Chapter 1

The Construction Contract

1-1 FORMALITIES OF THE CONTRACT

1-1:1 Requirement of a Written Contract

Under Georgia law, a contract for services (which would include a construction contract) that is not to be performed within one year must be in writing and signed by the party to be charged therewith to be enforceable.[1] If it is possible to perform the contract within one year, the contract need not be in writing to be enforceable.[2] Thus, depending on the circumstances, a construction contract may not necessarily need to be in writing to be enforceable.[3] Obviously, the better practice is to have a written contract.

Conversely, a contract or order for the sale of goods for the price of $500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or his agent.[4] As between merchants (i.e., persons who customarily deal with the goods as a part of their occupation or business), a written confirmation of an order sent by one party to another may satisfy the requirement of a writing if the receiving

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1. O.C.G.A. § 13-5-30(5).

2. *Klag v. Home Ins. Co.*, 158 S.E.2d 444 (Ga. Ct. App. 1967).

3. *See Royal Mfg. Co. v. Denard & Moore Constr. Co.*, 224 S.E.2d 770 (Ga. Ct. App. 1976) (a contract to erect an addition to a building may be oral).

4. O.C.G.A. § 11-2-201(1).

party does not object to the confirmation within 10 days after it is received.[5]

1-1:2 Requirement of a Seal

Frequently, contracts recite that they are given under seal and contain the words "seal" or "L.S." near the signatures.[6] Georgia law does not require construction contracts to be under seal to be enforceable. If a contract is under seal, the statute of limitations to bring an action for breach of contract could be as long as twenty (20) years.[7]

1-1:3 Execution

While signing a contract is the customary way to evidence a binding contract, one may become obligated to a written contract even though it is never actually signed. An individual may be bound by a written contract where assent is indicated by such conduct as accepting the benefits under the contract or accepting the performance of another.[8]

Documents, including contracts, may be signed electronically when the parties have "agreed to conduct transactions by electronic means."[9] An electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with intent to sign the record."[10] The electronic signature satisfies any laws requiring a record to be in writing and signed.[11]

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5. O.C.G.A. § 11-2-201(2); *see also Ready Trucking, Inc. v. BP Exploration & Oil Co.*, 548 S.E.2d 420 (Ga. Ct. App. 2001) (invoice sent to merchant which confirms the terms of an agreement constitutes an enforceable writing).

6. *See Jolles v. Wittenberg*, 253 S.E.2d 203 (Ga. Ct. App. 1979).

7. O.C.G.A. § 9-3-23.

8. *See Comvest, LLC v. Corporate Sec. Grp., Inc.*, 507 S.E.2d 21 (Ga. Ct. App. 1998). *See also Netsoft Assocs., Inc. v. Flairsoft, Ltd.*, 771 S.E.2d 65 (Ga. Ct. App. 2015) (question of fact for jury as to whether parties entered into independent and enforceable *quid pro quo* agreement where parties negotiated agreement calling for continued cooperation between parties and parties acted in conformity with agreement). *But see Division Six Sports, Inc. v. Hire Dynamics, LLC*, 822 S.E.2d 841, 844 (Ga. Ct. App. 2019) (setting out elements for the ratification of a written agreement and recognizing that, in addition to receiving or accepting benefits under the agreement, "the principal must have had full knowledge of all material facts" for a ratification).

9. O.C.G.A. § 10-12-5(b) ("Uniform Electronic Transactions Act").

10. O.C.G.A. § 10-12-2(8).

11. O.C.G.A. § 10-12-7. *See also* O.C.G.A. §§ 13-10-43, 13-10-66, 32-2-70(b), 36-91-42 (electronic signature accepted on public works bonds).

1-2 APPLICABILITY OF THE UNIFORM COMMERCIAL CODE TO CONSTRUCTION CONTRACTS

Article 2 of the Uniform Commercial Code (UCC), O.C.G.A. §§ 11-2-101 et seq., governs the sale of "goods," where goods include tangible, moveable property, but not real estate, contracts to lease goods, or contracts for services. Typical construction contracts are not subject to the UCC. Some agreements, however, may be "hybrid contracts," i.e., contracts involving both goods and services. For example, a contract for the purchase and installation of heating and air conditioning systems in an apartment complex is a hybrid contract.[12]

The determination of whether a hybrid contract is governed by the UCC or common law is important for at least two reasons. First, generally speaking, it is easier to form a binding contract under the UCC without an integrated writing.[13] Second, the statute of limitations may be substantially different under the UCC and under general principles of contract law.[14]

Whether a hybrid contract is governed by the UCC or common law depends on the "predominant purpose" of the transaction.[15] When the predominant purpose of the contract is the sale of goods, the contract is viewed as a sales contract and is governed by the UCC, "even though a substantial amount of service is to be rendered in installing the goods."[16] Conversely, when the predominant purpose of the contract is the furnishing of services,

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12. *See Mingledorff's, Inc. v. Hicks*, 209 S.E.2d 661, 662 (Ga. Ct. App. 1974) (holding the contract was for services and labor with an incidental furnishing of equipment and materials).

13. *See* O.C.G.A. § 11-2-204(1) (a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract); O.C.G.A. § 11-2-204(2) ("an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined").

14. *See, e.g., Southern Tank Equip. Co. v. Zartic, Inc.*, 471 S.E.2d 587, 588 (Ga. Ct. App. 1996) (determining the predominant purpose of a contract for a chemical mixing tank and associated pump and pipe system was the sale of goods; therefore the four-year statute of limitations was applicable, not the six-year statute of limitations for written agreements).

15. *Ole Mexican Foods v. Hanson Staple Co.*, 676 S.E.2d 169 (Ga. 2009); *Dixie Amusement, LLC v. Primero Games, LLC*, 907 S.E2d 702, 708-09 (Ga. Ct. App. 2024) (contract for purchase of coin-operated amusement machines and related software was predominately for the sale of goods so that UCC governed the transaction).

16. *W.B. Anderson Feed Co. v. Ga. Gas Distribs.*, 296 S.E.2d 395 (Ga. Ct. App. 1982).

the contract is deemed to be a service contract and ordinary contract principles apply.[17] "A contract for services and labor with an incidental furnishing of equipment and materials" is not a transaction involving the sale of goods and thus is not governed by the UCC.[18]

The Georgia Court of Appeals held the predominant purpose of a purported agreement to supply and deliver fill dirt was the sale of a good, so that the UCC governed the contract.[19] Paramount, the general contractor, was awarded a contract to improve the runways at Hartsfield-Jackson Airport. DPS, the subcontractor, quoted Paramount a price for supplying the fill dirt, including furnishing and hauling. Its quotation excluded other services such as "traffic control, dust control, security and escort services" from the scope of work. Additionally, the contract allowed Paramount to test the quality of the dirt and provided a price of $140 per truckload. The question was whether a contract was formed based on the offer. The jury found a contract and the court of appeals found there was sufficient evidence of an enforceable contract for the sale of goods to sustain the verdict and judgment.

In 2024, the Georgia General Assembly enacted the "Uniform Commercial Code Modernization Act of 2024," amending Article 2 of the UCC to codify the predominant purpose test for hybrid transactions into O.C.G.A. § 11-2-102.[20] The amendment recognizes two categories of hybrid transactions:

> First, when the sale-of-goods aspects do not predominate, only the provisions of Article 2 that primarily relate to the sale of goods apply, while provisions addressing the transaction as a whole do not.[21]

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17. *Mail Concepts v. Foote & Davies, Inc.*, 409 S.E.2d 567 (Ga. Ct. App. 1991).

18. *See OMAC, Inc. v. Sw. Mach. & Tool Works*, 374 S.E.2d 829 (Ga. Ct. App. 1988); *see also J. Lee Gregory, Inc. v. Scandinavian House, L.P.*, 233 S.E.2d 687, 689 (Ga. Ct. App. 1993) (holding a letter of intent was enforceable as a contract under the UCC where the contract was to furnish and install windows in an apartment building, and where two-thirds of the contract price was allocated to the cost of the windows); *D.N. Garner Co. v. Ga. Palm Beach Aluminum Window Corp.*, 504 S.E.2d 70, 74 (Ga. Ct. App. 1998).

19. *Paramount Contracting Co. v. DPS Indus., Inc.*, 709 S.E.2d 288 (Ga. Ct. App. 2011) (physical precedent only).

20. *See* 2024 Ga. Laws, Act 600 § 5-6 (H.B. 1240), effective July 1, 2024.

21. O.C.G.A. § 11-2-102(2)(a).

> Second, when the sale-of-goods aspects predominate, Article 2 applies to the entire transaction but does not preclude the application of other laws where appropriate to aspects unrelated to the sale of goods.[22]

Thus, the predominant purpose analysis does not result in an "either-or" application of Article 2. Instead, UCC Article 2 may govern the sale-of-goods aspects of a transaction, while other statutes or common law principles may apply to its non-goods components.

1-3 TYPICAL CONSTRUCTION CONTRACT CLAUSES

1-3:1 Exculpatory Clauses

Aside from the essential terms of a construction contract—which include price, scope of work, and time for performance—many of the provisions are generally characterized as exculpatory clauses. Exculpat ory clauses include those that shift the risk of loss to the other party or a third party, such as indemnity clauses or insurance terms, or those that limit one's obligations, such as limitation of liability clauses or no-damage-for-delay clauses. Such provisions are generally enforceable provided that they do not contravene any recognized public policy, but are subject to exceptions for gross negligence or willful misconduct.[23] In addition, an exculpatory clause must be "explicit, prominent, clear and unambiguous."[24] In 2013, the Georgia Court of Appeals upheld a trial court's ruling that a $250 limitation of liability contained in a contract for home security monitoring was unconscionable and void as against public policy.[25] The limitation of liability clause was not set off in its own paragraph or even its own subparagraph and the limitation language appeared

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22. O.C.G.A. § 11-2-102(2)(b).

23. *See McFann v. Sky Warriors, Inc.*, 603 S.E.2d 7 (Ga. Ct. App. 2004).

24. *Monitronics Int'l, Inc. v. Veasley*, 746 S.E.2d 793, 802 (Ga. Ct. App. 2013) (physical precedent only) (quoting *Holmes v. Clear Channel Outdoor, Inc.*, 644 S.E.2d 311, 314 (Ga. Ct. App. 2007)).

25. *Monitronics Int'l, Inc. v. Veasley*, 746 S.E.2d 793, 803 (Ga. Ct. App. 2013) (physical precedent only).

toward the end of a long sentence that was far removed from the "damages" heading of the paragraph.[26] The court also criticized the clause because the limitation of liability was not capitalized or set off in any unique or prominent way from other language in the contract.[27]

In *Warren Averett, LLC v. Landcastle Acquisition Corp.*,[28] the Georgia Court of Appeals discussed in detail the "prominence" requirement in a contract for accounting services. The limitation of liability provision stated, "[i]n any event, no claim shall be asserted which is in excess of the lesser of actual damages incurred or professional fees paid to us for the engagement." The sentence was in the same font as the other terms of the contract and appeared under the heading of "Issue Resolution" along with other provisions relating to claims or disputes. The agreement was between a law firm and an accounting firm. The trial court ruled that the clause was not enforceable because it was not prominent, was ambiguous, and was invalid as it concerned claims for gross negligence. The Court of Appeals affirmed the ruling that the clause was unenforceable due to the failure to meet the prominence requirement.[29] The court observed that a number of factors are considered when evaluating the enforceability of an exculpatory clause or limitation of liability clause, including the degree of separation of the clause from the other provision and distinguishing features such as font. Specifically, the Court observed:

> . . . The Provision is the same font size as that used throughout [the contract], and is not capitalized, italicized, or set in bold type for emphasis. Further, the Provision is not set off in a separate section that specifically addressed liability or recoverable damages, with a bold, underlined, capitalized or

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[26] *Monitronics Int'l, Inc. v. Veasley*, 746 S.E.2d 793, 802 (Ga. Ct. App. 2013) (physical precedent only).

