The Battle of the Forms: AIA vs. ConsensusDocs and Other Notorious Contract Clauses

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I. EXECUTIVE SUMMARY

Among the various industries which drive the global economy, the construction industry arguably faces the most risks—safety, poor weather, payment, unforeseen conditions, and overlapping regulations too numerous to address. Some risks are predictable while others remain unknown until it is too late.

In an effort to mitigate against some of these risks, the construction industry must devote attention and resources to ensuring the contracts they enter provide maximum protections.

The contracting relationships on a construction project are intended to and should set forth the various parties’ rights and obligations in a written agreement. Careful and thoughtful contract drafting significantly increases the chances of a successful outcome on a project. The construction business, however, is risky and those risks are allocated in the construction contract. Depending on the role occupied (i.e., Owner, General Contractor, Construction Manager, Subcontractor or Supplier) risk is either assumed or assigned.

There are many ways to manage risk on a construction project. Risk management strategies include: (1) an accurate estimate; (2) comprehensive preplanning of the work; (3) safety; (4) a thorough understanding and description of the scope of work in the contract; (5) payment terms; (6) damages limitations; (7) dispute resolution; (8) insurance; and (9) indemnification.
Consequently, regardless of the role occupied by the contracting party, the strategy of managing risk is essentially the same at all levels. However, the higher the position occupied on the project the more that party gets to dictate the way risk is allocated by controlling the drafting of the contract.

A fundamental premise of the ConsensusDocs is to allocate risk to the party in the best position to control that risk. However, that premise is often not followed. ConsensusDocs and the AIA Documents are often used as basic templates within which a myriad of manuscript risk shifting provisions are inserted. Accordingly, in the end, those documents bear no resemblance to their original intent.

In 2017, the American Institute of Architects (“AIA”) updated its form contracts. Below is a comparison of the most common provisions and how they contrast with the form contracts produced by ConsensusDocs. Other common contract provisions are also discussed below.

II. **AIA V. CONSENSUSDOCS**

A. **Design Risk**

   When it comes to risk-shifting, neither the owner nor the contractor (or subcontractor or supplier) wants to assume the risk of design errors. Within the 2017 AIA A201, the Contractor must:

   - carefully study and compare the Contract Documents;
   - take field measurements; and
   - observe site conditions affecting the work;
The Contractor is liable if it fails to perform these obligations if it results in damages to the owner. Pursuant to Sections 3.2.1 – 3.2.4:

Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

Further, while “the Contractor does not have the responsibility to discover errors, omissions, or inconsistencies in the Contract Documents” . . . “if the Contractor does discover any such issues, the Contractor must report them to the Architect.”

Similarly, ConsensusDocs 200 Sections 3.3.1-3.3.2 provide that before commencing work, the Constructor must examine and compare drawings and specifications, relevant field measurements made by the Constructor, and any visible conditions that could affect the work. If the Constructor discovers any errors or omissions in the Contract Documents, the Constructor must report them in writing to the Owner. Note, however, the 2014 version provides that the Constructor is liable if it fails to perform this obligation and that failure damages the Owner. The 2017 version does not contain this provision.

B. Funding of the Work

Within A201, a contractor may request in writing that the Owner provide, "reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract." After that, the Contractor may only request such evidence if:
1. the Owner fails to make payments;
2. a change in the Work materially changes the Contract Sum; or
3. the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. If the Owner does not comply, the Contractor may stop work.

ConsensusDocs 200 takes this obligation a step further in Section 4.2:

Before and after commencement of the Work, at the written request of the Constructor, the Owner must provide reasonable evidence of sufficient financial arrangements to fulfill its obligations. This is a condition precedent to Constructor's commencing or continuing the work. Further, the Owner must notify the Constructor before any material changes in its funding condition occur.

