Boilerplate Clauses in Commercial Contracts: Avoiding Unintended Consequences
Navigating Common Pitfalls in Standard Contract Provisions and Implementing Practical Solutions

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Overview

- Electronic reading versus hard copy reading
- Skimming versus studying
- Do you see what you expect to see?
- Just as Outlook automatically fills in names, and often the wrong one, guard against automatically filling in a contract provision based on the heading or the opening words.
"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. The words of a contract are to be understood in their ordinary and popular sense. *Barroso v. Ocwen Loan Servicing, LLC*, 208 Cal. App. 4th 1001 (2012)
The Basics of Good Drafting

- Form versus Substance
- Choice of law, choice of forum
- Cultural Issues
- Being exact and concise in contracts & structuring clauses
- Business versus legal issues
- Ethical Issues
In drafting contracts, form should follow substance. The drafting follows the purpose. Decide on choice of law first. Use plain, understandable language: the business people need to understand rights and obligations. What are the eventualities, i.e., the “what ifs?” The "backyard barbecue" test: how would you explain it to your half-drunk neighbor? Remember: courts do not let form trump substance.
"The Form"

- "[S]ome documents do use meaningless boilerplate and, in our view, the rule should not be carried to absurd lengths to imbue meaning into every legalistic jotting." Schron v. Troutman Saunders LLP, 2012 NY Slip Op 3966 (1st Dept. 2012)

- Forms are a starting place, not a finish, and once size does not fit all—

- Distinguish from consistent documents in similar circumstances.
Why Contracts Matter

- Boilerplate contract provisions are not a one-size-fits-all. Attorneys who fail to carefully draft and revise potentially problematic boilerplate clauses carry on a weight of risks and legal dangers.
- Courts repeatedly hold that they will not make a better contract for parties than they have drafted for themselves.
Choice of Law: Introduction

- The “legal stuff” affects you
- E.g., choice of law is not esoteric.
- As a lawyer, do not assume that all “boilerplate” provisions are the same based on heading
Choice of Law: Purpose

- Establishes which law will govern the substantive issues relating to contract and related claims
- Establishes common understanding of the clauses
- Should be done first, not as a tag-on at end
- US courts generally enforce; if not specified, various tests (substantial relationship, e.g.), unless: against public policy or no reasonable relationship to forum
- US courts also apply foreign law (F.R.C.P. 44.1)
- Can affect ability to terminate contract or amount of damages, entitlement to interest, and others
Substance versus Procedure

- Governs *substantive*, not procedural issues
- Courts apply choice of law provision to the substantive law of the chosen state, but not to procedural or practice questions
- Forum state governs procedural issues: form of claim (tort or contract); necessary or indispensable parties; rules regarding service of process and notice; rules of pleading and pre-trial practice; whether a claim can or must proceed as counterclaim, defense or set-off; conduct of trial (e.g., entitlement to jury and role of judge); sufficiency of evidence, *et al.*
Choice of Law and Scope

- Many clause are dependent upon the particular choice of law
- Scope: tort and contract, “relating to and arising out of” versus “interpretation” versus “governed by”
- Applies in arbitration as well as court
- If absent, courts do their own analysis
- Can affect ability to terminate contract or amount of damages, entitlement to interest, modify restrictive covenants, and others
Example of Scope Issues

- The breadth of the clause may preclude its application to tort claims, as opposed to those based in contract.
- In *Miguel v. Pro and David Landscape*, 2008 US Dist Lexis 100181 (D.N.J. 2008), the court noted that choice of law clauses using the language “govern and construed by” are broad enough to capture tort and contract, but clauses that simply say “construed under” are limited to contract claims.
- "[this] Agreement shall be construed under the laws of the State of California” did not include tort claims. *Caton v. Leach Corp.*, 896 F.2d 939, 942 (5th Cir. 1990).
Relationship to Choice of Forum

- E.g., in *N. Bergen Rex Transp. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999), the issue was the reasonableness of attorneys fees in a lease dispute.
- Though Illinois law was substantive, court held attorneys fees were procedural and examined the reasonableness of contractually permitted fees under New Jersey law, and not Illinois law.
Practice Pointer

- Raise the issue early in the drafting process, not when it is done
- Consider neutral jurisdictions if neither party concedes the other’s jurisdiction.
- E.g., consider New York as reasonable and established commercial venue
A Caveat

- When dealing with multiple contracts, consider a single choice of law clause
- If multiple choice of law clauses, consider how they interact
- Generally, courts review integrated documents as a whole and try to render them consistent and give effect to their purpose.
- E.g., a mortgage on New Jersey property governed by New Jersey law that secures a note governed by New York law
It is helpful to have broader language that applies to claims “relating to the relationship” between the parties, or words to that effect. In general, the broader the language in your choice of law clause, the better chance exists that a court will apply a contractual choice of law clause to tort claims as well.

