Overview

The ultimate purpose of a contract is to allocate risk and responsibility between the parties: risk of loss in the event of failure, risk associated with unforeseen events, responsibility for making decisions, and responsibility for ensuring certain results. Parties to a contract can reduce or eliminate certain types of risk both at the contract negotiation phase and during performance of the contract by recognizing their risks and responsibilities and taking steps either to accept them or shift them to other parties. The principles of contract law guide parties and courts in interpreting contract risks and responsibilities only up to a point: therefore, the parties must take on the rest of this job themselves.

Responsibilities and risks not adequately addressed in a contract fall where the courts determine they fall. By default, the law makes presumptions and implies terms into the contract. Similarly, a party may inadvertently accept risks because of certain phrasing in a contract. But parties can easily avoid such inadvertent risks if they recognize them and knowingly assign them.

Risk of conflict is greatly increased when a party is dissatisfied. Party dissatisfaction is often unrelated to the quality of service provided or the skill of the professional or contractor providing the service, or of the owner in fulfilling its obligations, but may be a function of poor communication.

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1 See Chapter 6, p. 45.
15.1 Risk Assessment

When parties are about to enter agreements, they often do so in an atmosphere of enthusiasm and hope and with an expectation of profit. However, to properly identify risks, both parties must temporarily become pessimists during the contract negotiation stage. Hoping for the best is acceptable as long as one also plans for the worst. Contract lawyers are trained to ask themselves what could possibly go wrong and then to find a way to deal with those possible events. Architects, engineers, and geoscientists must learn to adopt this approach during the planning stage of a project, before the contracts have been signed.

When identifying risks, professionals must ask very specific questions, such as the following in the context of a technology contract:

- What losses would be suffered by each of the parties for each day that the project is delayed?
- Who should bear the risk of the technology not working?
- What if the technological challenges are more difficult than expected?
- Who will complete the work if the technology provider defaults?

Simply by asking such questions, parties can develop logical solutions. For example, the contract should specify whether insurance should be purchased to cover the risk of fire or theft, whether performance bonds should be put in place to cover the risk of contractor default, and whether bonus or liquidated damages provisions should be added to deal with delays. Once the parties have discussed the risks and solutions, they can decide whether to pass those risks on to third parties, such as subcontractors, suppliers, bonding companies, and insurers; or they may allocate the risks to the contracting parties by mutual agreement.

15.2 Common Law Presumptions

In contract disputes, courts generally view professionals as relatively sophisticated parties. In other words, the law usually presumes that the terms of a contract signed by a geoscientist were negotiated fairly, and if the geoscientist agreed to the inclusion of a specific term, then he or she should be bound by that term. Rarely will a court be persuaded that the professional acted out of economic duress or hardship. Moreover, professionals who argue that had they better understood the terms they would have refused the contract, which would then have been awarded to someone else, are not likely to be successful. Courts presume in most cases that the parties have freedom of contract and the ability to walk away during negotiations if the terms are unacceptable: They either choose to live with the onerous terms or let someone else live with them.

The law also presumes that if a risk has been identified in the contract, then the parties had addressed their minds to that issue. Thus, courts are reluctant to substitute their own allocation of risk for the parties’ choice. If the risk has been addressed in the contract, courts generally let the contract determine the outcome.

While clients often believe that professionals guarantee the result of their work, the law makes no such presumption. In the absence of contractual language to the contrary, the law provides that a professional must act with the level of competence and care expected of the average practitioner in that field. For this reason, professionals should be extremely careful

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2 See Chapter 6, p. 52.

3 Of course, different standards apply to those who hold themselves out as experts or to those who guarantee results. See Chapter 12, pp. 140–142.
to avoid any contractual language that places them in the position of guarantor or surety. Perfection in the provision of any professional services is rare, which is one reason why clients have contingencies in their budgets. But if a professional represents to a client in the contract or in a letter, email, or conversation that results are guaranteed, then a court may hold the professional to that standard.

