

# Loopholes: Identifying and Managing Key Risks in EPC Contracts

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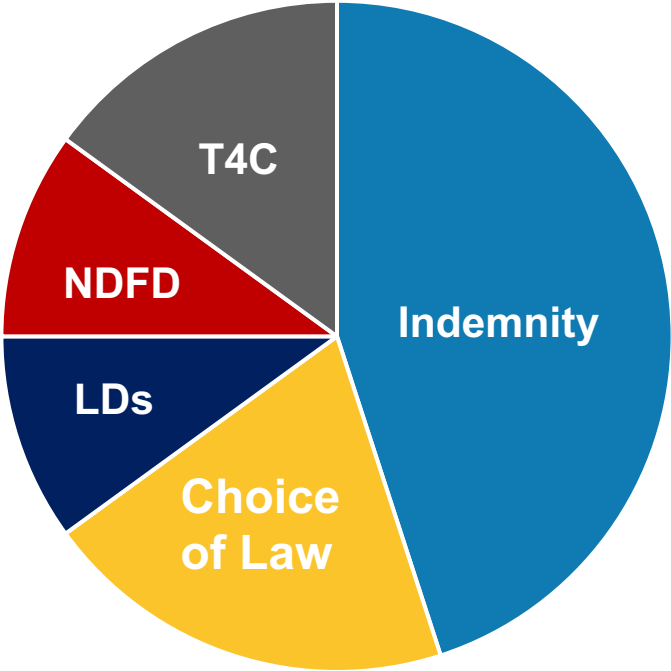
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# Overview of Program

- Contracts assign risk
  - Whole contract is identifying and managing risk
- Hidden risks
  - The contract gives
  - And the contract or state law Takes Away!
- Key Takeaways

# 5 Loopholes

Loopholes



■ Indemnity   ■ Choice of Law   ■ Liquidated Damages   ■ No Damages for Delay   ■ Termination for Convenience