[27] *Monitronics Int'l, Inc. v. Veasley*, 746 S.E.2d 793, 802-03 (Ga. Ct. App. 2013) (physical precedent only).

[28] *Warren Averett, LLC v. Landcastle Acquisition Corp.*, 825 S.E.2d 864 (Ga. Ct. App. 2019) (physical precedent only).

[29] The Court did not address the question of ambiguity or the gross negligence exception on grounds of mootness.

> italicized specific heading, such as **'Limitation of Liability'** or 'DAMAGES.' Nor is the Provision in a prominent place within the contracts to emphasize the importance of the Provision's limitation on recoverable damages, such as being adjacent to another similarly significant provision or being next to the parties' signature lines.[30]

The court ruled that the clause was not prominent due to the absence of the listed factors. While the opinion is helpful as concerns what is *not* prominent, it does not offer a clear statement of what *is* prominent. For example, does the font need to be bold, capitalized, and italicized, or will one choice work? In addition, one judge of the three-judge panel concurred in the judgment, which means that the opinion is limited, physical precedent.[31]

In *High Tech Rail & Fence v. Cambridge Swinerton Builders*,[32] a construction dispute, the Georgia Court of Appeals held that a waiver of claims, in a termination for default clause, for certain damages, *i.e.*, lost profits and other alleged damages related to any "wrongful back charges or wrongful termination" proceeding, was an exculpatory clause and subject to the requirements of clarity and prominence. The Court ruled that since the waiver clause was in the same font as used entirely throughout the contract and contained in a provision titled "Termination," rather than under a title or heading "specifically addressing liability or recoverable damages," the waiver was "not sufficiently prominent as to be enforceable."[33]

Frequently, terms of a construction contract are onerous. Laypersons may harbor thoughts that harsh terms may not be enforced. Nevertheless, courts will enforce the clear terms of a

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30. *Warren Averett, LLC v. Landcastle Acquisition Corp.*, 825 S.E.2d 864, 869 (Ga. Ct. App. 2019) (physical precedent only) (emphasis by the Court) (internal citations omitted).

31. *See* Ga. Ct. App. R. 33.2(a)(1) ("An opinion is physical precedent only (citable as persuasive, but not binding, authority), however, with respect to any portion of the published opinion in which any of the panel judges concur in the judgment only, concur specially without a statement of agreement with all that is said in the majority opinion, or dissent.")

32. *High Tech Rail & Fence v. Cambridge Swinerton Builders*, 871 S.E.2d 73 (Ga. Ct. App. 2022).

33. *High Tech Rail & Fence v. Cambridge Swinerton Builders*, 871 S.E.2d 73, 77 (Ga. Ct. App. 2022). Although the Court of Appeals held that the waiver of damages was unenforceable, it nevertheless ruled that the subcontractor could not recover the damages under theories of *quantum meruit* and unjust enrichment because there was an express contract between the parties. *Id*. *See generally* § 10-2:4, below, regarding *quantum meruit*.

contract, even terms that are unwise or disadvantageous or that place a hardship on a party, including agreements to shorten the applicable statute of limitations.[34]

1-3:1.1 "No-Damage-for-Delay" Clause

Many contracts and subcontracts contain one or more clauses that provide the contractor (or subcontractor) is not entitled to recover any damages on account of a delay in the work, but rather the sole remedy for delay shall be an extension of the contract time. As a general rule, such clauses are valid and enforceable, provided they are clear, unambiguous, and specific in what they purport to exclude.[35] A clause which states that, in the event the subcontractor is delayed in the work by the contractor, then the "contractor shall owe subcontractor therefor only an extension of time for completion equal to the delay caused . . .," is sufficient to constitute an enforceable no-damage-for-delay clause.[36]

A number of exceptions to the enforceability of such clauses have been recognized by the courts. The following are some of the more common exceptions:

- The no-damage clause will not be applied to delays or causes that are not contemplated by the parties.[37]
- A clause may not apply to preclude recovery for damages for delays caused by the other party's bad faith or willful, malicious or grossly negligent conduct.[38]
- Delay damages may be recovered where the delay is so unreasonable that it constitutes an intentional abandonment of the contract.[39]

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34. *See EZ Green Assocs., LLC v. Ga.-Pac. Corp.*, 734 S.E.2d 485 (Ga. Ct. App. 2012).

35. *See Department of Transp. v. Arapaho Constr., Inc.*, 357 S.E.2d 593 (Ga. 1987); *Department of Transp. v. Fru-Con Constr. Corp.*, 426 S.E.2d 905 (Ga. Ct. App. 1992) (enforcing no-damages provision for delays caused by DOT's other contractors or resulting from late delivery of project sites).

36. *L&B Constr. Co. v. Ragan Enters., Inc.*, 482 S.E.2d 279 (Ga. 1997).

37. *See Department of Transp. v. Arapaho Constr., Inc.*, 357 S.E.2d 593 (Ga. 1987).

38. *See Corinno Civetta Constr. Corp. v. City of N.Y.*, 67 N.Y.2d 297 (1986).

39. *See Corinno Civetta Constr. Corp. v. City of N.Y.*, 67 N.Y.2d 297 (1986).

- Delay damages may be recovered where they result from the contractee's breach of a fundamental obligation of the contract.[40]

In *Ragan Enterprises, Inc. v. L & B Construction Co.*,[41] the no-damage-for-delay clause excepted delays due solely to fraud or bad faith of the owner or its agents. The contractor argued that the owner's "bad faith" included the failure to provide access to work sites, to coordinate work, and to resolve discrepancies and deficiencies in the plans and specifications in a timely manner. The court of appeals held that the contractor failed to show by specific evidence that the delay was due *solely* to these alleged acts.

The effect of a no-damage-for-delay clause may be avoided by characterizing the damages as something other than "delay damages." For instance, the damages may be characterized as disruption claims, rather than delay damages, thereby removing the claim from the operation of the "no-damage-for-delay" clause.[42] The Georgia Court of Appeals has held that a provision in a change order that waives any claim for delay damages by a subcontractor through the date of the change order does not, as a matter of law, foreclose a claim for disruption, which resulted in loss of efficiency and increased labor costs, due to re-sequencing of the work, restricted access to work areas and acceleration of the schedule.[43] The court explained that there is a fundamental distinction between a delay claim and a disruption claim. The disruption claim is intended to compensate the subcontractor for the contractor's actions that make the work more difficult and expensive than both what the subcontractor anticipated and what the work should have been. The delay claim, on the other hand, is directed at the subcontractor's loss from being unable to work.

1-3:1.2 Site Inspection Clauses

Contracts frequently contain a clause averring that the contractor (or subcontractor) has visited the site, examined all conditions affecting the work, and is fully familiar with the conditions thereon

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40. *See Corinno Civetta Constr. Corp. v. City of N.Y.*, 67 N.Y.2d 297 (1986).
41. *Ragan Enters., Inc. v. L & B Constr. Co.*, 492 S.E.2d 671 (Ga. Ct. App. 1997).
42. *See United States Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539 (D.C. Cir. 1982).
43. *Atlantic Coast Mech. v. R.W. Allen Beers Constr.*, 592 S.E.2d 115 (Ga. Ct. App. 2003).

affecting the same. If the contract does not also contain a changed or differing site condition clause, the site inspection requirement of the contract places the risk of uncertainty or of unknown conditions upon the contractor (or subcontractor).[44]

The consequences of the site inspection clause, however, may be avoided, if the contractor can establish that the owner has made material misrepresentations of fact concerning the true subsurface conditions.[45] In order to show a misrepresentation, the contractor must demonstrate that he or she could not have discovered the actual subsurface condition through reasonable investigation and that the data actually provided by the owner was materially inaccurate.[46] In addition, where an owner has knowledge of material facts, such as a subsurface soils report, the particular circumstances of the transaction may create an obligation upon the owner to disclose the information to the contractor before the contract was executed.[47] In such circumstances, the owner's concealment of the true conditions may constitute fraud and may entitle the contractor to relief, notwithstanding the site inspection clause.

Rock appears to be an exception to the general rule that the contractor assumes responsibility for unknown conditions. The Georgia Court of Appeals has permitted recovery for extra work due to rock based upon an architect's testimony that "he was familiar with the general conditions in Atlanta of construction and architectural practices, and that according to local building customs removal of rock was extra work if not contemplated by the contract."[48] In another case with a site investigation clause, the Georgia Court of Appeals did "not believe that the conditions encountered on the project [rock and springs] were such that the contractor should

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44. *See Pinkerton & Laws Co. v. Roadway Express, Inc.*, 650 F. Supp. 1138 (N.D. Ga. 1986); *American Demolition v. Hapeville Hotel, Ltd.*, 413 S.E.2d 749 (Ga. Ct. App. 1991); *see also Jerome Bradford Constr. Co. v. Pinkerton & Laws Co.*, 332 S.E.2d 26 (Ga. Ct. App. 1985) (subcontractor assumes the obligation to achieve compaction of soils to 95 percent of modified proctor and could not avoid that responsibility by arguing that the amount of rainfall made it "economically impossible").

45. *See Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D. Ga. 1976).

46. *See Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D. Ga. 1976).

47. *See Pinkerton & Laws Co. v. Roadway Express, Inc.*, 650 F. Supp. 1138 (N.D. Ga. 1986).

48. *Puritan Mills, Inc. v. Pickering Constr. Co.*, 262 S.E.2d 586, 588 (Ga. Ct. App. 1979).

have been expected to have anticipated in the exercise of reasonable diligence."[49] Since the contract provided for extra work due to the unforeseen conditions, this provision was "evidence enough that not every condition is expected to be anticipated."[50]

1-3:1.3 Indemnity Clauses

Indemnity or "hold harmless" agreements are a virtual certainty for inclusion in any construction contract or subcontract. An indemnity agreement is an agreement whereby one party, usually called the indemnitor, agrees to secure or protect another, usually called the indemnitee, against an anticipated loss or injury, the extent and type of which is further defined in the indemnity agreement.[51] The words of a contract of indemnification are construed strictly against the indemnitee, and every presumption is against an intention to indemnify.[52] While indemnity agreements are often seen in written contracts, indemnity agreements do not have to be in writing to be enforceable.[53] An indemnity agreement may provide for indemnity against the consequences of one's own negligence, provided the agreement is clearly written to cover such a loss. Indemnifying oneself from one's own negligence usually requires expressly referring to indemnity for the negligence of the indemnitee.[54]

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49. *State Highway Dep't v. Wright Contracting Co.*, 131 S.E.2d 808, 811 (Ga. Ct. App. 1963).

50. *State Highway Dep't v. Wright Contracting Co.*, 131 S.E.2d 808, 811 (Ga. Ct. App. 1963).

51. *Old Republic Nat'l Title Ins. Co. v. Darryl J. Panella, LLC*, 734 S.E.2d 523, 526 (Ga. Ct. App. 2012) ("indemnity" means "reimbursement, restitution, or compensation").

52. *See Sherwood v. Williams*, 820 S.E.2d 141, 145 (Ga. Ct. App. 2018).

53. *See Auto-Owners Ins. Co. v. CW Masonry, Inc.*, 829 S.E.2d 443, 446 (Ga. Ct. App. 2019) (contract of indemnity ". . . falls outside the Statute of Frauds and need not be in writing to be enforceable.").

