

Exemption clauses: a comparative review of the UNIDROIT Principles and the Qatar Civil Code

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Abstract

This article deals with exemption clauses and specifically with respect to their definition, types, and validity. It tackles clauses that exempt the obligor from liability for his or his employees' non-performance. The article presents and analyses the legal provisions on exemption clauses under the UNIDROIT Principles and the Qatar Civil Code and discusses the case law made under these legislative instruments. In addition, the article draws a comparison between the legal texts at issue in order to conclude with a solution that best serves the parties' interests.

I. Introduction

The UNIDROIT Principles on International Commercial Contracts (PICC), as the title already conveys, govern (many aspects of) international commercial contracts.¹ The PICC acknowledge the principle of freedom of contract. Article 1.1 of the PICC states that '[t]he parties are free to enter into a contract and to determine its content'.² In application of this principle, Article 7.1.6 of the PICC allows the parties to agree to exempt the obligor from liability for non-performance. It states that '[a] clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'.

In addition to contracts, the Qatar Civil Code no. 22/2004³ (hereinafter Qatar Civil Code) covers many topics, like torts and rights *in rem*. The Qatar Civil Code recognizes the parties' liberty to contract. Article 171(1) accepts the doctrine that the contract is the law of the parties; it states in part that '*Pacta sunt servanda*—that is, a contract duly and properly concluded between the parties—must be kept, and non-fulfilment of the respective obligations is a breach of that contract'. Based on the principle of party autonomy, Article 259 of

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¹ Text of the UNIDROIT Principles of International Commercial Contracts (PICC) (UNIDROIT 2010) as well as official comments, is available online: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>, accessed 25 February 2022.

² In addition, PICC (n 1) Art. 1.3 states that '[a] contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles'.

³ An English translation of this law is available online: <https://www.almeezan.qa/LawPage.aspx?ID=2559&language=en>, accessed 25 February 2022.

the Qatar Civil Code acknowledges exemption clauses in the field of contractual liability.⁴ It states that:

- 1) The parties may agree to discharge the obligor from any liability arising from his failure or delay to perform his contractual obligation, except for his fraud or gross negligence.
- 2) The parties may also agree to discharge the obligor from liability for fraud or gross negligence committed by persons employed by the obligor to perform his obligation.

Both the PICC and the Qatar Civil Code recognize and control exemption clauses. However, the control mechanism adopted by the former is different from the one adopted by the latter. The PICC adopt a general, flexible criterion based on the fairness of the exemption clause. An exemption clause ‘may not be invoked if it would be grossly unfair to do so’. In contrast, the Qatar Civil Code adopts a rigid criterion. A contractual clause shall be invalid if it discharges the obligor from his liability for non-performance arising from ‘his fraud or gross negligence’. This article will elaborate more on these two criteria to identify which of them is better in terms of validity of an exemption clause and the grounds for invalidity/unenforceability thereof.

This article is limited to the Qatar Civil Code and the PICC as well as the case law thereunder. This is particularly important because these two legislative instruments include different provisions concerning the mechanism of controlling exemption clauses. This article may refer to legislative instruments or laws of other jurisdictions only when necessary. In particular, because the Qatar Civil Code is heavily influenced by the Egyptian Civil Code (that is, Law no. 131/1948), reference will be made, when necessary, to the counterpart provisions of the Egyptian Civil Code and its practical application by courts.

This article will not tackle exemption clauses in consumer contracts because the PICC neither cover consumer contracts nor interfere with mandatory legislation. Rather, this study may only refer to such contracts when it is necessary. The purpose is twofold: first, this article discusses and analyses the related legal provisions on exemption clauses in light of their application in real life because exemption clauses ‘are particularly common in international contract practice and tend to give rise to much controversy between the parties’.⁵ Second, given the diversity in the mechanism of controlling exemption clauses, this article compares the provisions of the Qatar Civil Code with those of the PICC to determine which ones provide the best solutions in this regard. The article will start with defining and categorizing exemption clauses in section 2. Section 3 explains the validity of exemption clauses. Section 4 discusses exemption clauses concerning the obligor’s liability for his employees’ acts. Section 5 concludes with remarks and recommendations.

II. Exemption clauses: definition and types

1. Definition of exemption clauses

Literally, an exemption clause ‘is a clause which removes or omits something or grants relief from liability to which others are subject’.⁶ In the legal sense, an exemption clause is a clause that discharges the obligor from any liability for non-performance of his part of the

⁴ As for tortious liability, Art. 259(3) Qatar civil code expressly prohibits exemption clauses made prior to the arising of liability for the unlawful act. However, the parties agreement concluded after the arising of such liability shall be valid; thus, the obligor may be discharged from such liability in whole or in part.

⁵ Official Commentary of the PICC (n 1) UNIDROIT Principles, (n 1) Art. 7.1.6 no 1. Cf. Al-Habib Belhaj, ‘Protection of Weaker Party and Exemption Clauses’, (2015) *Sfax Bar Association—Journal of Legal Research and Studies* 11, 21, 25 (in Arabic). Michael Joachim Bonell, ‘Policing the International Commercial Contracts Against Unfairness under the UNIDROIT Principles’, (1994) *Tulane Journal of International & Comparative Law* 3, 73, 81.

⁶ JL van Dorsten, ‘The Nature of Contract and exemption Clauses’, (1986) *THRHR* 49(2), 189, 194.

contract. An exemption clause may restrict such liability too. In addition, the parties may agree to permit the obligor to render a substantially different performance. In all events, an exemption clause may not discharge the obligor of his contractual obligation.⁷ It only exempts or limits the obligor's liability in damages for non-performance.⁸ Exemption clauses—that is, the parties' agreement to discharge the obligor from his liability for non-performance may be expressed in different ways. Such agreement may be just a clause in the main contract (whether as a standard term or as an individually negotiated one) or an independent, separate agreement.⁹ Such agreement may be made either at the time of conclusion or thereafter.¹⁰ In all cases, this agreement shall be made by the parties in advance¹¹—that is, before the non-performance (whether failure to perform, defect, or late performance) exists.¹²

Exemption clauses differ from termination or forfeiture clauses. The Article 7.1.6 of the Official Commentary of the PICC makes this very clear.¹³ Under the Qatar Civil Code, an earnest payment made at the conclusion of the contract shall serve as a presumption that both parties have the option to withdraw (Article 100). The party who has paid the earnest money may withdraw from the contract and forfeit the earnest money. The other party (who has received the earnest money) may also terminate the contract, but he must repay double the amount received (Article 101). Earnest money is different from damages; it is the consideration for forfeit or termination of the contract. Nevertheless, there may be earnest money clauses 'which are in reality intended by the parties to operate as disguised exemption clauses'.¹⁴ This would be the case if an earnest money clause permits a party to terminate or withdraw from a contract on payment of very little indemnity.¹⁵ Indeed, such a clause limits the obligor's liability for non-performance of his contractual obligation 'since the obligor only has to pay a small amount of money if it does not perform'.¹⁶

Exemption clauses are also distinguished from agreed payment clauses. Under Article 7.4.3 of the PICC and Articles 265–7 of the Qatar Civil Code, the contracting parties may calculate the amount of indemnity in advance; they may agree that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance. An agreed payment clause 'may also have the effect of limiting the compensation due to the aggrieved party'.¹⁷ This would be the case if the parties fix a sum lower than expected damages resulting from non-performance.¹⁸ Under Article 7.1.6 of the PICC, 'a court may render the agreed payment ineffective as a limitation on liability—that is, the amount is lower than the damages—if it would be grossly unfair for the obligor to rely on a penalty

⁷ Rahma Berriq & Aissa Haddad, 'The Condition Exempting from Contractual Liability and the Restrictions on It', (2020) *Hassiba Benbouali University of Chlef Comparative Legal Studies Journal* 6(2), 220, 222 (in Arabic). Younes Ali, 'Restrictions Imposed on the Condition Exempting from Contractual Liability in English Law: An Analytical and Comparative Study with Iraqi and Egyptian Laws', (2018) *Alexandria University College of Law Journal for Legal and Economic Research* 3, 551, 571 (in Arabic).