Furthermore, while the law does not necessarily presume that the contract will provide the results desired by the client, it may imply certain warranties. For example, in most jurisdictions the law implies that in a contract for design or construction of a residence, the final product will be fit for human habitation. The law will also imply certain minimum standards of quality, workmanship, skill, and care.

Yet these presumptions may be modified by terms of the contract. For example, the CCDC 2 construction contract states the following:

The Contractor shall review the Contract documents and shall promptly report to the Consultant any error, inconsistency or omission the Contractor may discover. Such review by the Contractor shall be to the best of his knowledge, information and belief and in making such review the Contractor does not assume any responsibility to the Owner or the Consultant for the accuracy of the review. The Contractor shall not be liable for damage or costs resulting from such errors, inconsistencies or omissions in the Contract Documents which the Contractor did not discover. If the Contractor does discover any error, inconsistency or omission in the Contract Documents, the Contractor shall not proceed with the work affected until the Contractor has received corrected or missing information from the Consultant.¹

This clause modifies the common law presumption about errors that a reasonably competent contractor would normally be expected to discover. With such a clause in the contract, the contractor would not be liable for failure to discover an obvious problem; whereas at common law, the contractor might be liable.

### 15.3 Shifting Risk

Looking after the client’s interest does not mean that the professional must ignore his or her own interest. Certainly, a client’s interest is paramount to the personal interest of a hired consultant. Yet the two are not always in conflict; and in many cases, the two coincide. But many professionals end up accepting risk that properly belongs to their client in the mistaken belief that it is somehow improper to leave that risk with the client.

## Case Study 15.1

### Risk Shifting

### Facts

Assume that a mechanical engineer is hired to design the heating, ventilation, and air conditioning system for an office building. In assessing what kind of chiller to install, the engineer determines that one make and model would be marginally adequate but might fail in the event

¹ Clause GC 3.4.1.
of high demand, whereas a larger make and model would be adequate but would cost substantially more. The engineer is aware that the client is on a tight budget and has rejected all requests for upgrade.

Questions
1. What might happen if the engineer selects and installs the less expensive unit?
2. What might happen if the engineer selects and installs the more expensive unit?
3. What might the engineer do to shift the risk?

Analysis
1. If the engineer simply selects and installs the less expensive unit, and it subsequently proves inadequate, the client could sue the engineer. The engineer might be found liable.
2. Similarly, if the engineer selects and installs the more expensive unit, the client might complain once it became apparent that the increased cost was unnecessary.
3. The engineer could write to the client explaining the problem, setting out the possible consequences and likely costs, thereby allowing the client to make an informed decision. The client would then be unable to argue that he or she would have been more than willing to accept the increase in cost to avoid the risk.

15.4 Disputes Caused by Client Dissatisfaction
Client dissatisfaction is one of the prime causes of litigation. This dissatisfaction may be justified or it may be simply a matter of perception. Justified dissatisfaction may result in the client winning the case, whereas perceived dissatisfaction may have the opposite result. Regardless, all parties incur the cost and aggravation of a legal battle.

In some cases, professionals can avoid disputes simply by advising the client of the choices available, outlining the advantages and disadvantages of each choice, and allowing the client to make an informed decision, as in Case Study 15.1. Even where there is no practical choice, keeping the client apprised of the likely results can avoid disputes as well.

Case Study 15.2
Client Dissatisfaction Dispute

Facts
Assume that the client, a developer of a shopping centre, is constructing a parking garage. The client advises the structural engineer that the cast-in-place concrete slabs must be flat, so that water will not pond on the surface. The engineer knows that over time slabs develop creep deflection, and unless camber, or curvature, is designed and built into the structure a slab that
is flat right after it is poured will result in ponding over time. Furthermore, removal of the formwork after pouring causes short-term deflection, such that measurements taken before stripping the forms differ from those taken afterwards. The amount of deflection is even greater if live load is imposed. For this reason, the timing of measurement can determine whether or not it appears flat.