C. Contract Management

Those familiar with the AIA forms recognize the expanded role that the architect takes in the relationship of the owner and contractor. Within the 2017 AIA 201, the architect is the contract administrator and:

- Must become generally familiar with and keep the Owner informed about the progress and quality of the Work.
- Is required to report "known deviations" and "observed" defects or deficiencies in the Work.
- The Architect acts as the Administrator "during construction until the date the Architect issues the final Certificate for Payment."
- The Architect must respond to RFI's in accordance with agreed time limits or "otherwise with reasonable promptness."
By contrast, ConsensusDocs 200 virtually removes the Design Professional (Architect) from the relationship between Owner and Constructor. Instead, much of the supervision and contract administration duties are placed upon the Owner. Pursuant to section 3.10.1, the Owner (not the Design Professional) issues a written order containing work instructions, now called an Interim Directive as opposed to a Directed Change. Moreover, the owner is charged with identifying unsafe worksite conditions and directs the contractor to take directive action. Finally, the Owner, not the Design Professional, issues certificates of substantial completion and final completion.

D. **Construction Schedule**

Within the 2017 AIA A201, the contract outlines the construction schedule to include the date of commencement, interim milestone dates, date of substantial completion, apportionment of work by trade or building system, and the time required for completion of each portion of the work. Further, if the Contractor fails to provide a submittal schedule, the Contractor is not entitled to any additional compensation or a time extension based on the Owner's or the Architect's slow processing of submittals, regardless of any delays.

The 2017 ConsensusDocs 200 eliminates the term “Contract Time” and replaces it with “Schedule of the Work.” The Schedule of the Work must be formatted in detailed precedence-style critical path method that (a) provides a graphic representation of all activities and events (including float) and (b) identifies dates that are critical to ensure timely and orderly completion of the Work. An initial schedule must be completed
before the first payment application, and thereafter on a monthly basis. In turn, the Owner is allowed to change the sequences provided in the schedule as long as it does not "unreasonably interfere with the Work."

**E. Consequential and Liquidated Damages**

The 2017 AIA A201 contract contains a mutual waiver of consequential damages. By contrast, the 2017 ConsensusDocs 200 provides a limited mutual waiver of consequential damages and allows the owner and contractor to negotiate which types of consequential damages may be recoverable.

Both forms also provide for liquidated damages. If elected, liquidated damages tip the scale in favor of the Owner should there be any delays in completing the underlying project.

**III. SO WHAT’S IN MY CONTRACT AND WHAT DOES IT MEAN?**

**A. Common Contract Clauses**

1. **Indemnity**

An indemnity provision in a contract requires one party to pay for losses incurred by another party arising from claims made by third parties or incurred by the indemnitee as a result of the indemnitors breach. The obligation to indemnify is usually limited to the extent caused by the indemnitor’s negligence. However, some indemnification clauses seek to impose an indemnity obligation on the indemnitor for the indemnitees
own negligence. Not surprisingly, only a handful of states actually allow such a clause to stand. States that have enacted anti-indemnity statutes or cases in those states that have found such clauses void and against public policy have done so to provide the incentive for all parties in the construction process to be safe and operate with care. Allowing a party to be indemnified for their own negligence that results in injury would eradicate such an incentive.

Some indemnity clauses also require an indemnitor to indemnify an indemnitee for the indemnitor’s intentional conduct. Taken alone this type of provision seems fair. Why shouldn’t a party be liable for losses caused to others because of that person’s intentional acts? If you are the party accepting the risk, the answer is simple; because intentional acts are not insurable.

2. Insurance

Any party assuming an indemnity obligation to another should ensure, to the greatest extent possible, that those risks are capable of being insured.

Contractual indemnity provisions included in contracts are only as good as the indemnitor’s ability to honor them. The indemnitor must have the financial ability to satisfy its indemnification obligations. Accordingly, when transferring risk through an indemnity provision, it is important to ensure that the transferee (or the indemnitee) has, or is able to procure insurance coverage sufficient to pay for the assumed indemnity obligations. As noted above, sometimes risks allocated in an indemnity provision, such
as liability arising out of an indemnitor’s intentional conduct, are not insurable due to moral hazard and/or public policy considerations. The lack of insurability for such conduct, however, does not necessarily constitute a valid argument for not requiring the indemnity—the party best able to control the loss should be the one indemnifying the other party from and against that loss, regardless of whether insurance is available to backstop the indemnity.

