

6 KEY CONSTRUCTION CONTRACT CLAUSES

If you work in the building and construction industry and receive or are preparing a construction contract, it is essential to know which key clauses to look out for and why.

This fact sheet identifies six key clauses that are typically found in construction contracts, explains their significance and the risks they may pose to your business.

INDEMNITIES



An indemnity makes one party responsible for compensating the other party for any loss suffered or incurred by that party. Construction contracts often include indemnities for:

- death or personal injury;
- property loss or damage;
- infringement of intellectual property rights; and
- breaches of law (including Work Health and Safety and Security of Payment Laws).

Indemnities often increase liability beyond what is required by the law. This can be problematic for the party giving the indemnity, as it may result in uninsured losses. Indemnities are frequently the focus of negotiations and can be tricky. If an indemnity is not market-standard, you should request for it to be deleted.

LIABILITY CAPS



In a construction contract, typically a Contractor will seek to limit their liability to a specific amount or a percentage of the contract sum. Sometimes a Principal may also have a cap on their liability. A liability cap limits a party's liability under a construction contract (so far as the law permits). Although it is market-standard and reasonable for a Contractor to cap their liability, a Principal will often request "carve outs" (or exclusions) from the liability cap, which may include:

- insurance proceeds recovered by the Contractor;
- personal injury or death;
- infringement of intellectual property rights; and
- fraud, criminal misconduct, wilful default and gross negligence.

If you are a Contractor, it is important that you have a cap on your liability. If you are a Principal, you should consider requesting exclusions from the liability cap.

FORCE MAJEURE



A force majeure event is generally an unforeseen event that is beyond the reasonable control of a party. Such an event affects the party's ability to meet their obligations under the terms of a construction contract.

Force majeure events may include natural disasters and pandemics (including COVID-19). When a party is affected by an unforeseen event, the force majeure clause will commonly excuse them from performing their obligations while affected by this event. If you are a Contractor, you may also be entitled to an extension of time to the date for practical completion.

LIQUIDATED DAMAGES



Liquidated damages are payable by a Contractor to a Principal to compensate the Principal for a failure by a Contractor to complete the construction works on time (i.e. by the date for practical completion). Liquidated damages are quantified in the contract as an amount or a rate per day or week. They are determined at the time the contract is entered into.

Liquidated damages need to be a genuine pre-estimate of the Principal's likely losses, otherwise, they may be voided by a court. If you are a Contractor, you may seek to cap your liability for liquidated damages under a construction contract.

CONSEQUENTIAL LOSS



Consequential losses are indirect in nature i.e. they do not naturally flow from an event or breach of the construction contract. Often construction contracts prepared by a Principal will not exclude consequential loss. However, it is common for a construction contract to include a clause excluding both parties' liability for consequential loss. Types of consequential losses include:

- loss of revenue;
- loss of profit;
- loss of benefit;
- loss of reputation; and
- loss of contract or opportunity.

When excluding consequential loss, it is important to set out clearly which types of losses are intended to be excluded. Typically you will set out the types of consequential losses in the definition of "Consequential Loss". If you are a Contractor, a broader exclusion for consequential loss is ideal, whereas if you are a Principal, you may want to consider a more limited exclusion. This is because, generally, a Contractor is more likely to be liable for Consequential Losses.

WARRANTIES



A warranty is a promise about a factual situation or particular outcome, or a commitment to take certain actions in the future. In a construction contract, a Principal may require a Contractor to provide warranties regarding the construction works.

These sometimes include warranties that the construction works will be:

- fit for purpose;
- compliant with applicable laws; and
- carried out in accordance with good industry standards and in a timely manner.

Contractors should treat warranties with caution, as breaching a warranty may result in the Principal claiming remedies other than, or in addition to, damages. Even if the contract does not spell out certain warranties, they may still be required under residential building legislation or the Australian Consumer Law.

If you are a Contractor, it is important to know which warranties you are required to provide at law.