⁸ Berriq & Haddad, (n 7) 222. Kazem Ali & Ru'a Saleh, 'The Exclusion Clause of Contractual Liability under both the English and Iraqi Laws', (2017) *Baghdad University Journal of Legal Sciences*, 32(1), 240, 244 (in Arabic).

⁹ Mustafa Mousa Mustafa Alajarmeh, 'The Role of Will in Exemption from Contractual Liability in Accordance with the Provisions of Jordanian Civil Law', (2016) *University of Bahrain Journal of Law* 13(2), 321, 351 (in Arabic).

¹⁰ van Dorsten, (n 6) 196.

¹¹ Ali & Saleh, (n 8) 244. Ali, (n 7) 572.

¹² Anwar Sultan, *Sources of Obligation in Civil Law—a Comparative Study with Islamic Law*, (3rd edn, Dar Al-Thaqafa, Amman 2012) 358 (in Arabic). Ali, (n 7) 571. Alajarmeh, (n 9) 329.

¹³ Official Commentary of the PICC (n 1) UNIDROIT Principles, (n 1) Art. 7.1.6 no 3: 'Exemption clauses are to be distinguished from forfeiture clauses which permit a party to withdraw from a contract on payment of an indemnity.'

¹⁴ Official Commentary of the PICC (n 1) UNIDROIT Principles, (n 1) Art. 7.1.6 no 3.

¹⁵ Harriet Schelhaas, 'Chapter 7: Non-performance', in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, Oxford 2009) 760, 761–2.

¹⁶ Schelhaas, (n 15) 762.

¹⁷ Official Commentary of the PICC (n 1) UNIDROIT Principles, (n 1) Art. 7.1.6 no 4.

¹⁸ Schelhaas, (n 15) 761.

clause which fixes a clearly inadequate sum to compensate for the expected harm'.¹⁹ According to Article 259(1) of the Qatar Civil Code, 'the agreed payment clause may be rendered ineffective as a limitation of liability for non-performance resulting from the obligor's fraud or gross negligence'.²⁰

2. Types of exemption clauses

There are different categories of exemption clauses: clauses discharging or limiting the obligor from liability for non-performance and clauses allowing the obligor to render a substantially different performance.

A. Discharge of obligor's liability

Under Article 7.1.6 of the PICC and Article 259(1) of the Qatar Civil Code, the contract parties may agree to exclude the obligor's liability in the event of non-performance. This was clearly stated in a decision made by the Netherlands Supreme Court in *Eiseres v Atria Watermanagement B.V.*²¹ In a dispute between two Dutch companies over the supply of bulb-cleaning machinery, the Hoge Raad (Supreme Court) in the Netherlands found that the standard terms attached to the contract for the sale of the machinery included a clause discharging the seller from any liability for losses sustained by the buyer in using the machinery. Since the buyer actually suffered a loss, he claimed damages from the seller. The seller invoked the exemption clause; the buyer objected that it was invalid because, *inter alia*, the seller, by having sought insurance coverage for possible liability on his part, implicitly admitted that he or she might be held liable *vis-à-vis* the buyer. The Supreme Court decided against the buyer. In his conclusion, the *advocaat-generaal* pointed out that, in denying the validity of the exemption clause in question, the Netherlands would depart from the internationally prevalent approach expressed in different instruments, including the PICC.

In addition, the Egyptian Court of Cassation referred to Article 217(2) of the Egyptian Civil Code (equivalent to Article 359(1) of the Qatar Civil Code) to uphold the validity of the exemption clause. The parties to an agency contract disputed the validity of a clause exempting the principal from any liability for termination of the agency contract with the agent. The Court indicated that '[i]t may be agreed that the debtor shall be exempted from any liability arising from the non-performance of its contractual obligation, unless this non-performance is a result of its fraud or gross negligence'. According to the Court, this resembles 'the right of the principal to dismiss the agent at any time without liability for any compensation'.²²

B. Restriction of obligor's liability

The contract parties may agree to limit the obligor's liability in the event of non-performance. Such limitation may have different forms, such as fixed sum, ceiling,²³ percentage of the performance in question,²⁴ or deposit retained.²⁵ Accordingly, the parties may limit the obligor's liability to a certain percent of damages. For example, the parties may agree to make the obligor liable only for half of the damages he would normally

¹⁹ Amin Dawwas, 'Agreed Payment for Non-performance under UNIDROIT Principles and Arab Region Laws', (2021) *Uniform Law Review* 26, 270, 278.

²⁰ *ibid.*, 281.

²¹ Case no C07/012HR of 11 July 2008, <http://www.unilex.info/principles/case/1547>, accessed 25 February 2022.

²² Egyptian Court of Cassation, decision no 731 (civil) for the judicial year 60, dated 25 December 1994, https://www.cc.gov.eg/civil_judgments, accessed 28 February 2022.

²³ Dalal Tafkir Murad Al-Ardhi, 'Cases of Invalidity of Some Contractual Liability Adjustment Agreements', (2020) *Adab Al-Kufa Journal* 45(2), 343, 354 (in Arabic). Schelhaas, (n 15) 761.

²⁴ Schelhaas, (n 15) 761.

²⁵ Official Commentary of the PICC (n 1) Art. 7.1.6 no 2. Nasr Al-Balaawi, 'Rules of Contractual Liability of the Exemption or mitigation Clause and its Legislative Applications—a Comparative Study' (2018) *Journal of Law & Political Sciences* 18(4), 169, 185 (in Arabic).

endure.²⁶ In Decision no. 92/2008,²⁷ the Qatari Court of Cassation concluded that the disputant parties had limited the obligor's liability to a fixed percent (50 percent) of damages resulting from the termination of the contract before its five-year period collapsed. In their contract of 14 March 2005, the appellant agreed to construct a housing project for the appellee on the appellee's land. Although the appellant started the construction works, the appellee terminated the contract on 3 July 2005 under the pretext that the required licenses could not be procured. Therefore, the appellant claimed damages.

The Court of Cassation found that 'Clause 2(4) of the [aforementioned] contract limits the liability of either party for termination of the contract before the expiry of its term to the costs associated with the preparation of the project's site and the provision of the necessary infrastructure, and provides for the division of such costs equally between the parties'. Accordingly, the Court of Cassation indicated that the decision of the trial court that made the appellant responsible for half of the said cost was correct. The Court of Cassation, after stating that the trial court had the discretionary power to conclude the parties' mutual intent regarding the discharge or limitation of liability, rejected the appellant's argument that Clause 2(4) of the contract was only a treatment of the costs incurred, not a limitation of liability. The parties may agree on a ceiling for the obligor's liability in damages. For example, the parties to a transport contract may agree that the damages the passenger claims in cases of non-performance by the transporter will not exceed 10,000 (Qatari Riyal, QR).²⁸

Exemption clauses may also shorten the time limits of damages claims²⁹ or reverse the burden of proof.³⁰ The Egyptian Court of Cassation referred to Article 217(2) of the Egyptian Civil Code (equivalent to Article 359(1) of the Qatar Civil Code) to uphold the validity of the clause limiting the obligor's liability—namely, by shortening the time limits of damages claims. The facts of the case show that two companies disputed overcompensation for damages caused by dyeing fabrics and textiles. The Court of Cassation found that the invoice, which was the basis of the two companies' contractual relationship, required the appellee to claim compensation within 15 days after the delivery of the goods. The Court of Cassation indicated that the appellant should be discharged from all forms of compensation if the appellee asks for such compensation after the collapse of the time limit stated in the invoice.³¹

In addition, the parties may limit the obligor's liability to some types of damages.³² They may agree to make the obligor liable for material damages only, with the exclusion of moral damages.³³ The obligor's liability for material damage may be limited to the loss incurred with the exclusion of missed profit.³⁴ The real practice confirms this conclusion. In Case no. SEF 0003–000176/2014 of 22 October 2014, the First Tribunal Apelaciones Civil in Uruguay³⁵ found that the respondent's standard terms, including the exemption clause, were incorporated into the business-to-business contract under dispute. The exemption

²⁶ Al-Balaawi, (n 25) 189.

