

PROACTIVE LIABILITY  
LIMITATION:  
CONTRACTUAL  
STRATEGIES BEYOND  
SAFE PRACTICES

EXPLORING COMMON CONTRACTUAL TERMS TO  
MITIGATE LIABILITY

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# LEGALLY REQUIRED DISCLAIMER!!!

- Although I am a lawyer and this presentation is advising on contractual liabilities, it is not considered legal advice.
- The Law Society of Ontario prevents me from providing legal advice to nonclients. Therefore, even though it walks like legal advice, quacks like legal advice, it is not legal advice.
- Think of it as friendly guidance from someone who happens to wear a suit and has a pathological need to share information about contracts!

# CONTRACTUAL WORK OF LOCAL DISTRIBUTION COMPANIES

- "A contract is a legally binding agreement between two or more parties that creates mutual obligations enforceable by law. The formation of a contract generally requires an offer, acceptance, consideration, mutual assent, and a lawful purpose."
- Most of the work performed by local distribution companies (LDCs) or their affiliates is governed by a contract. Whether it's a construction project, a locate performed for a third party, the installation of electrical equipment, or contracted maintenance, there will be a contractual agreement that dictates the terms and conditions of the work

# CONTRACT WITH CUSTOMERS

- • The principal contract that LDCs work with is the Conditions of Service.
- • These conditions are regulated and deal with the LDC's provision of electricity to customers.
- • They do contain certain limitations of liability but are beyond the scope of this presentation.
- • This presentation focuses on contracts of other varieties.
- • However, much of the information here applies to the terms that appear in the Conditions of Service.

# ACCIDENTS AND LIABILITIES IN CONTRACT PERFORMANCE

- Accidents happen during contract execution:
  - - A faulty locate may lead to striking and damaging underground infrastructure.
  - - Improperly performed maintenance could result in personal injury.
  - - Incorrect installation of electrical equipment might cause a fire.
  - - Miscommunication during a construction project could lead to structural damage.
  - - Failure to adhere to safety protocols might result in hazardous leaks.
  - - Inadequate supervision could lead to machinery malfunction and injury.
- These accidents can result in liabilities of small to gigantic proportions:
  - - Depending on the contract and the terms limiting liability, this can lead to long and protracted litigation or no litigation at all.
  - - The financial impact can vary from millions of dollars in liability to no liability whatsoever.

# KEY CONTRACTUAL CONCEPTS TO LIMIT LIABILITY

- In this section, we will explore three key contractual concepts that are essential for limiting liability in contractual agreements:
  - Indemnity Clauses
  - Insurance Clauses
  - Limitations of Liability

# INDEMNITY CLAUSES

- • **Definition**:
  - An indemnity clause is a provision that transfers responsibility from one party to another.
- • **Purpose**:
  - To clarify who is responsible for specific tasks or outcomes and ensure that in the event of a claim, the responsible party will take responsibility, defend, and indemnify the other party.
- • **Example**:
  - "The Contractor agrees to indemnify, defend, and hold harmless the Company, its officers, employees, and agents from and against any and all claims, liabilities, damages, losses, and expenses, including reasonable attorneys' fees, arising out of or in any way connected with the performance of the work under this contract, except to the extent such claims, liabilities, damages, losses, and expenses are caused by the sole negligence of the Company."

# INSURANCE CLAUSES

- • **\*\*Definition\*\***:
  - - An insurance clause requires parties to maintain specific types and amounts of insurance to provide financial protection against potential liabilities.
- • **\*\*Purpose\*\***:
  - - To ensure that there is financial coverage for liabilities that may arise during the execution of a contract.
- • **\*\*Example\*\***:
  - - "An LDC might be required to have liability insurance covering damages up to a specified amount, ensuring that any claims related to their work are financially covered."



# LIMITATIONS OF LIABILITY

- • **\*\*Definition\*\***:
  - - A limitation of liability clause caps the maximum amount a party can be held liable for under a contract.
- • **\*\*Purpose\*\***:
  - - To limit financial exposure and protect parties from excessive claims that could arise during contract execution.
- • **\*\*Example\*\***:
  - - "A contract may limit a company's liability to the amount paid under the contract, preventing disproportionate claims that exceed the agreed value of the contract."

# STANDARD INDEMNITY CLAUSE EXAMPLE

- "The Contractor agrees to indemnify, defend, and hold harmless the Company, its directors, officers, employees, and agents from and against any and all claims, liabilities, damages, losses, and expenses, including reasonable legal fees, arising out of or in any way connected with the performance of the work under this agreement, except to the extent such claims, liabilities, damages, losses, and expenses are caused by the sole negligence of the Company."

