What is contractual negligence?

STUART JORDAN* highlights the differences between tortious negligence and breach of contract.

EVERYONE understands what negligence is. It has a common meaning – essentially, a failure to take due care. It has more developed meanings in law for situations where that failure to take care becomes legally actionable.

Negligence is recognised in both common law and civil law jurisdictions as a tort; which is a civil (not criminal) wrong, not arising from a contract. But we see reference to negligence in construction contracts both in the Gulf and elsewhere – so we need to understand what is meant by this.

Negligence is generally understood to have these attributes:

- The existence of a duty of care, arising from "proximity" between people, rather than from a contract;
- A breach of that duty; and
- Damage or injury arising from that breach, which was a reasonably foreseeable consequence of it.

Breach of contract runs along similar lines (duty, breach, damage or loss) but the similarity is only superficial: contract and tort each has different rules for establishing the duty of care and the extent of that duty, for calculating damages, for recovery of different types of damages, for limitation of actions and more. So, can there be a role for negligence in contracts?

Negligence is most often mentioned in contract provisions dealing with the consequences of breach, such as an exclusion of liability or (as in the case below) carving out certain actions from an exclusion of liability. The question then arises: would this provision be effective in excluding liability (or carving out from a liability exclusion) for an act or omission which is, in fact, a contractual breach rather than negligence in tort?

This question came up in the case of *Triple Point Technology Inc* vs *PTT Public Co Ltd*, on which the UK Supreme Court gave judgment last month. Here, Triple Point agreed a contract to provide software and related services to PTT. That contract included:

Jordan ... negligence is recognised in both common law and civil law jurisdictions as a tort.

- A provision requiring Triple Point to exercise "all reasonable skill, care, diligence and efficiency in performance of the Services under the Contract"; and
- A cap on liability but the cap did not cover liability for "fraud, negligence, gross negligence or willful misconduct".

The works were severely delayed, as were the payments, and the parties fell out in the usual way: Triple Point suspended its work, PTT notified termination of the contract, Triple Point sued for its fees and PTT counterclaimed for breach of contract. One of the questions for the court to decide was whether the "negligence" carve-out covered a failure to exercise "all reasonable skill, care, diligence and efficiency" (that is, a breach of contract – in which case liability could be uncapped) or whether the carve-out referred only to tortious negligence.

The court decided (but only on a majority decision) that "negligence" referred to failure to exercise "all reasonable skill, care, diligence and efficiency" and that Triple Point's liability for any such breach would, therefore, be uncapped. In other words, the court decided that negligence was, in this case, to be understood in contractual terms.

It was interesting that the court decided not to restrict "negligence" to its meaning as a tortious wrong, because to do so would give the word a meaning other than its ordinary and natural meaning. Without arguing with the decision, I find this reasoning surprising, because the general understanding of negligence is as a tort.

Regardless of the reasoning, the court was effectively recognising that "negligence" is an accepted shorthand term for breach of a contractual obligations to use reasonable skill and care. I think that this is what most of us would have expected but we should note that the contract in this case included obligations to provide specialist services. The provider, therefore, had both express and (in common law) implied contractual duties to use reasonable skill and care.

In other words, it was easy for the court to recognise the parties' intention in referring to "negligence". We need to be careful not to assume the same outcome in contracts which have no services element nor any express obligations to use reasonable skill and care. References to negligence in (for instance) a liability cap in a supply contract might not be as easy to understand.

Also, if a contract is governed by a Gulf region law, there is the added feature of legal code which prohibits exclusion of liability for negligence. Under Article 296 of the UAE Civil Code: "Any agreement purporting to provide exemption from liability for a harmful act shall be void."

The consequences are serious if parties get it wrong on liabilities that are trying to cap, uncap or exclude. As always, take care and take advice. ■

** Stuart Jordan is a partner in the Global Projects group of Baker Botts, a leading international law firm. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. He has extensive experience in the Middle East, Russia and the UK.*