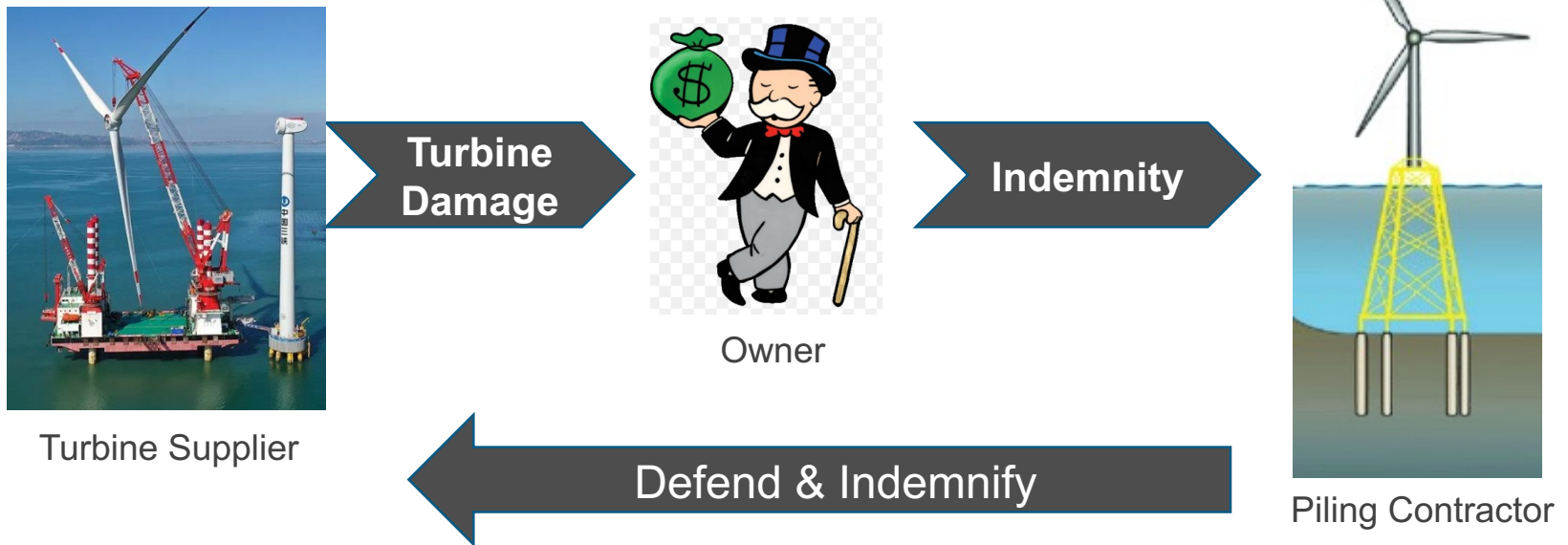
# Loophole 1: Indemnity Obligations

**Key Takeaway:** Indemnity obligations can undermine limitations of liability provisions.

# Loophole 1: Indemnity Obligations

- Indemnity

- Turbine supplier asserts a claim because “bad pilings” caused damage during erection of turbines
- Piling contractor pays the owner’s cost to defend and damages (usually insurance)



# Loophole 1: Indemnity Obligations

- Consequential Damages Waiver
  - No lost profits, no loss of use of the project, etc.
- Limitation on Liability
  - Overall cap (10% up to 2x contract price depending on project)

# Loophole 1: Indemnity Obligations

## Limitation on Liability *Excludes* Indemnity

Contractor's ***maximum liability to Owner*** under this Contract will be limited to the full value of the Contract Price, provided that such limitation of liability ***will not limit Contractor's liability*** in any case of the following: . . . or (5) ***fulfillment of Contractor's obligations under Section 14.1 [Indemnification by Contractor]***.

# Loophole 1: Indemnity Obligations

## Consequential Damages Waiver *Excludes* Indemnity

Neither party shall be liable to the other party for **loss of use of the Work, loss of profit**, or for any indirect or consequential loss or damage that may be suffered by the other party in connection with this Contract, **other than** under Section 17.2(b) [*Termination by Owner*] and **Sections 14.1 [Indemnification by Contractor]** and 14.2 [*Indemnification by Owner*]



# Loophole 1: Indemnity Obligations

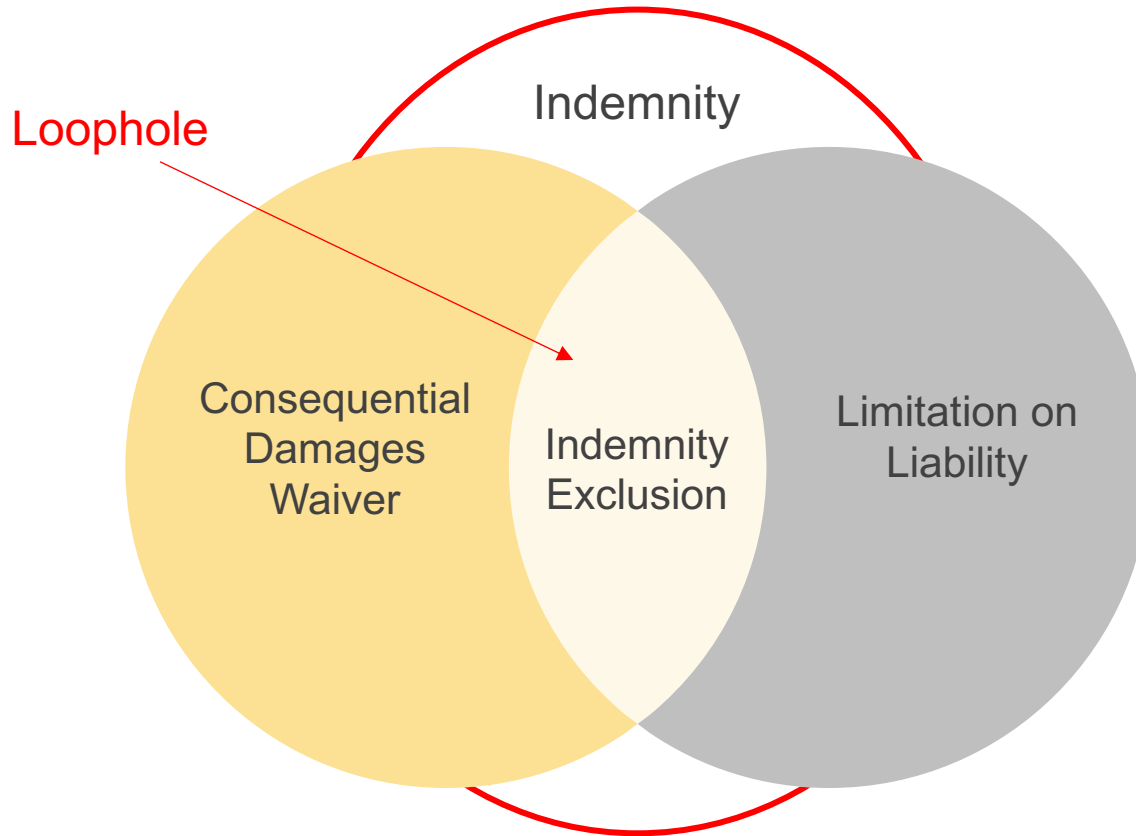
## Indemnity Provision Requires Indemnity for Any Breach of Contract

