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Boilerplate Clauses in Contracts: Avoiding Unintended Consequences

Common Pitfalls and Practical Solutions for Standard Contract Provisions

TUESDAY, MAY 17, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Robert D. Frawley, Law Offices of Robert D. Frawley, Morristown, N.J.

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Boilerplate Clauses in Contracts: Avoiding Unintended Consequences

May 17, 2011

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Choice of Law

“Everything and everyone is in State X, but
... the law of State Y applies.”

Choice of Law

“This Agreement shall be governed by and construed in accordance with the law of State X.”

Choice of Law

“All claims arising from or related to this Agreement shall be governed by the laws of State X.”

Choice of Law

“All claims arising from or related to this Agreement shall be governed by the laws of State X, ***excluding any choice of law rules that would direct application of the laws of another jurisdiction.***”

Forum Selection

“All disputes arising from or related to this Agreement shall be adjudicated by the courts located in State X.”

Forum Selection

“All disputes arising from or related to this Agreement shall be adjudicated ***exclusively*** by the courts located in State X.”

Forum Selection

“All disputes arising from or related to this Agreement shall be adjudicated exclusively by ***the state or federal court located in County X.***”

Forum Selection

“All disputes arising from or related to this Agreement shall be adjudicated exclusively by the state or federal court located in County X. ***Each party consents to personal jurisdiction in such state or federal court, and waives any right to challenge, dismiss or transfer any such action based on inconvenience of the forum.***”

Choice of Law and Forum Selection Check List

1. Know the Law
2. Reasonable Basis
3. Define Claims
4. Exclude Choice of Law Rules
5. Match the Law with the Forum
6. Exclusivity of Forum
7. Venue
8. Available Courts
9. Consent to Jurisdiction
10. Waiver of Convenience Objection

Merger Clause

“This Agreement, together with all Exhibits referenced herein, constitutes the entire agreement between the Parties in relation to the Subject Matter of this Agreement and supercedes all prior agreements, understandings and commitments, whether oral or in writing, between the Parties.”

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Merger Clause

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Merger Clause Checklist

1. Define the Agreement
2. Expressly Exclude Reliance
3. Representation of Exclusive Reliance on Party's own Due Diligence
4. Future Amendments and Modifications

The Big Deal

- Big Deal can mean Big Mess
- Plan ahead
- Be consistent
- Merge for clarity's sake

haynesboone

Setting precedent.

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BOILERPLATE CLAUSES IN CONTRACTS

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DUANE MORRIS

BOILERPLATE CLAUSES IN CONTRACTS: AVOIDING UNINTENDED CONSEQUENCES

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Parties should draft with the end game in mind, and with awareness of the particulars of the chosen law:

Arbitration clauses—the how

Limitation of Damages—the amount

Third Party Beneficiaries—the who

Jury Waiver—the how

Arbitration Clauses: The Why

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- **Factors in opting for arbitration:**
 - assumed to be less expensive
 - lacks extensive discovery and motion practice
 - generally confidential
 - presumed faster
 - considered more flexible as to evidence
 - can be tailored to particular industry
 - ability to choose rules and fact-finders

Arbitration Clauses: The What

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- Need for writing (FAA 9 U.S.C. Section 2)
- Can't be compelled if no agreement, but may be found to have agreed through agency or otherwise
- Make sure multiple documents are consistent
- Identifying the regime, rules and forum
- Scope and subject
- Discovery, privilege and rules of conduct/evidence
- Arbitrators: number, disqualification, designated and vacancy

Class Action and Arbitration Clauses

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- Class action waivers in arbitration agreements are enforceable—*AT&T Mobility v. Concepcion*, –U.S.– (2011)
- Where contract silent, class action arbitration will not be compelled. *Stolt-Nielsen v. AnimalFeeds Int'l*, 130 S. Ct. 1758 (2010)
- Arbitrator determines if contract silent regarding class arbitration. *Green Tree Financial Corp. v. Bazzle*, 539 US 444 (2003) (plurality)