²⁷ Qatari Court of Cassation, Decision no 92/2008, dated 3 December 2008, <https://www.eastlaws.com/>, accessed 28 February 2022.

²⁸ Ahmed Abu-Shanab, 'Rules of Amendment by Agreement of Contractual Liability in Jordanian Law', (2006) *Mu'tab Journal for Research and Studies: Humanities and Social Sciences Series* 21(2), 123, 132 (in Arabic).

²⁹ Al-Balaawi, (n 25) 172, 185. Khaled Hassan, 'Legal Protection of Consumers in Agreements for Exemption from Contractual Liability', (2018) *Al-Qanouniyya* 8, 37, 58 (in Arabic).

³⁰ Schelhaas, (n 15) 762. van Dorsten, n 6) 194.

³¹ Egyptian Court of Cassation, decision no 2311 for the judicial year 72, dated 9 March 2013. https://www.cc.gov.eg/civil_judgments, accessed 28 February 2022.

³² Ali & Saleh, (n 8) 245. Schelhaas, (n 15) 762.

³³ Al-Balaawi, (n 25) 189. Suha Al-Sabaheen, 'Agreements Amending the Provisions of Contractual Liability, a Comparative Study between the Jordanian Law and Egyptian Law', (2012) *National Criminal Journal* 55(3), 51, 55 (in Arabic).

³⁴ Muhammad Wahid-Eddin Sewar, *Explanation of Civil Law General Theory of Obligations, Part One: Sources of Obligation—Voluntary Sources: Contract and Unilateral Act* (Damascus University Press, Damascus 1995–1996) 395 (in Arabic).

³⁵ <http://www.uniflex.info/principles/case/1989>, accessed 25 February 2022.

clause limiting the shipyard's (respondent's) liability in case of losses caused to the vessel to losses caused by the wilful misconduct of its technical staff was found valid. The Court of Appeal affirmed that the principles of the *lex mercatoria*, such as those expressed in Article 7.1.6 of the PICC admit this kind of exemption clause.

In application of Article 259(1) of the Qatar Civil Code, the Qatari Court of Cassation affirmed that the non-performing party's liability might be limited to some types of damages. In Decision no. 347/2016, the Court found that the disputed employment accident insurance policy (made between the appellant [the insurance company] and the second appellee [the employer]) included a clause titled 'the exceptions'. This clause stated that '[i]n cases of a liability covered by a compulsory insurance in accordance with the requirements of the Traffic Administration or other regulatory authority, the amount compensable under this policy shall be only the sum in excess of the amount of compensation under such compulsory insurance'. According to the Qatari Court of Cassation, such a statement was conclusive in indicating the obligation of the company in charge of insurance coverage for work accidents. Therefore, the Court rejected the appellant's argument that it was discharged from liability. The Court indicated that, under the aforementioned insurance policy, the liability of the company *vis-à-vis* the injured worker or his heirs is limited to the sum in excess of the amount of compensation established under the compulsory insurance policy.³⁶

C. Permission of obligor to render a substantially different performance

The parties' agreement may grant the performing party the right 'to unilaterally alter the nature of performance promised'.³⁷ Under Article 7.1.6 of the PICC, the clause that 'permits one party to render performance substantially different from what the other party reasonably expected' qualifies as an exemption clause. The official commentary to Article 7.1.6 of the PICC gives further illustration:

A tour operator offers at a high price a tour providing for accommodation in specifically designated luxury hotels. A term of the contract provides that the operator may alter the accommodation if the circumstances so require. If the operator puts up its clients in second class hotels, it will be liable to them notwithstanding the contractual term since the clients expected to be accommodated in hotels of a category similar to that which had been promised.³⁸

Some legal writers say that an exemption clause may not go to the heart of the contract³⁹—that is, to discharge the obligor from his major contractual obligation.⁴⁰ Such a clause will generally be invalid⁴¹ because it 'empties the contract from all content'.⁴² In exceptional cases, this clause may transform the contract into another, different type.⁴³

Article 259(1) of the Qatar Civil Code does not expressly validate the parties' agreement that permits the obligor to render a substantially different performance. Articles 379 and 380 thereof cover the so-called 'settlement with agreed consideration'. The obligee is allowed to accept 'payment by a thing other than the thing receivable by the agreement'.

³⁶ Qatari Court of Cassation, decision no 347/2016, dated 24 January 2017, <https://www.eastlaws.com/>, accessed 28 February 2022.

³⁷ Bonell, (n 5) 82.

³⁸ Official Commentary of the PICC (n 1) Art. 7.1.6, illustration 1.

³⁹ Gabriela Shalev, 'Control over Exemption Clauses: A Comparative Synthesis', (1977) *Boston College International and Comparative Law Review* 1, 11, 43.

⁴⁰ Berrig & Haddad, (n 7) 234. Alajarmeh, (n 9) 331, 339.

⁴¹ Ali, (n 7) 655. Berrig & Haddad, (n 7) 234. Ali & Saleh, (n 8) 257.

⁴² Shalev, (n 38) 44. Cf. van Dorsten, (n 6) 202-03. Alajarmeh, (n 9) 331.

⁴³ van Dorsten, (n 6) 197-8. Alajarmeh, (n 9) 331. According to Art. 167 of the Qatar Civil Code, 'Where a void or voidable contract contains the elements of another contract, the contract shall be deemed valid to the extent of the other contract, whose elements are available if the intention of the contracting parties indicates that they wish to conclude such other contract'.

Unlike with the pre-prepared exemption clause, where the parties' agreement exists before the obligor fails to perform, the obligee accepts the payment by consideration offered by the obligor at the time of performance. However, Article 253(1) of the Qatar Civil Code offers an application of an exemption clause that permits the obligor to render a substantially different performance. It states that '[w]here the obligor is required to maintain or manage a thing or to act carefully in the performance of his obligation, he shall have performed his obligation if he uses reasonable care, even where the intended purpose is not achieved, unless the law or agreement provides otherwise'.

Generally, obligations are divided into two categories: an obligation to achieve a specific result and an obligation to make the best efforts. As for the obligation to achieve a specific result, the obligor will have performed his obligation only if he achieves the promised result. In cases in which the obligation is of best efforts, in contrast, the obligor does not guarantee the achievement of a specific result. Instead, the obligor will have performed his obligation if he takes the efforts that a reasonable person of the same kind would take in the same circumstances.⁴⁴ Unlike with the obligation to achieve a specific result, Article 253(1) of the Qatar Civil Code approves the parties' agreement to permit the obligor to use lower care than reasonable when performing an obligation of best efforts. Indeed, based on this agreement, the obligor is permitted to perform his obligation to maintain or manage a thing in a way that is substantially different from what the obligee reasonably expected.⁴⁵ The obligor is no more bound to make such efforts as would be made by the ordinary person of the same kind in the same circumstances. Instead, the obligor would have performed his obligation even if he made fewer efforts than would be made by a reasonable person of the same kind in the same circumstances.

Nevertheless, Article 259(1) of the Qatar Civil Code makes it clear that such an exemption clause may not violate public policy.⁴⁶ In consistency with the rule of Article 259(1) of the Qatar Civil Code, Article 253(2) of the same expressly prohibits such exemption clauses in cases of the obligor's liability for fraud or gross negligence. It states that, '[a]t all times, the obligor shall be liable for any fraud or gross negligence committed by him'. Accordingly, an exemption clause under Article 253(1) of the Qatar Civil Code will make tolerable only light or slight negligence by the obligor.

III. Validity of exemption clauses

In principle, based on the doctrine of freedom to contract, exemption clauses shall be valid and enforceable under Article 7.1.6 of the PICC and Article 259 of the Qatar Civil Code. However, under certain conditions, exemption clauses may not qualify as valid or enforceable.

