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CONSTRUCTION

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Clause For Concern: Common Construction Contract Provisions

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Recent Developments - Louisiana

Court Enforces Arbitration Clause Of Allegedly Terminated Contract, *Lorusso v. Landrieu Enterprises, Inc.*, 2002-2346 (La. App. 4 Cir. 5/21/03) 848 So.2d 656.

The Fourth Circuit Court of Appeals reversed a lower court ruling denying a Petition to Compel Arbitration. The case arose out of a contract between a homeowner and a contractor who had been retained to renovate and construct an addition to a home. When subcontractors filed claims against the homeowner, the homeowner attempted to invoke the contract’s arbitration clause by sending certified letters to the contractor requesting arbitration. The contractor did not respond to the letters, and the homeowner filed a Petition to Compel Arbitration.

The contractor opposed the Petition, claiming he had not received the letters, which were a procedural prerequisite to arbitration. Further, the contractor argued that there was no right to arbitration because the parties had orally agreed to terminate the contract due their deteriorating relationship. Finally, the contractor maintained that the homeowner had waived the right to arbitrate by waiting two years after the alleged termination to commence the arbitration. The homeowner denied an agreement to terminate, and contended that the contractor walked off the job after receiving a progress payment. The homeowner's Petition to Compel Arbitration was dismissed by the trial court without comment.

On appeal, the court held the contract and its arbitration clause were still enforceable. The court based its decision on the following factors: (1) the contract did not contain a provision allowing for unilateral termination; (2) the absence of evidence to support an oral agreement to mutually terminate; and (3) the homeowner's attempt to initiate the arbitration process, which was an act inconsistent with a mutual agreement to terminate. In this regard, the court held that the homeowner's delay in initiating the arbitration process did not waive his right to arbitrate, because the homeowner did not act inconsistently with his claimed arbitration right, and he complied with the terms of the contract in demanding that the disputes be arbitrated.

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New Home Warranty Act Provides Exclusive Remedy For Homeowners Against Homebuilder, *Ory v. A.V.I. Construction, Inc.,* 03-72 (La. App. 5 Cir. 5/28/03) 848 So.2d 115.

The Fifth Circuit Court of Appeal reversed a lower court judgment awarding homeowners damages in redhibition against a builder. Several months after moving into their new home, the homeowners noticed cracks in the drywall, which were subsequently repaired by the homebuilder. The homeowners, however, were unsatisfied with the repairs, and refused to allow the homebuilder to do any further repairs. After negotiations broke down, the homeowners filed a redhibition claim, seeking damages for defectively installed finishes. Following a bench trial, the trial judge ruled in favor of the homeowners, awarding damages and attorney fees in redhibition.

On appeal, the court held that the homeowners had no cause of action in redhibition because they purchased the home from its builder and the dispute arose solely out of alleged construction defects. Under these facts, the court held that the New Home Warranty Act (NHWA), La. R.S. 9:3141, *et seq.,* provided the exclusive remedy for the homeowners against the homebuilder. Further, the court held that homeowners' NHWA claim had prescribed. Under the Act, a homeowner must file an action to enforce the warranty within one year plus 30 days from the expiration of the applicable warranty. Because the warranty period at issue was one year, the homeowners' action, filed 16 months after the homebuilder last attempted to make any repairs, was untimely. The court found that subsequent contacts between the homebuilder and the homeowners' attorney were not sufficient to interrupt prescription because the contacts only served to demonstrate that there had been no progress toward resolving the dispute.

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No Need To Comply With Open Account Statute Requirements Where Contractual Right To Attorneys' Fees Exists, *Jefferson Door Co. v. Lago Development, L.L.C.,* 03-61 (La. App. 5 Cir. 5/28/03) 848 So. 2d 101.

The Fifth Circuit Court of Appeal upheld a lower court decision awarding attorney fees and costs to the plaintiff/seller of construction products in a collection action against its customer. The dispute arose from a credit sale of windows to a small housing developer. Both the credit application and a personal guarantee signed by the purchaser indicated that attorneys fees and costs would be due in the event of non-payment, and the contract of sale indicated that no notice of indebtedness would be required. After the developer failed to pay, the seller initiated a collection action, seeking the principal amount due, service charges, attorney fees, and other costs. Before trial, the parties stipulated as to the amount of the debt, leaving only the recovery of fees and costs in dispute.