# STANDARD INDEMNITY CLAUSE EXAMPLE

- Standard Indemnity Clause Example:
- "The Contractor agrees to indemnify, defend, and hold harmless the Company, its directors, officers, employees, and agents from and against any and all claims, liabilities, damages, losses, and expenses, including reasonable legal fees, arising out of or in any way connected with the performance of the work under this agreement, except to the extent such claims, liabilities, damages, losses, and expenses are caused by the sole negligence of the Company."
- Key Points:
  - - All-Encompassing Scope: Covers all claims and liabilities except those due to the company's own negligence.
  - - Reinforces Existing Law: Often does little beyond reinforcing that each party is responsible for its own negligence.
  - - Practical Reality: In actual situations involving accidents, both parties are typically sued, and the lawsuit determines negligence.
  - - Litigation Required: It usually takes legal proceedings to sort out the responsible party.

# TRANSFERRING NEGLIGENCE LIABILITY

- Slide Title: Transferring Negligence Liability
- Indemnity Clause Example:
  - "The Contractor agrees to indemnify, defend, and hold harmless the Company from any and all claims, liabilities, damages, losses, and expenses, including reasonable legal fees, resulting from the Contractor's performance under this agreement, including any claims or damages arising from the Company's own negligence."
- Key Points:
  - - Careful Consideration Required:
    - - Ensure you are not unintentionally assuming liability for the other party.
    - - Review indemnity clauses thoroughly to avoid accidental liability assumptions.
  - - Courts generally disfavor clauses that attempt to transfer one's own negligence to the other party.
    - - They often seek to avoid enforcing such clauses unless the language is explicit.
  - - To effectively transfer liability for one's own negligence, the clause must use clear and explicit terms, such as "negligence."
    - - Vague or ambiguous language is likely to be rejected by courts.

# UNDERSTANDING INSURANCE CLAUSES

- Slide Title: Understanding Insurance Clauses
- Two Key Types of Insurance Clauses:
  - - Covenant to Obtain Liability Insurance:
    - - Purpose: Ensures that parties maintain adequate liability insurance to cover potential claims and damages that may arise during the execution of the contract.
    - - Example: A clause requiring the contractor to carry a certain amount of liability insurance to protect against claims for bodily injury or property damage.
  - - Covenant to Insure Property or the Project:
    - - Purpose: Mandates that specific property or the project itself be insured to safeguard against loss or damage.
    - - Example: A clause requiring the contractor to insure a construction project against risks such as fire, theft, or natural disasters.

# EXAMPLE OF A COVENANT TO OBTAIN LIABILITY INSURANCE

- Liability Insurance Clause Example:
- "The Contractor agrees to maintain comprehensive general liability insurance with a minimum coverage of \$2,000,000 per occurrence, including coverage for bodily injury, property damage, and personal injury. The policy shall name the Company as an additional insured and include a waiver of subrogation rights in favor of the Company."
- Key Points:
  - - Coverage Requirements: Specifies the types of liability coverage required (e.g., bodily injury, property damage).
  - - Minimum Coverage: Sets a minimum amount for insurance coverage.
  - - Additional Insured: Requires the Company to be named as an additional insured.
  - - Waiver of Subrogation: Includes a waiver of subrogation to prevent the insurer from seeking recovery from the Company.

# EFFECTIVENESS OF THE COVENANT TO OBTAIN LIABILITY INSURANCE

- More Effective than Indemnity Clauses:
  - - Coverage Assurance: Ensures that any issues related to the contract are covered by insurance taken out by the other party.
  - - Risk Transference: Courts view this as a transfer of risk, holding the party liable even if the insurance is not actually taken out.
  - - Broad Coverage: Covers the company even if the damage is caused by its own negligence.
- Key Points:
  - - Risk Coverage: The party responsible for obtaining insurance must cover any incidents up to the stated insurance limits.
  - - Legal Precedent: Courts have upheld that failure to procure insurance does not absolve the party from liability; they remain liable for the coverage amount.

# PRACTICAL CONSIDERATIONS FOR LIABILITY INSURANCE COVENANTS

- Requirement for Proof of Insurance:
  - - Proof Necessity: The contract typically requires proof of insurance to be provided to the company.
  - - Common Oversight: This requirement is often overlooked, leading to complications in litigation.
- Key Points:
  - - Litigation Issues: Failure to obtain proof of insurance can be a significant issue in legal disputes.
  - - No Financial Relief: If the contractor has not taken out the insurance and lacks the financial resources, the company receives no protection despite the legal liability being transferred.
  - - Verification: Ensuring proof of insurance is crucial to guarantee coverage and avoid litigation pitfalls.



