The University of Texas School of Law's
2007 Construction Law and Litigation Conference

October 11-12, 2007
Dallas, Texas

A LITIGATOR'S VIEW OF TROUBLESOME CONTRACT CLAUSES

Chris S. Stacy
DuBois, Bryant & Campbell, LLP
700 Lavaca, Suite 1300
Austin, TX 78701
Telephone: 512-457-8000
Telecopier: 512-457-8008

TABLE OF CONTENTS

Page #

I. INTRODUCTION 1
II. PRELIMINARY CONTRACT ISSUES 2
A. Interpretation 2
1. Holisitc Interpretation: Give Effect to All Provisions 2
2. Typewritten / Handwritten Provisions Supersede Printed Provisions 2
3. Contra Proferentem: Document Construed Against Drafter 2
4. Earlier-Appearing Provisions Supersede Later-Appearing Provisions 3
5. Specific Language Supersedes General Terms 3
B. Incorporation by Reference 3
III. TROUBLESOME CLAUSES 4
A. Changes 4
B. Concealed Conditions 7
C. Force Majeure 10
D. Compliance with Codes and Standards 11
E. Delegation of Design 12
F. Hold Harmless/Indemnity 13
1. The Express Negligence Doctrine – The *Ethyl* Decision 14
2. The Conspicuousness Requirement – The *Dresser* Decision 15
3. Statutory Limitations on Indemnification 15
G. No Damage for Delay 16
H. No Third Party Beneficiaries 17
I. Suspension/Termination 18
1. Suspension 18
2. Termination 19
IV. CONCLUSION 20

A LITIGATOR'S VIEW OF TROUBLESOME CONTRACT CLAUSES

I. INTRODUCTION

A thoroughly prepared construction contract does more than simply describe one party's promise to perform work in exchange for another party's promise to pay a fee. The terms of the construction contract can also provide the foundation for loss prevention and litigation avoidance. Realizing this potential, however, requires the contract to address the entire enterprise to be undertaken—not only by assigning responsibility for anticipated duties, but also by attempting to foresee and allocate potential risks.

Although it is impossible to accurately foresee every potential risk that may arise during the course of a construction project, there are a number of issues that arise with sufficient frequency to merit attention in nearly all construction contracts. The attention that is paid to such issues is the primary advantage of using industry-recognized form agreements. The form agreements promulgated by the American Institute of Architects ("AIA")—including the ones that will be discussed in this article: the A101, A111, A201 Owner-Contractor Forms and B141 Owner-Architect forms (Part 1 and Part 2)† —are developed with the input of various industry stakeholders from across the country and over a long period of time. The AIA documents are also drafted to be used together, by featuring consistent terminology and setting forth complementary roles that are filled by the various project participants. Because they draw upon such a depth of experience and breadth of perspective in its development of contract forms, the AIA's drafters are able to produce a suite of documents that is widely used in the construction industry.

On the other hand, the AIA documents are *form* documents, meaning that their drafters sought to create documents that would establish contractual arrangements flexible enough to be used in a wide array of projects and in a wide variety of state jurisdictions. Nonetheless, not all projects or project participants are alike, and different states follow different bodies of statutory and common law when it comes to contracts and the construction industry. Furthermore, the law does not always provide clear or complete guidance that parties can apply in every situation. Too often, the general rules of contract law are too broad to fit precise situations, or are subject to exceptions. As such, the standard provisions of the AIA documents may not strike the preferred balance of risks between participants that the participants would themselves arrive at through a custom contract.

---

† AIA Document A101™ – 1997 Standard Form of Agreement between Owner and Contractor where the basis of payment is a STIPULATED SUM (the "A101 Lump Sum Agreement");

AIA Document A111™ – 1997 Standard Form of Agreement between Owner and Contractor where the basis of payment is the COST OF THE WORK PLUS A FEE with a negotiated Guaranteed Maximum Price (the "A111 GMAX Agreement");

AIA Document A201™ – 1997 General Conditions of the Contract for Construction (the "General Conditions");

AIA Document B141™ – 1997 Part 1 Standard Form of Agreement between Owner and Architect with Standard Form of Architect's Services; and AIA Document B141™ – 1997 Part 2 Standard Form of Architect's Services: Design and Contract Administration (the "B141 Architect Agreement").

This article is intended to provide some general insight into several troublesome contract situations that arise frequently during the course of construction projects, and a discussion of how the AIA A101, A111 and A201 and the B141—address those situations. Two notes of caution are in order. First, this article discusses the 1997 editions of the A101, A111, A201 and B141 forms. As of the date of this conference, the AIA is on the cusp of releasing the 2007 editions. As such, comments contained in this article may not apply to provisions contained in (or omitted from) the new AIA editions. More importantly, please note that this article is not a substitute for legal advice and the reader is cautioned to consult with their counsel with any questions or concerns about the duties and obligations of the parties to any contract.

II. PRELIMINARY CONTRACT ISSUES

A. Interpretation

Texas courts follow various rules when they attempt to arrive at the proper interpretation of contracts, including AIA contracts. These rules should be kept in mind when considering contract provisions, and especially when making changes to form agreements.

1. Holisitc Interpretation: Give Effect to All Provisions

All provisions of a contract must be construed together to arrive at the true intent of the parties. The Texas Supreme Court has said that the "orderly way" to do this is "to start at the beginning of the contract and take up the pertinent provisions as they come," and when they are analyzed, to try to arrive at the proper construction to be placed on the entire contract. *Southland Royalty Co. v. Pan American Petroleum Corporation*, 378 S.W.2d 50 53 (Tex. 1964).

2. Typewritten / Handwritten Provisions Supersede Printed Provisions

If a printed agreement is modified by a written or typewritten provision, the written or typewritten provision controls in the event of an inconsistency. *McMahon v. Christmann*, 303 S.W.2d 341 (Tex. 1957). Perhaps obviously, this rule is not automatic and absolute and the matter is subject to explanation of the parties' intent. *Roylex, Inc. v. Avco Community Developers, Inc.*, 559 S.W.2d 833 (Tex. Civ. App.–Houston [14th Dist.] 1977, no writ).

Because typed or handwritten provisions are often added to a printed form of agreement as a result of negotiations, very often in the heat of a last-minute attempt to consummate a transaction, each party should take enough time to carefully re-read all provisions of the agreement, including revisions, to prevent an interpretation that differs from the party's intent.

3. Contra Proferentem: Document Construed Against Drafter

In Texas, written documents are generally construed most strictly against the author, but with the goal of reaching a reasonable result consistent with the parties' apparent intent. *Temple-Eastex v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984). It would be useful to state

Title search: A Litigator's View of Troublesome Contract Clauses

Also available as part of the eCourse
A Litigator’s View of Troublesome Construction Contract Clauses and Other Hot Topics

First appeared as part of the conference materials for the
2007 Construction Law Conference session
"A Litigator's View of Troublesome Contract Clauses"