At trial, the purchaser argued that the suit was on an open account, and attorney fees were not recoverable because the seller had not made a written demand for payment and had failed to provide an accurate statement of the amount due. The trial court, however, ruled that the contractual agreement was more akin to a guarantee, and rendered judgment in favor of the seller.

On appeal, the court agreed with the trial judge, holding that the seller had a contractual right under the credit application and guaranty agreement to be awarded attorney fees and costs, and, therefore, that the seller need not meet the requirements of the open account statute to recover these items.

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Hurricane Debris Removal Project Not A "Public Work Contract" Subject To Public Bid Law, *Regency Construction v. Lafayette City-Parish Consolidated Government,* 2003-313 (La. App. 3 Cir. 6/4/03) 847 So.2d 796.

The Third Circuit Court of Appeal held that a hurricane debris removal project was not a "public work contract" subject to Louisiana's Public Bid Law. The dispute arose out of an attempt by the Lafayette City-Parish Consolidated Government (LCG) to let debris removal contracts following Hurricane Lili in October 2002. Prior to issuing a "Notice to Bidders" for the proposed removal project, the Louisiana State Licensing Board for Contractors informed the LCG that unlicensed contractors could bid on the project so long as they promptly applied for a Louisiana license. After the notice went out, however, the Board changed position and informed LCG that contractors had to have a Louisiana license, but indicated that unlicensed contractors had time to apply and qualify in early 2003. LCG sent out an addendum to the bid package advising prospective bidders of this information. After the bids were received, the Board changed position again and notified LCG that it would take legal action if the contract were awarded to an unlicensed contractor. Based upon this notice, the lowest bidder for the project, an unlicensed contractor, withdrew its bid. At that point, LCG rejected all bids, citing "errors and confusion" with respect to the licensing issue.

Regency, the lowest licensed bidder, filed suit seeking an award of the contract, claiming that under Louisiana's Public Bid law, La. R.S. 38:2211 et seq., LCG was required to consider the merits of the lowest responsible bidder. The trial court dismissed the claims, awarding attorney fees to LCG. Regency sought supervisory writs. The appellate court held that the Public Bid Law did not apply to the contract in question because the object did not involve construction on public property; rather, it involved tree removal from private property that endangered LCG property. Because the contract did not involve "some type of construction on public property," the court stated that it could not be considered a "public work contract" for purposes of the Public Bid Law.

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Proof Of Substantial Completion Date An Essential Element Of Any Claim Under The Private Works Act, *C&S Safety Systems, Inc. v. SSEM Corporation,* 2002-1780 (La. App. 4 Cir. 3/19/03) 843 So.2d 447.

The Fourth Circuit Court of Appeals reversed a lower court judgment allowing a subcontractor to recover monies due for work performed as part of an office renovation project under the Private Works Act. The subcontractor had installed a fire suppression system as part of a build-out of a suite in the building. After the contractor failed to pay for the work performed, the subcontractor filed an action, under the Private Works Act, against the contractor and the building owner. The trial court, on a motion for summary judgment, held that the subcontractor's claim was timely filed and rendered a judgment in favor of the subcontractor, awarding the payment due, plus interest, costs and attorney fees.

The principal issue on appeal was whether the subcontractor's statement of claim was timely filed. The subcontractor maintained that the claim was timely because it was filed before the subcontractor had completed its work on the fire suppression system. The owner contended that the date of substantial completion occurred much earlier, when the tenant occupied the space pursuant to a variance from the fire marshal. After noting that the validity of the subcontractor's claim turned on the "narrow issue" of when substantial completion occurred, the court held the subcontractor's focus on the completion of the fire suppression system as the crucial date for determining substantial completion "misplaced." Rather, the court held, "the proper focus in determining substantial completion under the [Private Works] Act is on the entire construction project." Given this focus, the court held that the subcontractor's claim was untimely. The court rejected the subcontractor's argument that substantial completion could not have occurred because the system had not been tested and the state fire inspector had not yet approved the system. The court concluded by stating that "establishing the date on which substantial completion of the project occurred is an essential element of a subcontractor's claim under the Private Works Act because by statute that date marks the commencement of the lien period." Because the subcontractor could not establish that date, he was unable to establish the timeliness of its claim, and the court dismissed the action.

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Recent Developments - Texas

Sovereign Immunity For Breach Of Contract Claims, *Catalina Development, Inc., et al v. County of El Paso,* 46 Tex. Sup. J. 636 (Tex. 2003).