1. The rule: exemption clauses are valid and enforceable

The PICC govern exemption clauses in Chapter 7, titled 'performance'. Under Article 7.1.6 of the PICC, exemption clauses are, in principle, valid and enforceable.⁴⁷ Exemption clauses are useful in international commercial contracts⁴⁸ because '[t]hey serve legal certainty by

⁴⁴ PICC (n 1) Art. 5.1.4 distinguishes between the duty to achieve a specific result and the duty of best efforts. Such distinction provides judges and arbitrators with criteria for determining whether a party has performed its obligations. If the obligation involves a duty to achieve a specific result, the obligor is bound to achieve that result. If the obligation involves a duty of best efforts, the obligor is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

⁴⁵ According to Al-Balaawi, (n 25) 172, this would qualify as restriction of obligor's liability.

⁴⁶ Abu-Shanab, (n 28) 139. Al-Sabaheen, (n 33) 61.

⁴⁷ Official Commentary of the PICC (n 1) Art. 7.1.6 nos 1 and 5.

⁴⁸ Case no C07/012HR of 11 July 2008, <http://www.unilex.info/principles/case/1547>, accessed 25 February 2022, (in his conclusion, the *Advocaat-Generaal* pointed out that exemption clauses were common practice and played an important role in commerce.)

clarifying the risk allocation in a commercial transaction'.⁴⁹ The real practice affirms the admissibility of exemption clauses under the PICC. In *Eiseres v. Atria Watermanagement B.V.*,⁵⁰ the Hoge Raad in the Netherlands found that the clause discharging the seller from any liability for losses sustained by the buyer in using the supplied machinery was valid. The Court rejected the buyer's objection that the seller, by having sought insurance coverage for possible liability on its part, implicitly admitted that she might be held liable *vis-à-vis* the buyer. In his conclusion, the *advocaat-generaal* made it clear that this approach is expressed in different instruments, including Article 7.1.6 of the PICC.

The Qatar Civil Code deals with exemption clauses in Article 259 (Part 1: Obligations, Book 2: Effects of Obligation, Chapter 1: Performance of Obligation). In line with the parties' freedom of contract,⁵¹ Article 259(1) of the Qatar Civil Code makes exemption clauses valid in principle. It states that '[t]he parties may agree to discharge the obligor from any liability arising from his failure or delay to perform his contractual obligation, except for his fraud or gross negligence'. This exemption clause may exclude or restrict the obligor's liability for his light or slight negligence only;⁵² it may not discharge the obligor from his liability for his fraud or gross negligence.⁵³ According to the Qatari Court of Cassation, the contract should be subject to the principle of party autonomy; the determination of the rights and obligations of the parties to the contract should be made based on the contract terms and clauses. Each of the parties should respect the contract terms and clauses unless it is contrary to the law or public policy.⁵⁴ In principle, exemption clauses do not violate public policy or morals⁵⁵ as the rules governing contractual obligations are generally facultative in nature.⁵⁶

Under Article 259(1) of the Qatar Civil Code, a distinction shall be made between exemption clauses relating to fraudulent or grossly negligent non-performance and other forms of non-performance. In principle, the parties' agreement to directly exclude or restrict contractual liability for non-performance shall be valid and enforceable. Only if the parties agree to discharge the obligor from liability for his fraud or gross negligence is such an agreement invalid. However, Article 259(2) of the Qatar Civil Code makes valid the exemption clause concerning the obligor's liability for his employees' fraud or gross negligence. Based on Article 259 Qatar Civil Code, the Qatari Court of Cassation affirmed the validity of exemption clauses, saving the obligor's liability for his fraud or gross negligence. Two parties made a contract for the construction of five housing units in exchange for 6,000,000 QR. The contract included a clause that discharges the constructor from his liability for delay in delivering the units. Accordingly, the Court of Cassation confirmed the decision of the trial court, according to which the constructor was unaccountable for damages resulting from delay in performing his contractual obligation.⁵⁷

On another occasion, the Qatari Court of Cassation confirmed that, apart from cases of fraud or gross negligence, the parties' agreement to exclude or limit the obligor's liability should be valid.⁵⁸ The Court found that, in the contract of 14 March 2005, the appellant

⁴⁹ Schelhaas, (n 15) 760.

⁵⁰ <http://www.unilex.info/principles/case/1547>, accessed 25 February 2022.

⁵¹ Art. 171(1) of the Qatari Civil Code states in part that 'the contract is the law of the contractors'.

⁵² Ali, (n 7) 573. Dmana Muhammad, 'Exemption Clause between Party Autonomy and Law Autonomy', (2011) *Journal of Politic and Law* 5, 240, 244 (in Arabic). Ali & Saleh, (n 8) 258. Sewart, (n 33) 396.

⁵³ Abd-Errazzaq Ahmad As-Sanhouri, *Treatise in Explaining the New Civil Code –Theory of Obligation in General—Sources of Obligation* (Dar Ihya' Et-Turath El-Arabi, Beirut 1952) 675-6 (in Arabic). Hassan, (n 29) 70.

⁵⁴ Qatari Court of Cassation, decision no 347/2016, dated 24 January 2017, <https://www.eastlaws.com/>, accessed 28 February 2022. See also Berriq & Haddad, (n 7) 221.

⁵⁵ Sultan, (n 12) 358. As-Sanhouri, (n 53) 673. Al-Ardhi, (n 23) 345. Al-Balaawi, (n 25) 178.

⁵⁶ Abu-Shanab, (n 28) 136. Ali & Saleh, (n 8) 243. Alajarmeh, (n 9) 335.

⁵⁷ Qatari Court of Cassation, decision no 74/2011 (civil and commercial), dated 16 June 2011, <https://www.eastlaws.com/>, accessed 28 February 2022.

⁵⁸ Qatari Court of Cassation, decision no 92/2008 (civil and commercial), dated 3 December 2008, <https://www.eastlaws.com/>, accessed 28 February 2022.

agreed to construct a housing project for the appellee on the appellee's land. Clause 2(4) of the contract excluded the obligor's liability for termination of the contract before the end of its five-year term. The Court of Cassation confirmed the decision of the trial court by which the exemption clause was enforced. In doing so, the Court referred to Article 170(2) of the Qatar Civil Code, according to which 'where the contract contains a clause discharging a party from liability, such provision shall be construed narrowly'. In order to approve the validity of the exemption clause, the Court could instead have availed itself from the clear provision of Article 259(1) of the Qatar Civil Code.

2. The exception: exemption clauses are invalid/unenforceable

If the exemption clause is invalid or cannot be relied upon, the obligee will obtain full compensation for the obligor's non-performance. Under Article 7.1.6 of the PICC, an exemption clause 'may not be invoked if it would be grossly unfair to do so'. Under Article 259(1) of the Qatar Civil Code, an exemption clause shall be invalid if it discharges the obligor from his liability for non-performance resulting from 'his fraud or gross negligence'. In addition to this specific criterion, exemption clauses may be invalid or unenforceable in other situations under the general provisions of contracts,⁵⁹ such as the arbitrary terms in adhesion contracts and exemption clauses concerning personal injuries and death.

A. The specific criterion: unfairness of exemption clause versus obligor's fraud or gross negligence

The PICC and the Qatar Civil Code take different approaches to controlling the validity of exemption clauses. The PICC adopt a general, flexible criterion based on the unfairness of the exemption clause; the Qatar Civil Code adopts a rigid criterion—that is, the obligor's non-performance for fraud or gross negligence.

(i) *Unfairness of exemption clause under the PICC*

Under Article 7.1.6 of the PICC, an exemption clause 'may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'. Thus, if the obligor inserts an exemption clause, the obligee should prove this clause's unfairness if he is willing to claim damages. The provision on exemption clauses is not included in the validity chapter of the PICC (Chapter 3). This raises diversity in opinions concerning whether or not the unfair exemption clause is invalid. According to Joseph Perillo, 'the question of whether the exemption clause [under Article 7.1.6 of the PICC] will be sustained is one of unconscionability of application rather than a question of invalidity. . . . Such clauses are not made invalid, but "may not be invoked" if it would be grossly unfair to do so'.⁶⁰

⁵⁹ Noteworthy, the legislature in Qatar expressly prohibits exemption clauses with regard to certain contracts. For instance, with regard to construction contracts, Article 715 Qatar civil code states that '[a]ny provision intended to discharge the contractor or the engineer from liability or to limit such liability shall be void'.

