How Coexistence Agreements Work

Anderson Duff, writing for Revision Legal, discusses coexistence agreements, which are contracts whereby two trademark owners agree to use their similar marks, but agree to limitations.

"The purpose of the coexistence agreement is to set out the agreement of the disputing trademark owners about use of the marks," he explains. "Most often, the coexistence agreement will limit the use of the similar marks to certain geographical territories or to certain types of good or products."

He discusses the historic coexistence contract involving the trademarks "Sun-Maid" and "Sun-Kist."

The article also explains the importance of careful drafting of coexistence agreements.

Read the article.

Just How Broad is That Arbitration Clause in Your Transportation Contract?

In a case of first impression, the First U.S. Circuit Court of Appeals addressed issues that have broad implications and present a reminder to companies to review their arbitration clauses and confirm if they are drafted properly as to the issue of who decides arbitrability issues; a court or arbitrator?

Christopher R. Nolan and **Clayton J. Vignocchi** discuss *Oliveira v. New Prime, Inc.* in Holland & Knight's **Transportation Blog**.

"The dispute concerned a Fair Labor Standards Act class action between an independent contractor truck driver and an interstate trucking company. The plaintiff executed an 'Independent Contractor Operating Agreement,' which included an arbitration clause," the authors explain.

They discuss the court's rejection of the trucking company's argument, warning that in-house counsel who draft a broad arbitration clause similar the the trucking company's will result in litigation concerning arbitrability.

Read the article.

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Fast and (Sometimes) Furious: Acceleration and Compensability in Construction Contracts

Brian L. Lynch, writing for **Faegre Baker Daniels**, discusses the principle of acceleration in construction contracts.

A major consideration in acceleration clauses is whether the contractor is getting for the speed up in work. He covers the three types of acceleration, which usuall dictate whether the contractor is being compensated for additional costs related t the disruption.

In three sections of the article, Lynch discusses directed acceleration, constructive acceleration, and voluntary acceleration.

Read the article.

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Does Harvey Give You An Excuse: Force Majeure And Related Contract Doctrines

In the wake of Hurricane Harvey, a number of energy companies have declared *force majeure* or announced shutdowns in southeast Texas, the nation's hub for petrochemical plants and refineries, reports **David M. Bond** in Kane Russell Coleman Logan's **Energy Law Today** blog.

His article provides an overview of applicable doctrines and makes some suggestions for including *force majeure* provisions in contracts.

One section, titled "How to Protect Against *Force Majeure* Events in Your Contracts," Bond advises that *force majeure* provisions should always be included, and they should identify possible events tailored to your specific business and risks.

Read the article.

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What Every In-House Attorney

Needs to Know About Federal Contracting

Centre Law & Consulting will present a **one-day instruction** that combines the basics of federal government contracting with the nuts and bolts of compliance issues, subcontractor issues, and hot topics in the industry.

The event will be Oct. 17, 2017, in Tysons, Va.

Topics will include:

- Basic Principles in Federal Contracting
- How the Government Buys
- Types of Contracts
- Labor and Employment Law Issues
- Anti-Kick Back and Gifts
- Organizational Conflict of Interest & Personal Conflict of Interest
- Mandatory Disclosure and Ethics Issues
- Changes, Inspection & Acceptance
- Delays & Payment
- Termination of Convenience / Termination of Default
- Claims, Disputes, and Appeals
- Prime/Subcontractor Disputes
- Bid Protests
- Privilege Issues and Attorney Work Product
- Ethic Issues in Internal Investigators and Managing Relator Lawsuits

Register for the event.

How to Guarantee Bad Performance From Your Vendors

A well-crafted master services agreement for outsourced services can create a powerful alliance between you as the customer and the service provider or vendor, writes **Matt Hafter** for **Thompson Coburn LLP**. Then there's the other kind of agreement.

Writing with what he calls "hearty dose of well-meaning sarcasm," he highlights a few of the pitfalls that will likely or almost guarantee an unsuccessful relationship with your vendors.

As an example, his first point is, "Make sure the business unit using the services stops their involvement in the procurement process after the RFP."

Another is, "Use the word 'penalty' to describe fee credits for service level failures."

Read the article.

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Defining Personal Information in Contracts

The terms “personal information,” “personal data,” “personally identifiable information,” and “PII” are often left undefined in contracts and treated as if they were terms of art for which there was a single definition, points out David A. Zetoony of **Bryan Cave**.

“Because different statutes, regulations, and guidance documents define the terms differently, you could either say that they are not terms of art, or that they are terms of art that are highly dependent upon context,” he explains.

He offers an example of one of the most expansive and one of the most narrow definitions of near identical phrases, and illustrates the degree to which the meaning of such terms can differ depending upon context.

