

Prohibited Contract Clauses: A Guide for UNCSA Employees Negotiating Agreement Terms

As a State university, UNCSA is prohibited by law from agreeing to certain contractual terms. Below are the most commonly occurring types of prohibited clauses or provisions, along with an explanation as to why these types of clauses or provisions cannot be included in the contract and suggestions for fixing the problems. If a proposed contract contains one or more of these prohibited clauses or provisions, the contract will not be approved by either the General Counsel or the individual authorized to sign the contract.

Please note that different contracts may use different headings or titles, and that sometimes several provisions are combined in a single paragraph. The focus must be on what the provision says, not what it is called.

If you have questions or are unsure about how to use the information below, contact Amanda Balwah in the General Counsel's office (balwaha@uncsa.edu; 770-1321).

Acceleration of Payment
Arbitration; Mandatory Alternative Dispute Resolution
Assignment of Rights; Delegation of Duty
Choice of Law; Governing Law
Forum, Venue, and Jurisdiction Selection
Indemnity; Hold Harmless; Assumption of Liability
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Acceleration of Payment

Example:

"If UNCSA breaches the agreement, Contractor may accelerate and declare all obligations of UNCSA immediately due and payable by UNCSA."

Explanation:

Acceleration clauses are terms which require all future payments to automatically become due when a certain event occurs (often breach of the agreement) before those payments would otherwise be due.

In negotiating an acceleration clause out of the contract, you may wish to use the following language to explain why UNCSA cannot agree to such a provision:

"UNCSA, as a State university, is obligated to operate within a budget fixed for every fiscal year. Acceleration clauses force UNCSA to make payments for which no money has been budgeted and which are not due in

a particular fiscal year. Therefore, UNCOSA may not enter into a contract with an acceleration clause.”

Solution:

Remove the clause.

Arbitration; Mandatory Alternative Dispute Resolution

Example:

“All disputes arising out of this Agreement shall be settled by arbitration. The decision of the arbitrator shall be final and binding upon both parties.”

Explanation:

Arbitration clauses or mandatory alternative dispute resolution clauses require disputes arising out of the contract to be resolved through some process other than mediation or litigation in the courts of North Carolina.

In negotiating the removal of an arbitration clause, you may wish to use the following language to explain UNCOSA’s limitations:

Because UNCOSA is a State university, any contract between UNCOSA and another party implicates the laws of North Carolina. UNCOSA cannot agree to waive provisions of North Carolina law, including governmental immunity. Any waiver of governmental immunity for breach of contract must be limited to those waivers authorized under North Carolina law. A clause requiring any mandatory alternative dispute resolution, including binding arbitration, changes the law under which immunity was waived and thus constitutes an unauthorized waiver of immunity. Therefore, UNCOSA cannot agree to binding arbitration or any mandatory dispute resolution other than legal action in North Carolina courts.

Solution:

Preferred Solution: Remove the clause and add a clause requiring mediation in North Carolina, such as: “Any dispute arising under this Agreement may be settled by mediation in the State of North Carolina in accord with such procedures as may be acceptable to the parties.”

Alternative Solution: Remove the clause.

Assignment of Rights; Delegation of Duty

Example:

“Contractor may delegate the performance of this Agreement to a qualified third party;”

“Contractor may assign any interest in this Agreement without UNCOSA’s prior written consent.”

Explanation:

Assignment of rights and delegation of duties clauses allow the vendor contracting with UNCOSA to give away rights or transfer the obligation to perform services under the contract to a third party.

In negotiating the removal of an assignment clause, you may wish to use the following language to explain UNCOSA's limitations:

A clause that permits delegation of performance or assignment of rights under the contract constitutes a waiver of regular contract defenses available to UNCOSA and a waiver of UNCOSA's recourse against a vendor who breaches the contract. In addition, it may violate the North Carolina constitutional provision prohibiting anyone from receiving payment from the State for work without actually providing services. Therefore, UNCOSA, as a State university, cannot agree to an assignment clause.

Solution:

If the Contract allows the vendor to assign its right to payment or delegate its duty to perform to a third party, modify the Contract by removing the assignment language and inserting the following clause: "This Contract is not assignable by either party."

The clause below is UNCOSA's standard anti-assignment and anti-delegation clause:

Assignment & Delegation. Contractor shall not assign any interest in this contract without UNCOSA's prior written consent. The Services to be performed by the Contractor, or Contractor's personnel secured pursuant to this Agreement, may not be delegated to a subcontractor without UNCOSA's prior written approval. This Agreement shall be binding upon the parties, their respective legal representatives, successors, and assigns.

Choice of Law; Governing Law

Example:

"This Agreement shall be governed in accordance with the law of the Planet of Mars. Any legal action shall be brought in the proper court of Mars."