Contractor shall defend, indemnify and hold each Owner Indemnified Party harmless against ***all third-party actions, liability, loss, damages, claims, liens, costs and expenses, including attorneys' fees*** (each a “Claim”), it may incur as a result of or related to the following:

***Any breach*** by Contractor or any Subcontractor ***of any obligation*** in this Contract or the relevant Task Order to be performed by Contractor.

- Time is of the Essence + Delay = BREACH OF CONTRACT
- Uninsurable

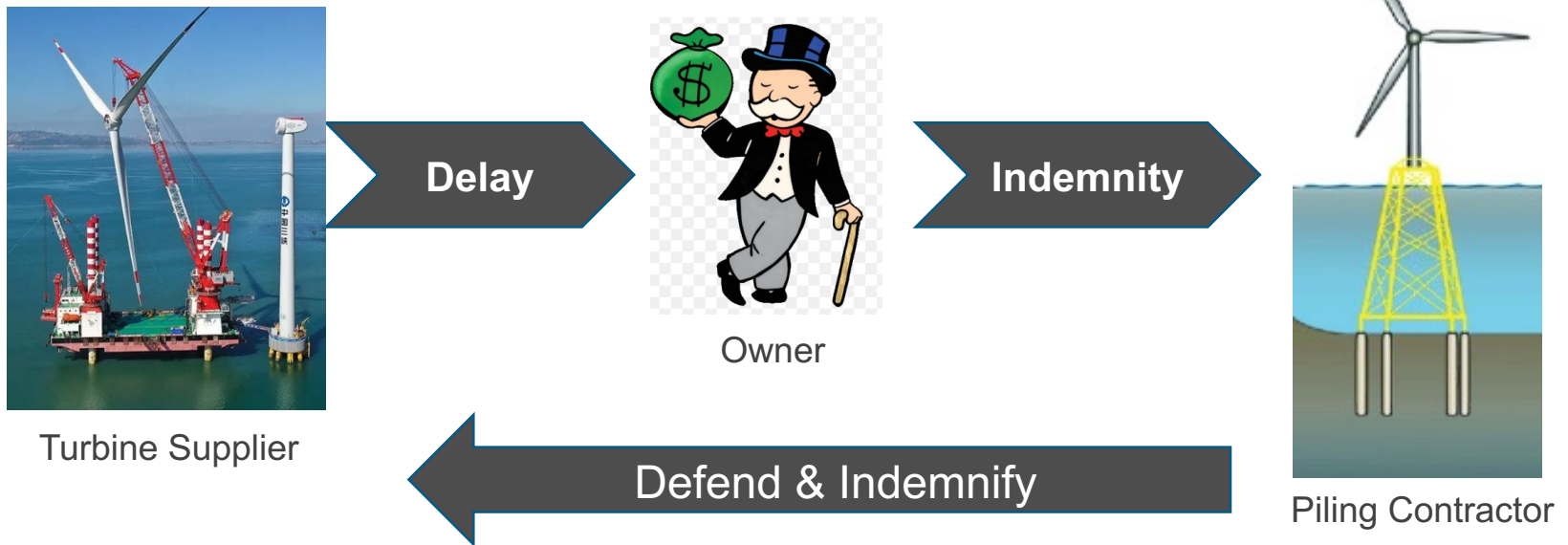
# Loophole 1: Indemnity Obligations



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- Turbine supplier asserts a claim because “bad pilings” caused **delay** to erection of turbines
- Piling contractor pays the owner’s cost to defend **and damages**



