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What Your Contract Is Missing

5 Clauses Missing From Most Business Contracts

The pattern in business litigation is remarkably consistent: the contract at the center of the case was drafted in a hurry, copied from a template, or negotiated by people focused on the deal rather than the downside. By the time the relationship breaks down, the contract either fails to address the dispute at all—or addresses it in a way that makes things worse. These are the five clauses I see missing most often, and the real cost of leaving them out.

1 A Dispute Resolution Roadmap

Most business contracts either say nothing about how disputes will be resolved or include a boilerplate arbitration clause copied from a form. Neither is a strategy. A well-drafted dispute resolution clause creates a sequence: mandatory written notice, a defined cure period, then mediation before either party can file suit or demand arbitration. Without this roadmap, disputes escalate from disagreement to lawsuit in a single phone call—and both sides spend tens of thousands of dollars before anyone has a conversation about resolving the problem.

What it costs you: A client came to me after filing a breach-of-contract suit, only to discover the contract required 60 days' written notice and an opportunity to cure before filing. The case was dismissed. They had to start over—six months and $30,000 in legal fees later.

The fix:

Include a step-by-step escalation path: written notice with a defined cure period (typically 15–30 days), then mandatory mediation, then litigation or arbitration. Specify who bears mediation costs and where it takes place.

2 A Real Attorney's Fees Clause

California follows the "American Rule": each side pays its own legal fees unless a contract or statute says otherwise. Many business owners assume they will recover their fees if they win. They will not—unless the contract explicitly provides for it. And not all fee clauses are equal. A vague reference to "reasonable attorney's fees" without specifying the triggering events, the scope (does it cover arbitration? appeals? post-judgment enforcement?), or the standard for calculating fees creates ambiguity that the losing side will exploit.

What it costs you: Without a fee-shifting clause, winning a $150,000 breach-of-contract judgment after spending $80,000 in legal fees is a net $70,000 recovery. With one, the defendant owes you the judgment plus your fees—and that changes their settlement calculus entirely.

The fix:

Draft a mutual (not one-sided) prevailing-party fee clause that covers all costs of enforcement including litigation, arbitration, mediation, appeals, and post-judgment collection. Under California Civil Code § 1717, a one-sided fee clause is automatically made mutual anyway—so draft it that way from the start.

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3 A Specific Venue and Choice-of-Law Provision

When two businesses in different cities, counties, or states enter a contract, where will a dispute be litigated? Under whose law? If the contract is silent, you may spend the first six months of litigation fighting about jurisdiction and venue rather than the substance of your case. Worse, you may end up litigating in a forum that is expensive, inconvenient, or unfavorable. A venue clause is not a formality—it is a strategic decision that should be made when you have leverage, not after the relationship has broken down.

What it costs you: An Orange County business sued a vendor in Orange County Superior Court, assuming that was the proper venue. The vendor moved to transfer the case to San Francisco under CCP § 395. The motion was granted. The client now faces depositions, hearings, and trial 400 miles from home.

The fix:

Specify both governing law (e.g., “This Agreement shall be governed by California law”) and exclusive venue (e.g., “Any action arising under this Agreement shall be brought exclusively in the Superior Court of Orange County, California”). Make it exclusive, not permissive.

4 Defined Termination Rights and Exit Procedures

Business relationships end. Partnerships dissolve. Vendors underperform. Key employees leave. Yet most contracts treat termination as an afterthought—a single sentence about “30 days’ written notice.” That is not enough. A contract should define what happens to work in progress, who owns intellectual property created during the relationship, how final payments are calculated, what post-termination obligations survive (confidentiality, non-solicitation, indemnification), and what constitutes “cause” for immediate termination versus termination for convenience.

What it costs you: A company terminated a contractor mid-project. The contract said nothing about ownership of work product created before termination. The contractor claimed ownership of the code, held the project hostage, and demanded a six-figure buyout to release it.

The fix:

Define termination for cause (with specific triggering events) and termination for convenience (with a notice period). Address work-product ownership, final payment terms, return of confidential information, and survival of key obligations. Make IP assignment automatic upon payment, not contingent on the relationship continuing.

5 A Limitation of Liability That Actually Protects You

Limitation-of-liability clauses cap the amount one party can recover from the other. They are standard in vendor contracts, SaaS agreements, and service contracts—but they are frequently one-sided, poorly drafted, or missing entirely from contracts between small businesses. A missing liability cap means your exposure is theoretically unlimited. A poorly drafted one may be unenforceable. And a one-sided cap that only protects the other party is a red flag that the contract was drafted by their attorney, not yours.

What it costs you: A business signed a vendor agreement with no liability cap. The vendor’s software failure caused a data breach affecting the company’s customers. The vendor’s total fees were $24,000. The company’s exposure to its own customers: over $500,000. With a mutual liability cap tied to fees paid, the company could have pushed that risk back to the vendor.

The fix:

Include a mutual cap on direct damages (commonly 12 months of fees paid or contract value). Exclude consequential, incidental, and punitive damages. Carve out exceptions for indemnification obligations, IP infringement, confidentiality breaches, and willful misconduct—these should not be capped.

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The Bottom Line

The best time to protect your business is before the handshake, not after the breach. Every clause on this list costs a few hundred dollars to draft and can save tens or hundreds of thousands in litigation. If you are entering a partnership, signing a vendor agreement, or onboarding a contractor, have a litigator—not just a transactional attorney—review the downside. The perspective of someone who has seen these contracts fail is worth more than the cost of drafting them right.

Need a Contract Reviewed — or Drafted Right?

Kolmogorov Law, P.C. drafts, reviews, and litigates business contracts across California. We bring a litigator's perspective to every agreement—because we know exactly how they break.

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