The Texas Supreme Court confirmed the extension of the doctrine of sovereign immunity to counties in breach of contact claims. A county, in a breach of contact claim, is immune from suit (but not from liability). A county can only waive immunity from suit through its express consent. Entering into a contract does not waive immunity. Contractors must be aware of the risks in contracting with the State of Texas and its subdivisions. Filing suit to recover amounts due for a breach by the State of Texas or a county in Texas may not be an available option for the contactor to recover amounts due on a project.

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Feature Article

Clause For Concern: Common Construction Contract Provisions[1]
By Richard J. Tyler, Practice Group Chair

In the early stages of a project, little (if any) attention is paid by the participants to the particulars of their contracts. The focus is on obtaining the work, and then on completing the job within the allotted time and budget. Indeed, if all goes smoothly, final completion may be achieved without anyone ever pulling their contract from the pile gathering dust atop the file cabinet. When things go awry, however, the contract becomes the focus. Great attention is paid to the “fine print,” often for the first time and often to the great surprise of one or both of the contracting parties.

Contracts by their nature allocate risks between the parties, and particular clauses can pose traps for the unwary. Some provisions can be particularly troublesome.

Incorporation by Reference

Contracts frequently contain provisions that identify and incorporate by reference other documents, for example:

> The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract.[2]

Such provisions serve two purposes: First, they identify the documents that are part of the parties’ contract but not attached to it. The second and lesser noticed effect, however, is to “flow down” contractual obligations of one party, such as a contractor, to other parties, such as his subcontractors or suppliers. A subcontractor who agrees to “perform all the Work required by the Contract Documents for the construction of the Project,” binds himself to comply with all the “Contract Documents,” even if they are not physically attached to his subcontract. For example, if the term “Contract Documents” is defined as including project specifications and those specifications, in turn, incorporate by reference codes and standards, then those codes and standards will be deemed a part of the contract.

Particularly nettlesome is incorporation by reference through multiple layers of contracting parties. An extreme example can be found in the case of *Russellville Steel Co., Inc. v. A&R Excavating, Inc.*[3] There, an owner entered into a contract with Landis for construction of a research facility, which contract provided for the arbitration of disputes. Landis subcontracted certain steel installations to Russellville Steel, which were to be performed “strictly in accordance with the Contract Documents, listed in Schedule B and incorporated herein by reference.” Schedule B identified the owner/Landis contract as one of the many documents incorporated by referenced. Russellville Steel, in turn, subcontracted certain of its work to A&R Excavating through a purchase order. The purchase order required A&R “to perform the erection work as called for in the attached subcontract.” A dispute arose between Russellville Steel and A&R, and

A&R filed a demand for arbitration; Russellville Steel denied the existence of an agreement to arbitrate. The court held that the attachment of Russellville Steel/Landis subcontract to the purchase order, which subcontract incorporated by reference the owner/Landis agreement, was sufficient to "flow down" the arbitration agreement of the top tier contract to the purchase order.[4]

The inclusion of an incorporation by reference provision in a proposed contract counsels diligent research and understanding of the obligations imposed by the incorporated documents before the contract is signed. A failure to do so will not excuse non-performance of obligations imposed by incorporated documents.[5]

Contingent Payment Clauses ("Pay When/If Paid")

In the traditional construction paradigm, an owner contracts with a design professional, usually an architect, to furnish plans and specification for the project. The owner thereafter contracts with a general contractor to build the work according to the design. In each instance, the party contracting with the owner typically subcontracts out portions of the work due the owner. An architect, for example, may hire a mechanical design engineer to do the HVAC design; the contractor may hire a mechanical subcontractor to perform the HVAC installation. In each instance, the party contracting with the owner is potentially between a rock and a hard place: he owes his subcontractor for the services performed, but is at risk that the owner cannot pay for that work.

Contingent payment clauses, commonly called "Pay When Paid" or "Pay if Paid" clauses, are used to shift this risk of non-payment or late payment to the subcontractor. These clauses generally provide that a subcontractor is not entitled to payment until the party with whom he contracted receives payment from the owner, for example:

> Contractor shall have no obligation, legal, equitable, or otherwise, to pay Subcontractor for Work performed by Subcontractor unless and until Contractor is paid by the Owner for the Work performed by Subcontractor. Furthermore, in the event Contractor is never paid by Owner for Subcontractor's Work, then Subcontractor shall forever be barred from making, and hereby waives, in perpetuity, any claim against Contractor therefor.