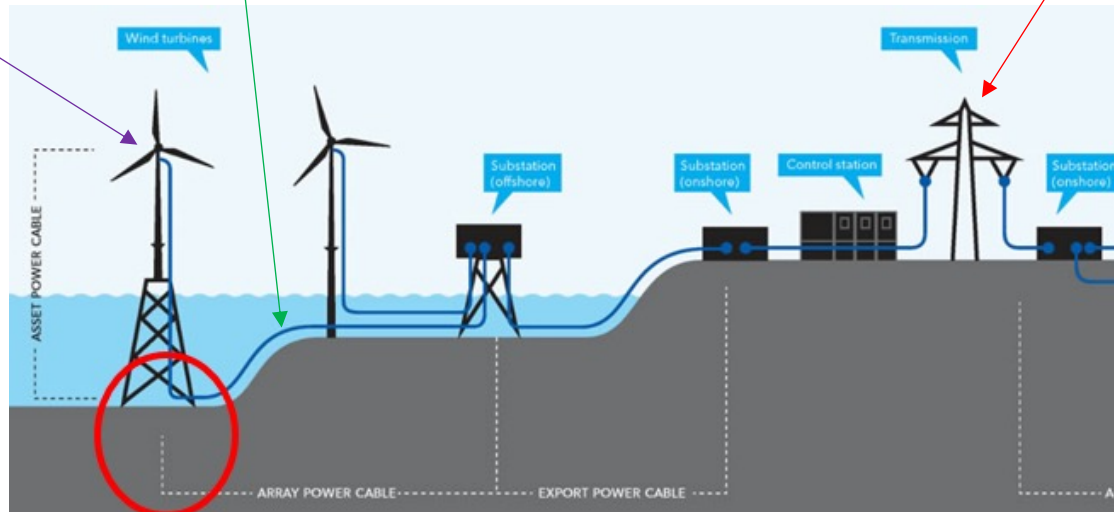
# Loophole 1: Indemnity Obligations

## PARADE OF HORRIBLES Potential Third Party Claims Relayed to Delay

Turbine Supplier/  
Erection Contractor

Conduit/Electrical

Purchaser under PPA



Piling Contractor

# Loophole 1: Indemnity Obligations

- **No limit on liability for delay, no waiver of consequential damages for delay, and NOT insurable**
- **What to Do:**
  - LDs = sole and exclusive remedy for delay *notwithstanding* anything else
  - Indemnity =
    - Do not indemnify for “breach of contract” (ideally)
    - OR (at least) carve out delay (and warranty) from indemnity for breach of contract
    - OR (at least) don’t allow indemnity for delay (and warranty) to be carved out of LOL, Consequential Damages Waiver

## Loophole 2: Choice of Law

**Key Takeaway:** States may have anti-choice of law statutes that can impact contract risk.

# Loophole 2: Choice of Law

## Typical Choice of Law Provision

**Governing Law; Invalidity.** This Contract and the relevant Task Order ***will be governed by and construed under the Laws of the State of Texas*** excluding any conflicts of laws principles. Any court action or proceeding of any nature whatsoever, in law or in equity, for damages or otherwise, to enforce directly or indirectly, or to construe any terms of this Contract ***will be brought in the state and federal courts located in the Houston, Texas***, and the parties hereby consent to such jurisdiction. Contractor waives all defenses of lack of personal jurisdiction and forum non conveniens. Process may be served on Contractor in the manner authorized by applicable law or court rule. If a court of competent jurisdiction finds that any term of this Contract is invalid, then such finding will not affect the validity of the remaining terms of this Contract.