"[this] Agreement shall be construed under the laws of the State of California” did not include tort claims. Caton v. Leach Corp., 896 F.2d 939, 942 (5th Cir. 1990).
Renvoi

- What if New York and Florida companies contractually provide for Florida law to apply, but the Florida court, under its conflict of law rules, determines that New York should apply?
- Many parties add “without regard to its own conflict of law principles,” or words to that effect, to avoid the issue.
Forum Selection Clauses

- Determines where disputes will be resolved
- Witness availability, local procedures, cost of dispute are all factors
- Can be mixed
- Mandatory preferred over permissive
- Applies to arbitration as well as litigation
- Federal, state, county courts
- One case where contract in German and provided for arbitration in Germany; US businessman failed to translate, signed and was bound
Factors in Choosing the Forum

- Costs of litigation—costs of traveling
- Need for witnesses
- Familiarity with decisions and practice
- Procedural rules
- Many others
Enforcement

- The Restatement (Second) of Conflict of Laws provides for the enforcement of a forum selection clause “unless it is unfair or unreasonable.”
- The comments make clear that statute may overrule such a forum selection clause, or that such will not be enforced based on “fraud, duress, the abuse of economic power or other unconscionable means.”

*Restatement (Second) Conflict of Laws, §80, Comment c (1988 Revisions).*
Types of Forum Selection Clauses

- A mandatory clause is one that requires the matter to be brought in a particular place, often by stating that the courts of a particular jurisdiction have “exclusive” jurisdiction, or that suit “must” be brought in a particular place, and so forth.
- “Will” has been held as mandatory as “shall,” and “must,” “only” or “exclusively” also should suffice to establish a mandatory clause. *Vogt-Nem, inc. v. M/V Tramper, West African Shipping Co., N.V.*, 263 F. Supp.2d 1226, 1231 (N.D. Ca. 2002).
Types of Forum Selection Clauses

- A permissive clause indicates that the court has “non-exclusive” jurisdiction or that the parties “may” bring an action in a particular place.
- A clause that is mandatory is given much more weight than one that is permissive. The clause should be clear.
Say what you mean:

“This constitutes an executory contract between the exporter and the above-indicated buyer. Place of jurisdiction is Sao Paulo/Brazil,” was held permissive since it “does not clearly specify that Sao Paulo is the only place of jurisdiction.” *Citro Florida, Inc. v. Citro-Vale, S.A.*, 760 F.2d 1231, 1231-32 (11th Cir. 1985).

Even where one uses the word “shall,” a court may find that to be permissive if the words “only” or “exclusively” are not used with it, on the grounds that “[j]ust because the contract establishes that venue lies in Florida does not mean that it cannot also lie elsewhere, as is the case here.” *Byrd v. Admiral Moving and Storage, Inc.*, 355 F. Supp.2d 234, 238-9 (D.D.C. 2005).
Why You Want a Forum Selection Clause

- Generally enforceable
- Eliminate uncertainty
- No guaranty, but increases chances of chosen forum
- Strong underlying policy: "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it could be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).
The Forum Should Have a Reasonable Basis

- Economic considerations also underlie policy reasons for enforcing forum selection clauses, even where they have not necessarily free negotiated, but the bound party was nonetheless on notice prior to entering into the agreement; such will be enforced where the parties were on notice of it and enforcement is not fundamentally unfair. *Carnival Cruise Lines v Shute*, 499 U.S. 585 (1991).
Forum Need Not Provide All Remedies

