



# **CONTRACT DRAFTING TIPS FROM THE LITIGATOR'S PERSPECTIVE: AVOIDING LAWSUITS IN THE POST COVID-19 WORLD**

Presented by Procopio Partners Robert H. Sloss, Mindy M. Morton and Sean M. Sullivan

# Introduction



- Who we are
- What we are going to cover
- Our methodology
- Why litigators are doing this

# Time of the Essence



“Time is of the essence of this Agreement; provided, however, that notwithstanding anything to the contrary in this Agreement, if the time period for the performance of any covenant or obligation, satisfaction of any condition or delivery of any notice or item required under this Agreement shall expire on a day other than a Business Day, such time period shall be extended automatically to the next Business Day.”

# Dispute Resolution



“The parties will use their commercially reasonable efforts to informally and timely resolve any dispute concerning any matter related to this Agreement by having the party representatives attend an informal meeting in person in\_\_\_\_\_. However, a dispute related to intellectual property rights shall not be subject to this provision. All negotiations pursuant to this section are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. If the parties are unable to resolve the dispute within thirty days of notice, the dispute will be resolved by arbitration with \_\_\_ arbitrators before JAMS/AAA in\_\_\_\_. The parties further agree that in any arbitration proceeding, they may conduct reasonable discovery pursuant to the arbitration rules, and any award will be enforceable in State or Federal court.”

# Choice of Law and Forum



---

“This Agreement is executed in the State of New York and shall be construed under and in accordance with the laws of the State of New York. Licensee agrees that any litigation, action or proceeding arising out of or relating to this Agreement may be instituted in any state or federal court in the State of New York, (ii) waives any objection to the venue of any such litigation, action or proceeding, (iii) irrevocably submits to the jurisdiction of any such court in any such litigation, action or proceeding, and (iv) hereby waives any claim or defense of inconvenient forum.”

# Notice



“Any notices required or permitted to be given hereunder shall be given in writing and shall be delivered (a) in person, (b) by certified mail, postage prepaid, return receipt requested, (c) by facsimile or transmitted by facsimile or electronic mail transmission (including PDF), or (d) by a commercial overnight courier that guarantees next day delivery and provides a receipt, and such notices shall be addressed as follows:\_\_\_\_\_. Signatures sent or received by email with a scanned document attached, or by verified electronic signature (such as DocuSign), or by facsimile transmission will be considered as enforceable and valid as an original signature by the party signing.”

# Indemnity Provisions



“Consultant shall defend, indemnify and hold the Company, its officers, directors, employees and agents, harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or resulting from the acts, errors or omissions of the Consultant in performance of this Agreement, except for injuries and damages caused by the sole negligence of the Company.”

# Limitation of Liability



“The Parties shall not, under under or in connection with this Agreement, be liable for any indirect or consequential damages, including but not limited to loss of profits, revenue, use, expectation or opportunity, wasted expenditure, lost production or similar loss. All provisions limiting the Parties’ liability shall not apply to those cases which are based on willful acts or fraudulent misrepresentations.”



# Termination



“Failure to strictly comply with any of the terms and conditions of this Agreement, including but not limited to the provisions of Sections \_\_ and/or any other agreement between Licensor and Licensee, may result in the immediate termination of this Agreement and/or any such other agreements by Licensor in its sole and absolute discretion. In the event of termination, all amounts owing under this Agreement remain payable in full and shall be retained by Licensor in addition to any other rights or remedies that Licensor may be entitled to assert for breach of contract. The confidentiality obligations in Section \_\_ shall survive termination of the Agreement for a period of two years from the date of termination.”

# Severability



“In the event that any provision of this Agreement, or the application of such provision, is found to be unenforceable, invalid or contrary to law by any court of competent jurisdiction, the remaining provisions shall remain in full force and effect.”

# Force Majeure – Statutory in CA



## Cal. Civ. Code § 1511:

The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just;
2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary;

# Force Majeure



“Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, without limitation, acts of God, acts of war or terrorism, shortage of supply, epidemics, labor difficulties or civil unrest.”

# Panelists:



**Robert H. Sloss - Partner**  
650.645.9024  
robert.sloss@procopio.com



**Mindy M. Morton - Partner**  
650.645.9020  
mindy.morton@procopio.com



**Sean M. Sullivan - Partner**  
619.525.3859  
sean.sullivan@procopio.com