As a result, the best way to manage risk for all parties is to make sure that those risks are insured risks. A party can certainly rely on a valid indemnity clause for losses incurred in the absence of available insurance, but collecting on that loss is another matter entirely.

3. Additional Insureds

Today, additional insured requirements in construction contracts are almost universal. Additional insured status generally provides the person named as the additional insured insurance coverage on a policy not owned by that person and covers that person from and against claims for losses, provided those losses were caused by the policy owner’s operations.

To be an additional insured, the policy must be endorsed to confer such coverage, or the actual policy must contain a blanket additional insured clause, which generally states: if you agree to make someone an additional insured in a written contract they are.
A common misconception is that additional insured status can be conferred by virtue of a standard ACORD certificate of insurance. This is false. How do we know this? It says so right on the ACORD form:

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERNS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed.

All additional insured endorsements are not created equally. If you are obligated in a written contract to name certain parties as additional insureds, you must do so. As noted above, the correct way to do so is by endorsement or a policy with a blanket additional insured clause. As such, the party with the obligation to do so should ensure that the endorsement or policy it obtains accomplishes that requirement.

Endorsements issued by insurance carriers are categorized as either (1) blanket endorsements or (2) specific endorsements. Blanket endorsements contain generic language that can provide automatic additional insured status to a person or entity that the named insured is contractually required to add. For instance, the blanket endorsement may state that the insurance policy will include as an insured “any person or organization whom you [the contractor] are required to add as an additional insured under a written contract.” This broad language captures any entity that the owner requires by the express provisions of the construction contract. In contrast, specific endorsements actually name the entities and provide additional insured status to only
those entities. Although specific endorsements provide a sense of security by unambiguously naming the entities that are to be afforded additional insured status, blanket endorsements are beneficial because a project owner and its contractor can include additional insureds on the contractor’s policy without any action necessary on the part of the insurance carrier.

The recent case of *Gilbane Building Co./TDX Construction Corp. v. St. Paul Fire and Marine Insurance Company*, 2016 WL 4837454 (1st Dept., Sept. 15, 2016) shows just how important obtaining the proper endorsement can be.

Gilbane was the construction manager for a project in New York. The project owner agreed with Gilbane in a written contract that the owner would ensure that Gilbane was named as an additional insured on the prime contractor’s policy. The owner thereafter retained a prime contractor and the contract between the owner and prime contractor did indeed require that the prime contractor name Gilbane as an additional insured. To satisfy that obligation, the prime contractor obtained an additional insured endorsement, which was the ISO Form CG 20 33 04 13. The endorsement reads as follows:

*WHO IS AN INSURED (Section II)* is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you.

Losses occurred resulting from the prime contractor’s operations and Gilbane tendered the claim to the prime contractor’s carrier because in Gilbane’s mind, it was an additional insured. The carrier disclaimed coverage stating Gilbane was not an additional insured. The prime contractor’s insurance carrier denied the claim and
Gilbane commenced a declaratory judgment for coverage under the prime contractor’s policy. The prime contractor’s carrier thereafter moved for summary judgment based on the fact that the plain language of the blanket endorsement did not provide Gilbane with additional insured status. Gilbane argued that the blanket endorsement merely required that the additional insureds be identified in a written contract, and since the prime contractor was required to name Gilbane as an additional insured in its contract with the owner, it was.

The trial court denied the carrier’s motion for summary judgment, but the First Department reversed, holding that the language of the blanket endorsement named only the project owner as an additional insured. The court held that the endorsement clearly and unambiguously required that Samson execute a contract with the party seeking coverage. The court analyzed the language of the endorsement, which named as an additional insured “any person or organization with whom [the contractor has] agreed to add as an additional insured by written contract,” and noted that the phrase “with whom” limited the additional insured status to the sole party, i.e. the owner, with whom the prime contractor contracted. Since the prime contractor did not have a written contract with Gilbane, Gilbane was not afforded additional insured status under the policy.

