

Proudly presents...

5B - Contractual Risk Transfer and Allocation

**Where does the risk start and
stop?**

Contract Building Blocks

- Identify the parties
- Identify the purpose
- Definitions
- Term and termination clauses
- Identify the responsibilities of each party
- Identify applicable laws – i.e. protection of privacy

Contract Building Blocks

- Identify the safety requirements, if any, including environmental concerns.
- Insurance and indemnity sections
- Are there specific concerns with confidentiality? Will individuals have to sign confidentiality agreements?
- If it includes intellectual property, who owns it at the end?

Contract Building Blocks

- How are changes made to the agreement?
- Any concerns with failure to perform?
- Can it be subcontracted or are there rules that apply if that occurs?
- Whose laws apply?
- Signing authority

Contracts – Rules of Thumb

- Written contracts are evidence of the “meeting of the minds”
- Contracts allocate risks and responsibilities
- Contracts are negotiable – every clause
- Who is driving the boat?
- Whomever supplies the contract generally protects themselves – they tend to be very one-sided

Contracts – Rules of Thumb

- Don't risk a lot for a little
- Don't assume risks you can't control
- Use the right contract – sometimes standardized contracts are all right
- Make sure the intent of the contract and the roles of each party are clear

Risk and Insurance Issues

- How much Risk should you accept?
- Liability for your own actions
- Transferring the Risk
- Shifting liability by contract Warranties/Representations
- Identify the allocation of risk to each party relating to indemnities and releases or warranties

Arranging the Insurance

- Identify the issues of parties in arranging insurance that covers the risk
- Identify all insurance that each party requires
- Check for any gaps in coverage

Additional Insured Status

- Allows the financial transfer of risk
- Provides defenses; reinforces hold-harmless clause
- Augments the indemnity or hold-harmless clause
- Makes sure there is a party to pay funds in the event of a loss that falls within the contract
- Requires the party providing insurance to add the other party as an Additional Insured, to all coverage being provided pursuant to the contract

Limitation of Liability

- Unlimited = unacceptable
 - A reasonable position is no more than your total of insurance coverage
 - Limiting things to the “cost” of the contract or a percentage of the contract
 - Limiting liability to term of project and to the specific contract
 - Is there a time limit on liability?

Consequential Loss

- Consider consequential loss; decline those potentially massive exposures
- Investigative costs
- Professional fees (legal, accounting, forensic)
- What is a “reasonable” fee when referred to in a contract?

Indemnify/Hold Harmless/Defend

- What is the conceptual difference between the terms?
- It is a conscious assumption of risk by one party as part of the agreement. It is a transfer of risk by the other party.
- It documents the intent and scope of the risks being transferred.
- It must be clear and fully understood by the parties.

Indemnity and Hold Harmless Key Issues

- Promise to indemnify and defend
- Do they have the resources?
- Who?
- Against what?
- Results from what?
- Caused by whom?
- Limitations - \$ and negligence

Waiver of Subrogation

- The purpose is to ensure that ultimate responsibility for the risk may wind up where the parties intended to transfer that risk.
- It prevents one party of the contract from recovery action by the other party's insurer for claims, that were at least in part, the fault of that one party.

Force Majeure

- What does this mean? What is an “Act of God”?
- Is lightning force majeure? Who decides what is included in that terminology?
Decided by case and country law?
- Lightning, volcanoes, terrorism, wars, embargoes, public disorders, adverse weather, pandemics, volcanic ash

Severability of Interests

- Preserves the Additional Insureds' rights to sue and recover from the Named Insured despite any possible “insured-versus- insured” exclusion as though a separate policy was issued to each party.

Cross Liability

- When one party requires Additional Insured status on another's policy;
- It doesn't want the insured status to eliminate coverage for liability the other party may have.

Statute of Limitations

- Often 2 years but could be extended by a court
- Understanding the difference between the time limit to make the claim (submit the Proof of Loss) and the time limit to launch a Statement of Claim if not settled
- Jurisdictional basic limitations – can you contractually amend them?

Determining the battleground

- Determine the province or country
- What happens if you can't agree to either party's home area? Is there an in-between country/law that would work?
- Do you have the resources to litigate elsewhere (including translation?)
- Courts have discretion to take jurisdiction regardless

Arbitration/International Dispute Resolutions

- Consider the options to for arbitration as arbitration can be more costly and can take longer to resolve than some of the court applications

Contra Proferentem

- Doctrine of contractual interpretation
- The legal drafting of the contract language – who is doing it? If you draft it and the term is ambiguous, it may be construed against the party that required its inclusion
- Kind of like the rule in baseball that a tie goes to runner

Human Hazards

- If you are working on an international agreement, consider your risk management plan for:
 - Terrorism
 - Wars (including civil wars / revolutions)
 - Acts of government
- Can you evacuate? Other options for in-country shelter for your people?

Signatories to the Agreement

- Ask yourself – how do I know that the person signing the agreement binds the organization?
- Perceived authority to sign
- Include a statement about the signatories having authorization to sign on both sides

Housekeeping

- Make sure you know who else needs to review it / be consulted in your company
- Keep a copy to pull out (electronic if possible) – when something happens you don't want a significant delay in responding

The best tips we can give you...

- Janet - It's OK to be the "Corporate Pessimist" – when you're in Risk Management it's part of your job!
- James - Get a good relationship with your broker and your legal counsel and use it – it can help you avoid "betting the company" when you didn't mean to.
- Gord - make "informed" decisions by balancing Risk v Reward.

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- Gord Wainwright, Managing Director, Insurance & Risk Management, CHC Helicopter Group / Chair, CHC Reinsurance S.A. (Luxembourg)
 - James Sproule, Barrister & Solicitor, Partner, McKercher LLP
 - Janet Stein, Director, Risk Management & Insurance, University of Calgary

Questions?

Enjoy the rest of the
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