Read the article.

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The 5 Most Overlooked Elements Of NDAs

Tom Kulik of Dallas-based **Scheef & Stone** writes about a trend toward companies and counsel using rote reliance on forms for

non-disclosure agreements without thinking through the application of the provisions and whether the document *actually reflects* what is contemplated (let alone *needed*) for the intended transaction.

Writing for **Above the Law**, he discusses the top five most overlooked elements in NDAs that should *always* be addressed before signing on the dotted line.

Those include the importance of definitions, exclusions, "what the government seeks, it can inadvertently take away," "use needs a purpose," and "the term is only the beginning."

Read the article.

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Liquidated Damage Provisions – A Good Idea or an Unenforceable Penalty?

A post by **Joshua M. Pellant** of **Faegre Baker Daniels** discusses the use of a provision for a stipulated or "liquidated" damage amount in the event of specified contract breaches in construction contracts.

"These provisions can be an effective tool to recover losses that otherwise may go uncompensated because they cannot be

proven or because the damages are not recoverable under an ordinary contract," he explains. "However, courts generally will not enforce a liquidated damage provision that is seen as a 'penalty' unrelated to any anticipated or actual loss. The question, then, is whether a particular contract provision will be interpreted as an enforceable liquidated damages provision or an unenforceable contractual penalty."

He discusses general enforceability standards and how much is too much (or not enough).

Read the article.

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White Paper: Electronic Signature Security & Trust

eSignLive by Vasco has published a white paper discussing the importance of making sure electronic signature providers meet the highest security standards. The paper **can be downloaded** from eSignLive's website.

Security is at the core of a trusted digital experience between a company, its employees and customers, says eSignLive.

That means more than simply passing an audit. eSignLive

recommends taking a broader view of e-signature security that also addresses:

- Choosing the appropriate level of authentication
- Protecting signatures and documents from tampering
- Making it easy to verify e-signed records
- Ensuring vendor-independent records
- Verifying the vendor has a consistent track record of protecting customer data
- Creating end-to-end trust through white-labeling and integration with your existing IAM framework

Download the white paper.

Announcing LawGeex 4.0 – Contract Review Automation

LawGeex, developer of an AI contract review platform for businesses, has launched **product enhancements** that provide more control, speed and consistency than ever before.

LawGeex combines machine learning algorithms and text analytics to quickly review and approve everyday contracts, helping businesses answer the question "Can I sign this?"

The new features and significant design upgrade empower customers to have deeper and wider control of their AI-powered

reviews, contract editing and approval process, the company said in a release.

One of the main features of the latest release is more granular control when creating legal policies in the LawGeex Policy Center. The introduction of specific variations of legal concepts allows businesses more granular control in clause concepts they want to see – and do not want to see – in contracts before signing them. Based on these pre-set policies, the LawGeex's AI can automatically accept, red flag or reject clauses in incoming contracts., and a revamp of LawGeex's Action Center.

Another feature of the new release is a revamp of LawGeex's action center – where the contract can be edited after the AI's first line of defense. When reviewing a contract within LawGeex, customers can now clearly see which of their policies were applied to each clause and can red-line the contract within the platform, instantly inserting their company's standard clause language with one click (LawGeex also provides default language). Users also have full visibility on their company's clause definitions, fallback positions, tips, and more, during the editing process, bringing an unparalleled transparency and cohesiveness between a company's policies and the actual contract review. The enhancements also include improved layout for LawGeex AI-reviewed contracts. Clauses are grouped simply by their status as "Missing" or "Present", and reviewers are simply able to manually override the acceptance or rejection of clauses.

Read more about the release.

The Questionable Non-Compete: How to Hire Someone but Avoid a Tortious Interference Claim

A post on the website of Nilan Johnson Lewis addresses a question about hiring: What specific steps should you take to set up your best defense to a claim that your company interfered with a new hire's non-compete agreement with her current employer?

The article defines tortious interference and then discusses five considerations: selecting counsel, proving reasonable reliance, selecting the witnesses, proving the advice happened, and proving the substance of advice.

"By taking these actions with future litigation squarely in mind, your company can create the best evidence to support a justification defense when hiring a new employee with a questionable non-compete," the article concludes.

Read the article.

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Landmark Second Circuit Ruling Clarifies the Standards for Mobile Contracts

The U.S. Second Circuit Court of Appeals has issued a landmark ruling in *Meyer v. Kalanick* that clarifies the standards for contract formation in the age of smartphones and mobile contracting, providing important guidance to companies about how to design enforceable mobile contracts, reports **Coblentz Patch Duffy & Bass**.