# EXAMPLE OF A COVENANT TO INSURE PROPERTY OR THE PROJECT

- Property Insurance Clause Example:
- "The Contractor shall procure and maintain property insurance covering all risks of physical loss or damage to the project, including fire, theft, vandalism, and natural disasters. The policy shall provide coverage for the full replacement cost of the property or project and name the Company as a loss payee."  
Project
- Key Points:
  - - Coverage Scope: Details the types of risks covered (e.g., fire, theft, natural disasters).
  - - Full Replacement Cost: Requires coverage for the full replacement value of the property or project.
  - - Loss Payee: Specifies that the Company is to be named as a loss payee, ensuring they receive compensation in the event of a claim.

# PURPOSE AND BENEFITS OF PROPERTY OR PROJECT INSURANCE CLAUSES

- Common Use in Builder's Risk Policies:
  - - Prevents Litigation: Aims to prevent litigation between project participants, ensuring that work does not come to a halt due to legal disputes.
  - - Damage Coverage: The insurance company covers damages, allowing the project to proceed smoothly despite incidents.
- Benefits in Property Claims:
  - - Legal Bar to Suit: When working on a project or someone's property, a contractual term requiring the other party to insure their property acts as a legal barrier to lawsuits.
  - - Example: If a company agrees to cover a building with fire insurance, and a fire occurs due to negligence, the company is not liable for damages since the property owner has insurance coverage for such incidents.
- Effectiveness:
  - - More Effective than Indemnity Clauses: These insurance clauses can often provide more comprehensive protection than indemnity clauses, transferring risk efficiently and minimizing financial exposure for contracting parties.

# EXAMPLE OF A LIMITATION OF LIABILITY CLAUSE

- Limitation of Liability Clause Example:
- "The Contractor's liability for any claim arising out of or relating to this agreement shall be limited to direct damages and shall not exceed the total amount paid under this agreement. The Contractor shall not be liable for any indirect, special, incidental, consequential, or punitive damages, including but not limited to, damages for delay, loss of profits, loss of revenue, or other economic loss, even if advised of the possibility of such damages."
- Key Elements:
  - - Cap on Liability: Limits the Contractor's liability to the total amount paid under the agreement.
  - - Exclusion of Consequential Losses: Excludes liability for indirect or consequential losses, such as:
    - - Damages for Delay: No liability for delays that may occur.
    - - Loss of Profits: Protects against claims for lost profits due to the Contractor's actions.
    - - Other Consequential Losses: Includes exclusion for economic losses such as loss of revenue.

# UTILITY OF LIMITATION OF LIABILITY CLAUSES

- Illustrating the Importance:
  - - Beyond Property Damage: Contractual and tort damages can extend far beyond simple property damage.
  - - Example: Damage to electrical equipment may have repair costs of \$5,000 to \$10,000, but the resulting downtime can cause millions of dollars in losses.
  - - Protection Against Large Claims: Without a limitation of liability clause, you could be responsible for the total damages, including substantial consequential losses.
- Key Points:
  - - Limiting Claims: Such clauses are crucial for keeping claims against utilities low.
  - - Conditions of Service: These limitations are often embedded in standard conditions of service agreements, providing a significant defense against large-scale claims.
  - - Managing Risk: Limitation of liability clauses help manage and mitigate the financial risks associated with significant disruptions or damages.

# THE IMPORTANCE OF INCLUDING LIABILITY LIMITING CLAUSES IN CONTRACTS

- **Essential Inclusion:**
  - - Ineffectiveness Without Contract: Tools to limit or transfer liability are useless if not included in the contract.
  - - Common Practice: These clauses are generally not an issue in large-scale, negotiated contracts.
- **Master Service Agreements:**
  - - Standard Inclusion: Liability limiting clauses are often part of master service agreements.
  - - Widespread Acceptance: Most large contracts automatically include these provisions.
- **Insurance Clauses:**
  - - Ease of Negotiation: Insurance clauses are typically easy to negotiate.
  - - Minimal Impact on Premiums: Many insurance companies include such coverage without increasing premiums.
- **Challenges in Smaller Contracts:**
  - - One-Off Contracts: These clauses are often overlooked in smaller, one-off contracts.
  - - Due Diligence Issues: The absence of proper due diligence during contract formation can lead to significant liability exposure.

# COMMON PROBLEMS WITH IMPLEMENTATION

- - Failure to Ensure Insurance Covenant Compliance:
  - - Lack of Verification: Not verifying that the other party has obtained the required insurance.
  - - Impact: This can result in significant liability exposure if an incident occurs and there is no insurance coverage.
- - Failure to Confirm Acceptance of Terms and Conditions:
  - - Overlooking Confirmation: Not ensuring that your terms and conditions are formally accepted by the other party.
  - - Impact: This can lead to disputes and a lack of enforceability of critical liability-limiting clauses.
- - Accidental Acceptance of Opponent's Terms:
  - - Battle of Forms: Unintentionally agreeing to the other party's terms and conditions, which may not include necessary liability protections or worse have you assume liability you though was excluded.
  - - Impact: This can nullify your liability protections and expose you to greater risk.