**Question**

1. How can client dissatisfaction be reduced?

**Analysis**

1. In these circumstances, if the client measures the flatness of the slab after pouring, the client will likely be dissatisfied. The engineer can avoid this problem by informing the client beforehand about the changes in measurement. If the client is informed, any ponding of water before the forms have been stripped will not become cause for complaint. But without having been informed of the explanation of camber and deflection, the owner is extremely unlikely to be satisfied upon finding water puddles after the first rain. He or she may consider suing the engineer for providing a design that did not accomplish the requested result.

Thus, offering explanations before rather than after a result is always advantageous. Explanations after the fact are often perceived as self-serving and are therefore less convincing to the client and less reliable in a court of law. Moreover, statements made after a dispute has developed and especially after litigation has commenced do not receive the same weight as statements made before litigation.

In some cases, a client tries to pressure a professional into making a design choice that should properly be made by the client. The owner might simply say, “Do whatever you consider appropriate.” If possible, the professional should avoid being drawn into making the choice. If that is not possible, the professional should inform the client in writing what choice is being made, for what reason, with what possible consequences, and at what cost. The written communication should also advise the client that if he or she is not happy with that choice, the professional must receive immediate notification so that the decision can be reconsidered.

A significant portion of claims against professionals are precipitated by claims for unpaid fees. The typical scenario is as follows: At the end of the project, the professional requests the last installment of the fee. The client then tells the professional to waive or reduce the fee because the project exceeded the budget because of alleged errors and omissions. The professional files a claim for the fee, and the client counterclaims for losses caused by alleged negligence. It is not unusual for the counterclaim to be many times greater than the claim for fees.

This scenario raises the question of how to avoid such counterclaims. Often, refusals by clients to pay the final fee installment arise from a poor understanding of the requirements and costs of the project. For example, a client may not understand the extent of an architect’s involvement in changes in a construction project. An unsophisticated client may expect that once the detailed design phase is complete, the architect’s involvement will be minimal. But in the construction process, architectural changes are often required for a variety of reasons, including contractor error, owner and tenant requests, unforeseen conditions, and designer error. Thus, a client may not have budgeted adequately for architectural costs. In addition, a
client may not understand the need for proper review of the work. For example, an engineer may have included in the contract only one or two visits per week, with additional visits to be paid as an extra. If eventualities demand that the engineer be on site more often, the client may refuse to pay. As well, a client may not understand the extent of investigatory work needed to arrive at a satisfactory geophysical investigation. In some cases, the initial investigation must be supplemented with much more extensive and costly investigations. A client that has not budgeted for these extra costs may refuse to pay them, resulting in litigation.

However, many of these problems can be prevented with clear discussions about expectations and involvement before the project begins. One of the causes of poor understanding of these issues is poorly drafted retainer agreements that do not specify the scope of the consultant’s services. For example, supervision differs from inspection, a difference that many designers take pains to ensure is documented in the contract. An architect who is responsible for supervision will want to be on site every day, whereas periodic review suggests a lesser degree of involvement. Although the architect may appreciate this distinction, the client may not.

Just as in all relationships, good communication is key to successful business relationships. Maintaining a good relationship with a client is vitally important, and doing so is the least expensive and most cost effective way to avoid claims. Attention to simple communication matters, such as returning telephone calls, can mean the difference between a client who is prepared to forgive small errors and one who is looking for any excuse to sue.

15.5 Disclaimers

Some contracts contain exclusion, limitation, or waiver clauses designed to preclude or limit the liability of one of the parties. These clauses are also known as disclaimers. Examples of such clauses include consequential damages clauses, no-damage-for-delay clauses, and pay-when-paid clauses.