54. *See Batson-Cook Co. v. Ga. Marble Setting Co.*, 144 S.E.2d 547 (Ga. Ct. App. 1965); *see also Ryder Integrated Logistics, Inc. v. BellSouth Telecomm., Inc.*, 642 S.E.2d 695 (Ga. 2007) ("Public policy is reluctant to cast the burden of negligent actions upon those who are not actually at fault," unless the contract expressly states that the negligence of the indemnitee is covered); *United Parcel Serv., Inc. v. Colt Sec. Agency, Inc.*, 676 S.E.2d 22 (Ga. Ct. App. 2009); *Viad Corp. v. United States Steel Corp.*, 808 S.E.2d 58 (Ga. Ct. App. 2017) ("[a]n indemnity that is merely 'implied' by other terms or circumstances is not sufficient."); *Sherwood v. Williams*, 820 S.E.2d 141, 145 (Ga. Ct. App. 2018) ("contractual indemnities do not extend to losses caused by an indemnitee's own negligence unless the contract expressly states that the negligence of the indemnitee is covered").

In the 1970s, due to perceived inequities in construction contracts which provided for indemnification for a party's negligence, Georgia, along with many other states, enacted statutes to curtail the enforceability of unlimited indemnity agreements. The Georgia statute, O.C.G.A. § 13-8-2(b), applies to indemnity clauses in contracts relating to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances. This "public policy" statute clearly applies to any type of contract relating to the construction or design of any improvement to real estate, but has also been held to include easements, lease agreements, and machinery maintenance agreements.[55]

> The apparent purpose of O.C.G.A. § 13-8-2(b) is to prevent a building contractor, subcontractor, or owner from contracting away liability for accidents caused solely by his negligence, whether during the construction of the building or after the structure is completed and occupied. Although the policy reasons behind O.C.G.A. § 13-8-2(b) were not stated and no clear legislative history is available, it would seem that construction contracts were singled out because of the possibility of hidden, or latent, defects of an extremely dangerous nature and not ordinarily detectable by a layperson.[56]

The statute, as amended in 2007, applies not only to indemnity agreements but also to agreements to insure or defend another:

> A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building

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55. *See Milliken & Co. v. Ga. Power Co.*, 829 S.E.2d 111 (Ga. 2019) (holding that Section 13-8-2(b) applies to easement for electrical transmission line); *Kennedy Dev. Co. v. Camp*, 719 S.E.2d 442 (Ga. 2011) (holding the anti-indemnity statute applies to an assignment and assumption agreement transferring management and operation of a new subdivision to the homeowner's association); *Power v. Toccoa Dreams, LLC*, 885 S.E.2d 82 (Ga. Ct. App. 2023) (short term rental agreement); *Ameris Bancorp v. Ackerman*, 674 S.E.2d 358 (Ga. Ct. App. 2009) (lease); *Borg-Warner Ins. Fin. Corp. v. Exec. Park Ventures*, 400 S.E.2d 340 (Ga. Ct. App. 1990) (lease agreement for real estate); *Federal Paper Bd. Co. v. Harbert-Yeargin, Inc.*, 53 F. Supp. 2d 1361 (N.D. Ga. 1999) (Section 13-8-2(b) applies to maintenance and repair agreement for large paper machines in a plant.).

56. *Federated Dep't Stores v. Superior Drywall & Acoustical, Inc.*, 592 S.E.2d 485, 488 n.7 (Ga. Ct. App. 2003) (citations omitted).

> structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.[57]

Accordingly, if an agreement specifically provides for indemnification or insurance for one's own sole negligence, or if the agreement can be read to require such indemnification, then it is void and unenforceable even if the indemnitee is not solely responsible for the loss.[58]

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57. O.C.G.A. § 13-8-2(b).

58. *See Power v. Toccoa Dreams, LLC*, 885 S.E.2d 82, 86 (Ga. Ct. App. 2023) (holding that indemnification "from any responsibility or liability . . . resulting from any loss, damage or personal injury" included a promise to indemnify for sole negligence, and was thus unenforceable); *Havenbrook Homes, LLC v. Infinity Real Est. Invs. Inc.*, 847 S.E.2d 840, 848 (Ga. Ct. App. 2020) (reading the indemnification and agreement to obtain insurance clauses together to determine both provisions void under O.C.G.A. § 13-8-2(b)); *National Candy Wholesalers v. Chipurnoi, Inc.*, 350 S.E.2d 303, 305 (Ga. Ct. App. 1986) (even though agreement did not refer to "sole negligence," indemnitee sought indemnification for "any and all claims (which necessarily includes claims . . . caused solely by sole negligence")).

Problems usually can be avoided by drafting the agreement to except any loss arising from the indemnitee's sole negligence.[59] Even if the indemnitee is responsible for most of the loss, he or she can still obtain complete indemnification for the loss if the contract is properly worded.

A cause of action for indemnity does not require the existence of a judgment against the party seeking indemnification.[60]

Contractual indemnity is only as good as the financial ability of the indemnitor—the party with the obligation to indemnify. Insurance coverage for the indemnity obligation, known in insurance terminology as liability assumed under any contract or agreement, is excluded from general liability insurance policies; however, the policies typically contain exceptions for an "insured contract" and for liability that the insured has in the absence of a contract or agreement.[61]

> An insured contract means part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[62]

Thus, indemnity for a contract breach or economic damages would not be covered under standard form general liability policies. Endorsements may modify or extend the contractual liability coverage.

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59. *See Precision Planning, Inc. v. Richmark Cmtys., Inc.*, 679 S.E.2d 43 (Ga. Ct. App. 2009) (indemnity clause specifically excluded events caused by the sole negligence of the indemnitee).

60. O.C.G.A. § 51-12-32; *R. Larry Phillips Constr. Co. v. Muscogee Glass, Inc.*, 691 S.E.2d 372 (Ga. Ct. App. 2010) (where owner alleged defective construction, general contractor's action for indemnity and contribution against subcontractors was not subject to dismissal on grounds that owner had neither obtained a judgment against the general contractor nor settled its claim).

61. *See Nuvell Nat'l Auto Fin., LLC v. Monroe Guar. Ins. Co.*, 736 S.E.2d 463, 470 (Ga. Ct. App. 2012).

62. *See Nuvell Nat'l Auto Fin., LLC v. Monroe Guar. Ins. Co.*, 736 S.E.2d 463, 470 (Ga. Ct. App. 2012) (insurance company was obligated to cover insured for agreement to indemnify third party for a wrongful death claim).

1-3:1.4 Agreements to Shorten Limitations Periods

Georgia law recognizes the enforceability of contract terms that shorten statutory limitations periods. These provisions establish a reduced timeframe within which claims arising under the contract must be brought, and are a common in construction and design contracts, insurance contracts, agreements for the purchase and sale of real estate, and other transactions where parties seek to limit extended liability exposure.

When deciding whether a contract provision that shortens statutory limitations periods is enforceable, Georgia courts generally apply the following criteria:

1. The clause must be clear and unambiguous, leaving no doubt as to the scope of the claims covered.
2. The clause must be reasonable as a matter of law.
3. The clause cannot be contrary to public policy.

The Georgia Supreme Court applied each of the criteria in *Omstead v. BPG Inspection, LLC*.[63] There, a property inspection contract required that all legal actions against the inspector be filed within one year of the inspection date. The clause at issue, in bolded font, provided:

YOU MAY NOT FILE A LEGAL ACTION, WHETHER SOUNDING IN TORT (EVEN IF DUE TO OUR NEGLIGENCE OR OTHER FAULT), CONTRACT, ARBITRATION OR OTHERWISE, AGAINST US OR OUR EMPLOYEES MORE THAN ONE YEAR AFTER THE INSPECTION, EVEN IF YOU DO NOT DISCOVER A DEFECT UNTIL AFTER THAT.

More than a year later, the buyer's widow sued for wrongful death after a retaining wall collapsed. The plaintiff argued that the contractual limitation should not apply to tort claims and was an impermissible contractual statute of repose. The Georgia Supreme Court rejected these arguments, holding that the clause (1) was clear and unambiguous in its application to both contract and tort claims; (2) provided for a one-year period that has long been held as reasonable under Georgia law; and (3) was not an indemnity or

63. *Omstead v. BPG Inspection, LLC*, 903 S.E.2d 7 (Ga. 2024).

hold-harmless clause that violated O.C.G.A. § 13-8-2(b) and was not otherwise void as against public policy.[64]

The *Omstead* opinion cited its prior opinion, *Langley v. MP Spring Lake, LLC*, where the Court held that a contractual one-year limitations period was unenforceable due to ambiguity.[65] The lease provision in *Langley* required tenants to bring "any legal action" within one year, but the Court concluded the language was unclear as to whether the limitation provision applied to personal injury claims. Construing the limitation provision against the drafter, the Court held that the clause did not bar the tenant's premises liability suit.[66]

The *Omstead* opinion also noted that while Georgia law does not define a bright-line rule for reasonableness, courts have long enforced contractual provisions setting a one-year limitation period in which a party can file an action, "even when that period is shorter than the one, if any, set by statute—that is, even when the period functions to deprive a party of the chance to file suit where the law would otherwise permit suit."[67]

There are also statutory constraints that may restrict a party's right to shorten limitations. For example, under Article 2 of the UCC, parties to a contract for the sale of goods may reduce the default four-year limitations period, but not beyond a one-year minimum.[68]

In light of these considerations, parties seeking to contractually shorten limitations periods should draft clear and narrowly tailored provisions. The provision should explicitly identify the claims covered, specify the modified time period, and ensure that the period affords a meaningful opportunity to pursue relief.

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64. *Omstead v. BPG Inspection, LLC*, 903 S.E.2d 7, 12-17 (Ga. 2024).

65. *Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800 (Ga. 2019).

66. *Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800 (Ga. 2019).

67. *Omstead v. BPG Inspection, LLC*, 903 S.E.2d 7, 13 (Ga. 2024). *See also Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800 (Ga. 2019) (agreeing that a contract's one-year limitation period could apply to a breach-of-contract claim even though statute of limitation for breach of a written contract is six years under OCGA § 9-3-24); *Thornton v. Ga. Farm Bureau Mut. Ins. Co.*, 695 S.E.2d 642 (Ga. 2010) (approving insurance contract's one-year limitation period even though statute of limitation for contract claims was six years).

68. O.C.G.A. § 11-2-725(1) ("By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.").

1-3:1.5 Agreements to Obtain Insurance Coverage

Closely related to indemnity clauses are provisions by which one party to the contract agrees to procure insurance coverage for the other party. In addition to indemnity agreements, such clauses are common in many construction contracts. An agreement to provide insurance is not barred by the prohibition against agreements indemnifying one for his or her sole negligence.[69] An agreement to procure insurance coverage for another is a separate and distinct obligation from any indemnity obligation and exists notwithstanding any deficiencies in the indemnity agreement. For example, the Georgia Supreme Court held that an agreement to maintain commercial general liability insurance in the amount of at least $1 million and to name an employer's customer as an additional insured on the insurance policy is enforceable to at least the stated limits of the policy, even though the court held that the indemnity agreement was not enforceable.[70]

Insurance industry contracts contemplate additional insureds of the principal or named insured. The addition of insured parties is frequently accomplished with an "Additional Insured Endorsement." Additional Insured Endorsements may take one of two forms: (1) specific endorsements in which an additional insured is named explicitly, or (2) an omnibus additional insured endorsement that does not name individuals or organizations, but instead provides a definition of persons who are additional insureds.[71] The latter form typically includes "any person or organization to whom [the principal insured] is obligated by a written agreement to procure additional insur[ance] coverage" if the event giving rise to the liability occurs after execution of the agreement and the agreement is in effect when the covered loss occurs.[72]

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69. *See McAbee Constr. Co. v. Ga. Kraft Co.*, 343 S.E.2d 513 (Ga. Ct. App. 1986).

70. *Ryder Integrated Logistics, Inc. v. BellSouth Telecomm., Inc.*, 642 S.E.2d 695 (Ga. 2007).

