Most lawyers are used to encountering terms such as "special, indirect, consequential, or incidental damages," and "multiple, punitive, or exemplary damages" in limitation or exclusion of liability provisions. However, when negotiating such provisions in Québec, you should know that these common terms do not have the same meaning and effect under Québec law.

Moreover, Québec civil law imposes certain restrictions in the application of limitation or exclusion of liability clauses - depending on the type of business of the parties, the type of damages, and other circumstances that might render the clauses invalid or unenforceable. Legal counsel should be aware of these restrictions in order to better conduct risk assessments.

**Base contractual damages regime**

Québec's civil law allows a party to recover damages that are an immediate and direct consequence of the other party's default. In contractual matters, only damages that were foreseen or were foreseeable can be awarded, unless the co-contractor committed an intentional or gross fault.

**Common types of damages**

The expression "indirect damages" does not have the same meaning in Québec as it does in common law. In Québec, the term refers to damages for which the immediate cause is not the debtor's fault, or for which we can attribute a different cause. Such indirect damages cannot be awarded in virtue of Québec law.
For example, the interest paid for the purchase of a new product - in replacement of a defective product - is not a direct and immediate cause of the defective product but rather derives from the party's financial situation.

Québec civil law does not have an equivalent of "consequential or incidental damages." Damages of this nature can be claimed as "direct damages," but only so long as they are an immediate and direct consequence of the debtor's default.

Since these types of damages have no particular meaning in Québec law, it is considered a best practice to list in the limitation or exclusion of liability provision the main damages usually included in the common law concept of "consequential or incidental damages," such as loss of profits, loss of goodwill and loss of data.

Since "foreseeable damages" can be claimed, it would be prudent to list damages that could be reasonably foreseen and not just the damages that were known or discussed as part of the negotiation of the agreement. This may involve leaving the comfort of the boilerplate provisions and having a more surgical approach in the drafting of the provision.

Furthermore, Québec law makes no distinction between "general and special damages," and, therefore, such categories of damages should not be included in limitation or exclusion of liability clauses.

"Punitive or exemplary damages" can be awarded in Québec for specific kinds of defaults, such as a violation of a fundamental right. The amount awarded varies depending on the circumstances, including the seriousness of the default and the financial situation of the debtor, and it may not exceed what is sufficient to fulfil its preventive purpose.

This evaluation does not involve a calculation based on a multiplier, making the concept of "multiple damages" meaningless in Québec.

**Restrictions to clauses of limitation or exclusion of liability**

Québec law prevents a party from excluding or limiting its liability in certain circumstances and for certain types of damages such as:

- A party cannot limit or exclude its liability for a fundamental breach of contract.
- A party cannot exclude or limit its liability for its intentional or gross fault (including gross negligence, recklessness, or carelessness).
- A party cannot exclude or limit its liability for punitive or exemplary damages as it would
stifle the preventive (or punitive) purpose of such damages.

- A party cannot exclude or limit its liability for bodily or moral damages. That being said, while Québec courts will sometimes hesitate to award moral damages to corporations for troubles and inconveniences, they often award damages for reputational damages, which are considered moral damages.

- Certain types of contracts, including consumer, transportation, and employment contracts, contracts of adhesion (a contract a party cannot negotiate), and leases of dwellings have their own particular restrictions. For example, a clause of limitation or exclusion of liability in a consumer contract or a contract of adhesion could be declared null in its entirety if found abusive. Also, a merchant cannot exclude its liability for its own act or the act of its representative in virtue of the Consumer Protection Act.

- Recoverable legal fees are fixed by a tariff - so are significantly less than a lawyer's fees - and are generally awarded to the prevailing party, unless the court decides otherwise. Actual legal fees are rarely granted, only in cases of abuse of proceedings or if contractually provided. Since the award of actual legal fees is contingent on a party's attitude in the judicial process and, thus, the post-contractual relationship, we believe a clause excluding or limiting the fees would not be enforceable.

It should be noted that product liability cases are governed by specific rules favourable to the buyers and users.

In a nutshell, manufacturers and professional sellers are presumed to be liable to buyers for all damages caused by the defective product - and not simply the cost of the product - if the product malfunctions or deteriorates prematurely in comparison with products of the same type. If this is the case, the product is presumed defective and the manufacturer and professional sellers are presumed to have known the defect.

Because of such presumptions, the manufacturers and professional sellers cannot limit or exclude their liability unless they are able to rebut the presumptions and prove they could not have known of the defect, which is a very high standard of proof.

**Conclusion**

In conclusion, it is important to remember your limitation or exclusion of liability clauses may not have the effect that is literally written because of restrictions and special treatment of certain types of damages and contracts, or the type of relationship of the parties involved provided by Québec law.

When in doubt, limitation or exclusion of liability clauses are generally interpreted in favour
of the debtor. You should always review your liability regime in light of such restrictions to make certain that the level of liability the parties wish to assume is actually enforceable and effective in Québec.