

The contractual provisions and what they mean for you

By Tyler J. Carrell



Like it or not, nearly everyone is a party in at least one contract. Some may take the time to read every word of contracts, such as an employment contract, and others may skim through contracts because of their length or dullness, such as mortgage or loan documents. Finally, there may be some contracts, such as online “terms and conditions” contracts, where most people immediately click “agree” and don’t read them at all. Most attorneys would encourage people to read every contract before signing. While every contract is unique, there are some common contractual provisions you should be aware of that are included in many different types of contracts. Here are some of those common provisions and what they really mean for you.

Governing law; venue. This provision indicates that the law of a certain state or states governs the contract. In the case of a dispute regarding the terms or performance of the contract, this provision is designed to dictate the way in which the contract is interpreted. Since the laws of Arizona and the laws of another state may vary, the governing law provision attempts to alleviate any confusion of what law governs the contract. In addition, this provision may also state where any lawsuit related to the contract should take place (e.g., the Maricopa County Superior Court, Arizona). However, the venue provision may be separate from the governing law provision. But even if the governing law and venue are separate provisions, they are rarely, if ever, in conflict.

Alternative dispute resolution (ADR) or arbitration provision. This provision is included to cut down on potential legal costs, should a dispute arise between the parties of the contract. While a typical lawsuit may involve several pleadings, extensive discovery and a costly trial, many contracts dictate that any dispute be adjudicated at a less formal, but binding arbitration. In addition, the ADR section usually includes the process for selecting an arbitrator, or the person(s) who acts as judges or a jury at arbitration. Some contracts call for a three arbitrator panel, where each party selects one arbitrator, and then the two arbitrators choose the third arbitrator themselves. Other contracts simply call for the parties to agree upon a single arbitrator, or ask for the court to appoint an arbitrator if the parties cannot agree.

Severability; waivers. A severability provision is put into contracts to preserve the remainder of a contract in the event that a certain provision is held to be invalid. This provision prevents an “all or

Legal
Ease

nothing” approach to the enforcement of a contract. If a party challenges a certain provision of a contract and argues that it is defective or should be unenforceable, the severability provision allows the parties (or a court) to strip the defective provision from a contract while continuing to enforce the remainder of the contract.

Attorneys’ fees. In the event that a dispute arises under the contract, many contracts include a provision that awards the successful party its attorneys’ fees and costs incurred to litigate or otherwise resolve the dispute. Even if this provision is not included, Arizona law, specifically A.R.S. §12-341.01(A), states in relevant part that: “[i]n any contested action arising out of a contract...the court may award the successful party reasonable attorney fees.”

Counterparts. Finally, the counterparts provision usually appears near the end of a contract. This section allows the contract to be properly executed even if the parties do not sign the same copy of the contract. In my practice, many clients sign real estate contracts or (in the case of litigation) settlement agreements by signing a separate copy. In today’s technological-minded society, this makes executing contracts much more convenient. A PDF copy of the contract is often included in an email to the client. The client then prints the contract, signs it and scans a copy back to his or her attorney. The attorney exchanges the signed copy with the opposing party (or their counsel), and the opposing party provides a copy that they signed. The counterparts provision ensures that even though the parties did not sign the same copy of the contract, the contract is still enforceable and was executed properly.

Tyler J. Carrell is an associate at Gallagher & Kennedy, where he focuses his practice on commercial litigation, real estate transactions and bankruptcy. For more information about Mr. Carrell, please visit gknet.com.