# Loophole 2: Choice of Law





# Loophole 2: Choice of Law

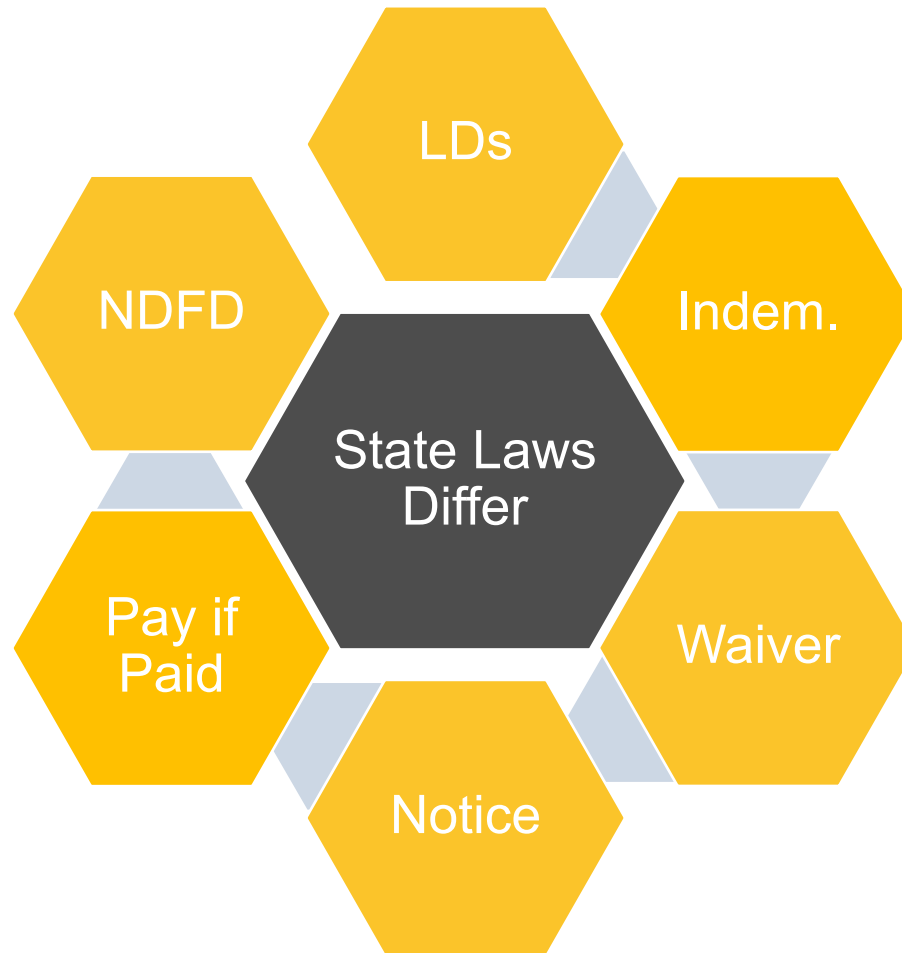
## Example Anti-Choice of Law Statute

### New York General Business Law § 757

The following provisions of construction contracts shall be **void and unenforceable**:

A provision, covenant, clause or understanding in, collateral to or affecting a construction contract, with the exception of a contract with a material supplier, **that makes the contract subject to the laws of another state** or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state.

# Loophole 2: Choice of Law



# Loophole 2: Choice of Law

- Indemnity
  - Indemnity for own negligence
    - State anti-indemnity statutes differ
  - Are there special requirements for indemnity
    - TX Express Negligence/Fair Notice
      - **WHY YOU SEE THESE PROVISIONS IN ALL CAPS AND BOLD!**
- LDs – states have nuances in enforcing
  - E.g., TX look back (“unbridgeable discrepancy”)
- Pay if paid – some states will not enforce
- Waiver – when is it enforceable?
- Notice – enforceability of notice provisions – substantial compliance? Or strict compliance?
- NDFD – enforceable?