71. *Insurance Co. of the State of Pa. v. APAC-Se., Inc.*, 677 S.E.2d 734, 736 (Ga. Ct. App. 2009).

72. *Insurance Co. of the State of Pa. v. APAC-Se., Inc.*, 677 S.E.2d 734, 736 (Ga. Ct. App. 2009). The subcontract required the subcontractor to name the contractor as an "additional insured with primary coverage." The court held that the general contractor was an additional insured under the subcontractor's liability coverage, both the primary insurance and the excess policy, even where the subcontract did not require the subcontractor to procure excess coverage.

The obligation to provide coverage for an additional insured, however, will also be governed by the terms and provisions in the contract. In *Bruce v. Georgia Pacific, LLC*,[73] Bruce, a tractor trailer driver for TMC Transportation (TMC), was injured when he fell off a tractor trailer at a facility owned and operated by Georgia Pacific (G-P). At the time of Bruce's fall, G-P and TMC had contracted for TMC to haul freight for G-P under a carriage agreement.[74] Under the agreement, TMC was required to name G-P an additional insured on TMC's general liability and automotive liability policies.[75] The additional insured provision defined additional insureds as only those entities that TMC "is obligated by a covered contract to reimburse, hold harmless or indemnify the additional insured."[76] The policy provided that coverage would be extended to G-P "but only with respect to occurrences arising out of the negligence of [TMC and] its agents, servants or employees."[77] The court held that since the complaint filed by Bruce asserted negligence only as to G-P, and the terms of the carriage agreement expressly excludes any duty to indemnify as to claims arising from G-P's own negligence, TMC's insurer had no duty to defend G-P as an additional insured.[78]

In the event that a party who is required to obtain insurance coverage for another fails to do so, the former can be liable in breach of contract or tort for the loss or damage up to the limit of the amount of the coverage which he or she agreed to obtain.[79]

1-3:1.6 Limitation of Liability Clause

Georgia recognizes limitation of liability clauses as valid and enforceable. Although the precise language may vary, these clauses purport to limit the liability of one party to the contract to a fixed or readily ascertainable monetary amount. Typically, a

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73. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192 (Ga. Ct. App. 2014).
74. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192, 197 (Ga. Ct. App. 2014).
75. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192, 197 (Ga. Ct. App. 2014).
76. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192, 197 (Ga. Ct. App. 2014).
77. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192, 197 (Ga. Ct. App. 2014).
78. *Bruce v. Ga.-Pacific, LLC*, 757 S.E.2d 192, 198 (Ga. Ct. App. 2014).
79. *See Myers v. Texaco Refining & Mktg., Inc.*, 422 S.E.2d 216 (Ga. Ct. App. 1992); *Spurlock v. Com. Banking Co.*, 227 S.E.2d 790 (Ga. Ct. App. 1976); *see also Southern Tr. Ins. Co. v. Cravey*, 814 S.E.2d 802, 804 (Ga. Ct. App. 2018) (holding that additional insured is a third-party beneficiary of an insurance policy).

party's exposure is limited to the amount of compensation under the contract. Such clauses are most frequently seen in contracts for services such as agreements with design professionals and testing laboratories. Nonetheless, there is no reason that they could not be included in general contracts and subcontracts.

In 1996, the Georgia Court of Appeals upheld a limitation of liability, by use of an exculpatory clause, in a contract for home inspection services in the face of a contention that the clause violated the prohibition against indemnity clauses. A divided panel of judges on the court held that an exculpatory clause is not an indemnity clause and therefore not subject to the prohibitions of O.C.G.A. § 13-8-2(b).[80] In *Holmes v. Clear Channel Outdoor, Inc.*,[81] the contractor waived any right of recovery from Clear Channel arising from work on its billboards. After the contractor fell from a billboard, he brought suit against Clear Channel for damages due to an alleged defective catwalk. In affirming the judgment for Clear Channel, the court observed:

> Nor is there any general policy prohibiting an exculpatory clause for claims of negligence. 'As a general rule[,] a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, except when such an agreement is prohibited by statute.' '[A]ny impairment of [a freedom-to-contract] right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation.'
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> No statute prohibits a billboard owner from contracting with an independent contractor who

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[80] *See Brainard v. McKinney*, 469 S.E.2d 441 (Ga. Ct. App. 1996) (physical precedent only); *see also HI Tech. Corp. v. Quality & Inv. Props. Suwanee, LLC*, 894 S.E.2d 666, 672-77 (Ga. Ct. App. 2023) (holding that consequential damages waiver in services agreement was valid and limited data center host's liability for grossly negligent breaches of contract to $1 million). In *US Nitrogen, LLC v. Weatherly, Inc.*, 343 F. Supp. 3d 1354 (N.D. Ga. 2018) (the district court enforced a clause that limited the liability of a design engineer to the owner for an ammonium nitrate solution plant to fifteen percent (15%) of the price as defined in the agreement (amounting to approximately $2.2 million)). The court found that the limitation, or "cap," on the liability did not violate public policy, including O.C.G.A. § 13-8-2(b).

[81] *Holmes v. Clear Channel Outdoor, Inc.*, 679 S.E.2d 745 (Ga. Ct. App. 2009).

> puts posters on billboards to limit the owner's liability to that contractor.[82]

In 2008, however, in *Lanier at McEver, L.P. v. Planners & Engineers Collaborative, Inc.*,[83] the Supreme Court of Georgia declined to enforce a limitation of liability clause in a professional engineer's contract, which provided:

> the risks have been allocated such that [developer] agrees . . . to limit the liability of [the engineer] . . . to [developer] and to all construction contractors and subcontractors on the project or any third parties for any and all claims, losses, costs, damages of any nature whatsoever . . . so that the total aggregate liability of [the engineer] . . . to all those named shall not exceed PEC's total fee for services rendered on this project.[84]

The Court held that the clause operated as one of indemnity and as such, it violated public policy.[85] The Court reasoned that, since the clause required the developer to limit the liability of the engineer for claims by third parties arising out of the engineer's sole negligence, it amounted to an impermissible indemnification clause.

The *Lanier* case involved a claim between the parties to the underlying contract. It is clear that a limitation of liability clause is not enforceable against a non-party to the contract. A clause similar to that in the *Lanier* case that did not purport to exculpate the engineer from claims by third parties was found to be enforceable in *RSN Properties, Inc. v. Engineering Consulting Services, Ltd.*[86]

Alternatively, a clause may limit or exclude specific types of damages. For example, a clause excluding or waiving "consequential

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82. *Holmes v. Clear Channel Outdoor, Inc.*, 679 S.E.2d 745, 749 (Ga. Ct. App. 2009).

83. *Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 663 S.E.2d 240 (Ga. 2008).

84. *Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 663 S.E.2d 240, 241 (Ga. 2008).

85. *See Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 663 S.E.2d 240 (Ga. 2008).

86. *RSN Props., Inc. v. Eng'g Consulting Servs., Ltd.*, 686 S.E.2d 853 (Ga. Ct. App. 2009).

damages," which often appears in industry form contracts, is generally enforceable as written, so long as it is explicit, prominent, clear, and unambiguous.[87] Assent to a limitation of liability clause is required for any limitations clause to be effective.[88]

1-3:1.7 Differing Site Conditions Clauses

Differing site conditions (DSC), sometimes called changed site conditions, are latent conditions on, in, or under the construction site that were not anticipated by the parties in their contract nor shown on the plans, specifications, and other contract documents. In the absence of a contract term that allocates the risk of such conditions, the risk is born by the contractor. The conditions may be asbestos or other hazardous materials in a structure to be renovated or expanded, but most often are subsurface conditions in the soil, which may include rock, ground water, toxic or hazardous substances, or unsuitable soil. These unexpected conditions make the work more difficult or even impossible.

There are two recognized types of DSCs that are derived from a federal procurement regulation:

- Subsurface or latent physical conditions at the site which differ materially from those indicated in the contract (Type I), and
- Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. (Type II).[89]

Many commonly used form contracts contain clauses that expressly recognize the two types and provide a method to address

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87. *See Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc.*, 490 S.E.2d 124 (Ga. Ct. App. 1997) (exclusion of consequential damages including lost profits was enforceable); *see also US Nitrogen, LLC v. Weatherly, Inc.*, 343 F. Supp. 3d 1354 (N.D. Ga. 2018) (citing *Silverpop Sys. Inc. v. Leading Mkt. Techs., Inc.*, 641 Fed. Appx. 849, 850 (11th Cir. 2016) (district court enforced contractual waiver of consequential damages including "loss of production, business or, profits")); *Mark Singleton Buick, Inc. v. Taylor*, 391 S.E.2d 435 (Ga. Ct. App. 1990).

88. *See Turfgrass Grp. v. Ga. Cold Storage Co.*, 816 S.E.2d 716 (Ga. Ct. App. 2018) (Georgia's ". . . law of bailment requires assent to limitations of liability.").

89. Federal Acquisition Regulations, 48 C.F.R. § 52.236-2.

the risk allocation. For example, AIA document A-201 General Conditions (2007 ed.) provides:

> If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions.

The elements of a Type I DSC have been summarized by court decisions in federal procurement cases:

> To establish entitlement to an equitable adjustment due to a Type I differing site condition, a contractor must prove, by preponderant evidence, that: [1] the conditions indicated in the contract differ materially from those actually encountered during performance; [2] the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of the bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and [3] the contractor was damaged as a result of the material variation between expected and encountered conditions. . . . On the other hand, a contractor is not eligible for an equitable adjustment for a Type I differing site condition, 'unless the contract indicated what that condition would be.'[90]

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90. *Trafalgar House Constr., Inc. v. United States*, 73 Fed. Cl. 675, 698 (2006) (quoting *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002)).

Thus, the critical inquiry for a Type 1 DSC is what the contract says about the condition. If it is silent then the question turns to whether the condition is of the Type II variety. Type II DSCs are more difficult to prove because proof depends upon amorphous concepts such as "unknown physical conditions," "unusual" or what is "ordinarily encountered." These are not just contractual issues but depend on opinion testimony of experts who are not necessarily engineers, but those who have building experience in the locality or type of construction involved.

Few reported decisions in Georgia deal with DSCs. In 2011, however, the court of appeals affirmed an award in favor of a contractor for the construction of a parking garage for the City of Savannah.[91] The opinion does not discuss at length the terms of the agreement, however, it appears the contract allowed the contractor to claim additional compensation for either or both of the two types of conditions. The clause required the party observing the differing conditions to notify the other party within 21 days. A subcontractor discovered that the excavation of the site uncovered more soft clay than was indicated by the soils investigation reports. The jury returned a substantial verdict for the subcontractor and contractor, which the court of appeals affirmed. The finding of a DSC was not directly challenged, but the city contended that the contractor had failed to give timely written notice of the differing conditions. The court of appeals rejected this challenge because the clause did not require the notice to be in writing and because a series of emails among the city, contractor, subcontractor, and engineer concerning the discovery of the conditions was sufficient evidence of notification to support the verdict.

1-3:2 Clauses Relating to Payment and Changed Work

1-3:2.1 Pay When Paid Clause

One of the most common issues in construction disputes is whether a contractor is obligated to pay its subcontractor before the general contractor has received payment from the owner for the

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91. *Mayor of Savannah v. Batson-Cook Co.*, 714 S.E.2d 242 (Ga. Ct. App. 2011), *rev'd and remanded on other grounds*, No. S11G1814, 2012 Ga. LEXIS 488 (Ga. May 29, 2012).

work. Most construction subcontracts address this problem and attempt to make the owner's payment to the general contractor a condition precedent to the general contractor's obligation to pay the subcontractor. Typically, these clauses are known as "pay when paid" clauses because they condition the general contractor's obligation to pay the subcontractor upon receipt of payment by the owner.