As for employment contracts, Article 4 of the Qatar Labor Law no 14/2004 states that, '[t]he entitlements prescribed by this law represent the minimum entitlements of the workers and any stipulation contradicting the provisions of this law shall be void even if it was made prior to the date of application of this law unless the said stipulation is more advantageous to the workers and any release, compromise or waiver of the entitlements prescribed for the worker by this law shall be deemed void'. <https://dohape.dfa.gov.ph/images/Logo/forms/LABOUR-LAW-STATE-OF-QATAR.pdf>, accessed 28 February 2022. Concerning consumer contracts, Article 2 of the Qatar Consumer Protection Law no 8/2008 states that, '[t]he basic rights of a consumer shall be guaranteed under the provisions of this Law. No person may conclude any agreement or conduct any activity that prejudices such rights, in particular the following: . . . The right to file lawsuits concerning anything that may violate, harm or restrict the consumer's rights'. <https://almeezan.qa/LawView.aspx?opt&LawID=2647&language=en>, accessed 28 February 2022. Article 24 of the same says that [a]ny condition referred to in a contract, document or other similar instrument in respect of contracting with the consumer shall be null and void where such condition relieves the supplier of any of his obligations stipulated in this Law'. <https://almeezan.qa/LawView.aspx?opt&LawID=2647&language=en>, accessed 28 February 2022.

⁶⁰ Joseph Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review', (1994) *Fordham Law Review* 63, 281, 294.

In contrast, Michael Bridge argues that the provision of Article 7.1.6 of the PICC may be referred to as a quasi-validity.⁶¹ Harriet Schelhaas clearly equates the unsustainability ('may not be invoked') of exemption clauses with the invalidity of the same.⁶² Similarly, Opinion no. 17 of the Advisory Council of the Convention on Contracts for the International Sale of Goods (AC-CISG) says that 'Article 7.1.6 has retained the more flexible idea of 'gross unfairness' as the standard for invalidity'.⁶³ Indeed, the provision of Article 7.1.6 of the PICC amounts to a statement of 'public policy or mandatory rules'.⁶⁴ It should therefore qualify as a provision of validity. The practical practice shows some situations in which invalid (unfair) exemption clauses have been excluded. In *Compañía Suramericana de Seguros S.A. v Compañía Transportadora S.A.*—Case no. 11001–3103-026–2000-04366–01 of 8 September 2011⁶⁵—the Corte Suprema de Justicia in Colombia affirmed that, under the PICC, the parties are not entirely free to limit their liability for breach of contract. The Supreme Court expressly indicated that, according to Article 7.1.6 of the PICC, a party may not avail itself of a clause that limits or excludes its liability for non-performance or that permits it to render performance substantially different from what the other party reasonably expected if it would be grossly unfair to do so. Accordingly, the Court did not uphold the exemption clause in the bill of lading that limited the amount of damages to be paid by the carrier.

In *El Paso Energy International Company v Argentine Republic*—Case no. ARB/03/15 of 31 October 2011⁶⁶—the Arbitral Tribunal working under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) affirmed the same. The Arbitral Tribunal concluded that, under the PICC, exemption from liability for non-performance or other forms of relief are excluded . . . if it would be "grossly unfair" to allow for such exemption.⁶⁷ Obviously, the above-mentioned practical practice restates the provisions of Article 7.1.6 of the PICC only. It does not illustrate further the standard of unfairness of exemption clauses. Article 7.1.6 of the PICC adopts a general criterion in this regard; it 'gives the court a broad discretionary power based on the principle of fairness'.⁶⁸ To determine whether an exemption clause is unfair, the court should take into account all surrounding facts and circumstances, including 'the purpose of the contract and . . . what a party could legitimately have expected from the performance of the contract'.⁶⁹ In particular, a court may not invoke an exemption clause 'where [this exemption clause] is inherently unfair and its application would lead to an evident imbalance between the performances of the parties'.⁷⁰ In addition, an exemption clause for defects in the essential obligation, like the transfer of title in the sale of goods, will generally be invalid.⁷¹

Other factors may be relevant, such as the parties' bargaining power. An exemption clause in a standard-term contract will qualify as unfair easier than the individually negotiated one.⁷² The stronger bargaining party generally prepares the standard terms; thus, the

⁶¹ Michael Bridge, 'The CISG and the UNIDROIT Principles of International Commercial Contracts', (2014) *Uniform Law Review* 19, 623, 629.

⁶² Schelhaas, (n 15) 764.

⁶³ CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, Rapporteur: Prof. Lauro Gama Jr., Pontifical Catholic University of Rio de Janeiro, Brazil. Adopted by the CISG-AC following its 21st meeting in Bogotá, Colombia, on 16 October 2015. <https://iicl.law.pace.edu/cisg/page/cisg-advisory-council-opinion-no-17-limitation-and-exclusion-clauses-cisg-contracts>, accessed 25 February 2022.

⁶⁴ Bridge, (n 61) 937.

⁶⁵ <http://www.unilex.info/principles/case/1656>, accessed 25 February 2022.

⁶⁶ See a detailed commentary on this case in Andrea Marco Steingruber, 'El Paso v Argentine Republic: UNIDROIT Principles as a Reflection of General Principles of Law Recognized by Civilized Nations in the Context of an Investment Treaty Claim', (2013) *Uniform Law Review* 18, 509–31.

⁶⁷ <http://www.unilex.info/principles/case/1658>, accessed 25 February 2022.

⁶⁸ Official Commentary of the PICC (n 1) Art. 7.1.6 no 1. Cf. Tallon, Denis Tallon, Damages, 'Exemption Clauses, and Penalties', (1992) *The American Journal of Comparative Law* 40(3), 675, 681.

⁶⁹ Official Commentary of the PICC (n 1) Art. 7.1.6 no 5.

⁷⁰ *ibid.*

⁷¹ Schelhaas, (n 15) 764.

⁷² *ibid.*, 765.

presumption arises that the exemption clause included in those terms is unfair to the other party.⁷³ Conversely, when parties have equal bargaining powers, the presumption is that the exemption clause negotiated and agreed on by them is fair.⁷⁴ However, even such individually negotiated exemption clauses may be unfair if the facts and circumstances of the case ‘suggest an important inequality of bargaining power’ as in ‘multinational contracts with a small local supplier or distributor’.⁷⁵ Insurance may be a relevant factor too.⁷⁶ An exemption clause may be unfair ‘where the aggrieved party could not have obviated the consequences of the limitation or exclusion of liability by taking out appropriate insurance’.⁷⁷

(ii) Obligor’s fraud or gross negligence under the Qatar Civil Code

Unlike Article 7.1.6 of the PICC, Article 259(1) of the Qatar Civil Code adopts a rigid criterion to control the validity of exemption clauses. It only invalidates exemption clauses of the obligor’s liability for his fraud and gross negligence. Indeed, the first drafts of the provision of Article 7.1.6 of the PICC spoke about invalidity of exemption clauses in cases of liability for ‘intentional or reckless conduct’ or for ‘deliberate breach’.⁷⁸ Since the drafters acknowledged the difficulty of defining these terms, they decided to adopt a more flexible formula—that is, the unfairness of exemption clauses.⁷⁹ Under the Qatar Civil Code, the validity of exemption clauses depends on the state of mind of the non-performing party. An exemption clause may not enable the obligor to escape liability for his fraud or gross negligence. Since such a clause violates public policy,⁸⁰ it shall be invalid.

In fraud cases, though the obligor may not intend to cause harm to the obligee,⁸¹ the obligor deliberately refrains from performing his contractual obligation.⁸² Gross negligence resembles a great ignorance of others’ rights without regard to the potential harm that may arise from this negligence; even a person less than reasonable may not commit such negligence.⁸³ Exemption from the obligor’s liability for his fraud or gross negligence would infringe public policy.⁸⁴ Such exemption, if not prohibited, would make it easy for the obligor to evade the fulfilment of his duties.⁸⁵ Fraud and gross negligence involve bad faith;⁸⁶ they violate the obligor’s general duty to perform his contractual obligations in good faith,⁸⁷ which is stated in Article 172(1) of the Qatar Civil Code. According to the Egyptian Court of Cassation, ‘[e]ach of fraud and gross negligence provided for in Article 217(2) Egyptian civil code [equivalent to Article 259(1) Qatar Civil Code] is achieved by the pillars of tortious liability. In both cases, the obligor would breach a legal obligation; he should not commit such an act in all cases, whether as a contract party or not’.⁸⁸

The Qatari Court of Cassation rejected the appellant’s argument that, even if Clause 2(4) of the contract would qualify as an exemption clause, this clause should be invalid due to

⁷³ Shalev, (n 39) 41.

