

CONTRACT CLAUSES THAT KILL

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“Contract law is essentially a defensive scorched earth battleground where the constant question is ‘If my business partner was possessed by a brain-eating monster from beyond spacetime tomorrow, what is the worst thing they could do to me?’”

- Charles Stross

Clauses Imposing Liability for Personal Injury & Property Damage

- Defense and Indemnity:
 - Making another party responsible to cover defending potential liabilities and payment
- Insurance:
 - Coverage requirements and additional insureds
- Project management provisions:
 - Clauses assigning supervisory, safety management or imposing sets of rules and regulations

Insurance: Understanding Limitations of Coverage

- Coverage typically includes property damage and personal injury
- Beware: Not all claims are covered in part or in full
- Factors commonly used to limit coverage obligations:
 - Type of policy
 - Policy limits
 - Definitions in policy
 - Occurrences
 - Covered Persons
 - Covered Properties
 - Coverage Limits
 - Exclusions

Indemnity: Don't Get Trapped

- Indemnity clauses are flexible and can be drafted to cover nearly any obligation
- Insurance and indemnity clauses should work together in a contract when the contract is fairly balanced
- Both insurance and indemnity clauses should focus on risks over which a company has less direct control (everyone pays for their own mistakes)
- Beware of common traps:
 - Scope can extend beyond personal injury and property damage
 - Indemnitors want narrow scope; indemnitees want broad scope
 - Waiver of workers compensation immunity
 - Mimicking insurance coverage clauses

Payment Provisions: Consider Contingencies

- Consequences of “Pay when paid” and “Pay if paid” provisions
- Know effects of sequencing and scheduling on timing and amounts of payments
 - Deposits, progress payments and retainage
 - Defining “Substantial Completion” and “Final Completion”
- Recourse for non-payment
 - Prompt Pay Statutes, Mechanics’ Lien Laws and payment bonds
 - Build in default provisions that allow for prompt action when payment is overdue
 - Proof of solvency
 - Joint check agreements
 - Payment of interest & acceleration of contract balance
 - Termination clauses

Often Overlooked Change Order Provisions

- Prepare for the inevitable: Changes in the field, unexpected problems & unforeseen conditions
- Carefully define scope of work in the base contract
- Require agreement on all change order work before the work is performed
- Address all aspects of the change order work in writing
 - Price, time and sequencing
 - Increases, decreases or the same
- Keep form change orders on site

The Danger of Unlimited Damages

- Compensatory Damages
 - Expectation damages: Provide the benefit of the bargain
 - Consequential damages: Damages flowing from the breach
- Schedule related damages
 - Liquidated Damages: Predetermined and measured damages that generally accrue when a deadline is missed
 - Delay Damages: Actual damages sustained by a party as a result of project delays
 - Acceleration Damages: Damages sustained while speeding up work to meet deadlines
- Punitive Damages
- Nominal damages

Common Limitations of Liability: No Damage for Delay Clause

- “No damage for delay” clause limits damages arising from delays in the work to a simple extension of time
 - Overcoming the clause requires evidence of
 - Active owner interference
 - Hindrance
 - Fraud
 - Unreasonable delay
 - Not foreseeable
 - Cardinal change
- Limiting liability to the price of the contract or some other amount

Termination & Suspension

- Non-contractual right to terminate
 - Frustration resulting from illegal, impossible or radical change in circumstances
 - Repudiation due to material or anticipatory breach
- Contractual provisions generally govern the right to terminate
 - Termination for convenience or “at will”
 - Termination due to defined circumstances
- Suspension
 - Often works in conjunction with or is closely related to the termination clauses
 - Can be useful to provide time for parties to resolve a dispute when a problem arises
- Notice provisions must be followed

Getting Stuck with an Unfavorable Dispute Resolution Forums & Law

- Choice of law provisions control what law applies
- Venue selection clauses dictate geographic location & jurisdiction
- Forum Selection clauses determine how your dispute will be handled
 - Courts: Small claims, state courts, federal courts and appellate courts
 - Alternative dispute resolution forums: Mediation and private arbitration
 - Government forums: Administrative Agencies and special courts for claims against government entities
- Your choice will affect many aspects of your dispute including:
 - Time
 - Rules
 - Cost
 - Representation
 - Rights to appeal
- Jury waivers

Contract Administration

- Make your team aware of the contract provisions so they can ensure compliance on their end
 - This is a case where the right hand must know what the left hand is doing
- Keep a cheat sheet of important deadlines not only for the construction work but for contractual obligations such as submission deadlines and notice dates
- Revisit the contract to ensure compliance with provisions
- Document your project
- Seek legal advice early, before the dispute reaches a point of no return – behind the scenes legal work is sometimes the most effective and allows relationships to continue

Contact the Presenter



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