In the event that the owner does not pay, the issue becomes whether or not payment from the owner was a condition precedent to the general contractor's obligation to pay the subcontractor. Georgia is in the minority of jurisdictions in that its courts readily find an owner's payment to be a condition precedent to the general contractor's obligation to pay. For example, a subcontract which provides "payments will be made from money received from the owner only" is sufficient to make payment by the owner a condition precedent to the subcontractor's right to receive payment.[92] Seemingly any indication that the parties contemplate payment after the owner pays a general contractor is sufficient to create a condition precedent to payment in Georgia.

In *Powell Co. v. The McGarey Group, LLC*,[93] a construction case, the district court distinguished *Sasser* and *Eby Construction* because in those cases the clauses stated that the funds would come "only" from the owner, which created an explicit condition precedent to payment. The court found the subcontract language which stated the compensation "was payable on the first day of the month or upon receipt of the monthly retainer due [from the owner] whichever shall last occur" was a timing provision for payment and not a condition precedent.[94]

An exception to the enforceability of a pay-when-paid clause exists for actions upon federal Miller Act payment bonds. In *United States ex rel. McKenney's, Inc. v. Government Technical Services, LLC*,[95] the

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92. *See Sasser & Co. v. Griffin*, 210 S.E.2d 34 (Ga. Ct. App. 1974); *Peacock Constr. Co. v. West*, 142 S.E.2d 332 (Ga. Ct. App. 1965); *see also Associated Mech. Corp. v. Martin K. Eby Constr. Co.*, 67 F. Supp. 2d 1375 (M.D. Ga. 1999), *aff'd in part and rev'd in part on other grounds*, 271 F.3d 1309 (11th Cir. 2001).

93. *Powell Co. v. McGarey Grp., LLC*, 508 F. Supp. 2d 1202 (N.D. Ga. 2007).

94. *Powell Co. v. McGarey Grp., LLC*, 508 F. Supp. 2d 1202, 1210 (N.D. Ga. 2007).

95. *United States ex rel. McKenney's, Inc. v. Gov't Tech. Servs., LLC*, 531 F. Supp. 2d 1375 (N.D. Ga. 2008).

court held the remedial purposes of the Miller Act payment bond trumped the pay-when-paid clause of the subcontract,

> [a] surety's liability is governed by the obligation of the prime contractor under the contract, however not to the extent that a surety may avoid its obligations imposed by the Miller Act. A contract provision that would deny the subcontractor its federal remedy under the [Miller] Act cannot be used as a defense to the surety.[96]

Georgia courts have not determined whether the same exception is applicable to actions on bonds issued pursuant to Georgia's Little Miller Act.[97]

In *Vratsinas Construction Co. v. Triad Drywall, LLC*,[98] the subcontract contained a "pay-if-paid" clause which, stated in part:

> . . . all payments by [the general contractor, VCC] to [Triad] under the Subcontract, including with limitation, progress payments, full payment or partial release of retainage, payment for change orders and final payment, are expressly and unequivocally contingent upon and subject to Owner's acceptance of all Subcontract Work and [VCC's] receipt of payment from Owner for the Subcontract Work. Subcontractor expressly acknowledges that it relies on payment under the Subcontract on the creditworthiness of Owner, and not that of Contractor. It is expressly understood that any other basis for such non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent to payment from [VCC] to [Triad], [Triad] further agrees that Owner's acceptance of the Subcontract Work and Owner's payment to [VCC] for the Subcontract Work are express, independent conditions precedent

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96. *United States ex rel. McKenney's, Inc. v. Gov't Tech. Servs., LLC*, 531 F. Supp. 2d 1375, 1380 (N.D. Ga. 2008).

97. *See, e.g.*, Chapter 7, § 7-1.

98. *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 739 S.E.2d 493 (Ga. Ct. App. 2013).

> to any obligation of [VCC] to make any payments to [Triad] and are not merely expressions of the time or manner of such payments.[99]

The owner failed to pay the general contractor due to the former's insolvency, or financial inability to pay for the work. Notwithstanding the pay-if-paid clause, a jury found that the general contractor had waived the pay-if-paid clause by giving verbal assurances to the subcontractor that the contractor would pay the subcontractor from its "own pocket" if the owner failed to pay. The Georgia Court of Appeals vacated the verdict and judgment for the subcontractor. The court of appeals observed that a waiver of an important contract right must be "clear and unmistakable," and must so clearly indicate an intent to relinquish a known right or benefit so as to exclude any other reasonable explanation.[100] The only evidence of waiver was: (1) a statement attributed to the contractor's project manager that he would pay out of his own pocket and (2) payment in full of one payment application for which the contractor had received only a partial payment from the owner. Other evidence, including the submission and non-payment of seven other payment applications and testimony of the subcontractor's account manager that she did not understand that there was a verbal change, led the court to conclude that there was insufficient evidence that the general contractor waived the "pay-if-paid" clause to support the verdict for the subcontractor. Georgia appears to adhere to the rule that if the contract makes payments from the owner a condition precedent to the general contractor's obligation to pay, then the general contractor's obligation never arises if the owner becomes insolvent and never makes a payment.

A 1997 amendment to the Georgia lien law ameliorates the harsh consequences of the pay-when-paid clauses where "the contract between the party claiming the lien and the contractor or subcontractor includes a provision preventing payment to a claimant until after the contractor or subcontractor has received payment." In that case, the lien claimant is relieved of the necessity of filing an action or obtaining a judgment against the contractor

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99. *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 739 S.E.2d 493, 495 (Ga. Ct. App. 2013).
100. *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 739 S.E.2d 493, 496 (Ga. Ct. App. 2013).

or subcontractor as a precondition to filing an action to enforce a claim of lien against the owner.[101]

1-3:2.2 Substantial Compliance as Condition to Payment

The law does not require perfect performance of a contract to entitle the contractor (or subcontractor) to recover payment for his or her work. Instead, "[p]erformance, to be effectual, must be accomplished by the party bound to perform . . . and must be *substantially in compliance* with the spirit and the letter of the contract and completed within a reasonable time."[102] A contractor may recover compensation notwithstanding slight defects or deviations in performance for which compensation may be made by an allowance to the owner.[103]

Where a contract calls for performance to be "to the satisfaction of the owner," other terms of the contract that set forth more objective standards for workmanship may control. Thus, the issue of satisfaction is not left to the subjective whim of the owner, and the contractor may recover payment for work even when the owner is not satisfied.[104]

1-3:2.3 Requirement for Written Change Orders

"Ordinarily, when one renders services or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof."[105] Virtually every construction contract, however, contains a requirement that all change orders be in writing and executed prior to performance of the modification in order to be enforceable. Such terms are generally valid and enforceable provisions precluding recovery for extra work in the absence of a written change order.[106]

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101. O.C.G.A. § 44-14-361.1(a)(4).

102. O.C.G.A. § 13-4-20 (emphasis added).

103. *See Southeastern Erectors, LLC v. Premier Bldg. Sys., Inc.*, 820 S.E.2d 214, 216 (Ga. Ct. App. 2018) (citing O.C.G.A. § 13-4-20); *P. H. L. Dev. Corp. v. Sammy Garrison Constr.*, 319 S.E.2d 543 (Ga. Ct. App. 1984); *Kent v. Hunt & Assocs.*, 299 S.E.2d 123 (Ga. Ct. App. 1983).

104. *See Oak Creek Dev. Corp. v. Hartline-Thomas, Inc.*, 225 S.E.2d 515 (Ga. Ct. App. 1976).

105. O.C.G.A. § 9-2-7.

106. *See Biltmore Constr. Co. v. Tri-State Elec. Contractors, Inc.*, 224 S.E.2d 487 (Ga. Ct. App. 1976); *see also Choate Constr. Co. v. Ideal Elec. Contractors, Inc.*, 541 S.E.2d 435 (Ga. Ct. App. 2000) (stating the requirement for written change orders for extra work also bars claims for extras based upon quantum meruit or implied contract).

Despite the general unwillingness to relieve a party of the consequences of an unambiguous contract term, some courts are hostile to attempts by a contracting party to avoid responsibility for additional work because the party who performed such work did not obtain a written change order before proceeding.[107] Provisions for a written change order can be waived by the conduct of the parties.[108] For instance, where the owner orally orders extra work, with knowledge that the contractor regards the work as extra and expects additional payment, the contractor may recover for the work, notwithstanding the requirement of a written change order.[109]

The waiver by conduct exception does not apply against the State of Georgia or other governmental bodies who have sovereign immunity. In *Georgia Department of Labor v. RTT Associates, Inc.*,[110] the Supreme Court held that the requirement for written modifications to a contract by a state department could not be waived by the state by its conduct. The court reasoned that the state generally has sovereign immunity, but it waives the immunity for breach of any written contract by the state. If the contract requires modifications to be in writing, a purported change or modification cannot be established by conduct or waiver. In *Fulton County v. SOCO Contracting Co.*,[111] the Georgia Court of Appeals held that sovereign immunity bars recovery for changed work without a written change order.

If the parties have engaged in conduct whereby they *operated without prior written change orders*, these circumstances may support a waiver or departure from the provisions of the

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107. *See generally Circle Y Constr., Inc. v. WRH Realty Servs., Inc.*, 721 F. Supp. 2d 1272 (N.D. Ga. 2010), *aff'd,* 427 Fed. Appx. 772 (11th Cir. 2011) (district court, applying Georgia law, held that a verbal directive for extra work was an enforceable contract, and, since breached, compensation for the additional work performed was appropriate).

108. *See Hanham v. Access Mgmt. Grp. L.P.*, 825 S.E.2d 217 (Ga. 2019) (terms of written contract may be modified by parties' course of conduct).

109. *See Hanham v. Access Mgmt. Grp. L.P.*, 825 S.E.2d 217, 220 n.2 (Ga. 2019) ("Notably, the parties' subsequent course of conduct can also operate to waive an otherwise validly enforceable written requirement that all modifications be in writing."); *Biederbeck v. Marbut*, 670 S.E.2d 483 (Ga. Ct. App. 2008); *State Highway Dep't v. Wright Contracting Co.*, 131 S.E.2d 808 (Ga. Ct. App. 1963), *distinguished by Georgia Dep't of Labor v. RTT Assocs., Inc.*, 786 S.E.2d 840 (Ga. 2016); *see also Department of Transp. v. Dalton Paving Constr., Inc.*, 489 S.E.2d 329 (Ga. Ct. App. 1997), *disapproved in part by Georgia Dep't of Labor v. RTT Assocs., Inc.*, 786 S.E.2d 840 (Ga. 2016).

110. *Georgia Dep't of Labor v. RTT Assocs., Inc.*, 786 S.E.2d 840 (Ga. 2016).

111. *Fulton Cnty. v. SOCO Contracting Co.*, 808 S.E.2d 891, 896 (Ga. Ct. App. 2017).

contract.[112] The foregoing principles indicate the importance of at least giving written notice to the other party prior to commencement of any extra work, or alternatively, that the party generally responsible for paying for extra work considers the work in question to be part of the contract.

Where a contractor signed change orders or modifications stating that the contractor waives all prior claims other than those that had been previously presented in writing, the court held that the contractor released the prior, unreserved claims, and rejected the contractor's claim of waiver by the owner's conduct.[113]

1-3:3 Time for Performance and Delays

1-3:3.1 Time Must Be of the Essence

Under Georgia law, time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so.[114] As applied to construction contracts, the contract must contain a provision that time is of the essence or else it will be construed that the contractor or subcontractor has a reasonable time to complete the work.[115] Therefore, the contract should state that time is of the essence and specify a time for completion of the work or make a reference to a schedule or other document which sets forth a time for completion.[116]

Even where the contract provides that time is of the essence, the importance of time can be waived by the conduct of the parties, such as where the owner allows the contractor to continue the construction work after the time for completion has passed.[117] Where parties in the course of the execution of the contract depart from its terms and pay or receive money under such departure, reasonable notice must be given to the other of the intent to rely upon the precise terms of the

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112. *See Daniel & Daniel, Inc. v. Stewart Bros., Inc.*, 228 S.E.2d 586 (Ga. Ct. App. 1976).