- Even where enforcement of the forum selection clause may, in connection with a choice of law provision, deprive a party of certain remedies, that is not enough to deny enforcement, provided it is not unreasonable and the parties still have comparable remedies. *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995)("
The Supreme Court clarified *Bremen* in *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988), in the context of 18 U.S.C. § 1404 to indicate that notwithstanding a forum selection clause, and the deference given it, a court must still evaluate a motion to transfer based on such a clause under the relevant statutory factors.
Click Wrap

- A clickwrap agreement is one that “appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.”). *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235-236 (E.D. Pa. 2007).
- Forum selection clauses will not be invalidated solely because they are contained within the clickwrap agreement. *Meier v. Midwest Rec. Clearinghouse, LLC*, 2010 U.S. Dist. LEXIS 68949 (E.D. Cal. July 9, 2010). They will be evaluated, however, in terms of the same factors of reasonableness; courts more likely to enforce where there was clear notice and an ability to review the terms.
The same concepts of notice and manifestation of consent will apply to contract formation issues relevant to choice of law and arbitration clauses, or any other clauses within the agreement, for that matter.

Leading case on clickwrap is *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 22 (2d Cir. 2002)(not enforced; plaintiff would have had to scroll down to a screen located below the download button, and this was held not to be sufficient notice)
Scope

- Scope of the choice of law clause defined what types of claims would be governed by that choice of law. The issue is the same with regard to forum selection. The language of the forum selection clause determines its scope. *Schering Corp. v. First Databank, Inc.*, 479 F. Supp. 2d 468, 470 (D.N.J. 2007).
Forum Non Conveniens

- Even where a forum selection clause is in force, or jurisdiction otherwise exists, a party may also seek another forum under principles of forum non conveniens. In other words, even if there is a proper forum, a party may seek to have the matter dismissed so that it may be heard in another country.
- Note that within the United States federal system, courts can transfer; if a non-U.S. venue is sought, the remedy is dismissal under forum non conveniens.
Before dismissing on the grounds of forum non conveniens, the court must find, first, that the alternative forum is "available," and second, the private interests of the parties and public policy considerations establish that the alternative is "convenient."

The generally strong presumption granted to plaintiff's choice of forum is lessened when the plaintiff is foreign.
Third Party Beneficiaries

- The Restatement (2d) of Contracts § 302 indicates establishment of a third party beneficiary where (1) the parties have not otherwise agreed; (2) recognition of the third party beneficiary is appropriate to effectuate the parties’ intention; and (3) the contract terms or circumstances surrounding performance show that either (a) performance of the promise satisfies and obligation or discharge of duty or (b) the promisee intends to give the beneficiary the benefit of the promised performance.
Enforcement of Rights

- An entity may enforce contractual rights if the entity was a signatory to the contract or, if not, it must either be in privity or be an intended beneficiary of the contract.

- An entity needs to show that the contract was made for its benefit. “It is not enough that the plaintiff may be benefited by the performance of the contract. He can only maintain the action when the contract is made for him.” *Brooklawn v. Brooklawn Housing Corp.*, 124 N.J.L. 73, 76 (E&A 1940)(citation omitted).
Intended versus Incidental

- Must be intended
- Incidental beneficiaries do not have rights of enforcement
- As a third party beneficiary of a particular contract, the party’s rights are limited to its terms and conditions, on the basis of a plain reading of such terms and conditions.
Whether a third party beneficiary is created is a function of the contact language.

Typical clauses may specify that there are no third party beneficiaries, or they may simply state that no persons other than those that are parties to the agreement have rights.

Generally enforce but not determinative; goes to intent.

A ‘no third party beneficiary” clause not enforced if it contradicts a statutory benefit or contrary to policy.
Waiver of Rights

- Several types of clauses that do different things
- Failure to enforce default does not mean waiver of rights: meant to preclude having other party use against you a failure to enforce in a particular instance
- Also is a contractual effort to avoid claims of estoppel
- Waiver generally requires clear and unambiguous intention to relinquish a right
Reservation of Rights

- Reservation of rights is meant to avoid application of the election of remedies doctrine, where a party may be held to have chosen one remedy over another.
- While can plead alternatively, useful to have a contractual provision that states all rights are reserved and all rights and remedies are cumulative.
- In insurance context, reservation of rights used to distinguish between duty to defend and ultimate coverage.
Example