Arbitration Clauses: Short Form

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- **All claims, disputes, controversies and causes of action arising out of or relating to this Agreement and its subject matter, and all transactions it contemplates, including without limitation, the validity, interpretation, construction, performance and enforcement, in the broadest possible way, including tort claims between the parties (“Dispute”), shall be determined by arbitration administered by the American Arbitration Association (“AAA”) in accordance with its International Arbitration Rules including its International Mediation Rules, and its applicable Procedures for Large, Complex Commercial Disputes.**

Limitation of Damages: The Why

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- Seek to limit kinds and amounts of damages
- “Willful misconduct” *Metropolitan Life Insurance Company v. Noble Lowndes International, Inc.*, 84 NY 2d 430 (NY 1994).
- Different from exculpatory clause, that immunizes from certain substantive conduct. *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F. 3d 195 (3rd Cir. 1995)

Liquidated Damages—Hybrid Issues

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- **Liquidated damages clauses anticipate amount of loss or set caps; generally enforceable unless penal**
- **Not to be confused with limitation of remedies**
- **Need not be reciprocal**
- **Apportionment of risk**
- **Watch multiple documents and impact of cumulative remedies or possibly contradictory provisions**

Limitation of Damages: The What

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- “(a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform. *Restatement (Second) of Contracts §347.*
- Direct damages flow naturally; consequential damages from special circumstances not ordinarily predictable. *Long v. Abbruzzetti* 254 Va. 122 (1997)
- Punitive (exemplary) damages meant to punish

Limitation of Damages: The How

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- **Understand the definitions under the chosen law: what are compensatory, actual, general, special and consequential damages?**
- **Uniform Commercial Code: general, consequential and incidental damages**
- **Lost profits may be recovered, if not speculative**
- **Do not overreach and risk unconscionability or failure of essential purpose**

Limitation of Damages: Sample Clause

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- . . . Seller will not be responsible or liable for any form of consequential, incidental, or indirect damages of whatever kind or type arising from any type of commercial, business, environmental, tort, warranty, contract, strict liability, or other cause(s) arising, directly or indirectly, from or in connection with the equipment and/or its use. Not by way of limitation, Seller shall not be liable for any losses to Buyer based on down time, spoilage, lost production or lost profits. It is the intention of the parties that this provision be construed by a court as being the broadest limitation of liability consistent with applicable law. In [no] event shall Seller be liable for damages which exceed the monies paid by Buyer to Seller for the equipment less the value of the benefits received by Buyer and the value of the equipment. *Leanin' Tree, Inc. v. Thiele Techs*, 43 Fed. Appx. 318 (10th Cir. 2002)

Third Party Beneficiaries: The What

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- **Clauses can either deny existence or specify TPBs.**
- **TPBs have legal ability to enforce contract rights**
- **Restatement (2d) of Contracts § 302 establishes TPB where (1) parties not otherwise agreed; (2) recognition of TPB appropriate to effectuate parties' intention; and (3) the contract terms or circumstances show (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.**
- **Status determined by choice of law in contract**

Third Party Beneficiaries: The How

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- Only intended, not incidental, TPBs can enforce contract
- Intent is determined by (1) existence of a contract, (2) the contract intended for the third party's benefit, and (3) the benefit is immediate and not incidental.
Chen v. Street Beat Sportswear, Inc., 364 F. Supp. 2d 269 (E.D.N.Y. 2002)

Third Party Beneficiaries—Sample Clause

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- **This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a party to this Agreement.**
- **Except as set forth in [Article X], which are expressly intended to be for the irrevocable benefit of, and shall be enforceable by, each identified class of parties, nothing in this Agreement, expressed or implied, is intended to confer upon any Person, other than the parties hereto or their respective successors, any rights, remedies, obligations or liabilities under or by reason of this Agreement.**

Jury Waiver: The Why

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- **Constitutional right issues “so triable”**
- **“So triable” means at common law, so legal, not equitable claims**
- **Factors:**
 - Complexity of issues
 - Docket backlog
 - Flexibility of court on evidence
 - Ability to try case “in pieces” over time
 - Expense