113. *See Citadel Corp. v. Sun Chem. Corp.*, 443 S.E.2d 489 (Ga. Ct. App. 1994).

114. *See* O.C.G.A. § 13-2-2(9).

115. *See Cassville White Assocs., Ltd. v. Bartow Assocs., Inc.*, 258 S.E.2d 175 (Ga. Ct. App. 1979).

116. *Cf. Hopper v. M&B Builders, Inc.*, 583 S.E.2d 533 (Ga. Ct. App. 2003) (where contract stated that time was of the essence, but omitted a specific completion date, trial court did not err in failing to give a jury instruction that time was of the essence).

117. *See ABC Sch. Supply, Inc. v. Brunswick-Balk-Collender Co*., 102 S.E.2d 199 (Ga. Ct. App. 1958).

contract before either may recover for failure of the other to pursue the letter of the agreement.[118] In such an instance, a party seeking to take action against the other for delay in performance must give notice and reasonable time to cure the default before the contract can be rescinded for failure to achieve a timely completion.

Even when the contractor may have violated time provisions by delaying completion, Georgia allows the contractor to recover in quantum meruit (literally "as much as deserved"). *Quantum meruit* is an equitable doctrine by which one who is enriched from the materials or labor of another must pay for the benefit he/she has received for the reasonable value of his or her work so as long as the contractor's failure to complete on time was not willful or deliberate.[119]

1-3:3.2 Liquidated Damages

Liquidated damages provisions are a common feature of many contracts and represent an attempt by the parties to agree upon damages in advance of a breach. While such clauses may conceivably cover any type of breach, in construction contracts they are more commonly associated with damages for delay in completion of the work and are typically calculated on the basis of an agreed amount for each day of delay in completion of the work. Liquidated damages clauses are valid and enforceable, if their terms satisfy a tripartite inquiry:

1. The damage or injury caused by a breach must be difficult or impossible to estimate accurately at the time the contract is executed.
2. The parties to the contract must intend to provide for compensatory damages rather than for a penalty or forfeiture.
3. The amount of liquidated damages must be a reasonable estimate of the probable loss in the event of a breach.[120]

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118. *See* O.C.G.A. § 13-4-4.

119. *See Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982).

120. *See Southeastern Land Fund, Inc. v. Real Est. World, Inc.*, 227 S.E.2d 340 (Ga. 1976); *City of Brookhaven v. Multiplex, LLC,* 891 S.E.2d 60 (Ga. Ct. App. 2023); *Fuqua Constr. Co. v. Pillar Dev. Inc.*, 667 S.E.2d 633 (Ga. Ct. App. 2008); O.C.G.A. §§ 13-6-7 and 11-2-718(1). Additionally, a purported liquidated damages provision must also be tied to a breach of the agreement in which the provision appears. *See Naik v. Hyde Park Homes, Inc.*, 899 S.E.2d 271,

As to the third factor, the court of appeals stated:

> the touchstone question is whether the parties employed a reasonable method under the circumstances to arrive at a sum that reasonably approximates the probable loss of the defaulting party. Deterrence should not factor into the equation.[121]

There has been a paucity of reported decisions from the Georgia appellate court that discuss the enforceability of liquidated damages for delayed work in a construction contract. But in *City of Brookhaven v. Multiplex, LLC*,[122] the Georgia Court of Appeals discussed the subject in some detail as applied to a construction contract. The City of Brookhaven ("City") entered into a written contract with Multiplex for the construction of a new park and elementary school. Among other terms, the contract provided that Multiplex would pay to the City "Liquidated Damages at the rate of $1,000.00 per calendar day," beyond the required date for completion of the project.[123] After substantial completion of the project, the City sued Multiplex to recover, among other items, $271,000 in liquidated damages for an alleged 271-day delay in achieving substantial completion at the rate of $1,000 per day. The

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274 (Ga. Ct. App. 2024) (holding that a non-refundable construction deposit paid to a builder was not an unenforceable liquidated damages provision where the agreement allowed the builder to retain the deposit as part of the consideration of the contract, rather than as a stipulated sum for damages for any breach).

121. *Caincare, Inc. v. Ellison*, 612 S.E.2d 47, 50 (Ga. Ct. App. 2005) (clause which provided $10,000 for first day of unauthorized use of trade name and $100 per day for each additional day of use was not a reasonable pre-estimate of damages and thus not enforceable). *See also Northside Bank v. Mountainbrook of Bartow Cnty. Homeowners Ass'n*, 789 S.E.2d 378 (Ga. Ct. App. 2016) (10 percent late fee as on past due payments as liquidated damages was not proven to be a reasonable pre-estimate of probable loss and was unenforceable); *Gwinnett Clinic, Ltd. v. Boaten*, 798 S.E.2d 110 (Ga. Ct. App. 2017) (liquidated damages not recoverable because no reasonable pre-estimation of probable loss); *Grayhawk Homes, Inc. v. Addison*, 845 S.E.2d 356, 357 (Ga. Ct. App. 2020) (evidence of parties' attempt to estimate damages resulting from potential breach necessary for enforceable liquidated damages clause); *Ultra Grp. of Cos., Inc. v. S&A 1488 Mgmt., Inc.*, 849 S.E.2d 531, 532 (Ga. Ct. App. 2020), *cert. denied* (June 21, 2021) (liquidated damages clause in contract for coin-operated amusement machines was not reasonable pre-contract estimate of probable loss resulting from breach); *Browne & Price, P.A. v. Innovative Equity Corp.*, 864 S.E.2d 686 (Ga. Ct. App. 2021) (recognizing "some value" in self-serving language in contract about parties' efforts to estimate actual damages); *Southern Star Enter. Corp. v. McDonald Windward Partners, L.P.*, 872 S.E.2d 901 (Ga. Ct. App. 2022) (assessment of 5% late fee on installment payment in lease constituted liquidated damages under O.C.G.A. § 13-6-7).

122. *City of Brookhaven v. Multiplex, LLC*, 891 S.E.2d 60 (Ga. Ct. App. 2023).

123. *City of Brookhaven v. Multiplex, LLC*, 891 S.E.2d 60, 63 (Ga. Ct. App. 2023).

trial court granted Multiplex's motion for summary judgement on the ground that the clause was not an enforceable liquidated damages provision.

The court of appeals affirmed the trial court's ruling. After stating the three requirements for an enforceable liquidated damages clause, the court observed that "the party who defaults on the contract has the burden of proving the liquidated damages clause is an unenforceable penalty" and that party can meet "this burden by proving any of the three factors is lacking."[124] In case of doubt over construction, the court will favor a construction of the contract that the stipulated sum is an unenforceable penalty. In determining the intent of a liquidated damages clause, the court will first look to the language of the contract, but the words or labels placed on the language is not conclusive. Nevertheless, the court noted that the contract did not have any language to the effect that the liquidated damages are not intended to be a penalty, as is sometimes included in contracts. Without such words, the court was free to look at parol evidence of the parties' intent. The City's representative testified "that the intent of the [liquidated damages] clause was to 'disincentivize delays' with the project '[b]ecause [Multiplex is] going to have to pay $1,000 a day out of their net profits if they don't get the project done on time.'"[125] The court of appeals concluded that the delay clause was included in order to deter a breach of the clause and was therefore an unenforceable penalty.

Additionally, the court held that the clause failed because there was no evidence that the $1,000 per diem rate was a reasonable estimate of the probable loss from a delay. In the absence of an attempt to make a reasonable pre-estimate to support the damages, the clause is a penalty. The court was not persuaded by the City's arguments that the liquidated damages were only a small fraction of the total project cost, that liquidated damages are very common in construction contracts, and that the $1,000 per day is a "standard" daily rate. When drafting a liquidated damages clause, one should include self-serving language to the effect that the clause is not intended to be a penalty, but rather an estimate of

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124. *City of Brookhaven v. Multiplex, LLC*, 891 S.E.2d 60, 63-64 (Ga. Ct. App. 2023) (quoting *J.P. Carey Enters., Inc. v. Cuentas, Inc.*, 864 S.E.2d 588 (Ga. Ct. App. 2021)).

125. *City of Brookhaven v. Multiplex, LLC*, 891 S.E.2d 60, 65 (Ga. Ct. App. 2023).

probable loss in the event of a delay, and should make a creditable effort to estimate or predict the probable loss.

A common myth concerning liquidated damages is that such clauses are not enforceable unless there is also some bonus or reward to the contractor for finishing the work ahead of the scheduled completion date. There is no such requirement. Liquidated damages can be assessed against a contractor who delays the completion of the work, even if he would not have been compensated by a bonus for an early completion.

Liquidated damages can also act to protect the contractor by establishing a cap on the owner's damages. A party entitled to recover liquidated damages ordinarily is not entitled to recover more than the stipulated damages, even if his or her actual damages are greater. An exception to this general rule is that "prejudgment interest may not be limited by a provision that seeks generally to cap a party's *contractual* liability."[126] Additionally, Georgia courts must award prejudgment interest on liquidated damages amounts once any prerequisites for such an award have been satisfied.[127]

A liquidated damages clause in the general contract between the owner and the general contractor may be passed along to the subcontractor through an incorporation by reference or flow down clause in the general contract; however, liquidated damages may not be the contractor's exclusive remedy against a subcontractor. In one case, the Georgia Court of Appeals decided the liquidated damages clause in the contract between the owner and the general contractor, which was incorporated by reference into a subcontract, conflicted with a term of the subcontract which provided that no right or remedy in the subcontract agreement was intended to be the exclusive of any rights or remedies. Therefore, the court held that the liquidated damages clause did not prevent the general contractor from seeking damages in excess of the liquidated

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126. *Crown Series, LLC v. Holiday Hosp. Franchising, LLC*, 851 S.E.2d 150, 157 (Ga. Ct. App. 2020) (emphasis in original).

127. *See Sovereign Healthcare, LLC v. Mariner Health Care Mgmt. Co.*, 766 S.E.2d 172 (Ga. Ct. App. 2014) (holding that plaintiff was entitled to prejudgment interest on liquidated damages amounts, as such interest is mandatory and awarded as matter of law).

damages amount from a subcontractor who had breached the contract by delaying completion of the work.[128]

Further, liquidated damages for delay are subject to many of the rules applicable to delay damages in general. For instance, where both parties to the contract contribute in some measure to the delay, the law generally does not provide for the recovery or apportionment of the delay damages occasioned by either party.[129]

If a liquidated damages clause is later found to be unenforceable, the offending clause may be severed from the remainder of the contract, allowing for the recovery of proven *actual* damages resulting from the breach.[130]

1-3:3.3 Notice of Delay and Request for Time Extension

Aside from questions of recoverability of delay damages, many contracts require that the contractor notify the owner of a delay beyond the contractor's control and make a written request for an extension of time. For example, in one case, the contract provided "if the normal progress of work is delayed for reasons beyond his control, the contractor shall within 15 days after the start of such a delay, file a written request to the engineer for an extension of time setting forth therein the reasons for the delay which he believes will justify the granting of his request." The court in *Department of Transportation v. Fru-Con Construction Corp.*,[131] held the purpose of this clause is to excuse the contractor from the consequences of any delay for causes beyond his control; however, if the contractor fails to give such notice, he or she may be barred from claiming a time extension to avoid liquidated damages sought by the owner. In *Fru-Con*, the contractor failed to make a timely written request for an extension and was held to be responsible for the liquidated damages. Without the written request for a time extension, the contractor had failed to complete

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128. *See Centex-Rodgers Constr. Co. v. McCann Steel Co.*, 426 S.E.2d 596 (Ga. Ct. App. 1992).

