A VIEW FROM THE TOWER

The stimulus for this Column was my 28th viewing of the Marx Brothers classic, A Night at the Opera. Groucho is reading from a long, scroll-like contract. As he reads a clause, Chico (who cannot read) says he doesn’t like it. Groucho tears it out. They get to the little that remains and Groucho says, “That’s the usual clause that’s in every contract.” Chico doesn’t like it, so it is snipped off the scroll, leaving nothing.

(Who needs a contract?)

This great scene triggered some thoughts about the many terms that can describe a contract.

When I started teaching Contract Law, I discovered the Adhesion Contract. This is one prepared by the dominant party with his own interests in mind. The weaker party has no choice and simply “adheres.” It is usually described as a “take or leave it” contract.

In my various tours in private practice I also learned about the Forms File. Find a form, I was told. This meant, at least in those days, a visit to the file room to find a Form Contract, one designed for similar transactions. It was prepared by combining a number of contracts for similar transactions. The Form Contract provided the skeleton, and all we needed to do was put some flesh on it. Sometimes a Form Contract became an Adhesion Contract, one about which there was no bargaining. But not always. Sometimes we had to sit down with the other party’s lawyer and really go over the terms. In such a case, what emerged was a Negotiated Contract, though it had started with a Form Contract.

When I started working in Construction Contracts, I encountered the Standard Contract. What are Standard Contracts (or standard clauses), such as those put out by the AIA? (The AIA calls them “Documents,” a nice official ring.) Let me explore this a bit.

To Groucho, as we saw, a standard clause is the usual (normal) clause, one “that’s in every contract.” Why did he put it that way?

If it is in all contracts, it must be okay. If everyone uses this clause (or this contract), we can assume that it meets their needs, at least the needs of the party who selects the clause or contract. It may even be a balanced, efficient contract. Classifying it as “standard” may convince the party to whom it is presented that it doesn’t pay to study it, let alone fight over it. If you go elsewhere you will see the same clause. An air of inevitability is created. That’s it.

When we look at AIA Documents, we see another purpose. “Standard” also means the flag or symbol of the organization that creates it (the standard bearer?). It is as if we are being told that a prestigious national organization stands behind it, that it represents the AIA’s best thinking of how to do things right. Let’s look at AIA Documents more closely.

The AIA seeks to advance what it considers the best practices, such as inclusion of a Differing Site Conditions Clause, giving the architect the power to interpret and resolve disputes initially and requiring disputes be arbitrated.

Other organizations, such as the Engineers’ Joint Construction Documents Committee, make contracts that deal with the same subject as those of the AIA. If all use similar language, that language becomes the industry standard, industry-approved language.

Surrogate Contracts are those made by groups representing the prospective contracting parties. Are AIA Documents Surrogate Contracts? Unlike those for design (B-series), those for construction services (A-series) are usually endorsed by the National Associated General Contractors (AGC). The AGC can be seen as a surrogate for one party, the contractor. In my view, though, the AIA cannot be seen as a surrogate for the other party, the owner. In some respects, the AIA looks after the interests of the owner. Yet it is mainly concerned with the interests of the architect, though he is not a party to the contract. So I don’t think we should look at AIA Documents as truly Surrogate Contracts as are English JCT contracts.

How should the law deal with AIA Documents? In my view, the contracts for design services should be considered Adhesion Contracts where the client is neither legally represented nor is an experienced player. The contract is certainly valid but should be interpreted as would an Adhesion Contract, doubts being resolved in favor of the client and the client’s reasonable expectations taken into account.

The contracts for construction services are not pure Surrogate Contracts. But neither are they Adhesion Contracts. Bargaining can and often does occur, at least as to specified clauses, such as arbitration, indemnity, payment, and the role of the architect. If they were Surrogate Contracts, we would treat them as we would Negotiated Contracts.

But they are closer to Surrogate Contracts than Adhesion Contracts; A-series contracts are best described as Quasi-Surrogate Contracts. The parties can, though many do not, employ counsel. They should be treated as Negotiated Contracts. Here the lodestar is the intention of the parties. If the parties do not have a specific intention as to particular language, often the case, I would not seek the intention of the AIA. Where there are no actual intentions of the parties, the law should seek to harmonize the language with the Common Law.

Since AIA language becomes the private law in many transactions, we can consider the AIA as “legislating” through the use of Standard Contracts (Quasi-legislative Contracts?).

Whew! Look at all the types of contracts I have encountered in my life in Construction Law. I may have left out some, but how about these? Adhesion, Form, Negotiated, Standard, Industry, Surrogate, and Quasi-legislative.
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