# VERIFYING INSURANCE COVERAGE

- - Follow-Through on Insurance Covenants:
  - - Post-Contract Steps: After the contract is signed, it's crucial to obtain a certificate of insurance.
  - - Certificate of Insurance: Issued by the broker of the contracting party, certifying that the insurance is in place and that you are added as an additional insured.
- - Ensuring Your Own Insurance Compliance:
  - - Certificate Collection: If you are providing the insurance, ensure you collect and renew your certificate of insurance.
  - - Policy Renewal: Regularly renew your policy to comply with the contract's insurance requirements.
  - - Responsibility for Exclusions: Failure to verify can make you responsible for covering anything excluded by the insurance.
- - Role of a Risk Manager:
  - - Risk Management: A risk manager should ideally review all contracts and insurance documents.
  - - Mitigating Risk: This ensures compliance and mitigates the risk of insurance gaps.

# CONSENSUS AD IDEM AND THE BATTLE OF THE FORMS

- - Different Forms with Different Terms:
- - Common in One-Off Contracts: It's common for each party to have different forms with varying insurance and liability provisions.
- - Example: You may issue a purchase order with your desired terms and conditions, but the contractor may respond by agreeing to perform the contract but striking out terms in the purchase order or sending their own form to you. This situation, where each party has different terms and conditions, is known as the "battle of the forms."
- - Often the work will proceed without resolution and The conflicting terms create uncertainty about which terms govern the contract.
- - For a contract to be enforceable, both parties must agree on the same terms (*consensus ad idem*).
- - Risk of Unintended Terms: Without clear agreement, you may inadvertently accept the other party's terms, leading to liability and coverage issues and the court trying to make out what was actually agreed to.



# WINNING THE BATTLE OF THE FORMS

- - No Agreement Until Terms Are Unambiguously Accepted:
  - - Ensure Clarity: There should be no agreement until the other side has unambiguously agreed to your terms and conditions.
  - - Last Form Typically Prevails: Generally, but not always, the last form exchanged between the parties before agreement is the one that is considered binding.
- - Court Considerations:
  - - Pre-Contract Conduct: Courts will examine all pre-contractual conduct to determine which terms and conditions were agreed upon.
  - - Importance of Clear Agreement: It is crucial to have someone knowledgeable about the importance of terms and conditions execute the contract.
- - Key Points:
  - - Educate Signatories: Anyone authorized to sign on behalf of the company should understand the significance of these terms.
  - - Implement Firm Policies: If it is not possible to educate every signatory, enforce a strict policy that prohibits deviation from standard contractual language.
  - - Authority to Modify Terms: Clearly communicate in writing to the other party who has the authority to modify contract terms.
  - - Court's Role: Ultimately, courts will determine what is reasonable and which terms apply.

# SUMMARY OF KEY POINTS - PART 1

- - Understanding Liability Limitation:
  - - Importance of Contracts: Liability limitations and transfers must be included in contracts to be effective.
  - - Indemnity Clauses: Transfers risk from one party to another but often reinforce existing laws.
  - - Insurance Clauses: These are usually easier to negotiate and can be more effective than indemnity clauses, covering significant risks.
- - Limitation of Liability:
  - - Caps on Damages: Limits the financial exposure by capping the maximum liability.
  - - Exclusion of Consequential Losses: Helps protect against indirect losses like loss of profits and damages for delay.
- - Ensuring Compliance:
  - - Verification of Insurance: Crucial to obtain and verify a certificate of insurance to ensure coverage.
  - - Consensus ad Idem: Ensures that both parties agree to the same terms and prevents accidental acceptance of conflicting terms.

# SUMMARY OF KEY POINTS - PART 2

- Slide Title:
- - Effective Risk Management:
  - - Regular Policy Renewal: Ensure your own insurance policy complies with contract requirements.
  - - Risk Manager's Role: A risk manager should review contracts and insurance documents to mitigate gaps.
- - Winning the Battle of the Forms:
  - - Clarity in Terms: Ensure no agreement until the other side unambiguously agrees to your terms.
  - - Last Form Precedent: Usually, the last form sent and accepted governs the contract terms.
- - Implementing Firm Policies:
  - - Educate Signatories: Make sure those signing contracts understand the importance of terms.
  - - Policy Enforcement: Implement policies to prevent deviations from standard contractual language.
  - - Authority Communication: Clearly state who has the authority to modify terms to prevent unauthorized changes.

# THANK YOU

- - Stay Connected: Feel free to reach out with any further questions or for more information.
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