Although Gilbane was not covered under the prime contractor’s insurance, it still had a contractual claim for breach of contract against the owner for the owner’s failure to ensure that the prime contractor named Gilbane as an additional insured. The moral of the story: if you agree to name a party as an additional insured, or if you want to be named as an additional insured, be sure that the documents doing so are proper.
4. **Pay-if-Paid versus Pay-when-Paid**

General Contractors and Construction Managers attempt to manage the risk of non-payment from an owner by inserting “pay-if-paid” or “pay-when-paid” clauses in their subcontracts.

The “pay-if-paid” clause places the risk of non-payment by an owner to a general contractor or construction manager on a construction project squarely on the subcontractor. A typical pay-if-paid clause is as follows:

**Time of Payment.** Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made no later than thirty (30) calendar days, or such shorter period as may be required by applicable prompt payment laws, after receipt by the Contractor of payment from the Owner for such Subcontractor's Work. The Subcontractor agrees that the Contractor shall be under no obligation to pay the Subcontractor for any Work done on this Project until the Contractor has been paid therefore by the Owner and that the provisions of paragraph 4.9.1 of this Subcontract, stating the time of progress payments, are subject to the condition that the Contractor shall receive from the Owner progress payments in at least the amounts payable to the Subcontractor on account of Work done by the Subcontractor on this Project; otherwise, the time when such payments shall be due the Subcontractor shall be postponed until the Contractor has received same from the Owner. The Subcontractor expressly contemplates that payments to the Subcontractor are contingent upon the Contractor's receiving payment from the Owner, the Subcontractor expressly agreeing to accept the risk that he will not be paid for Work performed by him in the event that the Contractor, for whatever reason, is not paid by the Owner for such Work. The Subcontractor states that he relies primarily for payment for Work performed on the credit and ability to pay of the Owner and not of the Contractor, and thus the Subcontractor agrees that payment by the Owner to the Contractor for Work performed by the Subcontractor shall be a condition precedent to any payment obligation of the Contractor to the Subcontractor. The Subcontractor agrees that the liability of the surety on Contractor's payment bond, if any, for payment to the Subcontractor, is subject to the same conditions precedent as are applicable to the Contractor's liability to the Subcontractor.
In sum, the above “pay-if-paid” clause states that if the contractor does not receive payment from the owner for the subcontractor’s work, for any reason, the contractor has no obligation to pay the subcontractor and the subcontractor expressly assumes that risk. Under an enforceable pay-if-paid clause, the contractor’s obligation to pay a subcontractor is discharged if the contractor does not receive payment from the owner.

On the other hand, a pay-when-paid clause does not extinguish the contractor’s obligation to pay a subcontractor. Instead, it merely postpones the obligation for a reasonable time. A typical pay-when-paid clause is as follows:

The Contractor shall pay the Subcontractor within thirty (30) days after the Contractor receives payment from the Owner. Receipt of payment from the Owner is a condition precedent to the Contractor's obligation to pay Subcontractor.

The notable difference between the pay-if-paid and pay-when-paid examples is the absence of the Subcontractor expressly assuming the credit risk of non-payment by the owner. Courts in most states will seek to attempt to find ambiguity in a pay-if-paid clause and interpret such a clause as a pay-when-paid if such ambiguity exists. However, 24 states allow a pay-if-paid clause if very specific and unambiguous language is used. Seven states have declared pay-if paid clauses void but allow pay-when-paid clauses. Four states do not allow either pay-if-paid or pay-when-paid clauses. The other states are up in the air on the issue. In those 24 states, a true “pay-if-paid” contract usually won’t affect lien rights. Subcontractors can still file a lien and collect in full from the owner. If the job is covered by a payment bond, a “pay-if-paid” contract may relieve the surety from liability on the bond.
In order to manage this risk, it is important to know your state’s laws and potential alternate remedies. It is also wise to pick the projects you work on wisely with reputable owners and contractors.

5. **No Damage for Delay**

Delays on construction projects happen and they almost always cost money. Whether delay costs are recoverable or not by the party experiencing the delay is dictated by the contract. No Damage for Delay clauses are frequently used to address delay related costs. In addition, recovery for delay costs depends on the law of the state where the project is performed as different rules apply in different jurisdictions.

