harm is a natural consequence of a sequence of damaging actions.</p>



# Poland

## Wardynski & Partners



**Anna Prigan**

Partner

[anna.prigan@wardynski.com.pl](mailto:anna.prigan@wardynski.com.pl)

[View Anna's Bio](#)

**WAR PAR  
DYN TNE  
SKI+ RS•**

Num.	Question	Opinion
2	If permitted, is it customary for public contracts to include such clauses?	<p>Article 361 § 2 CC is not mandatory and allows the parties to introduce contractual provisions changing the rules of liability for harm. Parties may limit their liability only to direct harm, exclude liability for lost benefits, and also place an aggregate cap on the liability for harms.</p> <p>On the other hand, for contracting authorities and/or bodies governed by public law, there is a requirement for contractual penalties to be reserved as the major remedy securing the public interest. Contractual penalties are lump-sum compensation for redressing the harm arising from non-performance or improper performance of an obligation. In practice, the charging of contractual penalties in a situation where specific circumstances have arisen, as envisaged in the contract, is deemed sufficient security for this interest. The maximum amount of contractual penalties is not defined in the PPL, but most often, the maximum amount of contractual penalties is around 30% of the contractor's remuneration.</p> <p>Contractual penalties are not the sole remedy in a typical public contract. The right to pursue supplementary compensation over and above the accrued contractual penalties is usually provided for under the contracts. However, in Polish practice, it is not usual for parties to pursue such compensation. In order to claim compensation in excess of the contractual penalties, the creditor needs to demonstrate the occurrence of the following circumstances:</p> <ol style="list-style-type: none"> <li>i. non-performance or improper performance of an obligation, for which the debtor bears liability,</li> <li>ii. the harm suffered by the creditor,</li> <li>iii. a causal link between the non-performance or improper performance of an obligation by the debtor and the harm suffered by the creditor</li> </ol> <p>The above conditions must occur concurrently.</p> <p>Finally, pursuant to the Polish Public Procurement Law:</p> <ul style="list-style-type: none"> <li>• the contractor is not liable for delay, unless justified by the circumstances or the scope of procurement (Article 433 sec. 1);</li> <li>• the contractor may not be liable for circumstances for which the sole liability rests with the contracting authority (Article 433 sec. 3).</li> </ul>

# Portugal

## Morais Leitão, Galvão Teles, Soares Da Silva & Associados



**Vasco Xavier Mesquita**  
Senior Lawyer  
[vxmesquita@mlgts.pt](mailto:vxmesquita@mlgts.pt)

[View Vasco's Bio](#)

**MORAIS LEITÃO**  
GALVÃO TELES, SOARES DA SILVA  
& ASSOCIADOS

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>With regard to the possibility of including liability caps in public contracts, please note that we have to differentiate the following types of liability:</p> <ol style="list-style-type: none"> <li>1. Liability for (i) damages caused to third parties and other events which, by law, must be the subject of an insurance contract; and (ii) damages caused to property, equipment or to the works itself, inter alia, which may be covered by an insurance contract. In this case, the law does not provide for any liability caps, which may be set in the Tender Documents and in the Contracts. The amounts of insurance policies required to cover the risks of the contract may also be provided for in such documents.</li> <li>2. Liabilities for the breach of the contract or its defective fulfilment, such as those resulting from the breach of contractual deadlines. In this case, the liability caps may also be set in the Tender Documents and in the Contracts. When the price of the contract is over 500.000 euros it is usually guaranteed by a bond of up to 5% of the contract value. The law only provides for liability caps in case of liquidated damages for delays: <ol style="list-style-type: none"> <li>i. 20% of the contract price unless/without prejudice of the right of the public entity to terminate the contract (article 329/2 of the Public Contracts Code);</li> <li>ii. 30% of the contract price if the public entity decides not to terminate the contract due to a risk of serious harm to the public interest (article 329/3 of the Public Contracts Code);</li> <li>iii. In case of termination (when the 20% of the Contract Price penalties is reached), the public entity may claim higher liquidated damages, notably the losses of launching a new public procurement procedure (i.e., higher price paid to a new contractor for the performance of the same contract) - article 333/2 of the Public Contracts Code.</li> </ol> </li> </ol>
2	If permitted, is it customary for public contracts to include such clauses?	We note that in most public contracts in Portugal it is not common to include liability caps, other than those mentioned above, and the coverage of risks transferred to civil liability insurance. Although it may occur, in the most public contracts there are no liability caps clauses.

# Romania

## Nestor Nestor Diculescu

## Kingston Petersen



**Adina Chilim-Dumitriu**

Partner

[adina.chilim-dumitriu@nndkp.ro](mailto:adina.chilim-dumitriu@nndkp.ro)

[View Adina's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>In Romania, the laws that transpose Directives 2014/24 and 2014/25 do not prohibit (and therefore allow) contracting authorities and/or bodies governed by public law to include liability caps in public contracts executed with contractors.</p> <p>In the case of works / design and works contracts related to investment objectives financed from public funds (including EU funds), the standard contract applicable (under Government Decision 1/2018) expressly provides that the liability of the Contractor towards the Employer is capped to the Price of the Contract (for Works related damages or any other contractual damages). However, the amount of damages may go beyond the cap if the Contractor's liability is sought for bodily injury, decease, willful misconduct and gross negligence.</p>
2	If permitted, is it customary for public contracts to include such clauses?	As previously mentioned, works / design and works contracts related to investment objectives financed from public funds provide a liability cap for the contractor by default. As concerns other types of contracts that are awarded through public procurement/utilities procurement procedures, we have encountered both cases when liability caps were included in the contract draft or later accepted by the contracting authorities/bodies governed by public law during the procurement process (through clarifications to the award documentation, during the negotiation stage etc.), as well as cases when liability caps were not included or accepted during the procurement process.