129. *See J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd,* 461 F.2d 1269 (5th Cir. 1972).

130. *See Grayhawk Homes, Inc. v. Addison*, 845 S.E.2d 356, 357 (Ga. Ct. App. 2020) (holding that an unenforceable liquidated damages clause in an employment contract was severable such that actual damages from breach are still recoverable).

131. *Department of Transp. v. Fru-Con Constr. Corp.*, 426 S.E.2d 905 (Ga. Ct. App. 1992).

the contract within the requisite time period and was thus liable for delay damages.[132]

More recently, however, the court of appeals held that the enforcement of a contract's notice requirements may depend on whether there was actual notice of delays for which damages are sought.[133] Letters by the contractor referring to delays and the possible "domino-effect" of such delays present a factual question for a jury on the issue of notice. Further, the court noted that the owner may waive the benefit of the notice provisions of the contract by its conduct, including granting time extensions without request, not assessing liquidated damages, and acknowledging, in writing, the contractor's general complaints of problems and delays.[134]

In contrast to the court in *APAC-Georgia*, the Eleventh Circuit Court of Appeals held that actual knowledge of the occurrence does not satisfy the notice requirement in a subcontract.[135] The court reasoned that the subcontractor needed to give the contractor notice of the former's claim so that the contractor could include it in its claim to the owner.

Since courts generally allow parties to freely enter into contracts of their choice, courts will enforce claim notice requirements contained in contracts.[136] In *Western Surety*, there was no dispute that the sureties for a highway contractor did not follow the claim notice requirements set forth in the contract with the Department of Transportation (DOT).[137] Instead, the sureties argued that they should be able to recover on their claims for damages because (i) the DOT waived strict compliance with the notice requirement; (ii) the

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132. *See also Dan-D, Inc. v. Burnsed Enters.*, 372 S.E.2d 303 (Ga. Ct. App. 1988).

133. *APAC-Georgia, Inc. v. Dep't of Transp.*, 472 S.E.2d 97 (Ga. Ct. App. 1996) (a contractor on a DOT project sought damages for delays allegedly caused by DOT acts or omissions; the contractor argued the DOT had actual notice of the delays).

134. *APAC-Georgia, Inc. v. Dep't of Transp.*, 472 S.E.2d 97 (Ga. Ct. App. 1996). In *Mitchell & Assocs. v. Glob. Sys. Integration*, 844 S.E.2d 551, 552 (Ga. Ct. App. 2020), the Georgia Court of Appeals held that when a contractor failed to comply with a contract's ten-day notice provision, it lost its contractual right to a refund of monies previously paid for unsatisfactory work. *Id.* (quoting *Forsyth Cnty. v. Waterscape Servs.*, 694 S.E.2d 102 (Ga. Ct. App. 2010)) ("a party to a contract may waive a contractual provision [that otherwise exists] for his or her benefit").

135. *Associated Mech. Contractors, Inc. v. Martin K. Eby Constr. Co.*, 271 F.3d 1309 (11th Cir. 2001).

136. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 275 (Ga. Ct. App. 2014).

137. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 274 (Ga. Ct. App. 2014).

sureties reasonably and substantially complied with the notice requirement; (iii) the DOT had actual notice of the claims and (iv) the DOT was not prejudiced by the lack of strict compliance.[138] With respect to the first argument the court noted that:

> in the context of claim notice requirements, courts will readily seize upon any fact or circumstance growing out of the conduct of the parties, tending to show a waiver of strict compliance, and will seek to avoid the forfeiture and to leave the actual merits of the case open to investigation.[139]

Nevertheless, the court found that the DOT took no affirmative action with respect to the parties in the action that would amount to a waiver.[140]

Next, substantial compliance may present an issue for the jury "if the evidence [of notice] appears to be 'in the spirit' of the contract provision."[141] The claim letters at issue were provided late and when the DOT requested that the sureties send additional information in compliance with the notice provision, the sureties did not respond. Thus, the court found that the efforts by the sureties were not "in the spirit" of the contract.[142] Finally, the court held that the DOT's knowledge that there were delays was not tantamount to actual notice that the sureties were incurring monetary damages, nor was lack of prejudice relevant to the issue of waiver of strict compliance of a notice provision.[143]

Of course, the request for a time extension assumes one is legally entitled to a time extension. Where the contractor has assumed responsibility to meet a schedule, it is not excused from this commitment simply because a delay is beyond its control. A construction manager (C.M.) at risk assumes the risk of construction delays and cost overruns unless the contract provides otherwise. Thus, where increases in the price of steel delayed delivery and an escalation of the cost of steel to the C.M., it requested a time

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138. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 275 (Ga. Ct. App. 2014).

139. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 275 (Ga. Ct. App. 2014).

140. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 275-76 (Ga. Ct. App. 2014).

141. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 277 (Ga. Ct. App. 2014) (internal citations omitted).

142. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 278 (Ga. Ct. App. 2014).

143. *Western Sur. Co. v. Dep't of Transp.*, 757 S.E.2d 272, 278-79 (Ga. Ct. App. 2014).

extension and change order for additional compensation. The owner denied the request and the C.M. then sought judicial relief including acceleration costs due to the refusal to recognize a time extension. The court held that the C.M. was not entitled to any relief because it had assumed the risk of the late delivery of the steel. The contract had a force majeure clause which permitted a time extension for such things as national emergencies declared by the President of the United States, riots and insurrections, and extreme and unusual weather conditions amounting to an Act of God; however, the clause did not expressly provide relief for price increases or delay in delivery of materials. Accordingly, the court denied relief.[144]

1-3:4 Contract Interpretation

1-3:4.1 Ambiguities

When a question arises as to the proper construction of a contract, the primary purpose of courts or arbitrators is to determine the true intent of the parties. An ambiguity in a contract is said to exist when a term is capable of having more than one meaning. Where the terms of a contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties. If an ambiguity exists, the court will try to resolve the ambiguity by applying established rules of construction.[145] Finally, if the rules of construction cannot resolve the conflict, then the jury must decide the appropriate meaning.[146] The rules of construction include the following:

- Any ambiguities in a contract are usually construed against the drafter or party who prepared the contract.[147]
- Printed or handwritten portions of the contract will prevail over preprinted portions if they cannot be reconciled.[148]

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144. *Holder Constr. Grp. v. Georgia Tech Facilities, Inc.*, 640 S.E.2d 296 (Ga. Ct. App. 2006).
145. *See Benedict v. Snead*, 519 S.E.2d 905 (Ga. 1999).
146. *See Duffett v. E & W Props.*, 430 S.E.2d 858 (Ga. Ct. App. 1993).
147. *See Hertz Equip. Rental Corp. v. Evans*, 397 S.E.2d 692 (Ga. 1990).
148. *See Benedict v. Snead*, 519 S.E.2d 905 (Ga. 1999); *Lester v. Crooms, Inc.*, 277 S.E.2d 751 (Ga. Ct. App. 1981); O.C.G.A. § 13-2-2(7).

- A limited or specific provision of a contract will prevail over one that is more general or broadly inclusive.[149]
- Where two clauses are contradictory, the first of the two clauses will prevail.[150] But the intention of the parties should be given effect regardless of "mere literal repugnancies" in the different clauses of the contract.[151]
- In resolving an ambiguity or a conflict, the court may resort to considering the customs and usages in the trade or profession.[152]
- A court will interpret the entire contract and avoid interpretations which leave a portion of the contract meaningless.[153]
- The construction placed upon a contract by the parties by their actions or conduct is entitled to great weight in resolving an ambiguity.[154]

1-3:5 Merger or Integration Clause

Most contracts will contain a merger clause stating that the terms of the written agreement between the parties constitutes the parties' complete agreement and that any oral or other written agreements, representations, or statements of the parties prior to the execution of the written agreement are not a part of the agreement unless otherwise stated within the agreement. The purpose of such a clause is to prevent a party from asserting that there are other, unstated agreements if a dispute later arises concerning the contract. Ordinarily, such clauses preclude the introduction of an oral understanding between the parties or representations made by the party prior to execution of the contract, particularly if

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149. *See Holtzclaw v. City of Dalton*, 377 S.E.2d 196 (Ga. Ct. App. 1988).

150. *See Holtzclaw v. City of Dalton*, 377 S.E.2d 196 (Ga. Ct. App. 1988).

151. *See Benedict v. Snead*, 519 S.E.2d 905 (Ga. 1999).

152. *See Colonial Pipeline Co. v. Robert W. Hunt Co.*, 296 S.E.2d 633 (Ga. Ct. App. 1982); O.C.G.A. § 12-2-2(3).

153. *Board of Regents of Univ. Sys. of Ga. v. A.B. & E., Inc.*, 357 S.E.2d 100 (Ga. Ct. App. 1987).

154. *See Barranco v. Welcome Years, Inc.*, 579 S.E.2d 866 (Ga. Ct. App. 2003).

those oral understandings contradict the terms of the written agreement. The merger clause precludes a claim of reliance upon representations, promises or inducements not included in the construction contract.[155] Accordingly, the merger (or integration) clause can be used to defeat a claim based upon actual fraud by the other party to the contract.[156] In the words of the Georgia Supreme Court, "it is well-settled law in Georgia that a party who has 'the capacity and opportunity to read a written contract cannot afterwards set up a fraud in the procurement of his signature to the instrument' based on oral representations that differ from the terms of the contract."[157]

A concept closely related to merger is the parol evidence rule. Parol evidence is evidence of discussions or understandings between the parties which add to, take from, or vary the terms of a written contract. Under this rule, parol evidence is not admissible as evidence in a court proceeding.[158]

1-3:6 Incorporation by Reference and "Flow Down" Clause

Incorporation by reference is a shorthand way by which the terms of other agreements, documents, or writings are included as part of the contract without expressly stating those terms within the agreement. This procedure is most frequently seen in subcontract agreements where the subcontract purports to incorporate the terms and conditions of the contract between the general contractor and the owner as well as the specifications and drawings for the project.

A concept closely related to the incorporation-by-reference clause is the so-called "flow down" or "conduit" clause by which the subcontractor agrees to assume toward the general contractor

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155. *See Fountainhead Dev. Corp. v. Dailey*, 588 S.E.2d 768 (Ga. Ct. App. 2003).

156. *See Novare Grp., Inc. v. Sarif*, 718 S.E.2d 304 (Ga. 2011) (holding a merger clause precluded the claim of fraud brought by plaintiffs/purchasers who claimed defendant/developers verbally assured them subsequent buildings would not block their view); *Jimenez v. Houseboats on Lanier, Inc.*, 899 S.E.2d 334 (Ga. Ct. App. 2024); *Pennington v. Braxley*, 480 S.E.2d 357 (Ga. Ct. App. 1997).

157. *See Novare Grp., Inc. v. Sarif*, 718 S.E.2d 304, 308 (Ga. 2011) (quoting *Craft v. Drake*, 260 S.E.2d 475, 477 (Ga. 1979)).

158. *See Wages v. Mt. Harmony Mem'l Gardens*, 375 S.E.2d 57 (Ga. Ct. App. 1988); O.C.G.A. § 24-6-1 (after Jan. 1, 2013, O.C.G.A. § 24-3-1).

all obligations that the general contractor assumes toward the owner. Additionally, the general contractor agrees to assume toward its subcontractor all obligations which the owner owes to the general contractor.[159] Incorporation by reference is generally effective to accomplish its intended purpose when the documents or provisions to which reference is made have a reasonably clear and ascertainable meaning.[160] When, however, the incorporation by reference is for a specific purpose, then the incorporation of such documents can serve no other purpose than the one specified. Thus, when the only purpose of incorporating the specifications is to specify the material and manner of installation of the work, the incorporation by reference clause is ineffective to accomplish other purposes.[161] Further, where the signed contract conflicts with terms that are incorporated by reference, the contract will control.[162] Incorporation by reference clauses have been held to be sufficient to incorporate the terms of an arbitration agreement between the general contractor and the owner and indemnity agreements.