- All of Seller's remedies shall be cumulative and not exclusive. Failure of Seller to exercise any remedy at any time shall not operate as a waiver of the right of Seller to exercise any remedy for the same or any subsequent default at any time thereafter. *Hooker v. Norbu*, 899 N.E.2d 655 (Ct. App. Ind. 2008)
Merger Clauses

- Purport to make an agreement the “complete and exclusive” (fully integrated) agreement.
- Legal effect of contract *with* a merger clause: Courts generally will give merger clause conclusive effect absent fraud, misrepresentation, or mistake.
- Legal effect of contract *without* a merger clause: Parol evidence rule applies to determine if disputed term is barred: common law test (would the parties *naturally and normally* include the term at issue in this type of writing?) versus UCC test (would the parties *certainly* have included such a term in the writing?)
The limits of merger clauses:

-Fraud: most jurisdictions hold that fraud, without restriction, is admissible to challenge the validity of a written agreement. See, e.g., Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association, 2013 Cal. LEXIS 253 (2013).

-Post-formation events: oral modifications, waiver, estoppel, post-formation warranties, and course of performance.
Negating “invisible terms”: Trade usage, course of dealing, and course of performance are “invisible terms” of the contract and not just interpretation devices (Restatement (Second) of Contracts § 202(4) - course of performance; § 222 - usage of trade; and § 223 - course of dealing; UCC § 1-303).

Trade usage and course of dealing can be “carefully negated” by using words in addition to the standard integration or merger clause. Precision Fitness Equip., Inc. v. Nautilus, Inc., 2011 U.S. Dist. LEXIS 13576 (D. Colo 2011).
• Course of performance *cannot* be negated because it occurs after contract formation.
Multiple Documents

- There may be multiple documents for different aspects of the transaction (e.g., real estate -- mortgages, notes, security agreements)
- Explain the deal (the reason for multiple documents) in the recitals
- Make sure documents as integrated are consistent or, if not, there is a reason for the inconsistency
- Clear incorporation of external exhibits or references
- If out of sync with rest of contract, not taken seriously
- Courts look to substance over form
Multiple Documents (cont’d)

- Maintain a standard set of terms and conditions.
- Deviation: state clearly that they govern, notwithstanding anything to the contrary in the terms and conditions document; understand what is being given up and what is gained.
- Multiple documents should cross reference each other and have an order of priority of application.
- Use riders to avoid wholesale renegotiation.
- Clear incorporation of external exhibits or references
Use of Schedules and Incorporation

- Be specific when incorporating by reference, even to the point of attaching the referenced documents as exhibits, schedules or appendices to the agreement. The more you can eliminate uncertainty, the better chance you have of having your incorporated documents enforced.
Contemporaneous Documents

- Where various documents executed at or about the same time, as part of a single transaction, are involved, as secured transaction
- If expressly incorporated or referenced, the court will rely upon general principles to read them together.
- If they are, the court may be faced with inconsistent, if not diametrically oppose, terms that need to be construed.
Modified Documents

- Where there is a modification or amendment to an existing agreement which does not affect the entirety of the agreement, and the party wants to ensure only that the changes supersede certain terms, spell it out clearly in the modification or amendment.
Assignment Clauses

- Anti-assignment clause requires specific language
- If just anti-assignment, remedy is for breach, and money damages only will be awarded
- But if the contract says an attempted assignment is “void ab initio” or equivalent, then the transfer has no effect
- Spell out exceptions to anti-assignment clause (E.g., “a sale of all or substantially all of a party’s assets shall be deemed an assignment.”)
Notice

- Use positions, not individuals
- Not always need to copy attorneys
- Method of notice: is it antiquated?
- When is notice effective?
Evergreen/Renewal

- Can set a definite term, requiring affirmative renewal
- Can set for automatic renewal, and deadlines for non-renewal
- Make sure address interim periods between notice and effective dates, and what happens after termination
- Did we mention: think through the what ifs?
  - E.g., commissions based on sales during the interim period?
Arbitration and Litigation

- Arbitration is binding, out of court resolution; contract must be clear as to what and who, and applicable rules
- Mediation (non-binding facilitation)
- Litigation is traditionally in-court resolution
- A court will generally apply its own procedures and the chosen law
- Arbitration awards generally enforceable by treaty; at present no treaty for enforcement of foreign judgments
A sample clause:
All disputes, controversies, or claims arising out of or relating to this contract shall be submitted to binding arbitration with the applicable rules of the American Arbitration Association then in effect.