Disclaimers are not always written into contracts. They may be posted in conspicuous places or contained in letters. They may be a note or paragraph in a geotechnical report or at the top of drawings or specifications. For example, geoscientists often include disclaimers about a report’s accuracy in the report introduction. Architects and engineers frequently place a stamp on shop drawings they have reviewed, advising that the designer’s review is limited to general conformity with the intent of the design and is not a detailed review. Invitations for bid frequently include disclaimers about the accuracy of various pieces of information and require the contractor to make an independent investigation.

Disclaimers and exclusion, limitation, and waiver clauses can be effective tools for shifting risk. But regardless of the type, disclaimers must be brought to the attention of the party against whom they are intended. In addition, they must be carefully drafted to be enforceable.

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5 Some contracts describe the extent of the architect's visits as “intervals appropriate to the stage of construction ...” and explicitly state that continuous on-site inspection is not required.
6 See Chapter 11.
7 See Chapter 11.
8 See Chapter 11, p. 130.
Case Study 15.3
Zhu v. Merrill Lynch HSBC, 2002 BCPC 535

Facts
The plaintiff, Mr. Zhu, was a software engineer with a stock portfolio of $250,000 and considerable knowledge in the field of investment. Mr. Zhu traded stocks using a program known as NetTrader, run by the defendant through the Internet with commissions payable to the defendant. Mr. Zhu contended at trial that he used the defendant’s NetTrader to sell 4000 shares from his RRSP account at the noted time of 14:47 on May 23, 2001, then cancelled the trade immediately thereafter, also noted at 14:47 on May 23, 2001. He alleges that he received confirmation on his computer that 200 of the shares were sold by the time he made the cancellation but that the cancellation of the remaining 3800 was confirmed. He contended that he waited for five minutes and then placed another order to sell the remaining 3800 shares at the noted time of 14:52 on May 23, 2001. As it turned out, the cancellation of the shares had not been completed, resulting in duplicate trades of the same shares, thereby placing his account in a “short” position. When the defendant insisted that he make up his “short” position by buying back the 3800 shares, the price had increased to $5.26 (US) per share, up from the $3.70 per share he originally tried to sell them at. Zhu lost the sum of $9,768.12 as a result of the buy-back necessitated by the duplicated sale orders.

When a trade is made on NetTrader, the following disclaimer appears at the bottom of the computer screen:

Although we endeavour to maintain the accuracy of the above information, we cannot be held responsible for errors or omissions. All market data is delayed by at least 20 minutes unless otherwise noted. Click here for more information.

A second disclaimer reads:

Neither HIDC nor any information provider may be held liable to the customer or anyone else for … Any inaccuracy, error, delay, interruption or omission of any information … or … any loss or injury caused in whole or in part by either negligence or contingencies beyond their control in procuring, interpreting, compiling, writing, editing, reporting or delivering any information or services through the service…. The customer agrees that the liability, if any, of HIDC and the information provider(s) arising out of any kind of legal claim (whether in contract, tort or otherwise) in any way connected with the service shall not exceed the amount the customer paid to HIDC for the use of the service.

Question
1. Are these disclaimers enforceable?

10 See previous note at para. 10.
Analysis

1. The Court found that they were not:

   It strikes me that the Defendant’s Legal Disclaimer falls into the category of an agreement which “virtually eliminates liability for inaccuracy in the performance of the services contracted for by the customer” and can be construed as in fact “exonerating the broker from acts of … gross negligence” and in fact reserving “the right to be grossly negligent” to the broker. On this basis I find the Legal Disclaimer of the Defendant unenforceable.\(^{11}\)

   Thus, Zhu was awarded compensatory damages in the amount of $9768.12 plus interest, despite the disclaimer.

15.6 Record Keeping

When disputes proceed to court, professionals can increase their likelihood of success by keeping accurate records. Even though oral evidence is admissible in court, written documentation provides the judge with substantive proof and provides the witness with a mechanism for refreshing memory. Without notes in a diary or some other written record, defendants may not have enough of a detailed memory to provide the court with a complete picture.