1-3:7 Effect of Decision by Architect

Frequently, construction contracts will contain a provision that disputes involving contract interpretation shall be submitted to the project architect or engineer whose decision on the question is binding. When parties designate a person who is authorized to determine questions relating to the contract's execution, and stipulate that the decision of such person shall be binding, the designated person's declaration is conclusive. Both parties are bound by the decision of the designated person as to matters within that person's authority, except in the case of fraud or in cases of such gross mistake as would necessarily imply bad faith

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159. *See L&B Constr. Co. v. Ragan Enters., Inc.*, 482 S.E.2d 279 (Ga. 1997) (no damage for delay clause flows down from general contract to subcontract).

160. *See ADC Constr. Co. v. McDaniel Grading, Inc.*, 338 S.E.2d 733 (Ga. Ct. App. 1985).

161. *See Williams Tile & Marble Co. v. Ra-Lin & Assocs., Inc.*, 426 S.E.2d 598 (Ga. Ct. App. 1992).

162. *Centex-Rodgers Constr. Co. v. McCann Steel Co.*, 426 S.E.2d 596 (Ga. Ct. App. 1992); *see also Atlantic Coast Mech. v. R.W. Allen Beers Constr.*, 592 S.E.2d 115 (Ga. Ct. App. 2003).

or failure to exercise an honest judgment.[163] The decision must be made by the person designated by the contract and not some other person or entity.[164] Normally, courts will carefully review the contract clause granting the architect or engineer the authority to make final and binding decisions to determine whether the architect or engineer is clearly granted the authority to make such decisions as to particular questions.[165]

1-3:8 Termination Clause

Most construction contracts contain termination clauses. A termination clause that permits an owner or general contractor to terminate a contract for no reason is called a "termination for convenience" clause. A termination clause that allows the owner or general contractor to terminate the contract or subcontract due to a breach of a provision of a contract is a "termination for cause" clause.

Termination for convenience clauses permit one party to terminate a contract, even in the absence of fault or breach by the other party, without suffering the usual financial consequences of breach of contract.[166] The termination for convenience clause will permit the other party to recover reliance expenses or costs incurred in performing the contract until it was terminated, and may provide for a recover of some portion of anticipated profits and overhead costs. The benefit of these clauses is that it allows parties to end the contractual relationship without the need for further litigation and the risk of full damages for a breach of contract.

More common are termination for cause or default clauses which permit an owner or contractor to terminate an executory contract or subcontract for lack or performance or other failings which are usually enumerated or described in the termination clause. In addition to listing items that contractually permit

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163. *See Continental Cas. Co. v. Wilson-Avery, Inc.*, 156 S.E.2d 152 (Ga. Ct. App. 1967).

164. *See Huggins v. Atlanta Tile & Marble Co.*, 106 S.E.2d 191 (Ga. Ct. App. 1958).

165. *See C.B.I. Na-Con v. Macon-Bibb Cnty. Water & Sewage Auth.*, 421 S.E.2d 111 (Ga. Ct. App. 1992).

166. *Interboro Packaging Corp. v. Fulton Cnty. Schs.*, No. 1:05-CV-1838-TWT, 2006 WL 2850433 (N.D. Ga. Oct. 2, 2006), *aff'd*, 221 Fed. Appx. 964 (11th Cir. 2007) (citing *Harris Corp. v. Giesting Assocs., Inc.*, 297 F.3d 1270, 1272 (11th Cir. 2002)).

the termination, the clause will provide for giving notice and an opportunity to cure or rectify the conditions offered to justify the termination. In *High Tech Rail & Fence v. Cambridge Swinerton Builders*,[167] a subcontract for a construction project contained a commonly-worded termination for default clause.[168] During the course of the project, the general contractor sent the subcontractor notices to cure on June 29, 2017, September 20, 2017, and November 27, 2017. The notices referred to the subcontractor's failure or inability to provide materials and complete its work on schedule. Following the third notice the subcontractor did not send any laborers to the project and the general contractor terminated the subcontract for the subcontractor's lack of progress, failure to procure materials timely, and abandonment of the project. The subcontractor brought an action for breach of contract, *quantum meruit*, and unjust enrichment. The general contractor answered, counterclaimed, and moved for summary judgment on the subcontractor's claims for damages based upon the termination for default clause. The subcontractor argued that there was a question of fact as to whether the contractor terminated the subcontract in good faith. While recognizing that good faith is an implied factor to be considered before enforcing a contract, the presence or absence of good faith does not ordinarily block

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167. *High Tech Rail & Fence v. Cambridge Swinerton Builders*, 871 S.E.2d 73 (Ga. Ct. App. 2022).

168. Article 14 of the subcontract provided:

> **14. Termination**. If, in the opinion of [Contractor], [Subcontractor] shall at any time (1) refuse or fail to provide sufficient properly skilled workers, adequate supervision, or materials of proper quality, (2) fail in any material respect to prosecute the work according to [Contractor's] schedule, (3) cause in any way, the stoppage or delay or interference with the work of [Contractor] or any other contractor or subcontractor, (4) file bankruptcy, become insolvent, or generally be unable to pay its creditors, (5) fail to comply with any material provision of this Subcontract or the Contract Documents, then, [Contractor] may, forty-eight (48) hours after written notice to [Subcontractor], cure any such defect or default in [Subcontractor]'s performance and deduct the cost thereof from any money then due, or thereafter to become due, to [Subcontractor]. [Contractor] may also, at its option, terminate this Agreement, and [Contractor] shall have the further right to take possession of the materials and equipment of [Subcontractor] for the purpose of completing the work.

High Tech Rail & Fence v. Cambridge Swinerton Builders, 871 S.E.2d 73, 74-77 (Ga. Ct. App. 2022).

the use of the terms that actually appear in the agreement. The Court rejected the subcontractor's argument and held,

> Here, it is undisputed that High Tech [the subcontractor] did not send workers to the Project for three days after Cambridge Swinerton [the contractor] sent High Tech a notice to cure. Pursuant to Article 14 and the work-through provision, Cambridge Swinerton thus could terminate the contract. Although High Tech contends that the delays in completing the Project on schedule were attributable to Cambridge Swinerton, High Tech does not point to any facts in the record explaining its absence from the Project site for three days. Accordingly, the trial court did not err in granting summary judgment on this claim.[169]

While the Court of Appeals made short work of the substantive arguments against the action to terminate the contract, attacks on the procedure for termination may yield different results. Owners and general contractors should be careful when terminating any contractor "for cause" as failure to do so in accordance with the termination provision may itself constitute a breach of contract by the party who purports to terminate the contract. In *Hope Electric Enterprises, Inc. v. Schindler Elevator Corp.*,[170] the general contractor terminated the subcontract after four alleged safety violations by the subcontractor over a four-month period. The subcontractor sued for breach of contract.[171] The subcontract contained a clause allowing for termination if "repeated" defaults were not timely cured.[172] The court observed that "repeatedly" was not defined in the subcontract and found that the term is an

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169. *High Tech Rail & Fence v. Cambridge Swinerton Builders*, 871 S.E.2d 73, 78 (Ga. Ct. App. 2022) (footnotes omitted).

170. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5 (Ga. Ct. App. 2013).

171. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5, 7 (Ga. Ct. App. 2013).

172. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5, 7 (Ga. Ct. App. 2013) ("If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract . . . the Contractor may . . . terminate the Subcontract . . . .").

indistinct and uncertain term.[173] As a result, there was no indication in the subcontract regarding how many occurrences must take place before termination could occur.[174] The court of appeals held that a jury must decide whether the subcontractor repeatedly failed or neglected to perform its duties under the contract and whether termination was authorized.[175]

1-3:9 Disputes

1-3:9.1 Waiver of Jury Trials

The Georgia Supreme Court has held that an agreement to waive or relinquish the right to trial by jury before litigation occurs is unenforceable.[176] This holding does not affect the enforceability of pre-litigation arbitration provisions.

1-3:10 Choice of Law Provisions

Many contracts contain a designation of the state whose law will apply to the interpretation of the contract. Under Georgia law, such choice of law provisions are normally enforced provided that the law of the state does not contravene some public policy of the State of Georgia.[177]

1-3:11 Forum Selection Clauses

Georgia courts have begun to recognize clauses in a contract that designate a particular location or forum for any suits or other actions by the contracting parties. Forum selection clauses are prima facie valid and enforceable unless enforcement is shown to be unreasonable under the circumstances.[178] Provided the forum bears some reasonable relationship to the subject matter of the suit

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173. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5, 8 (Ga. Ct. App. 2013).

174. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5, 8-9 (Ga. Ct. App. 2013).

175. *Hope Elec. Enters., Inc. v. Schindler Elevator Corp.*, 752 S.E.2d 5, 9-10 (Ga. Ct. App. 2013).

176. *See BankSouth, N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994).

177. *See Kinnick v. Textron Fin. Corp.*, 422 S.E.2d 303 (Ga. Ct. App. 1992).

178. *See Cemex Constr. Materials Fla., LLC v. LRA Naples, LLC*, 779 S.E.2d 444 (Ga. Ct. App. 2015) (court ruled that "four-party agreement" requiring venue of action in Lee County, Florida was enforceable and dismissed action filed in Georgia).

or to the parties, Georgia will limit the arbitration or litigation to the forum so selected.[179] But, in *Central Ohio Graphics, Inc. v. Alco Capital Resource, Inc.*,[180] the court of appeals refused to enforce a clause, which stated that the action could be brought in any court of competent jurisdiction, because it was overly broad and failed to reflect a meeting of the minds sufficient to show that the parties agreed to a specific forum. Also, in *Equity Trust Co. v. Jones*,[181] the court of appeals recognized that a forum selection clause is not enforceable if the clause's inclusion in the contract was due to fraud or overreaching.

1-4 STANDARD CONSTRUCTION AGREEMENTS AND FORMS

Standard contracts and forms are commonplace in the construction industry. These contracts and forms are typically part of an entire series generated by specific industry groups, including the American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), and the Associated General Contractors of America (AGC), in conjunction with 19 other construction associations, comprising a new organization called ConsensusDocs. These forms include agreements for general contracting, architectural and design services, construction management, subcontracting, and joint venturing. The AIA, AGC, and EJCDC also have forms for pay applications, change orders, payment bonds, and other documents used on a construction project.

These organizations' standard contracts and forms have advantages and disadvantages. For example, the AIA documents have been in existence for over 100 years, allowing contract terms to evolve with court interpretation and industry-wide understanding. If both parties are familiar with the standard form agreement, contract negotiation may be expedited. Additionally, forms are updated periodically to reflect changes and trends in the construction industry.

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179. *See Harry S. Peterson Co. v. Nat'l Union Fire Ins. Co.*, 434 S.E.2d 778 (Ga. Ct. App. 1993).

180. *Central Ohio Graphics, Inc. v. Alco Cap. Res., Inc.*, 472 S.E.2d 2 (Ga. Ct. App. 1996).

181. *Equity Tr. Co. v. Jones*, 792 S.E.2d 458 (Ga. Ct. App. 2016).

However, since the contracts and forms are published within a series, failure to review incorporated terms and documents, or using an improper form for the parties or project involved, can—among other issues—lead to ambiguity or inconsistencies in contract terms. Standard form contracts can also be modified, and parties should be sure to review the contract to identify any modifications or revisions to the standard form.