Understanding the Importance of Indemnification Clauses

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, and my colleague Russell Berger, both attorneys at Offit Kurman. And today we are talking about those fun little sections and contracts under the miscellaneous section, the legal language that comes kind of towards oft- often, not always, but often towards the bottom of a contract.

You got your commercial terms, like what things are gonna cost, how things are gonna proceed, what the timelines are, all of those types of practical things often, and then you get down to the things that may look to a client in or, a business as just kind of legal gobbledygook and things they don't, don't know much about or will rely on counsel for.

And sometimes it looks like because they're further down or maybe they're under a, a clause that says miscellaneous, that they don't matter as much because they're just the legal stuff. Well, down there is a important clause, the [00:01:00] indemnification clause. So, why should companies be paying attention, companies, individuals who are contract- anyone who's in contracting and sees an indemnification clause, regardless of where it is, but especially if it's below a miscellaneous section and they don't want to pay attention to it why should they be paying attention to that clause, Russell?

Russell Berger: Yeah. Well, look, a lot of things in business are about properly balancing hopefully to your benefit, risk and reward. And an indemnification provision is a risk allocation tool. It shifts risk from one party to the other, and basically what most of them say is, "If a third party sues us for X, this party's gonna be responsible for indemnifying this other party."

And what that means is, if we get sued because, for these reasons, then the other side's gonna pay for my defense, or I'm gonna have to pay for the other side's defense. So it's an allocation of who's really responsible for different types of outcomes and different types of risk. So it's critically important that when you have indemnification clauses, at least look at it to make sure that it's limited.

You're only indemnifying for [00:02:00] things that are within your control and that you ought to be responsible for, or that you're comfortable being responsible for. You know, Flip that the other way, you wanna seek indemnification for things where you're not gonna be in control, where someone else is going to have, the ability to control that outcome.

So, lots of times you see provisions that say, "Party B will indemnify party A for, lawsuits and claims brought by third parties for party B's negligence." And if party A's getting sued because of something party B did, then party B's gotta pay the freight.

Those are the kinds of provisions that you typically expect to see, but when you start defining them and getting to the weeds of it, you wanna make sure that the language is align with the actual relationship between A and B.

Sarah Sawyer: Yeah, and another thing that happens often here, depending on the dynamics between the parties, is sometimes you might be contracting, you're a smaller business, and you might be contracting with a much larger business who might have very stringent indemnification clauses, ones that are really offlet, setting a lot of risk, like putting a lot of risk on [00:03:00] you.

And so there's different ways to be obviously negotiating those terms and figuring out what's reasonable. And I do find that it's an area where sometimes that, thousand pound gorilla that, company that's got the resources will have a really robust indemnity clause.

They might take a strong stance on it. And so hopefully you can negotiate it. Even if you're not able to negotiate it, though, to your points, Russell, about you're gonna accept that risk, well, know what that risk is, understand how big that risk might be and maybe find ways to insure around it or maybe you can make some modifications.

Sometimes you can also negotiate to limit your exposure to maybe the value of the contract, certain things like that. So there are tools that even if the indemnification clauses are exposing you to a little bit more risk than you are willing to accept, the key is at least knowing that you're... Or not willing to accept or want to accept, I should say.

You might be willing to accept but you don't want to. But, you know, at least you'll know that you're taking on that risk. 'Cause it's terrible when I have a client come to me, they're involved in [00:04:00] something where there's an indemnification claim under the contract, and they're like, "Why am I on the hook for this?"

And, "I didn't realize I was on the hook for this. I have to deal with this? Why aren't they dealing with this? Why is, Why is this on me?" And so you really wanna know those things up front, 'cause you don't wanna suddenly have that risk come calling when you think that it was never gonna come your way.

Russell Berger: Yeah. Yeah. Like anything we've ever talked about when it comes to contracting, think it all the way through. Every word in that contract is in there for a reason, and, Most non-lawyers aren't gonna fully appreciate every sentence that's in a contract. But you should have someone look at it who does and who helps guide your review through that.

I think it's really important that, I mean, to state the obvious, like, you know what you're signing, and that you're able to exert some, some influence over changing what you're signing if it's too far out of whack to be tolerable given, the business circumstances.

Sarah Sawyer: Yeah, despite what some people might perceive, we don't as lawyers just put things in there to put them in there to look fancy and look like fun legal [00:05:00] language.

It's in there for a reason. It's not just boilerplate language. It actually has meaning, so. Well, thanks, Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.