⁷⁴ *ibid.*

⁷⁵ Schelhaas, (n 15) 765.

⁷⁶ Shalev, (n 39) 42–3.

⁷⁷ Official Commentary of the PICC (n 1) Art. 7.1.6 no 5.

⁷⁸ Schelhaas, (n 15) 762. Bonell, (n 5) 82.

⁷⁹ Schelhaas, (n 15) 762.

⁸⁰ As-Sanhouri, (n 53) 673. Tallon, (n 68) 681.

⁸¹ Some legal writers argue that, in order fraud exists, the obligor should have the intention to harm the obligee, see Al-Ardhi, (n 23) 346. Ali, (n 7) 646. Alajarmeh, (n 9) 340.

⁸² Abu-Shanab, (n 28) 141. Berrig & Haddad, (n 7) 223. Al-Sabaheen, (n 33) 66.

⁸³ Berrig & Haddad, (n 7) 233. Muhammad, (n 52) 245.

⁸⁴ As-Sanhouri, (n 53) 673. Sewar, (n 34) 397.

⁸⁵ Sewar, (n 34) 397.

⁸⁶ Abu-Shanab, (n 28) 141–2. Al-Ardhi, (n 23) 346, 348.

⁸⁷ Belhaj, (n 5) 33.

⁸⁸ Egyptian Court of Cassation, decision no 8473 (commercial) for the judicial year 79, dated 8 November 2020. https://www.cc.gov.eg/civil_judgments, accessed 28 February 2022. See also Egyptian Court of Cassation, decision no 3246 (commercial) for the judicial year 85, dated 28 January 2016. https://www.cc.gov.eg/civil_judgments, accessed 28 February 2022. Egyptian Court of Cassation, decision no 1285 (commercial) for the judicial year 82, dated 26 April 2015. https://www.cc.gov.eg/civil_judgments, accessed 28 February 2022.

the appellee's ill will and deception. According to the appellant, the appellee—under the pretext of non-procurement of licenses—refrained by his own will from continuing to execute the agreement. The appellee's non-performance of his obligation to procure the necessary licenses was equal to fraud or gross negligence. Damages due should therefore be more than granted. However, because the appellant did not insert this argument before the trial court, the Court of Cassation indicated that such a new factual defence could not be raised for the first time before this court.⁸⁹

(iii) *Comparison between the PICC and the Qatar Civil Code*

Unlike the PICC, the Qatar Civil Code focuses on the party's behaviour concerning exemption clauses.⁹⁰ Whereas the PICC adopts a flexible criterion to control the validity of exemption clauses (fairness), the Qatar Civil Code adopts a very rigid criterion in this regard. The PICC's criterion is general in nature; it encompasses the criterion adopted by the Qatar Civil Code. According to the AC-CISG's Opinion no. 17, the notion of 'gross unfairness' comprehends those of 'fraud and gross negligence'.⁹¹ The Official Commentary to Article 7.1.6 of the PICC states that 'there may be circumstances in which even a term that is not in itself manifestly unfair may not be relied upon: for instance, where the non-performance is the result of grossly negligent conduct'.⁹² *A fortiori*, this should apply to cases of non-performance resulting from the obligor's fraud.⁹³ Accordingly, the provision of Article 259(1) of the Qatar Civil Code should be reformed. Like the PICC, it should adopt a general, flexible criterion to control the validity of exemption clauses. To put it in the words of Michael Bonell, '[t]he problem with exemption clause stems not so much from their construction as from the unreasonable or unconscionable consequences they may produce'.⁹⁴

(iv) *Severability of the (void) exemption clause*

The general rules of the Qatar Civil Code recognize the severability of the (void) exemption clause from the main contract. In principle, the parties should respect the remainder of the contract, 'unless it is evident that the contract would not have been concluded without such [exemption clause], in which event the contract shall be revoked in full'.⁹⁵ The same holds true concerning the PICC. Article 3.2.7 of the PICC provides for the possibility to avoid an individual contract term only; eventually, it recognizes the validity of the remaining contract.

The question remains where the exemption clause itself is null and void in part only, such as the one discharging the obligor from his liability without excluding fraud or gross negligence⁹⁶ or the one excluding or restricting the obligor's liability for his light and gross negligence.⁹⁷ Under Article 166 of the Qatar Civil Code, such a clause will be invalid concerning the obligor's liability for his fraud or gross negligence only. The rest of the exemption clause shall be valid. As for the PICC, one commentator argues that, because the Official Commentary to Article 7.1.6 of the PICC says that 'the court has no power to modify the exemption clause',⁹⁸ such clause should be invalid in whole.⁹⁹ Indeed, partial invalidity or the so-called reduction of contract (*réduction du contrat*) differs from modification of contract.

⁸⁹ Qatari Court of Cassation, decision no 92/2008, dated 3 December 2008, <https://www.eastlaws.com/>, accessed 28 February 2022.

⁹⁰ Tallon, (n 68) 680. Cf. Bonell, (n 5) 82.

⁹¹ CISG-AC Opinion No. 17, (n 63).

⁹² Official Commentary of the PICC (n 1) Art. 7.1.6 no 5.

⁹³ Schelhaas, (n 15) 763.

⁹⁴ Bonell, (n 5) 82.

⁹⁵ Art. 166 of the Qatar Civil Code. Cf. As-Sanhouri, (n 53) 678–9.

⁹⁶ Schelhaas, (n 15) 764.

⁹⁷ Ali & Saleh, (n 8) 260.

⁹⁸ Official Commentary of the PICC (n 1) Art. 7.1.6 no 6.

⁹⁹ Schelhaas, (n 15) 764.

The Official Commentary speaks about modification; it says that, '[c]ontrary to the rule laid down with respect to agreed payment for non-performance in Article 7.4.13, the court has no power to modify the exemption clause'.¹⁰⁰ As with the Qatar Civil Code, not only the severability of the contract but also the severability of a contract term should be allowed. The invalid part of the aforementioned exemption clauses should be separated from the rest of the clause. The obligee (who inserts the liability of the obligor) shall establish the invalidity of the exemption clause. If the obligee establishes that the contract would not have been concluded without this exemption clause, the court will render the whole contract invalid; in such a case, 'the contracting parties shall be reinstated to the position they were in prior to the conclusion of the contract'.¹⁰¹

B. Invalidity of exemption clauses based on general provisions of contracts

(i) Arbitrary terms in adhesion contracts

A contractual term should be considered arbitrary if imposed by the stronger party to give him an unjustified excessive advantage.¹⁰² Examples of arbitrary contract conditions include, but are not limited to, jurisdiction clauses, penalty clauses, or exemption clauses.¹⁰³ Article 3.2.7 of the PICC covers 'gross disparity'. Paragraph 1 thereof provides for the avoidance at any time of any of the contract individual terms if it unjustifiably gives the other party an excessive advantage.¹⁰⁴ Such excessive advantage should be unjustified when 'obtained by exploiting the other party's bargaining handicap'.¹⁰⁵ Accordingly, an exemption clause may be avoided if it upsets the equilibrium of performance and counter-performance to the extent that shocks 'the conscience of a reasonable person'.¹⁰⁶

In addition, Article 2.1.20(1) of the PICC prohibits surprising terms in standard terms contracts.¹⁰⁷ An exemption clause prepared in advance by one of the contract parties may qualify as surprising if 'the other party could not reasonably have expected it'. This will be very true if the content of the standard exemption clause 'is such that a reasonable person of the same kind as the adhering party would not have expected it in the type of standard terms involved'.¹⁰⁸ For instance, a term excluding or limiting the proposer's liability may qualify as 'surprising' and, in consequence, ineffective if it is uncommon in the trade sector concerned and is inconsistent with the parties' negotiations.¹⁰⁹ Based on Article 106 of the Qatar Civil Code, if the exemption clause is contained in an adhesion contract and is arbitrary in nature, the court may at the request of the adhering party amend or invalidate such clause as prescribed by justice, even if the adhering party proves to have known thereof.¹¹⁰ In order to protect the weak party more, the legislature made this provision imperative;¹¹¹ 'any agreement to the contrary shall be invalid'. Obviously, invalidity of the arbitrary term

¹⁰⁰ Official Commentary of the PICC (n 1) Art. 7.1.6 no 6.