The court applied California law to determine the enforceability of the arbitration clause in Uber's Terms of Service, holding that a "reasonably prudent smartphone user" unambiguously assents to a conspicuously hyperlinked contract when he downloads a smartphone application to his mobile phone and signs up for an account.

"Now is a good time for businesses to review their online and mobile contracting practices," according to the article by **Timothy Crudo**, **Rees Morgan**, **Skye Langs**, and **Mark Hejinian**. Make sure that your terms and conditions are highly visible on an uncluttered page or screen."

Read the article.

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Construction Contracts and Arbitration Provisions: Is the Word “May” Mandatory? Maybe!

According to some courts, the traditional line of reasoning in defining “may” versus “shall” is no longer the trend in the context of arbitration provision in construction contracts, writes Matthew DeVries in **Best Practices Construction Law**.

Traditionally, the use of “may” could be interpreted as making performance permissive or optional, while “shall” makes performance mandatory.

DeVries cities a case in which the Supreme Court of Virginia held that the parties’ use of the word “may” in the dispute resolution provisions of their construction contract required mandatory participation in arbitration at the election of one of the parties.

Read the article.

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Mother Nature Is Tough — How About Your Contracts?

What happens to supply contracts when a natural disaster floods entire cities, shuts down factories, cuts off warehouses, washes trucks off the road, and essentially brings an entire supply chain to a screeching halt?

Joe Jones, writing for Squire Patton Boggs' Global Supply Chain Law Blog discusses that question in a **new post**:

"In most US states, UCC Section 2-615 allows sellers to delay or cancel delivery if 'performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.'"

But inn practice, he warns, this "impracticability" defense can be difficult to exercise. For instance, hurricanes are a regular occurrence on the Gulf and Atlantic coasts of the United States, so a customer might argue that a supplier in Houston or Miami should have considered hurricane risk when agreeing to supply products from that location.

Read the article.

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White Paper: User Authentication for E-Signature Transactions

eSignLive by Vasco has published a white paper that provides guidance on how to create a trusted digital transaction by implementing the right user identity authentication method.

The white paper **can be downloaded** from eSignLive's website free of charge.

The document is designed to answer such questions as:

- How to select the right authentication for my process?
- How do I implement strong authentication, without making the process difficult for the customer?
- Can I leverage existing credentials?
- Can I adjust my authentication criteria for different transactions and processes?
- What are other organizations using? What best practices do they rely on?
- What authentication is available out-of-the-box with e-signatures? When do I need to integrate with other systems? Will I have to pay additional fees?

Download the white paper.

8 Signs You Need Contract Automation

Conga offers some tips on making the decision whether to look into contract automation.

First on the list is: “You keep your contracts on paper – in a filing cabinet.” Conga points out that B2B companies manage an average of 20,000-40,000 contracts at one time while 85 percent of those companies are using manual processes to manage them.

Some of the other tips, each with discussion, include: missing contract renewals, the sales team uses semi-manual processes to send out contracts or quotes, and the legal team has hundreds of clauses and no way to effectively manage or maintain them.

Read the article.

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Smart Contracts as Pre-Commitment Devices on a Blockchain

“Smart contracts” in blockchain technologyy are highly useful in many cases where contracting parties lack a strong ex post enforcement mechanism (like a court system) and need to pre-commit to not defrauding or otherwise taking advantage of each other when executing a contract, writes **Max Gulker** for the **American Institute for Economic Research**.

Gulker explains that pre-commitment strategies are useful in mitigating some types of fraud: “Smart contracts based on multisignature-escrow Bitcoin wallets, such as the system employed by blockchain-based retail platform OpenBazaar, can go a long way in allowing a buyer and seller to commit to fairly executing a contract.”

Read the article.

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Stays of Contract Award and

Performance (Post-Award Protest Primer #6)

Daniel Chudd and James Tucker of Morrison Foerster continue their discussion of stays of contract award and performance with an examination of the issue during the pendency of a bid protest.

They explain there are two kinds of protest stays: pre-award stays and post-award stays.

Their article covers the stay of contract award, the stay of contract performance, Court of Federal Claims protests, and stay overrides.

Read the article.

No Signature? No Problem! Enforcing Arbitration Even Without Everyone Signing

California courts are often hostile toward defendants that seek to require litigious employees to honor their arbitration agreements, warns Michael Wahlander in the Seyfarth Shaw California Peculiarities Employment Law Blog.

“The defendant’s plight might seem more stark still if the defendant has not itself signed the agreement. But defendant employers still have means of enforcing such agreements, which can be especially significant in class actions claiming joint employment,” he writes.

He covers the subjects of the agency theory, equitable estoppel, and third-party beneficiary.

Read the article.