Scope important to determine what is arbitrable

- IBA Guidelines for Drafting International Arbitration Clauses
- AAA Drafting Dispute Resolution Clauses
Enforceability of Arbitration

- Must be in writing; public policy in favor of
- Recent NJ decision did not enforce arbitration clause in consumer contract because the waiver of right to jury trial not conspicuously or fully expressed
- Hall Street limits contractual rights to shape appeal
Practical Considerations

- Supposedly faster, private, confidential, cheaper, though not all agree
- Scope of clause determines issues and authority
- Rules of evidence do not apply unless specified
- Dealing with vacancies, discovery, emergencies
- Lesson: think through and specify
ARBITRATION AND CLASS ACTION

- *Mastrobuono*: general choice of law clause does not override arbitral rules
- *Green Tree Financial Corp*: arbitrator decides whether contractual clause permits class arbitration
- *Stolt-Nielsen*: class action must be specified
- *AT&T MOBILITY*: upheld the validity of class action waivers in arbitration clauses
- New IBA Rules on Taking of Evidence
Checklists

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<td>• Dealing with vacancies; no clear answers where the matter is not dealt with by contract.</td>
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IBA Rules on Taking of Evidence

- Issued as a resource to parties and arbitrators
- Adopt in arbitration clause in contract
- Provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of hearing
- Used together with the regime’s rules

‘[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].’
Limitations of Damages

- Clauses that limit the *type* of damages, the *amount* of damages, or a *liquidated damages* clause.
- Generally enforceable as long as not a penalty, and as long as does not allow contract to fail of its essential purpose
- Used when damages may be difficult to estimate.
- Warranty: repair and replace; scope, choice, who decides
- Define consequential, incidental, lost profits
- Statutory formulas (UCC)
Liquidated Damages

- A sample clause:
  If Seller breaches its obligation to deliver goods in accordance with the schedule provided for in this contract, Buyer shall have the option to recover $x per day for each day of delay as liquidated damages.

- Parties to a contract may provide for anticipatory damages in the event of failure to complete performance within the time specified, as long as such agreement is neither unconscionable not contrary to public policy.” X.L.O. Concrete Corp. v. John T. Brady and Co., 104 A.D.2d 181 (1st Dep’t 1984)

- “A clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy.” Smith-Hoy v. AMC Property Evaluations, Inc., 52 A.D.3d 809 (2d Dep’t 2008).
Injunctive Relief

- Contracts often contain “consents” to injunction
- Rarely enough on its own to warrant an injunction
- Courts still do their own analysis
Willful Misconduct and Malice

- Used an as exception to limitations of damages
- Difficult to prove, as no real “negligent” breach of contract; all breaches are intentional as a rule
- Creates litigation issues
Interest

- Not mandatory in all jurisdictions for breach
- Default interest enforceable to extent not a penalty or usurious
- If not by statute or contract, may be discretionary with court
Exculpatory Clauses

- Exculpatory clauses immunize a party from liability for its own misconduct.
- Will not be enforced when, "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing." *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 N.Y.2d 20 (1998)
- Not necessarily contract enders, but safe harbors.
A jury trial waiver provision may read as follows:

Each of the Parties hereby waives, to the fullest extent permitted by law, any right to trial by jury of any claim, demand, action, or cause of action (a) arising under this Agreement or (b) in any way connected with or related or incidental to the dealings of the Parties in respect of this Agreement or any of the transactions related hereto, in each case whether now existing or hereafter arising, and whether in contract, tort, equity, or otherwise.