Jury Waiver: The How

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- Federal courts, diversity or otherwise, federal law whether jury trial is warranted; federal law determines whether claim is legal or equitable.
- Mechanics of demand governed by rule or statute
- Generally waivable if knowing, intentional, voluntary: but not in California and Georgia
- No need for mutuality as to who can assert; once raised, consent of all parties to withdraw
- If clause not conspicuousness, may result in unconscionability finding

Jury Waiver: Choice of Law

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- Federal question and diversity cases look to federal law to determine whether a jury trial is warranted; federal law will determine whether the claim is legal or equitable. *Simler v. Conner*, 372 U.S. 221 (1963)
- State law is relevant in determining the elements of the cause of action, but the ultimate analysis as to characterization implicates federal law to determine whether a jury is appropriate. *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120 (1st Cir. 1992).

Jury Waiver: Scope

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- 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. *See, e.g., Colorado Visionary Academy v. Medtronic, Inc.*, 397 F.3d 867 (10th Cir. 2005)

Jury Waiver—Sample Clause

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- **MAKER HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS NOTE, THE MORTGAGE [DEED OF TRUST] AND THE OTHER SECURITY DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY MAKER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. PAYEE IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY MAKER.**

Final Comments

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- **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 you believe are important, think twice**
- **It is all about managing and assessing risk**
- **Pay attention to choice of law**

FOR FURTHER INFORMATION

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Boilerplate Clauses in Contracts: Avoiding Unintended Consequences

Tuesday, May 17, 2011

ROBERT D. FRAWLEY
MORRISTOWN, NJ



CLAUSES TO BE REVIEWED

- ASSIGNMENT
- NOTICE
- WAIVER
- FORCE MAJEURE
- SEVERABILITY
- SURVIVAL
- COUNTERPARTS



ASSIGNMENTS

- **Assignments.** COMPANY may not assign, subcontract transfer or delegate this Agreement, any Statement of Work or any work required to be done or the right to receive any payments to be made hereunder without ABC's prior written approval. No invoices may be rendered by parties other than COMPANY without ABC's written permission. Any assignment, subcontract, transfer or delegation in contravention of this Section shall be null and void and of no effect.



ASSIGNMENTS

- REASONS FOR ASSIGNMENT CLAUSE
- CONTRACTS GENERALLY ASSIGNABLE
- VOID VS. BREACH
- CONTINUED LIABILITY OF ASSIGNOR



NOTICE

- **Notices.** Any notice to be given hereunder shall be in writing and delivered personally or sent by facsimile transmission or registered or certified mail, return receipt requested, postage prepaid, to the address first above written, or such other address as either party may designate by written notice to the other. Notices shall be deemed received at the earlier of actual receipt or three business days following mailing.



NOTICE

- FORM VS. SUBSTANCE-- ACTUAL NOTICE TRUMPS
 - BRUNSWICK HILLS RACQUET CLUB, INC. v. ROUTE 18 SHOPPING CENTER ASSOCS., 182 N.J.210 (N.J. 2005)
- RIGHT PARTIES MUST RECEIVE NOTICE
 - DENESEVICH v. MORAN, 211 N.J. SUPER. 554 (APP.DIV. 1986)
- NOTICE MUST CONTAIN REQUIRED CONTENT
 - ALSENTZER v. BULBOFF, 2006 N.J. SUPER. UNPUB.LWXIS 816 (APP. DIV. JAN 26, 2006)



WAIVER

- **No Waiver of Rights.** The failure of ABC to insist upon the strict observation or performance of any provision of this Agreement, or to exercise any right or remedy shall not impair or waive any such right or remedy in the future. Every right and remedy given by this Agreement to ABC may be exercised from time to time as often as appropriate. All remedies, either under this Agreement or by law or otherwise afforded, will be cumulative and not alternative.



