

Myth or Reality of Ironclad Contracts

Sarah Sawyer: Welcome to this week's OK at Work. I'm myself, Sarah Sawyer, and my colleague Russell Burger. We're both attorneys at Offit Kurman. And today we are talking about the ironclad contract or, contract drafting, trying to make contracts as strong as possible. Someone may have heard of that phrase before, the ironclad contract, where it's got no loopholes, it's super strong, there's nothing...

it's unbreakable. And, clients are often looking for that type of satisfaction as it relates to their contracts, which I understand. Obviously, the reason to have a contract is to bring certainty to a process, have a clear understanding. There's a lot of-- That's a big part of wanting to have a contract to begin with.

However, is, an ironclad contract possible, Russell?

Russell Berger: No, it is not, Sarah. Does not really exist. And the main reason why is, and you can certainly have a much better [00:01:00] contract. You can have sloppy contracts, incomplete contracts. You can have very good contracts.

You can have well-prepared contracts. But the issue is, in real life, there's things that happen that are unexpected, and when you draft a contract, you're planning for most things. And, that's the difference between a good contract and a sloppy contract. A good contract will have anticipated a lot of issues, and certainly all the common issues, and provided, if this happens, then this is how we proceed.

That's what a good contract will do for all the common, contingencies. But it can't possibly address everything that could possibly happen. We see the same thing in employee handbooks too. Like you just can't create a set of rules for, the infinite possibilities and combinations of possibilities that can happen in real life.

So instead, where I think the focus, it makes sense to have the most focus is on, the things that are commonly occurring, the frequently occurring issues and certainly the big picture item. Even if it's not as likely to [00:02:00] happen, well, this happens, it's a big deal that's a good place to make sure you're drafting carefully and you're including that in your contracts.

Sarah Sawyer: Yeah, and something to consider also is that, contracts can be a living, breathing contract in the sense that some people might be using the same agreement over and over again as a service agreement, for instance, with customers or vendor agreements, those types of things.

And as time goes on, they might realize certain things that they encounter that they hadn't thought about during the drafting process, hadn't told their attorney about, and say, "Oh, hey, we should probably add these things in. This keeps happening," or, "This is something that we didn't anticipate would be a product of what we're doing and how this is operating."

And so being adaptable is a good way to think about this as well, 'cause even if it's a really great contract, super enforceable, there's a lot of good things happening about it, there might just be something that you hadn't thought of that some change in circumstance, something might

adjust. I mean, you made the comparison between agreements and handbooks and policy [00:03:00] documents.

It's the same with why the law itself adapts, right? We all have state legislatures, we have the federal government constantly making changes to the law, right? And I'm sure everyone's got feelings about those changes, depending on what they are, right? But there's a reason that the law changes and adapts, and it's not stagnant either, and it's because the, circumstances are changing, things are changing, the environment changes, the needs of the business change, the needs of the parties change, things happen.

It's another reason that sometimes agreements have something about altering them in them, so it'll have something at the end of the contract that says that the parties can amend the agreement in writing, as long as they agree to that change. So there's a lot of reasons that, as much as we might want the stability of a very strong ironclad contract, there can be really practical reasons for why that reality does not exist and good reasons for things to change. It might be a good change. It's not always a bad thing.

Russell Berger: Yeah. Well, it kind of reminds me, I'm sure you had this in law school as well, professors always talk about students wanting to have, black [00:04:00] letter law, and by that they mean, clear, definitive answers, like clear sets of rules.

And a big part of what they teach you in law school is that, that's rarely the case. There's a lot of ambiguity, there's a lot of applying general principles, general constructs to very specific situations. And as lawyers, you end up arguing, this law, or in this case, the contract provision should be interpreted and applied this way because.

So you end up in a lot of those kinds of debates, and that's why, you end up having, contract litigation. Sometimes it's because the other side's being difficult but sometimes it's because there's some vagueness in how the contract should be applied to a specific set of circumstances.

So again I think the value on a planning side is for parties to do as much as they can to anticipate and prepare, and as you mentioned, to learn and evolve your contracts and the issues that you care about over time, and make sure those points are addressed. And then that you have good provisions for, if there is gonna be a dispute, we can litigate it efficiently or maybe with fee shifting that prompts, [00:05:00] quicker resolution.

Whatever it is, there's some other things we can do in terms of how you disagree and how you seek redress of a disagreement that can, still be to your advantage even if you don't know what you're gonna be disagreeing about.

Sarah Sawyer: Yeah. Hey, you still want to be thorough, you want to be strategic, you want to be strategic. You've buttoned up as much as possible.

Just to say that it's not possible to be ironclad doesn't mean that you want to just give up and write on the back of a napkin and call it a day either, right? So you do want to get as close as possible to limit your headache in the future. But don't be surprised if there is some change or some differences there.

Russell Berger: Yeah. Yeah. Just 'cause it's hard and imperfect doesn't mean you should just give up. As you said, put it on a napkin. Like it's still worth chasing that ironclad contract even though, it's not quite gonna be ironclad.

Sarah Sawyer: Good advice for life as well.

Russell Berger: That's right.

Sarah Sawyer: Thanks, Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.