THE **HOW**, **WHAT** AND **WHY** OF **BOILERPLATE** PROVISIONS IN YOUR CONTRACTS

by Robert Erven Brown and Tyler J. Carrell

IF YOU HAVE EVER SIGNED A FORMAL LEGAL DOCUMENT, LIKE A MORTGAGE, AN EMPLOYMENT CONTRACT, OR A LEASE, THEN YOU MAY HAVE WONDERED WHY THE CONTRACT HAS SO MANY WORDS! WHY IS THIS SO LONG? SO MUCH "BOILERPLATE!"

Here is a short answer: Over hundreds of years of experience, the legal profession learned (often the hard way!) that there are many "conceivable" issues which can, and frankly should, be addressed in a contract. Even though most of these issues do not appear in every situation, experience has taught that it is prudent to address as many of these issues as possible in all contracts.

If you take the time to read the contract and the time to discuss the clauses with your legal counsel, then you will discover there is a pattern in these provisions. You will start to notice that some of these provisions appear in nearly every legal transaction. Here are some examples of common "boilerplate" and a quick explanation of the protection provided by these time-tested provisions.

GOVERNING LAW; VENUE

When your contract includes items or people located in more than one state, you can legally specify where, how, and under which state law contract disputes will be resolved. Rules announced by the courts in previous decisions (referred to as the "case law") permit the parties to that transaction to jointly specify:

- where the dispute will be resolved,
- which court (or arbitrator) will rule on the dispute, and
- which state law will govern interpretation the contract if a dispute arises.

For example, the laws of Arizona and the laws of Nevada contain different requirements for giving notice in the event of default. The "governing law" provision will specify which law will control resolution of the dispute and interpretation of the contract. If the parties do not specify which law is to govern, then the court will apply a complex series of balancing factors arising from the United States Supreme Court "choice of law" decisions to determine the outcome. Unfortunately, it is very difficult for your attorney to predict how a given trial court will apply these factors.

By naming a specific state in which disputes are to be resolved, the parties reduce the number of issues in dispute, thus shortening the litigation. For example, you can require that the lawsuit be filed only in Arizona, and then only in the Maricopa County Superior Court located in Phoenix, Arizona. The parties could specify that Nevada law would govern interpretation of the contract ("choice of law"), even though the Arizona Court will handle the case ("venue" provision), but even if the governing law and venue are separate provisions, they are rarely, if ever, in conflict.

ALTERNATIVE DISPUTE RESOLUTION (ADR) OR ARBITRATION PROVISION

ADR provisions have become increasingly popular over the last two decades or so

due to their effectiveness in reducing legal expense and delay by avoiding the civil court system. If the parties fail to include an ADR provision in their contract, then disputes will be resolved by the civil court system when a dispute arises over the interpretation of the contract or a contract breach occurs. Due to the wide range of types of disputes handled by this system, the rules of procedure are lengthy and complex. Due to the massive number of legal suits processed by this system, it may take years to obtain a final judgment.

A well-drafted ADR provision avoids this log jam by specifying an expedited manner of resolving the dispute in a less formal setting. This clause can be used to limit the scope and amount of "discovery" which the parties may conduct, i.e., limit the number of depositions, interrogatories, documents to be produced, etc.

Typical ADR provisions include procedures for selecting an arbitrator (i.e., the person or persons who will serve as the judge/jury). The parties may specify whether the dispute will be resolved by a single arbitrator or by an arbitration panel. If the panel is used, it is common for each party to select one arbitrator and then those two arbitrators will select the third arbitrator. Some provisions require the arbitrator to have specialized skills or experience, such as using an architect to resolve design disputes.

The theory behind ADR is that the parties should be able to craft a unique, legally binding dispute resolution procedure to deal with their own specific type of dispute, rather than being bogged down in the general civil litigation system whose judges may have no subject knowledge about the dispute in question. This is particularly true in technical areas involving construction, tax law, engineering questions, etc.

SEVERABILITY; WAIVERS

A "Severability" clause preserves the remainder of a contract when one provision is invalidated by a court. This tactic prevents an "all or nothing" approach to enforcing a contract. Thus a successful challenge to one provision of a contract does not invalidate the entire agreement. The "Severability" provision allows a court to strip the defective provision from a contract while continuing to enforce the remainder of the contract.

ATTORNEYS' FEES

When the terms of the contract fall into dispute, the parties want to minimize the legal expense of resolving the dispute. One method for reducing legal costs is a provision awarding the successful party its attorneys' fees and costs. (Even if this provision is not included, some states allow the court to award attorneys' fees to the prevailing party by statute.) The hope is that this provision discourages frivolous litigation by punishing the losing party by forcing it to reimburse the prevailing party's legal fees and costs.

COUNTERPARTS

The "counterparts" provision usually appears near the end of a contract; it provides that the contract is legally binding even though all the signatures are not contained on the same piece of paper. This has become a common practice for signing real estate contracts and (in the case of litigation) settlement agreements. This speeds up the signing process since one piece of paper does not have to "make the rounds" to the offices of all of the signers.

This provision allows use of an email to send a copy of the contract as an attachment to the signers. They print the contract, sign it, scan the signed page, and email a copy back to the other parties and to legal counsel. The "counterparts" provision ensures that even though the parties did not sign the same page of the contract, the contract is legally enforceable.

ALLOCATING AND TRANSFERRING RISK

When you analyze your contract as a risk transfer document, you begin to gain insight into the process of allocating risk between the parties to the agreement. These "boilerplate" provisions are a critical part of the risk allocation process.

So, before you grab your red pen to strike a paragraph here and there to "shorten" the proposed contract, prudence would suggest that you speak with your legal counsel to obtain a full understanding of what the clause means and why it was included in agreement. These clauses evolved over, literally, centuries of use to protect you from risks and potential dangers that may not be obvious on the surface of your agreement.

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