WAIVER

- GENERAL RULE:
 - BREACH CAN BE WAIVED IN WRITING , BY COURSE OF DEALING, OR PASSIVE CONDUCT
 - WHEN A PARTY FAILS TO DECLARE BREACH OF CONTRACT AND
 - CONTINUES TO PERFORM AFTER LEARNING OF THE BREACH,
 - IT MY BE DEEMED TO HAVE ACQUIESCED IN AN ALTERATION OF THE TERMS OF THE CONTRACT
 - GARDEN STATE BLDGS, L.P. v. FIRST FIDELITY BANK, N.A. 305 N.J.SUPER 510 (APP.DIV. 1997)



WAIVER

- THE WAIVER CLAUSE PROVIDES THAT DELAY IN ENFORCEMENT DOES NOT PREJUDICE A PARTY'S RIGHTS
 - LITTON INDUS. v. IMO INDUS. 2008 N.J. SUPER, UNPUB. LEXIS 394 (APP. DIV. JAN 28, 2008)



FORCE MAJEURE

- **Force Majeure.** If the performance or observance of this Agreement or of any obligation herein, **except the payment of money**, is prevented or delayed by reason of an act of God, civil commotion, storm, fire, riots, strikes, legal moratorium, war, revolution or action by government, the party so affected shall, upon prompt notice of such cause being given to the other party, be excused from such performance or observance to the extent of such prevention or during the period of such delay, provided that the party so affected shall use its best efforts to avoid or remove the cause or causes of non-performance and observance.



FORCE MAJEURE

- Force majeure is defined generally as
 - any event or condition,
 - not existing as of the date of signature of the contract,
 - not reasonably foreseeable as of such date and
 - not reasonably within the control of either party,
 - which prevents, in whole or in significant part, the performance by one of the parties of its contractual obligations, or
 - which renders the performance of such obligations so difficult or costly as to make such performance commercially unreasonable.



FORCE MAJEURE

- PAYMENT OF MONEY?
- SHOULD BE DESIGNED WITH THE CLIENT/TRANSACTION IN MIND
- UNFORESEEABLE EVENT MUST BE THE CAUSE OF THE DELAY
 - GLEN HOLLOW PARTNERSHIP ET AL v. WAL-MART STORES, INCORPORATED 1998 U.S. APP. LEXIX 3214 (7TH CIR. 1997)



FORCE MAJEURE

- EXAMPLE OF SPECIFIC FORCE MAJEURE CLAUSE:
 - (i) Alien abduction, invasion, possession or interference. As used herein, "alien" means a life form, whether or not carbon-based, from any other time, world, galaxy, universe, or dimension, and includes angels, Lucifer and his minions, and/or Yeti (a/k/a/ bigfoot). For avoidance of doubt, "alien" does not mean a foreign national without a work visa.
 - BLOG: The Fine Print: Musings of a Corporate Contracts Lawyer. Chadwick C. Busk



SEVERABILITY

- **Severability.** If any term or provision of this Agreement or the application thereof shall be invalid or unenforceable, the remainder of this Agreement shall be unaffected thereby and each remaining term or provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.



SEVERABILITY

- GENERALLY REFLECTS THE COMMON LAW
 - If striking the illegal portion defeats the primary purpose of the contract, the entire contract will be unenforceable.
 - If the illegal portion does not defeat the central purpose of the contract, we can sever it and enforce the rest of the contract.
 - JACOB v. NORRIS ET AL. 128 N.J. 10 (N.J. 1992)



COUNTERPARTS

- **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. **This Agreement will take effect upon execution by both parties.**



COUNTERPARTS

- SOME CASES ARE QUITE OLD
 - PERRINE v. CHEESEMAN, 11 N.J.L. 174 (SUP. CT. 1829)
- CLAUSE IS USED TO DETERMINE WHEN A CONTRACT COMES INTO EXISTENCE
- CONTRACT MAY BE SIGNED IN COUNTERPARTS AND THEN REVOKED BEFORE DELIVERY
 - SORENSON v. BRAHVER 2007 NY SLIP OP 6662 (N.Y. APP.DIV.2D DEPT 2007)
 - SCHWARTZ v. GREENBERG, 304 N.Y. 250 (N.Y. 1952)



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