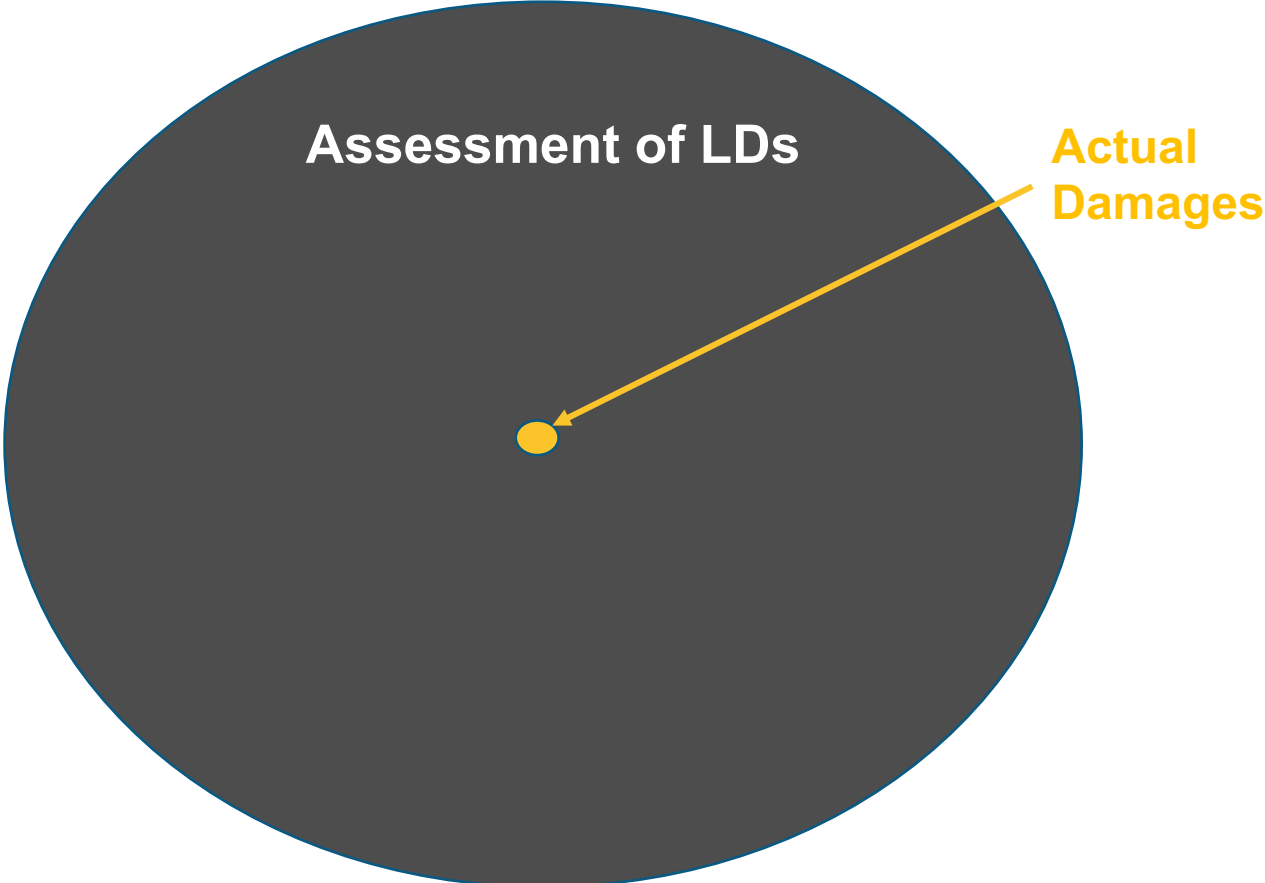
# Loophole 2: Choice of Law

- **What to Do:**
  - Requires your legal team's assessment
    - Does *not* mean that contract should never apply law of state that is not where the project is located
    - Not every state has limitation on choice of law
    - Recent Texas case says Texas statute is waivable, other states may be similar
    - Benefit in having uniformity among contracts

