

TEN PROVISIONS TO CONSIDER IN ALL CONTRACTS

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Contracts Are Everywhere...

<http://www.youtube.com/watch?v=P1ER3614R3g>

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Introduction: Piecing Together The Contract Puzzle

- Some provisions are universally applicable to almost any contract.
- Presentation covers several common provisions that are key to protection if a dispute arises.
- Whether clause is beneficial depends on nature of transaction and what side you end up on if suit is filed.
- Assume the worst so that you may be in a better position to prevail later.

Forum/Venue Selection Clauses

- Description: A clause agreeing that either certain types of disputes, or possibly all disputes arising out of or related to the contract, will be litigated in a certain place, such as a specific state, county, or city.
- Sample Clause: *All suits arising out of or related to this agreement shall be filed in the courts of Travis County, Texas.*
- Things to Consider
 - 1) Is it a convenient or inconvenient forum?
 - 2) Who is more likely to sue?
 - 3) Scope of clause

Arbitration Clauses

- Description: A clause agreeing that either certain types of disputes, or possibly all disputes arising out of or related to the contract, will be resolved by an arbitrator, instead of a court, which typically results in very limited rights to appeal.
- Sample Clause: *All disputes, controversies, or claims arising out of or relating to this contract shall be submitted to binding arbitration with the applicable rules of the American Arbitration Association then in effect.*
- Things to Consider:
 - 1) Costs of arbitration
 - 2) Timeline for resolution
 - 3) Discovery of unknown facts
 - 4) Public v. private decision
 - 5) Potential for appeal

Choice of Law Provisions

- Description: Where the parties agree in advance what state's law will apply to the interpretation of the contract or the resolution of the dispute instead of leaving the choice up to the state's conflicts of laws provisions.
- Sample Clause: *This Agreement shall be interpreted and construed according to, and governed by, the laws of Texas, excluding any such laws that might direct the application of the laws of another jurisdiction.*
- Things to Consider:
 - 1) Predictability
 - 2) Relationship to the chosen state
 - 3) Maturity of the state's law
 - 4) Attorneys' fees

Jury Trial Waivers

- Description: The parties agree to have the dispute heard by the judge and give up their right to a jury trial.
- Sample Clause: *Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.*
- Things to Consider:
 - 1) Predictability of judge v. jury
 - 2) Comparison to potential adversary
 - 3) Expediency

Representations and Warranties

- Description: A clause essentially making a promise regarding the quality or nature of something in existence or a promise to do something in the future.
- Sample Clause: *Seller hereby warrants that he possesses good and equitable title in the property conveyed in this agreement and that property is sufficient to operate the business.*
- Things to Consider:
 - 1) Relative knowledge of what's being sold
 - 2) Future protection
 - 3) Who is more likely to sue?

Integration/Merger Clauses

- Description: A clause stating the entire agreement between the parties has been completely memorialized in the words of the contract, so parties cannot claim additional agreements or representations about the contract.
- Sample Clause: *This Agreement and the exhibits hereto constitute the entire agreement between the contracting parties concerning the subject matter hereof. All prior agreements, discussions, representations, warranties, and covenants are merged herein. There are no warranties, representations, covenants, or agreement, express or implied, between the parties except those expressly set forth in this agreement. This agreement may only be amended by a written document duly executed by all parties.*
- Things to Consider:
 - 1) Certainty of performance and representations
 - 2) Likelihood to claim additional representations
 - 3) Potential of tortious behavior?
 - 4) Potential for fraud?

Indemnity/Insurance Obligations

- Description: Indemnify means to reimburse another for certain losses incurred in relationship to performance of the agreement. This can include reimbursement for loss suffered at the hands of (1) a third party's act, (2) your own negligence, or even, (3) the party's negligence who is being reimbursed. Insurance may be required by the agreement to secure such a reimbursement.
- Sample Clauses: *Contractor agrees to indemnify and hold harmless Owner for all claims or losses sustained in relation to Contractor's performance under this agreement. Contractor also agrees to obtain sufficient insurance to protect against all such loss, hereby waives all rights to subrogation against Owner, and will deliver a copy of said policy within seven (7) days of execution of this agreement that lists Owner as a secondary insured.*
- Things to Consider:
 - 1) Potential for damage to third parties
 - 2) Beneficiaries of agreement
 - 3) Scope of indemnity
 - 4) Conspicuousness
 - 5) Existence and extent of insurance protection

Waivers and Limitations on Damages

- Description: Limitation of damages clauses generally set a cap or otherwise limit the types of damages that may be awarded in a contract dispute. Liquidated damages clauses typically state that if a party fails to live up to the terms of an agreement, that party will be liable for a specific sum of money – used when the actual damages resulting from a breach are difficult to calculate.
- Sample Clauses: *If the Contractor fails to complete the work within the contract time, the Contractor agrees to pay the Owner \$300 per day as liquidated damages to cover losses, expenses and damages, not to exceed \$10,000. Both parties hereby waive any claim to all other damages including any consequential damages or harm caused to each other's business.*
- Things to Consider:
 - 1) Monetary risk of harm to each side
 - 2) Who is more likely to sue?
 - 3) Certainty of exposure or recovery

Attorneys' Fees Provisions

- Description: A provision expressly obligating the losing party to pay the prevailing party's attorneys' fees if any dispute arises out of the contract.
- Sample Clause: *In any proceeding by which one party either seeks to enforce its rights under this Agreement or seeks a declaration of any rights or obligations under this Agreement, the prevailing party shall be awarded its reasonable attorneys' fees, and costs and expenses incurred.*
- Things to Consider:
 - 1) Does the applicable law award attorneys' fees?
 - 2) Who is more likely to sue?

Guaranty or Performance Bond

- Description: A clause that binds a third party to secure an obligation or performance of one of the parties to the agreement.
- Sample Clause: *Guarantor unconditionally and irrevocably guarantees to Owner-Obligee payment and performance by Contractor, when due, of all its obligations under the terms and conditions of the Construction Agreement between Owner-Obligee and Contractor for the Work.*
- Things to Consider:
 - 1) Who is owed the performance?
 - 2) Creditworthiness of the performing party?
 - 3) Scope of the performance or obligation guaranteed
 - 4) Disclosure to others

Attorney Bios



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An associate in the Austin office, Marty's practice involves complex commercial litigation in both state and federal court. She has participated in all stages of the litigation process, including administrative proceedings, trial, and full briefing in appellate courts. With a particular emphasis on energy-related disputes, Marty has substantial experience representing companies and individuals in the oil and gas industry. She has also handled a variety of cases involving theft of trade secrets, trademark infringement, breach of contract, tortious interference with contract, breach of fiduciary duty, defamation, employment discrimination, class action defense and the Texas Public Information Act.



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After clerking at the Texas Supreme Court, Casey joined the Andrews Kurth litigation and appellate sections of the Austin office, where he is now a senior associate. Casey has represented both plaintiffs and defendants in state and federal courts, arbitration proceedings, and internal investigations both in Texas and nationally. His representations have involved a wide array of claims typical of complex commercial disputes on behalf of clients ranging from Fortune 500 member companies and foreign corporations to local individuals and small start-ups, spanning industries such as health care, technology, aviation, hotel, art, energy, financial services, and real estate. Casey's focus has often involved companies that have gone through internal struggles, such as partnership disputes or disputes with shareholders, or have been defamed or been the target of business disparagement or tortious interference with contracts or business relations by competitors.