A typical no damage for delay clause is as follows:

Subcontractor acknowledges that delays resulting from changes in the work, extreme weather, changes to the sequencing of the work, material shortages, transportation, strikes and other causes are inherent in the construction process. Subcontractor acknowledges that it has accounted for delays in its price and agrees to bring no claim for money damages as a result of any delay or hindrance. In the event that the Subcontractor claims that it has been delayed or hindered, it shall submit a request for an extension of time to Contractor in the manner and pursuant to the time periods set forth in the Contract Documents. If it is determined that Subcontractor has been delayed or hindered through no fault of its own, the time for performance hereunder will be extended and the extension of time shall be Subcontractor’s sole remedy for delay. Under no circumstances will the Contractor or Owner be liable to the Subcontractor for damages resulting from any delays or hindrances.

Subject to some exceptions, courts generally enforce No Damage for Delay clauses and most jurisdictions throughout the country recognize the validity of such a clause. Some states however have enacted statutes limiting such clauses in the public and private contracting context. For example, in public construction contracts in California, Colorado, Kansas, Louisiana, Minnesota, Missouri, New Jersey, North
Carolina, Oregon, and Virginia, under certain circumstances, if the delay is caused by the public entity, no damage for delay clauses are void. In Kentucky, Ohio, and Washington, under certain circumstances, no damage for delay clauses are void in both private and public construction contracts.

Most jurisdictions where the No Damage for Delay clause is enforced have also developed several judicially created exceptions to the clause’s enforceability. The most common exceptions typically involve delays caused by: (1) the [owner’s] bad faith or its [wilful], malicious, or grossly negligent conduct, (2) unanticipated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the [owner], and (4) delays resulting from the [owner’s] breach of a fundamental obligation of the contract. Corinno Civetta Construction Corp. v. New York, 67 N.Y.2d 297 (1986). Some jurisdictions have also created an active interference exception. These exceptions, which are highly fact specific, are rooted in the duty of good faith and fair dealing implied in every contract and are intended to avoid the otherwise draconian results that might flow from strict enforcement—namely, excusing the owner for harm to the contractor caused by a party’s egregious and unfair conduct.

Courts have not provided a uniform definition as to what constitutes active interference. In most jurisdictions, proving active interference requires a showing of some affirmative, willful conduct which is greater than ordinary negligence or passive omission. A simple mistake, oversight, error in judgment, lack of effort, or lack of diligence will generally not suffice to invalidate the clause.
Bad faith typically involves a conscious doing of a wrong. However, mere mistakes in judgement or mismanagement of the project are not typically sufficient to establish bad faith.

Similarly, gross negligence typically differs from ordinary negligence and involves a showing of conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.

Courts have not identified a minimum quantity of delay which is necessary to qualify as delay justifying abandonment of the contract. This exception is highly fact specific and the length of delay is not dispositive. Rather, oftentimes courts examine if the delay was so unreasonable as to signal a relinquishment of the contract by the party now seeking to enforce the no damage for delay clause. Thus, evidence that the party seeking to enforce the no damage for delay clause was working in good faith to complete the project could potentially support enforcement of a No Damage for Delay clause.

There is a split among jurisdictions concerning the viability of the delays uncontemplated by the parties exception. While some courts recognize this exception, others have found that uncontemplated delays are the main reason for including a No Damage for Delay clause. Where the exception is recognized, the party seeking to establish delay damages must show that the delays were not reasonably foreseeable by both parties to the contract.

Delay resulting in a breach of a fundamental obligation of the contract is an especially rare exception. To prove this exception, a party must prove that the other
party violated a provision going to the very heart of the contract thereby depriving the other party of its ability to perform under the contract.

IV.  CONCLUSION

The above clauses are just a sample of the common manuscript clauses that may find their way into the form ConsensusDocs or AIA documents. The propriety of including such clauses in construction contracts largely depends on your point of view (i.e., the position you occupy on the construction food chain). But, it is a reality that contractors will be faced with these clauses. In that event, the choice is to either pass on the contract or actively develop strategies to manage the risks.