Such clauses have been the subject of considerable dispute, with virtually identical language being held enforceable in one court, but not another. In a small number of states, legislatures have enacted statutes prohibiting the enforcement of such clauses.[6] In another small group of states, courts have found such provisions void as against public policy. In yet a third group of states, such clauses have been held enforceable if they clearly and unequivocally state that payment to the general contractor is a "condition precedent" to the general contractor's obligation to pay his subcontractor.

While the majority of state courts enforce such clauses, they typically go to great lengths to avoid interpreting them as a complete bar to payment of subcontractors. The reasoning underlying this result varies greatly from court opinion to court opinion, and is sometimes disingenuous. For example, in *Southern States Masonry, Inc. v. J.A. Jones Construction Company,*[7] the Louisiana Supreme Court held that rather explicit clauses failed to make the owner's payments to the general contractor a condition precedent to the general contractor's obligation to pay his subcontractors. Other courts have focused on whether owner insolvency was considered or contemplated at the time the subcontract was executed:

> In our opinion, [the provision was] designed to postpone payment for a reasonable period of time after work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. To construe it as requiring the subcontractor to wait to be paid by the owner, which may never occur, is to give it an unreasonable construction which the parties did not intend at the time the subcontract was entered into.[8]

Texas courts likewise have looked upon contingent payment clauses with disfavor, and generally interpret them as a covenant dealing with the terms or timing of payment:

> "Where the intent of the parties is doubtful or where a condition would impose an absurd or impossible result, then the agreement should be interpreted as creating covenant rather than a condition. Also, it is a rule of construction that a forfeiture, by finding a condition precedent, is to be avoided when possible under another reasonable reading of the contract. Because of their harshness in operation, conditions are not favorites of the law." [9]

Accordingly, careful attention must be paid to contingent payment language to understand whether it raises a complete bar to subcontractor payment, or merely affects the timing of payment.[10]

Indemnification

In an indemnity provision, the risk of loss from enumerated events is shifted from one party (the "indemnitee") to another (the "indemnitor"), with the latter agreeing to "hold harmless" - i.e., reimburse - the indemnitee for costs and expenses arising out of those events. These provisions typically take one of three forms. First, a "broad form" indemnity provision holds the indemnitee harmless from any and all claims, even if they arise from the indemnitee's own negligence. Second, "comparative fault" indemnity clauses make the indemnitor responsible only for the losses he causes, either in whole or in part. Finally, an "intermediate form" provision protects an indemnitee from all losses except those arising from the sole fault of the indemnitee.

The enforceability of a particular indemnity provision can vary from state to state. The majority of courts view with disfavor clauses that indemnify the indemnitee against losses arising from his own negligence. In these jurisdictions, "broad form" indemnity clauses will be strictly and narrowly construed. Indemnification against one's own negligence will not be allowed unless that intent was expressed in "unequivocal terms." While the intent to indemnify must be expressed unequivocally, there are no "magic words" that achieve that result; language that is acceptable in one jurisdiction may be found unacceptable in another. In addition, courts may look beyond the language of the indemnity clause to other provisions of the contract, such as the insurance clauses, for guidance on the scope of indemnity intended by the parties. Finally, courts may look at the sophistication of the parties and their relative bargaining positions; sophisticated parties of equal bargaining strength are in a better position to write contracts that exclude indemnification for the indemnitee's negligence.

Even in states permitting "broad form" indemnity, there are limits.[11] Generally, such clauses will not operate to relieve a party from their "gross negligence" or intentional acts. Parties negotiating a contract should know and understand the extent of their indemnification obligations before signing on the dotted line.

No Damage for Delay

Construction contracts typically provide a time extension for completion of the work in the event of an excusable delay:

> If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.[12]

Some contracts are silent on the issue of whether an excusable delay event also entitles a contractor to compensation. Other contracts may provide that an excusable delay event "does not preclude recovery of damages for delay." [13] Some contracts, however, may expressly bar the recovery of compensation in the event of excusable delay.

As a general rule, "no damages for delay" provisions are valid and enforceable. As with most general rules, there are exceptions. Courts will refuse to enforce a "no damages for delay" clause if the delay (1) was caused by an owner's active interference, gross negligence, or breach of contract; (2) is unreasonably long and effectively constitutes an abandonment of the project; or, (3) was not contemplated by either party.