Accurate records can also prevent matters from ever reaching litigation. For example, if one party alleges an oral agreement and threatens to sue based on that alleged agreement, the likelihood of an action being commenced would be substantially diminished if the other party produced written documentation proving that no such agreement was reached.

It is therefore important to keep accurate diaries, to follow up meetings with minutes, to follow up oral agreements with written versions or at least with a letter confirming the agreement, and to generally provide sufficient documentation to support or defend a claim.

Recently, non-paper and digital documentation has become more commonly used as evidence in court cases. Photographs and videos are considered documentation. Photographic evidence is routinely accepted in Canadian courts as proof of what is being shown in the picture. However, all photographs require authentication to be admissible as evidence. Digital photographs are less well received because of the ease with which they can be edited, and so some trail as to the history of the photo must be maintained (discussed below).

All documents presented as evidence must pass tests of authentication. Case law has developed the tests for paper documents, whereas federal and provincial Evidence Acts provide the tests for authentication of electronic documents, which assess the accuracy, genuineness, and authenticity of the evidence. Authenticity can be proven through a witness to the event, such as the person who took the image or an expert on the camera system. To authenticate an electronic document, the party adducing the evidence should prove the integrity of the system that created and stored the document. For this reason, organizations should have standard operating procedure in place for digital photographs. This procedure should specify how and when to download and store digital files, how and when to identify photographs, and how to document the chain of possession from the taking of the photograph to the presentation in court.

\(^{11}\) See previous note at paras. 17 and 18.
The following are suggestions for taking and maintaining digital photographs to be used as evidence. They should be included in a corporate policy and followed:

1. Start a paper audit trail as soon as possible, including the description, time and place of taking the photo, the downloading of data, and the creation of backups. Identify in the audit trail the persons taking each step.
2. Check the equipment routinely. When taking photographs, assess internal settings, time and date settings, space on the storage card, and battery strength.
3. Select image quality based on conditions rather than on storage capacity.
4. Never delete an image, either intentionally or accidentally, since this action may raise questions.
5. Designate one computer for the storage of electronic photographs. Ensure that this computer does not have editing software.
6. Create a backup of the data immediately and identify it appropriately in the audit trail. Make the backup to a non-editable medium (such as to a Write Once Read Many [WORM] CD). For important files, maintain multiple copies because CDs do not last forever. Maintain master and working copies separately, and limit and record access to the master.
7. Maintain printed and labelled versions of the photographs.
8. Maintain masters of the backup if there is any potential that it will be of evidential value.

The reason for maintaining a rigorous operating procedure is the protection of data. People within organizations come and go, and ensuring that you are able to prove the photographic record is crucial to being able to use it as evidence.

15.7 Problem Solving

When problems occur, professionals need to be proactive rather than reactive. Early meetings can sort problems out before they get out of hand. Refer to Chapter 14 for other methods for resolving disputes. The longer a problem festers, the more difficult it is to solve and the more likely that it will disrupt the relationship and end up in court.

CHAPTER QUESTIONS

1. Which of the following is not a contractual risk allocation provision?
   a) An insurance clause
   b) An “unforeseen conditions” clause
   c) An indemnity clause
   d) A pay-when-paid clause
   e) A prayer book
   f) None of the above

2. If an architect makes a mistake in a design, is that architect liable in negligence?

3. Do warranties always have to be expressly stated in writing in a contract?

4. Are disclaimers always enforceable? If not, under what circumstances might a disclaimer be unenforceable?

5. How may the authenticity of a document be proven in court?
ANSWERS

1. E

2. Not in every case. The mere fact that a mistake has been made does not automatically mean that there has been negligence. The plaintiff must still prove all of the elements of a negligence claim.

3. No. Implied warranties may exist. Courts often imply warranties of fitness for purpose in cases involving new (as opposed to used) products such as cars and houses.

4. No. If a disclaimer is too broad, a court may find it to be unenforceable.

5. The author of the document can take the witness stand and testify when the document was created. For other strategies, see pp. 180–181.