# Loophole 3: Liquidated Damages

**Key Takeaway:** Actual damages can matter.

# Loophole 3: Liquidated Damages



# Loophole 3: Liquidated Damages

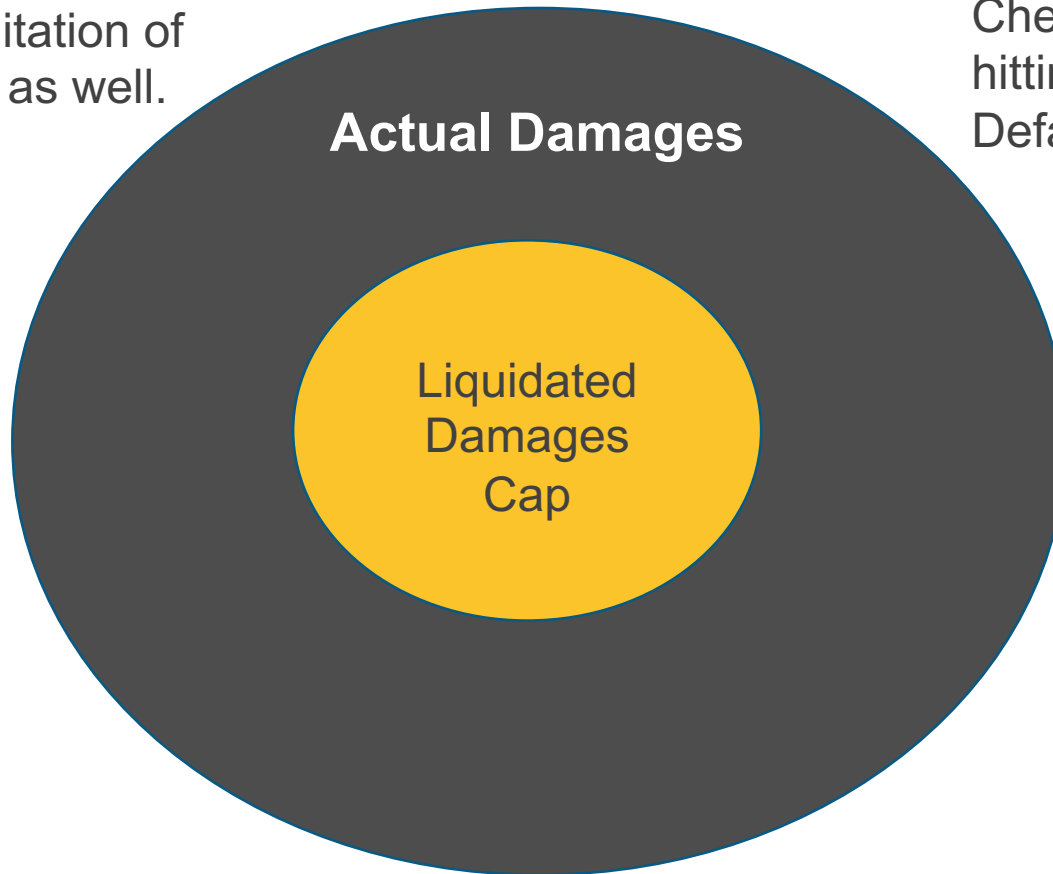
- “Unbridgeable Discrepancy” in Texas
  - Actual damages turn out to be minimal
  - Court invalidates the LD provision
  - Actual damages only
- So far, only encountered in Texas, but concept applies broadly
  - LDs not a penalty, supposed to be estimate of *actual* damages
  - Examples:

Case (jurisdiction, date)	Actual Damages	LDs	Difference	Holding
<i>Hanover Ins.</i> (S.D. Tex. 2020)	\$0	\$900,000	-\$900,000	NOT ENFORCEABLE
<i>Garden Ridge</i> (Houston, 14th 2013)	\$0	\$79,957	-\$79,957	NOT ENFORCEABLE
<i>Thanksgiving Tower</i> (5th Cir. 1995)	\$1,400,000	\$5,000,000	-\$3,600,000	FAILURE OF PROOF; HELD ENFORCEABLE
<i>S. Union Co.</i> (Austin, 2005)	\$1,045,944	\$2,100,000	-\$1,054,056	ENFORCEABLE; 2:1 RATIO OKAY; DOUBLE OKAY
<i>Baker</i> (Dallas, 1991)	\$15,000	\$51,000	-\$36,000	ENFORCEABLE
<i>Sealock</i> (Tex. 1988)	\$395,000	\$790,000	-\$395,000	ENFORCEABLE
<i>FPL Energy</i> (Tex. 2014)	\$6,160,000	\$29,000,000	-\$22,840,000	NOT ENFORCEABLE

# Loophole 3: Liquidated Damages

LDs can be a limitation of liability provision as well.