Explanation:

Choice of law clauses dictate what state's laws will apply to the interpretation of the contract and to any disputes relating to the contract.

In negotiating the removal or change of a choice of law clause, you may wish to use the following language to explain UNCOSA's limitations:

"Choice of law clauses requiring UNCOSA's contracts to be interpreted in accordance with the laws of another state or jurisdiction other than North Carolina implicate the State's governmental immunity. The scope of North Carolina's waiver of governmental immunity is based on North Carolina law, and subjecting a contract to the laws of another state or

jurisdiction exceeds the scope of the State's waiver. Therefore, UNCSA, as a State university, cannot agree to a clause subjecting UNCSA to the law of another state."

Solution:

Preferred Solution: Remove the clause and add a clause making the contract subject to the law and jurisdiction of the State of North Carolina, such as: "This Agreement shall be construed, governed, and enforced by and in accordance with the laws of the State of North Carolina.

Alternative Solution: Remove the clause.

The clause below is UNCSA's standard Choice of Law clause:

Choice of Law. This Agreement, and all claims arising under and related to this Agreement, will be governed by, construed, and interpreted in accordance with the laws of North Carolina without reference to principles of conflict of laws.

Forum, Venue, or Jurisdiction Selection

Example:

"The resolution of any claim or dispute arising under this Agreement shall be subject to enforcement solely in the proper court of Mars."

Explanation:

Forum, venue, or jurisdiction selection clauses dictate where litigation stemming from the contract will occur.

In negotiating the removal or change of a forum selection clause, you may wish to use the following language to explain UNCSA's limitations:

"Forum selection clauses requiring UNCSA to consent to litigation in the courts of a state other than North Carolina are prohibited under N.C. Gen. Stat. 22B-3. These clauses exceed the scope of the State's waiver of governmental immunity. In addition, these clauses impair the Attorney General's exclusive responsibility and obligation to defend UNCSA under N.C. Gen. Stat. 114-6. Therefore, UNCSA, as a State university, cannot agree to a clause subjecting UNCSA to litigation in the courts of another state."

Solution:

Preferred Solution: Remove the clause and add a clause making the contract subject to the jurisdiction of the State of North Carolina, such as: "Each party expressly consent to the jurisdiction of the Superior Court of the State of North Carolina should litigation arise between the parties."

Alternative Solution: Remove the clause.

The clause below is UNCOSA's standard Forum Selection clause:

Forum. The determination of any claim, dispute, or disagreement that may arise out of the interpretation, performance, or breach of this Agreement will be subject to enforcement and interpretation solely in a court of competent jurisdiction sitting in Forsyth County, North Carolina.

Indemnity; Hold Harmless; Assumption of Liability

Example:

“UNCOSA shall defend, indemnify, and hold harmless the Contractor against any and all loss, injury, or other damage.”

Explanation:

Indemnity, assumption of risk, or hold harmless clauses are terms that subject UNCOSA to liability for the acts (or failures to act, when necessary) of individuals not employed by UNCOSA or otherwise the responsibility of UNCOSA. Any clause compelling UNCOSA to pay for more than its own negligence falls within the scope of these prohibited provisions. **Note that indemnification clauses in favor of UNCOSA are permissible** (for example, “Contractor agrees to indemnify UNCOSA against any loss or injury”).

In negotiating the removal of such clauses, you may wish to use the following language to explain the UNCOSA's limitations:

North Carolina laws and regulations provide that contract provisions such as limitations on the other party's liability, waivers of the limits of UNCOSA's liability, and hold harmless or indemnification clauses in favor of the other party are contrary to public policy and are therefore void. Specifically, under the North Carolina Tort Claims Act (N.C. Gen. Stat. 143-291 et seq.), UNCOSA cannot waive the State's governmental immunity and assume liability for actions not covered by the Tort Claims Act. Agreeing to such terms in violation of the Tort Claims Act would render that agreement void. (Authority: Advisory Opinion, North Carolina Attorney General to David N. Edwards, Jr., UNC General Administration, December 12, 1990).

Solution:

In priority order:

1. Remove the clause entirely.
2. Replace the clause with the following language: “The parties shall remain responsible for the acts and omissions of their respective officers, agents, and employees.”
3. If you are unable to negotiate either 1 or 2, the only remaining option is to insert the following language at the end of each clause subjecting UNCOSA to liability beyond the limits of the Tort Claims Act (including attorneys fees) and after each sentence providing that UNCOSA will take assumption of risk, have responsibility, hold harmless, save

harmless, or indemnify: “. . . only in the manner and to the extent provided by North Carolina law, notwithstanding any other choice of law provisions in this contract.”

Limitation of Liability

Example:

“In no event shall Contractor be liable for any damages arising from any breach of contract or liability in tort.”

