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# Better Contracts

The First Line of Defence: Limiting Liability Through Better Contracts

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June, 2022

# Unregulated Business

- Non-standard business terms
- No mandated contractual terms or limitations of liability
- Liability risks large in relation to value of supplied goods and services and even size of business
- Terms of contract provide your most effective risk management tool
- Without appropriate terms your liability risk is uncontrolled

# A contract is a risk mitigation and allocation tool

- Most important function is to mitigate and allocate risks
- Must understand and identify risks which would undermine economics of the contract
- Most significant risks for you are uncertainty of business terms and liability for breach of contract
- Formation of the contract is your only opportunity to manage these risks

# Types of liability for breach

- Economic loss
- Physical loss
- Third party loss
- Losses potentially large in relation to benefits of contract

# Have a written contract

- Make sure all the business terms are spelled out
- Oral discussions are unlikely be effective
- Subjective intentions or assumptions don't matter
- Without a written contract which does more than specify the basic transactional terms, losses for breach are not subject to any limitation other than foreseeability and the duty to mitigate
- The common law imposes no limit on your liability

# Case Study

- Pitch for work – signed customer's Terms and Conditions – no work
- Years later get some minor work – after-the-fact time sheets had our Terms and Conditions
- Tech called out in the middle of the night to download some data from a tripped transformer relay – not material revenue
- Asked if OK to restart
- Transformer failed
- \$10M in property and economic losses
- Each side relied on their Terms and Conditions
- Uncertainty re: scope of work; limitations on liability; dispute resolution

# Business terms Beyond the Obvious

- Scope of work
- Service contracts – rights of termination
- Performance milestones and cure periods
- Product/service standards
- Warranties
- Right to sub-contract
- Intellectual property and confidentiality

# No battle of the forms

- Certainty as to the terms of the contract is paramount
- Parties often have competing Terms and Conditions – found in quotes, POs, invoices, time sheets, etc.
- Do not start work unless you have a definitive and current acknowledgement of the terms of the contract
- Either by a full written contract or explicit acknowledgement of your standard terms which have been communicated
- Implement proper internal procedures and educate all employees



# Limitations of Liability

- Limit type of conduct that will attract liability – limit to gross negligence or willful acts
- Limit type of losses – limit to direct physical loss and exclude profits, lost production, lost business opportunities and any other form of economic loss
- Limit amount of liability – put a cap (amount of contract price or some other fixed number)

# Force Majeure

- Consider if performance of contract may be disrupted by external events such as labour disputes, supply shortages, regulatory approvals etc.
- Specific terms and/or Force Majeure
- Force Majeure clauses need to be customized
- Cineplex v Cineworld – this matters

# Insurance

- On projects where you are one of multiple contractors or sub-contractors, ensure that there is a wrap-up policy with you as an insured
- When you use subs, make sure they are insured with an appropriate minimum, and that you are included as an insured for their negligence
- Include indemnification provision

# Entire Agreement Clause

- Exclude pre-contractual representations (e.g. “we never do that”)
- No waiver unless in writing
- No amendments unless in writing

# Dispute Resolution

- Consider pre-litigation resolution process – notice of dispute, executive conference, mediation, mandatory v optional.
- Consider arbitration or litigation in courts – are you likely to be plaintiff or defendant? Do you want/need specialized tribunal? Do you desire expedition? Do you desire confidentiality? Mandatory or optional?
- All contractors and subs must be included in arbitration clause
- If arbitration, consider number of arbitrators, which rules apply, time limits, appeals, costs.

# Case Study Conclusion

- Our terms imposed
- Damages limited to \$5,000
- No arbitration provision
- Litigation costs could have been avoided