# Slovakia

## Cechova & Partners



**Marek Varga**  
Attorney  
[Marek.Varga@cechova.sk](mailto:Marek.Varga@cechova.sk)

[View Marek's Bio](#)

 ČECHOVÁ & PARTNERS

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	In Slovakia, it is in general permitted for contracting authorities and/or bodies governed by public law to include liability caps in public contracts executed with contractors in the same way they may be included in commercial contracts.
2	If permitted, is it customary for public contracts to include such clauses?	It is not unusual to find such clauses included in public contracts, although in our view such clauses are included in public contract regularly.

# Slovenia

## ŠELIH & PARTNERJI

### Law Firm



**Barbara Hocevar**  
Partner  
[barbara.hocevar@selih.si](mailto:barbara.hocevar@selih.si)

[View Barbara's Bio](#)



Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	The Slovenian public procurement legislation does not contain any provisions regulating specific liability caps in public contracts. They are not prohibited neither specifically allowed. Given the public contracts shall in general be made in line with general contract law, in our opinion inclusion of liability cap in the public contract is allowed.
2	If permitted, is it customary for public contracts to include such clauses?	I have seen few cases of such clauses but not always. I am not aware that this would be customary on the market.

# Spain

## Uría Menéndez

URÍA  
MENÉNDEZ



**José Alberto Navarro Manich**  
Partner  
[josealberto.navarro@uria.com](mailto:josealberto.navarro@uria.com)

[View Jose's Bio](#)

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	<p>A distinction must be made between (a) the contractor's liability vis-à-vis third parties and (b) vis-à-vis the Public Administration. When it comes to indemnifying third parties, the Spanish Law on Public Sector Contracts provides that the contractor shall be obliged to indemnify all damages caused to third parties as a consequence of the operations required for the execution of the contract.</p> <p>However, when such damages to third parties have been caused as an immediate and direct consequence of an order of the Administration, or defects of the project in the works contract, the Administration shall be liable. Thus, the contractor's liability can only be "limited" vis-à-vis third parties when the liability is not attributable to the contractor but to the Administration.</p> <p>When it comes to indemnifying the Administration, a distinction must be made between (i) contracts entered into by "contracting authorities" and (ii) contracts entered into by "bodies governed by public law" (both terms as defined by the Directives).</p> <p>Contracts entered into by "contracting authorities" are considered administrative contracts and therefore, subject to the Law on Public Sector Contracts. These contracts shall establish a guarantee period as from the date of reception or conformity by the Administration, after which, if the Administration does not object, the contractor's liability shall be extinguished. Thus, broadly speaking, the contractor will be liable for any construction defects (works contract); defects in the goods supplied (supply contract); omissions, errors, inadequate methods or incorrect conclusions in the execution of the contract (service contract) occurring within the warranty period.</p> <p>Nevertheless, the Law on Public Sector Contracts sets out an instance of limitation of liability: in service contracts for the elaboration of a construction project, the compensation for damages caused to the Administration during the execution of the contract will reach 50% of the amount of the damages caused, and it can only amount to up to 5 times the price agreed for the project.</p> <p>On the other hand, contracts entered into by "bodies governed by public law" are only subject to administrative law in their preparation and adjudication, so their execution is subject to private law. In this case, nothing would prevent the possibility of limiting the contractor's liability under private law. However, the Law on Public Sector Contracts provides for a specific case of liability even if the contract is subject to private law: in service contracts consisting of the complete preparation of a construction project, the contractor shall be held liable for unremedied defects or errors in the project.</p>

# Spain

## Uría Menéndez

URÍA  
MENÉNDEZ



**José Alberto Navarro Manich**  
Partner  
[josealberto.navarro@uria.com](mailto:josealberto.navarro@uria.com)

[View Jose's Bio](#)

Num.	Question	Opinion
2	If permitted, is it customary for public contracts to include such clauses?	In cases where it is possible to limit the contractor's liability (contracts with "bodies governed by public law") it is most common not to do so — at most those contracts may contain a provision making the contractor liable for all damages unless they are the immediate and direct consequence of an order by the Administration (same regime as for the administrative contracts entered into by "contract authorities").

# Sweden

## Advokatfirman Vinge KB



**Daniel Wendelsson**  
Partner  
[daniel.wendelsson@vinge.se](mailto:daniel.wendelsson@vinge.se)

[View Daniel's Bio](#)

VINGE

Num.	Question	Opinion
1	In your jurisdiction, is it permitted for contracting authorities and/or bodies governed by public law, in the sense of Directive 2014/24 and 2014/25, to include liability caps in public contracts executed with contractors?	Yes, this is permitted in Sweden.
2	If permitted, is it customary for public contracts to include such clauses?	In Sweden, each contracting authority/entity is entitled to themselves decide the contractual terms and conditions in the procurement, and there is no centralized body imposing contractual terms to contracting authorities/entities. Hence, we experience public contracts in different procurements with and without liability caps and we cannot determine what is the most common practice in this respect.



# LexMundi

Bringing the best together™



Lex Mundi is the world's leading network of independent law firms.

Lex Mundi members are not affiliated in the joint practice of law; each member firm is an independent law firm and renders professional services on an individual and separate basis.

[lexmundi.com](https://www.lexmundi.com)