Explanation:

Limitation of liability clauses limit UNCOSA’s recourse against a vendor for nonperformance or other breach of the contract.

In negotiating the removal of a clause limiting the other party's liability, you may wish to use the following language to explain UNCOSA's limitations:

“Limitations on the other party's liability for nonperformance implicate North Carolina’s constitutional prohibition against anyone receiving payment from the State for work without actually providing services. These clauses also impair the Attorney General's exclusive responsibility and obligation to defend UNCOSA under N.C. Gen. Stat. 114-6. Therefore, UNCOSA, as a State university, cannot agree to clause limiting the vendor’s liability.”

Solution:

Remove the clause.

LIQUIDATED DAMAGES

Example:

“In the event that UNCOSA breaches this agreement, in addition to any actual damages, UNCOSA must pay to X liquidated damages in the amount of \$20,000, which such payment shall be over and above any other award of damages, costs and fees.”

Explanation:

Liquidated damages clauses require UNCOSA to pay a predetermined amount of money if UNCOSA breaches the contract. Cancellation fees require UNCOSA to pay a proscribed amount of money in the event UNCOSA cancels the contract.

In negotiating the removal of a clause providing for liquidated damages or cancellation fees to be paid by UNCOSA, you may wish to use the following language to explain the UNCOSA’s limitations:

Because UNCOSA is a State university, any contract between UNCOSA and another party implicates the laws of North Carolina. UNCOSA cannot agree to waive provisions of North Carolina law, including governmental

immunity. Any waiver of governmental immunity for breach of contract must be limited to those waivers authorized under North Carolina law. A provision requiring UNCOSA to pay liquidated damages or cancellation fees changes the law under which immunity was waived and thus constitutes an unauthorized waiver of governmental immunity. Therefore, UNCOSA cannot agree to a clause that requires UNCOSA to pay liquidated damages or cancellation fees.

MATERIAL BREACH; IRREPERABLE HARM

Example:

“The parties agree that a material breach of any provision of this Agreement constitutes irreparable harm entitling the non-breaching party to all remedies at law, including injunctive relief.”

Explanation:

This type of clause asserts that breach of the contract will necessarily be regarded as irreparable harm to the non-breaching party and will automatically justify court action to order the breaching party to comply.

In negotiating the removal of a clause providing that breach would cause irreparable harm and justify injunctive action, you may wish to use the following language to explain UNCOSA’s limitations:

“Because UNCOSA is a State university, any contract between UNCOSA and another party implicates the laws of North Carolina. UNCOSA cannot agree to waive provisions of North Carolina law, including governmental immunity. Any waiver of governmental immunity for breach of contract must be limited to those waivers authorized under North Carolina law. A clause asserting that breach would cause irreparable harm and justify injunctive actions changes the law under which immunity was waived and thus constitutes an unauthorized waiver of governmental immunity. Therefore, UNCOSA cannot agree to a clause providing that breach would cause irreparable harm and justify injunctive relief.”

Solution:

Remove the clause.

STATUTE OF LIMITATIONS

Example:

“Any legal action brought pursuant to this Agreement shall be initiated within a period of 1 year following the discovery by the party bringing the action of the event giving rise to the cause of action.”

Explanation:

The statute of limitations is the amount of time a party has to file a claim or lawsuit against the other. Under North Carolina law, the statute of limitations for claims involving contracts is three years.

In negotiating the removal of a clause that changes the amount of time the parties have to file a legal claim or sue for breach of contract, you may wish to use the following language to explain UNCOSA's limitations:

"Any contract with UNCOSA containing a clause that shortens or lengthens the parties' time to file a legal claim changes the law under which governmental immunity for breach of contract was waived. Therefore, it is unlawful for UNCOSA, as a State agency, to agree to a clause that changes the time frame during which the parties can file a legal claim or sue for breach of contract."

Solution:

Preferred Solution: Remove the clause.

Alternative Solution: Replace the clause with the following language: "Any legal action brought pursuant to this Agreement shall be initiated within a period of 3 years following the discovery by the party bringing the action of the event giving rise to the cause of action."

NON-COMPETE CLAUSES

Example:

"For a period of 12 months after the conclusion of this contract, UNCOSA agrees that it will not enter into a contract with any company performing substantially the same services that are the subject of this agreement."

Explanation:

Non-compete clauses prohibit UNCOSA from subsequently contracting with other parties that provide similar services for a specified length of time during and/or after the contract ends.

You may use the following language in a letter to explain UNCOSA's limitations:

"In hiring vendors and other contractors, UNCOSA, as a State university, is bound to comply with competitive bidding requirements under State law. Therefore, if UNCOSA determines that it needs a particular service, it is required to competitively bid for that service and cannot agree to a clause that prohibits such bidding."

Solution:

Remove the clause.