ABA studies reflect a moderate trend to include the provision in M & A agreements.
Choice of Law

- Where a jury waiver clause is sought to be enforced in the forum state, but it is contained in a contract with a choice of law provision applying the law of another state, the forum state is not bound by the chosen law, in determining validity of the jury waiver.
Ability to Waive

- In federal courts, waivers of constitutional rights (such as right to jury trial) must be knowing, voluntary and intelligent.
- In state courts, the federal test is generally used to determine enforceability, but some will presume enforceability unless proof of unconscionability, fraud, or duress.
- California, North Carolina, and Georgia have expressly held pre-litigation jury waivers are unenforceable.
Upsides & Downsides of Jury Waiver

• Pros:
  o Cost Savings
  o Certainty
  o Complexity of Issues
  o Potential jury bias

• Cons
  o Surrender of Constitutional right
  o Judge as fact finder
  o Enforceability
  o More litigation
Where an action involves both legal and equitable remedies and the facts are related, a court may order a jury trial on the particular legal issues, and reserve the equitable issues for bench determination. *Colorado Visionary Academy v. Medtronic, Inc.*, 397 F.3d 867 (10th Cir. 2005)

Should be conspicuous

Jury waiver may not always be mutual. In other words, only one party may have waived it. Under such circumstances, at least one court has held that such a lack of mutuality is not enough to establish unconscionability. *Ex parte Roy Isbell and Carroll Isbell*, 708 So. 2d 571 (Ala. 1997).

A court will interpret the scope of a waiver of jury provision in the same way it interprets the scope of an arbitration clause or any other clause that purports to define its applicability.
“Force majeure” is a French phrase meaning superior force.

Black’s Law Dictionary: “an event or effect that can be neither anticipated or controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).” Not reasonably controlled by either party.

Political eventuality, currency fluctuations, change of law—while not necessarily force majeure, can be a defined condition.
A sample clause:

If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.

Impossibility/impracticality of performance—NOT defenses in all cases

Economic hardship NOT generally a defense—but can structure agreement with benchmarks

If you want to remove all doubt be specific
Force Majeure (cont’d)

- UCC: must perform unless “impracticable”
- CISG: “the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”
- So: can have force majeure, and limit to duration of event, but can also deal with exigencies in other parts of contract
Impossibility

- Impossibility excuses performance under a contract only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible, and that impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).
Frustration of Purpose

- Related to but different from impossibility of performance is frustration of purpose. Frustration of purpose requires proof of an unforeseen event which destroys the underlying reasons for performing the contract so that, even if performance is possible, the party is discharged. *Bank of America v. Encases Venezuelans, S.A.*, 740 F. Supp. 260, 266 (S.D.N.Y. 1990), *aff’d w.o. opinion*, 923 F.2d 843 (2d Cir. 1990).

- Financial disadvantage is not enough.
Conditions

- “There are two kinds of conditions — precedent and subsequent. A condition precedent is one that is to be performed before the contract becomes effective, while a condition subsequent pertains to the contract of insurance after the risk has attached and during its existence." Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. Ct. App. 1995)
Conditions Precedent

- A "condition" whether it be "precedent" or "subsequent" may be either express, implied in fact, or constructive.

- Conditions precedent" are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.

- *Ross v. Harding*, 64 Wn.2d 231 (1964)
Determination

- Depends upon the intent of the parties, ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances. Any words which express, when properly interpreted, the idea that the performance of a promise is dependent on some other event will create a condition. Phrases and words such as "on condition," "provided that," "so that," "when," "while," "after," or "as soon as" are often used.

- *Ross v. Harding*, 64 Wn.2d 231 (1964)
If there is a valid condition precedent, then the specified fact must exist or occur before a duty of immediate performance of a promise could arise.

Consequently, if the condition precedent is not satisfied, the other side may be excused, the contract may be deemed void—it will depend upon how the condition and the contract is structured.

Ross v. Harding, 64 Wn.2d 231 (1964)
One party reserves the right to terminate a contract upon the occurrence of a condition subsequent, so the contract is enforceable and not void. *Flood v. ClearOne Communications, Inc.*, 618 F. 3d 1110 - Court of Appeals, 10th Circuit 2010
Parties will be held to the conditions and if the condition is a condition subsequent, and not met, or waived, then the parties' obligations to each other are extinguished. *Coviello v. Richardson*, 76 Mass. App. Ct. 603 (2010)

- E.g., mortgage contingency
- Again, good faith requirements
Think prophylactically
Read and understand the contract in terms of the business deal
Do not accept “boilerplate:” there is no such thing
Recognize the differences in foreign law and foreign culture (legal and otherwise)
When you get pushback on points your lawyer tells you are important, think twice
It is all about managing and assessing risk