Check Default Terms; hitting cap may be a Default Event.





# Loophole 3: Liquidated Damages

- **What to Do:**
  - Sole and exclusive remedy
  - Cap
  - Do not indemnify for delay or do not exclude indemnity for delay from LOL provisions (see Loophole 1)
  - Be prepared to prove your actual damages in Texas (and maybe elsewhere)

# Loophole 4: No Damages for Delay

**Key Takeaway:** No-Damages-for-Delay can be tough to enforce.

# Loophole 4: No Damages for Delay

- Language can be buried and not expressly say NDFD
- E.g., “Subcontractor agrees that its sole right and remedy in the case of any delay shall be an extension of the Completion Date”

# Loophole 4: No Damages for Delay

- State law may not enforce or may limit enforcement
- Gives leverage to the party claiming damages for delay
  - Costs to litigate the issue
- Texas – *Green Intern., Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997).
  - Delay not intended or contemplated to be in the purview of the clause
  - Delay so long would justify abandonment
  - Delay resulting from fraud, bad faith, misrepresentation
- Virginia – Va. Code § 2.2-4335(A) –
  - Unenforceable in public construction contracts
- Washington – Wash. Rev. Code § 4.24.360
  - Unenforceable in all contracts

# Loophole 4: No Damages for Delay

- **What to Do:**
  - Understand state law on enforceability
  - If state law limitations (especially limitations based on facts)
    - **Consider** whether brokering a deal (if possible) is preferable to digging in and winding up in litigation.

# Loophole 5: T4C Damages

**Key Takeaway:** Clearly identify what you have to pay for “Work” under T4C.

# Loophole 5: T4C Damages

- If you did not have T4C → breach
  - All damages, lost opportunity, lost anticipated profits, etc.
- T4C *theoretically* allows owner/contractor to “breach” the contract
  - Terminate contract without any cause
- Supposed to limit liability
  - Pay for work done and costs to end the job

# Loophole 5: T4C Damages

## Fairly Typical Provision

If this Subcontract is terminated by Contractor for convenience in accordance with the preceding sections, ***Subcontractor shall be paid for Work performed prior to the date of such termination*** plus Subcontractor's reasonable and mutually agreed demobilization costs and costs reasonably incurred in terminating its subcontracts and purchase orders for the terminated Work, and a reasonable allowance for Subcontractor's overhead and profit for completed Work calculated according to the compensation provisions of this Subcontract. Such costs shall not include any lost anticipated profit. Recovery of such costs shall be Subcontractor's exclusive remedy for a termination for convenience.



# Loophole 5: T4C Damages

- ***Subcontractor shall be paid for Work performed prior to the date of such termination***
- Lump Sum paid according to SOV for units completed
- Subcontractor blew lump sum
- Subcontractor claimed that it was entitled to recover for all costs incurred
  - Even through those costs exceed the whole lump sum price
  - For completing only a portion of the work.
- Is Subcontractor right?

# CLOSING

**Indemnity Key Takeaway:** Indemnity obligations can undermine limitations on liability provisions.

**Choice of Law Key Takeaway:** States may have anti-choice of law statute that impact contract risk.

**LDs Key Takeaway:** Actual damages can matter.

**NDFD Key Takeaway:** No-Damages-For-Delay can be tough to enforce.

**T4C Key Takeaway:** Clearly identify what you have to pay for “Work” under T4C.

# Further Info

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- “Three Sheets to the Wind: Cautionary Tales of Unlimited Risk in Offshore Wind Construction,” *Texas Lawyer*, March 4, 2022
- “The Choice Is Yours – Or Is It? Anti-Choice of Law Statutes Applicable to Construction Contracts,” *ConsensusDocs*, September 7, 2022
- [upcoming in ConsensusDocs article on T4C]