¹⁰¹ Art. 164(1) of the Qatari Civil Code.

¹⁰² Hassan, (n 29) 90. Abu-Shanab, (n 28) 146.

¹⁰³ Hassan, (n 29) 90. Ali, (n 7) 649.

¹⁰⁴ PICC (n 1) Art. 3.2.7(1) states that, 'A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to:

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
(b) the nature and purpose of the contract".

¹⁰⁵ Bonell, (n 5) 88.

¹⁰⁶ Official Commentary of the PICC (n 1) Art. 3.2.7 no 1.

¹⁰⁷ PICC (n 1) Art. 2.1.20(1) states that, 'No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party'.

¹⁰⁸ Official Commentary of the PICC (n 1) Art. 2.1.20 no 2.

¹⁰⁹ *ibid.*

¹¹⁰ In application of the general rule contained in Article 106 Qatar civil code, Article 777(2) of the same states that '[a]ny arbitrary condition, the breach of which proves to have no effect on the occurrence of the insured risk, shall be invalid'.

¹¹¹ Abu-Shanab, (n 28) 146.

falls within the discretionary power of the court;¹¹² based on the requirements of justice, the court may either adjust or invalidate the arbitrary contract term.¹¹³

The Qatari Court of Cassation has tackled the arbitrary term in an adhesion contract.¹¹⁴ On 26 March 2006, the Court found that the parties made a contract for the construction of five housing units in exchange for 6,000,000 QR. This contract included a clause that discharges the constructor from liability for delay in delivering the units. However, based on a letter of 12 March 2006, addressed to the appellant by the appellee's agent (the second appellee), the appellant claimed specific performance and damages for delay in performance. According to this letter, the appellee pledged that, in case of delay in delivering the housing units, the appellee would provide the appellant with a furnished housing villa. Alternatively, the appellant argued that the exemption clause is included in an adhesion contract so that the judge can amend it.

The Court of Cassation concluded that the contract between the parties (made on 26 March 2006) cancelled the said letter (made on 12 March 2006); therefore, the Court rejected the appellant's principal claims. As for the appellant's alternative claim, the Court confirmed the decision of the trial court in which the constructor, based on the exemption clause included in the parties' contract, was unaccountable for damages for delay in performing his contractual obligation. The Court affirmed that the contract at issue lacked the basic characteristics of an adhesion contract. In particular, the subject matter of the disputed contract—that is, the housing units—is not a necessary commodity for the public people.

(ii) *Personal injuries or death*

Unlike the Lebanese Code of Obligations and Contracts, most other Arab civil codes (including the Qatar Civil Code) do not directly cover exemption clauses concerning personal injuries in general.¹¹⁵ However, the prevailing opinion amongst Arab writers¹¹⁶ considers invalid any exemption clause discharging the obligor from liability for personal injuries or death. Some writers argue that human life and personal integrity are part of public policy;¹¹⁷ as such, they might not be an object of parties' dealings.¹¹⁸ Since the object of an exemption clause is in fact damages, this argument cannot be supported. Such exemption clauses should rather be inadmissible because they would discourage the obligor, when performing his contractual obligation, to take best efforts to prevent any potential personal injuries or death.¹¹⁹

The PICC do not expressly regulate this issue either. One commentator suggests that such clauses should qualify as unfair (under Article 7.1.6 of the PICC), taking into account 'the severe personal consequences of this kind of damage'.¹²⁰ The Qatar Civil Code includes an application of this rule. Article 591(2) thereof states that '[w]here the condition of the leased property may highly endanger the health of the tenant, or those who live with him, or his employees or workers, the tenant may demand termination of the contract, even if such right has already been waived'. This provision makes it clear that human life and personal integrity could not be an object of parties' dealings.¹²¹ Similarly, a transporter may not be

¹¹² As-Sanhouri, (n 53) 678.

¹¹³ Notably, in consumer contracts (which generally qualify as adhesion contracts), any arbitrary term, i.e. a term that relieves the supplier of any of his obligations stipulated in the consumer protection law shall be null and void by the operation of law (Art. 24 of the Qatar Consumer Protection Law no 8/2008). In cases of dispute, the court may only affirm the invalidity of such term.

¹¹⁴ Qatari Court of Cassation, Decision no 74/2011, dated 16 June 2011, <https://www.eastlaws.com/>, accessed 28 February 2022.

¹¹⁵ Article 139 of the Lebanese Code expressly states in part that '[t]his discharge is limited to material damage, not to damage to people, as human life and personal integrity are above all agreements'.

¹¹⁶ Abu-Shanab, (n 28) 147. Al-Ardhi, (n 23) 351. Ali & Saleh, (n 8) 255. Cf. Shalev, (n 39) 44.

¹¹⁷ Sultan, (n 12) 359. Abu-Shanab, (n 28) 147. Ali & Saleh, (n 8) 256.

¹¹⁸ Sewar, (n 34) 398. Al-Sabaheen, (n 33) 72. Cf. Shalev, (n 39) 44. Alajarmeh, (n 9) 338.

¹¹⁹ Hassan, (n 29) 72. Al-Ardhi, (n 23) 351.

¹²⁰ Schelhaas, (n 15) 765.

¹²¹ Al-Ardhi, (n 23) 352.

exempted from liability for personal injuries caused to the passenger during the trip.¹²² A medicine doctor's liability for personal injuries caused to the patient by the doctor's negligence (whatsoever) shall not be restricted or excluded.¹²³

IV. Exemption clauses concerning the obligor's liability for his employees' acts

According to the legal doctrine,¹²⁴ the obligor may be liable for non-performance by his employees under the following conditions:

- there should be a valid contract between the obligor and the obligee aggrieved by the act of obligor's employee;
- the employee should be obliged to perform the obligor's obligation by agreement or by law; and
- the employee should be liable for non-performance of such obligation.

In the general provisions of contracts, the Qatar Civil Code does not include a direct provision that makes the obligor liable for non-performance committed by his employees. However, when stating that '[t]he parties may also agree to discharge the obligor from liability for fraud or gross negligence committed by persons employed by the obligor to perform his obligation', Article 259(2) of the Qatar Civil Code implicitly recognizes the accountability of the obligor for non-performance by his employees.¹²⁵ The exemption from the obligor's liability for his employees' acts could not be perceived without the obligor being, in principle, liable for his employees' acts.¹²⁶

Accordingly, Article 259(2) of the Qatar Civil Code implicitly stipulates a general rule on the obligor's liability for the acts committed by persons employed by the obligor to perform his obligation.¹²⁷ In addition, the Qatar Civil Code includes some special applications of the obligor's liability for his employees' non-performance. For instance, Article 597(2) makes the property owner liable for any interference by any of his subordinates with the tenant's use of the leased property throughout the term of the lease.¹²⁸ Article 701 generally permits the contractor to delegate all or part of his work to a subcontractor and makes the contractor liable to the employer for the works performed by the subcontractor.¹²⁹ Under Article 9.2.6 of the PICC, the obligor may agree with another person that this person will perform the obligation in its place. This other person will render performance to the obligee when it becomes due. The obligee may not refuse to accept such performance unless the obligation in the circumstances has an essentially personal character.

¹²² Article 201 of the Qatari Law no 27/2006 on Trading Regulation states in part that '[t]he carrier may not disclaim responsibility for physical injury or physical damage or delay to the passenger unless force majeure, an error of the passenger or a health condition thereof is proved'.