Waiver of Consequential/Incidental Damages

When a contract is breached, both direct and indirect (a/k/a "consequential") damages can result. Direct damages are the costs and expenses incurred directly as a result of the breach of contract. For example, few would argue with the proposition that costs and expenses incurred by a hotel owner to investigate and remediate a mold problem caused by defective design or construction constitute damages directly flowing from breach. Consequential damages, which are generally defined as damages that are indirectly

caused by the breach of contract, are more controversial. Using the example above, lost revenue suffered by the hotel owner while rooms are undergoing remediation would be considered by some a consequential damage flowing from the breach; others would strenuously argue that such damages are direct, rather than consequential, because they are a foreseeable result of the breach.

It is not at all unusual for one or both of the parties to a contract to seek to limit their exposure for consequential damages.[14] The reason for such waivers is understandable. In many instances, exposure for consequential damages can substantially exceed the face amount of the contract at issue.[15] Moreover, the evidence of such damages, particularly in the area of future damages, lost profits - can be speculative at best. The enforceability of consequential damage waivers can vary from state to state. In some states, such waivers are prohibited in all construction contracts, and in others prohibited only in certain types of contracts. As alluded to above, there is considerable debate in legal circles as to which damages are direct and which are consequential. Parties who contemplate such waivers must carefully evaluate the potential damage claims being waived and assess the risk of doing so.

Dispute Resolution

Contract clauses providing for the arbitration of disputes are now the rule rather than the exception in construction industry contracts. For example, the widely used AIA General Conditions of the Contract for Construction, AIA Document A201, provides that “[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration” in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") currently in effect.[16] As arbitration provisions have become increasingly more commonplace in contracts, so too have arbitration laws become the norm/ In addition to the Federal Arbitration Act, all fifty states, the District of Columbia, and Puerto Rico have enacted arbitration laws. Under these laws, arbitration provisions are valid and enforceable. In fact, public policy favors arbitration, and doubts regarding the existence of an agreement to arbitrate generally are resolved in favor of arbitration.

Because of the strong public policy favoring arbitration, arbitration awards are presumed to be valid. Accordingly, the award of an arbitrator may be vacated, modified, or corrected only if one of the grounds enumerated in the applicable arbitration law is present. These statutory grounds typically are: (1) the award was procured by corruption or fraud; (2) there was evident partiality or corruption on the part of the arbitrator; (3) the arbitrator was guilty of extreme misconduct (e.g., refused to hear evidence material to the controversy); or (4) the arbitrator exceeded the powers granted him by the arbitration clause of the contract. An award may not be appealed merely for errors of fact or law by the arbitrator.

There are advantages and disadvantages to arbitration. Advocates of the process argue that it results in quicker, more economical dispute resolution. Generally, there is no discovery unless permitted by the arbitrator or agreed to by the parties. Proponents also argue that the award is more likely to be technically correct due to the relative informality of the proceeding, and the presence of a decision-maker that is experienced in the field. Critics dispute that arbitration is less expensive (particularly in complex cases), and point to the hidden costs, such as arbitrator fees, that are not incurred in a lawsuit. Critics decry the lack of discovery, which, in their view, leads to “trial by ambush.” Detractors also argue that arbitrators are more likely to reach an equitable result, known as “splitting the baby,” rather than do what the law or the contract requires, with the outcome not being subject to appeal.

Beyond weighing the advantages and disadvantages of arbitration, contract negotiators must also assess the process and procedures proposed for arbitration. Are the rules acceptable? Is the method for selecting arbitrators acceptable? These are just a few of the questions that should be addressed before contract signing.

Choice of Law/Forum

A “choice of law” or “governing law” provisions identifies the law under which the contract is to be interpreted (e.g., “This Agreement shall be governed by and construed according to the Laws of the State of New York.”). A “choice of forum” provision identifies the location where the parties have agreed that any disputes should litigated or arbitrated (e.g., “Any and all disputes arising out of this Agreement and/or the Project shall be decided by a state or Federal Court of competent jurisdiction in Suffolk County, New York.”).

As a general rule, both choice of law and choice of forum provisions are valid and enforceable.[17] In some jurisdictions, however, the parties’ freedom to contract in this area is limited by statute.[18]

Attorney's Fees

Attorney's fees generally are not recoverable in a lawsuit in the absence of a statute or contract provision authorizing their recovery.[19] In some instances, a contract will contain a provision awarding attorney's fees to the prevailing party in any dispute arising out of the contract. Here, the language used becomes important: "shall award" indicates that an award of attorney's fees is mandatory; "may award" indicates that an award is discretionary. Use of discretionary language begs the question of what criteria are to guide the exercise of that discretion. In both instances, the identification of the "prevailing party" can be problematic. If both parties make claims and win on some issues but lose on others, which party is the "prevailing party?" Finally, attention should be paid for hidden attorney's fee provisions. For example, one court found that an indemnity provision obligating the indemnitor "to bear the expense of the investigations and defenses of all claims or demands or causes of action" required the indemnitor to pay the indemnitee's attorney's fees as an "expense of . . . defenses."

