

Contracts – Important Clauses

Overview of Issue

While contracts vary, there are important clauses that should be included in all contracts. While the following is not an exhaustive list, the clauses listed are seen in contracts reviewed by HIROC. HIROC encourages subscribers to review contracts against the following list.

HIROC recommends subscribers have their corporate counsel (and privacy officer if personal health information is involved) review all contracts.

Refer to related Risk Notes for further details:

- Contracts – Important Provisions
- Contracts – Insurance Clauses
- Contracts – Indemnification and Hold Harmless Clauses

Key Points

- Important clauses should be included in all contracts, such as confidentiality, insurance, dispute resolution, and governing law.

Things to Consider

Background

- This informs how the agreement arose and the intent. It is not legally binding but helps to establish a context in which to read the agreement.

Party Names

- Each party/entity should be clearly identified by official legal name. The first time a name or entity appears, it should be spelled out in full, with a shortened moniker in parentheses. Afterwards, it is appropriate to use the abbreviated version.

Term of Contract

- The contract's duration should be specified. Some typical language may consist of expiration upon delivery or completion, or one year from the date of signing. To mitigate risk, automatic renewal provisions and 'evergreen' contracts should be avoided. In general, a term of less than three years is recommended.

Specifications (Obligations/Deliverables)

- There should be detailed descriptions of each party's obligations, including the product, service, facility, etc. provided and a timetable for delivery and completion. To successfully manage the contractual relationship, organizations are best served by having a detailed timetable with clear deliverables for each phase.
- Deliverables should be: concise, yet thorough in describing the requirements; consistent and unambiguous and not conflict with any other contract term; feasible and achievable; and measurable and verifiable.

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Date last reviewed: December 2016

- Note: If a promise/agreement/term in a contract is not clear, according to legal doctrine (*contra proferentum* rule), the preferred interpretation favours the interests of the party who did not draft or insist on the conflicting promise/agreement/term.

Performance Measures

- The contract should specify specific outcomes and ensure the party's performance is monitored and managed over time. In establishing performance measures, organizations must determine: what and how often to measure; and what indicators shall be used. The efficacy of indicators can be demonstrated by whether they provide warning signals of potential issues and whether they show that the desired targets will be achieved within the agreed upon timeframe.

Warranty

- This is a promise (i.e. promise to pay the debt of another that is additional to the original promise) made by one party to the other that specific events will take place or are true, i.e. the equipment is guaranteed to work for two years after installation.

Indemnification and Hold Harmless

- The other party should always agree to defend and indemnify and hold harmless the organization and its employees, agents, volunteers, etc. against liability for bodily injury (including personal injury) or property damage arising out of the party's performance under the contract. If the other party will not accept an indemnification cause, this may be a possible red flag and the organization may wish to reconsider entering into a contractual relationship with this party.

Insurance

- The insurance required for the vendor should reflect the risk and nature of the goods and services provided.

Ownership/Intellectual Property Rights

- The contract should specify who owns any intellectual property developed under the contract.

Confidentiality

- In some contracts, the organization will be required to protect the other party's confidential information and vice versa. If the organization agrees to protect the confidentiality of the other party, an obligation has been created to ensure procedures exist to safeguard the other party's information. It is important to ensure that this clause survive termination of the contract.

Termination

- The contract should include a termination clause that adequately protects the organization. Concurrent to entering into any contract, an organization must think of how to exit out of one. Some preferable termination provisions consist of terminating with no penalty by providing written notice within a specific time period (e.g. 30/60/90 days).

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Dispute Resolution

- One goal of any dispute resolution process is to resolve all challenges before they escalate. Contracts should include provisions detailing the obligations of both parties if a dispute arises during the contract term. Time frames and methods of escalation should be addressed, in addition to possible alternate dispute resolution.

Governing Law

- The contract should include a governing law provision. HIROC's coverage is triggered when a cause of action is filed only in Canada. The rationale behind this is to prevent lawsuits from being filed in other countries, where the laws of those countries would apply. Historically, awards have been much larger in foreign jurisdictions, such as the US, and this clause is meant to ensure that the cause of action will be heard in Canada and that Canada's more reasonable awards will apply.

Signature lines

- There should be places for each party's authorized representative to sign the contract. The organization should include the name, title address, phone number, and email address of the individuals signing the contract under each signature line. Only individuals who have the authority to sign should act on the behalf of the organization.

References

- CMPA. (2012). Medical-legal issues to consider with individual contracts.
- Devaney, P. (2012). How to maximize indemnity clauses – an important risk management tool. Smart Business.
- Gold, I, Donnelly, T, Keyes, C. (2011). Getting it right before the loss: indemnity, additional insured, and waiver of subrogation issues.
- Singleton, S. (2002). Can your termination clause hold up in court? Tech Republic.

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