¹²³ Abu-Shanab, (n 28) 147. Al-Ardhi, (n 23) 351. Al-Sabaheen, (n 33) 72.

¹²⁴ As-Sanhouri, (n 53) 665-7. Sultan, (n 12) 237. Al-Balaawi, (n 25) 180. Al-Sabaheen, (n 33) 53-4.

¹²⁵ As-Sanhouri, (n 53) 667. Sultan, (n 12) 236.

¹²⁶ As-Sanhouri, (n 53) 668.

¹²⁷ *ibid.*

¹²⁸ Art. 597 Qatar civil code states that '(1) [t]he landlord may not interfere with the tenant's use of the leased property throughout the term of the lease, or make any change in the leased property or its annexes which may impinge on such use; (2) [a]ny interference by any of the subordinates of the landlord shall be deemed interference by the landlord himself'.

¹²⁹ Art. 701 of the Qatar Civil Code states that '[t]he contractor may delegate all or part of his work to a subcontractor unless otherwise provided by the contract, or unless the personality of the contractor is considered in the light of the nature of the work'. However, the obligations of the main contractor to the employer shall remain effective and the contractor shall be liable to the employer for the works performed by the subcontractor.

Literally, Article 259(2) of the Qatar Civil Code and Article 9.2.6 of the PICC speak about the employee obliged to perform the obligor's obligation by agreement, such as a lease or contracting agreement (*Muqawala*).¹³⁰ The question of whether or not this provision encompasses cases in which the employee is obliged to perform the obligor's obligation by law (like, the legal representative) is controversial. Some legal writers answer this question in the negative depending on the literal construction of the legal provision at issue.¹³¹ However, the prevailing opinion says that this provision encompasses cases in which the employee is obliged to perform the obligor's obligation either by agreement or by law.¹³²

More importantly, Article 259(1) of the Qatar Civil Code approves exemption clauses that exclude or limit the obligor's liability for his employees' fraud or negligence, howsoever it occurs (light/slight or gross).¹³³ Under Article 7.1.6, in contrast, such a clause would generally qualify as unfair. According to the Official Commentary of the PICC, an exemption clause may not be relied upon where the non-performance is the result of gross negligence.¹³⁴ This general statement extends to cover not only the obligor's gross negligence but also the gross negligence committed by the obligor's employees. *A fortiori*, this rule holds true concerning fraud committed by the obligor or his employees. Accordingly, the PICC consider unfair any clause exempting or restricting the obligor's liability for non-performance arising from his or his employees' fraud or gross negligence.

In contrast, unlike with Article 259(1) of the Qatar Civil Code, Article 259(2) of the same permits the parties to 'discharge the obligor from liability for fraud or gross negligence committed by persons employed by the obligor to perform his obligation'. Whereas the obligor's liability for his fraud or gross negligence may not be excluded, the obligor, by agreement, may be discharged from liability for his employees' fraud or gross negligence. In support of this rule, one legal writer says the employees' fraud or gross negligence does not depend on the obligor's will;¹³⁵ this does not resemble fraud on the side of the obligor.¹³⁶ Another legal writer argues that the employees' fraud or gross negligence is a trivial negligence from the obligor's side;¹³⁷ the exemption from the obligor's liability for his employees' fraud or gross negligence is less risky than the exemption from the obligor's liability for his own fraud or gross negligence.¹³⁸

Indeed, this legal provision raises criticism. The position of the Qatar Civil Code opens the door for the obligor's potential to evade liability.¹³⁹ Since the obligor is not liable for his employees' fraud or gross negligence, he may not make any efforts when employing a person to perform his own obligation.¹⁴⁰ In addition, this provision is not consistent with the obligor's general duty to act in good faith and fair dealing. Under Article 172(1) of the Qatar Civil Code, '[a] contract shall be performed in accordance with its provisions and in such manner consistent with the requirements of good faith'. Apparently, it will not be consistent with the requirements of good faith if the obligor has the power to abuse freedom of contract in a way that harms the obligee.

Based on this argument, Article 259(2) of the Qatar Civil Code should be reformed. The obligor should not be discharged from liability for his or his employees' fraud or gross negligence. Indeed, with regard to some specific, nominated contracts, the Qatar Civil Code makes the obligor always liable for his employees' fraud or negligence. Article 806 of the

¹³⁰ According to Art. 682 of the Qatar Civil Code, *Muqawala* is defined as 'a contract under which either party [the contractor] undertakes to make a thing or perform any work for the other party [the employer] in consideration of a wage, without being an agent or representative of such party'.

¹³¹ Al-Balaawi, (n 25) 181–2.

¹³² As-Sanhouri, (n 53) 669. Sultan, (n 12) 237.

¹³³ Muhammad, (n 52) 244. Sewar, (n 34) 396, 398.

¹³⁴ Official Commentary of the PICC (n 1) (n 1) Art. 7.1.6 no 5.

¹³⁵ Abu-Shanab, (n 28) 146.

¹³⁶ Sultan, (n 12) 359.

¹³⁷ Sewar, (n 34) 398.

¹³⁸ *ibid.*

¹³⁹ Hassan, (n 29) 67. Al-Sabaheen, (n 33) 64.

¹⁴⁰ Al-Balaawi, (n 25) 183. Al-Sabaheen, (n 33) 64.

same states that '[t]he insurer shall be liable for damage caused by such persons for whom the insured is responsible, irrespective of the type and extent thereof'. In application of this provision, the Qatari Court of Cassation indicated that '[t]he clause in the insurance policy, which states that the insurance contract does not guarantee loss or damage to the insured objects caused by the work of repairs to the insured object except with written consent, shall be void'.¹⁴¹

V. Conclusion

In conclusion, it is worth emphasizing the following remarks. Exemption clauses are, in principle, valid and enforceable. Under certain conditions, however, such clauses may be invalid. Under the PICC and the Qatar Civil Code, the mechanism of controlling validity of exemption clauses varies considerably. While the PICC adopt a general, flexible criterion (unfairness of exemption clause), the Qatar Civil Code adopts a rigid one (no exemption from obligor's liability for his fraud or gross negligence). The PICC and the Qatar Civil Code do not contain a direct, general provision on liability of the obligor for his employees' non-performance. As for the exemption of the obligor's liability for non-performance by his employees, the Qatar Civil Code includes a direct provision that allows for exemption from the obligor's liability for his employees' fraud or negligence. In contrast, the PICC indirectly prohibit exemption from obligor's liability for his employees' fraud or negligence.

Accordingly, this author suggests the following recommendations:

- Like Article 7.1.6 of the PICC, Article 259(1) of the Qatar Civil Code should adopt a general, flexible standard for controlling the validity of the exemption clause. Such an approach would better serve the parties' interests; it would reflect a fair allocation of risks between the contract parties.
- The Qatar Civil Code should include a direct, general rule on the liability of the obligor for his employees' non-performance. In addition, Article 259(2) should be changed to make the obligor always liable for his employees' fraud or gross negligence. No exemption clause should be permitted in cases of non-performance for fraud or gross negligence, whether committed by the obligor or his employees.
- The PICC should include an express rule on the prohibition of the unfair exemption clauses concerning the obligor's liability for his employees' non-performance, particularly when such liability results from his employees' fraud or gross negligence.

¹⁴¹ In order to come to this conclusion, the court indeed referred to many other provisions of Qatar Civil Code—namely, Arts. 804–5. Art. 804 makes the insurer liable for any damage to an insured thing arising from the fire, even if such fire occurs due to a defect in the insured thing. Art. 805(1) makes the insurer liable for such damage that may arise from any non-deliberate mistake by the insured. Accordingly, the court concluded that, 'the legislator extends insurance scope in the event of a fire'. The court also referred to Arts. 801–2 of the same to affirm that the provisions of Art. 804–6 are imperative in nature and applicable to all types of insurance contracts. Qatar Court of Cassation, Decision no 140/2014 (civil), dated 24 June 2014, <https://www.eastlaws.com/>, accessed 28 February 2022.