**** Click on the note number to return to its location above.***

1 An earlier version of this article appeared in the February 2002 ASHRAE Journal. Reprinted by permission.

2 American Institute of Architects (AIA) Document A20l (1997), ¶ 1.1.1.

3 624 So.2d 11, 13 (La. App. 5th Cir. 1993).

4 In an Alabama case, *Dunn Construction Co. v. Sugar Beach Condominium Association,* 760 F. Supp. 1479 (S.D. Ala. 1991), a lender was held bound to the arbitration provision in the owner/general contractor agreement even in the absence of an incorporation by reference clause because the lender's claims were intertwined with those of the owner.

5 Allen v. Royale "16," Inc., 449 So.2d 1365, 1368 (La. App. 4th Cir. 1984). ("One who signs a contract is presumed to know its terms and cannot avoid its provisions, absent fraud or error, simply because he fails to read or understand it.").

6 E.g., N.C. Gen. Stat. 22C-2. ("Payment by the owner to contractor is not a condition precedent for payment to a subcontractor . . . and an agreement to the contrary is unenforceable.")

7 507 So.2d 198 (La. 1987).

8 *Thomas F. Dyer Co. v. Bishop Int'l Engineering Co.,* 303 F2d 655 (6th Cir. 1962).

9 *Gulf Const. Co., Inc., et al v. Calvin Self d/b/a Industry Electric Co.,* 676 SW2d 624 (Tex. App. - Corpus Christi 1984, *writ denied*).

10 *Compare North Harris County Jr. College District v. Fleetwood Construction Co.,* 604 SW2d 247 (Tex. App. - Houston 1980, *writ denied*) (finding condition precedent) with *Wisgnia v. Wilcox,* 438 SW2d 874 (Tex. App. - Corpus Christi 1969, *writ denied*) (clause fixes reasonable time for payment).

11 In Texas, an indemnity provision may protect an indemnitee from liability arising from the indemnitee's own negligence. To be enforced, such a provision must meet the express negligence doctrine and the conspicuousness test. *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 SW2d 505, 508 n. 2 (Tex. 1993). The express negligence doctrine requires the parties express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Const. Co.,* 725 SW2d 705, 707-708 (Tex. 1987). The indemnity provision must meet the fair notice requirement of conspicuousness - when a reasonable person against whom it is to operate ought to have noticed it. *Dresser, id.* at 511.

12 AIA Document A201 (1997), ¶ 8.3.1.

13 AIA Document A201 (1997), ¶ 8.3.3.

14 The 1997 edition of the AIA A201 contains a mutual waiver of consequential damages by the owner and general contractor. See AIA Document A20l, ¶ 4.3.10.

15 For example, in the indoor air quality lawsuit involving the Polk County (Fla.) courthouse, consequential damages made the county's total damage claim nearly twice the original construction cost. It is not merely contractors who are at risk for such claims. Owners can be sued for consequential damages arising out of, among other things, excusable delay events.

16 AIA Document A20l (1997), ¶¶ 4.6.1 and 4.6.2. In the absence of a contractual agreement providing otherwise, contractual disputes are resolved in the court system.

17 For transactions in excess of $1 million, forum selection clauses are enforceable by statute. Tex. Civ. Prac. & Rem. Code Ann. § 15.020 (Vernon 1986). For smaller transactions, Texas courts have adopted the Restatement (Second) of the Conflicts of Law approach. *De Santis v. Wackenhut Corp.,* 793 SW2d 670, 677-678 (Tex. 1990). Courts will generally enforce forum selection clauses that are agreed to, unless to do so would be unreasonable under the circumstances. *Accelerated Christian Educ. V. Orache Corp.,* 925 SW2d 66, 73-74 (Tex. App. - Dallas 1996, no writ).

18 E.g., La. Rev. Stat. 9:2779; N.C. Gen. Stat. 22B-3; Ohio Rev. Code 4113.62.

19 For example, Texas law allows recovery of attorneys fees in breach of contract actions. Tex. Civ. Prac. & Rem. Code Ann. § 38.001

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