

Boilerplate: Reading Between the Lines

Prepared for:

Corporate Counsel Dinner

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Advocates, Business Partners, Collaborators?



“This is the only copy that marketing and legal could agree on.”

Which Collaborators Need to Read the Agreement?

- Principals handling the transaction
- Specialists with in-depth knowledge of the area in question
- Attorney(s) representing the client

Need to promote a cohesive, collaborative, comprehensive approach

Remember:

- Principles and Transactional Attorneys Read Agreements Top to Bottom
- Litigators Read Agreements Bottom to Top
 - Look for loopholes due to statutory or commercial discrepancies

Boilerplate Clauses

- Lawyers and judges often refer in a disparaging manner to “boilerplate”.
- “Boilerplate” is just a term used to describe standardized language.
- Often are viewed as non-controversial. As a result, often times parties do not spend much time negotiating the terms.
- “Boilerplate” could have significant practical implications for parties.
- Weighing which provisions are necessary and appropriate for the transactions are critical for the business lawyer, and determinative for litigators.
- Key Principles:
 - **Subjects** of boilerplate clauses are familiar to business lawyers.
 - **Language and effect** of these clauses are both varied and variable.

Boilerplate Clauses

1. Choice of Law
2. Forum Selection Clauses
3. Entire Agreement (Oral Modifications)
4. Severability
5. Assignment
6. Waiver of Jury Trial
7. Expenses
8. Attorneys' Fees
9. Further Assurances
10. Public Announcements
11. Notices
12. Interpretation
13. Headings
14. Amendment and Modification
15. Waivers
16. Cumulative Remedies
17. Equitable Remedies
18. Successors and Assigns
19. No Third-Party Beneficiaries
20. Force Majeure
21. Joint and Several Obligations
22. Relationship of the Parties
23. Business Days
24. Time is of the Essence

1. Choice of Law

This Agreement and any controversy arising out of or relating to this Agreement shall be governed by and construed in accordance with the State of [state].

General Principles

1. Generally Enforceable

2. What it Covers → What It Doesn't Cover

- Chose of Law clause governs parties' agreement.
- Depending on the text potentially unlikely to cover other matters "relating to" the relationship of the parties, such as statutory or tort claims.

3. Law Chosen Must Either

- Bear a "substantial relationship" to either the transaction or parties, or
- Some other reasonable basis for the parties' choice.

4. Public Policy Considerations are Also Important

Choice of Law: Substantial Relationship

- **In general, jurisdiction selected must bear a “substantial relationship” to either the parties or transaction, or there must be some other reasonable basis for the parties’ choice.**
- **Several states (including California) allow parties to choose state law regardless of whether the state bears a “substantial” or “reasonable” relationship to the parties or transaction, so long as:**
 - Contract involves a set minimum amount of money and transaction is not for labor or personal services or personal, family, or household purposes.
California: \$250k; NY: \$250k; Delaware: \$100k
- **To the extent the litigation occurs in another jurisdiction, courts might not uphold the opt-in if there is no “substantial” or “reasonable” relationship**

Choice of Law: Public Policy Considerations

- **Several states have rules restricting contractual choice of law in certain types of contracts, such as franchise agreements or insurance policies.**
- **If there is a “Substantial Relationship” to selected jurisdiction, must determine whether a fundamental policy of an applicable state would be violated.**
 - In California, for instance, if a conflict exists, courts must determine whether state has a **materially greater interest** than the selected jurisdiction when determining enforceability of choice of law provision.

Examples: non-competition arrangements, reciprocity of attorney fees.

- Delaware Chancery Court in *Ascension Ins. Holdings, LLC v. Underwood*, 2015 WL 356002 (Del. Ch. Jan. 28, 2015) refused to enforce Delaware choice of law and venue when Delaware was asked to enforce a non-compete clause for CA resident that was void in California.

Choice of Law: International Considerations

- **Because treaties or conventions are deemed to be part of state law, to opt out of a treaty or international convention, when permitted, the choice-of-law clause must do more than merely choose a particular state's law.**
 - The parties must expressly exclude application of the treaty or convention if they want it not to apply.
 - Example:

This Agreement shall be governed by the laws of the State of California without regard to any conflict-of-laws rules, and the United Nations Convention on Contracts for the International Sale of Goods is hereby excluded.

- **In general, otherwise effective contractual choice of law provision will not govern contract formation questions.**
 - Thus, even if language in the contract tries to opt out of treaties, the United Nations Convention on Contracts for International Sale of Goods may apply in certain jurisdictions or situations.

2. Choice of Forum

The parties hereby submit to the jurisdiction of the state courts of [state] and to the jurisdiction of the United States District Court for the District of [judicial district] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement.

General Principles

1. **Generally Presumed to be Valid**
2. **"Forum" refers to a jurisdictional place**
"Venue" refers to geographical place where case will be heard
3. **In California:**
 - **Mandatory forum-selection clauses are generally given effect without consideration of parties' convenience. Only question is whether enforcement in the designated forum would be unreasonable.**
 - **Permissive forum-selection clauses are subject to traditional forum non conveniens analysis. Inquiry is whether "in the interest of substantial justice an action should be heard in a forum outside this state."**

Choice of Forum: State Authorizing Statutes

- **Certain states allow contracting parties to agree to litigate in that state's courts, regardless of whether jurisdiction would otherwise be proper there, if the parties have chosen that state's law to govern.**
 - California Code of Civil Procedure § 410.40 allows litigation concerning a transaction of \$1 million or more to occur in California if contract selects California law to govern:

“Any person may maintain an action or proceeding in a court of this state against a foreign corporation or nonresident person where the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of California law has been made in whole or in part by the parties thereto and which (a) is a contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than one million dollars (\$1,000,000), and (b) contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the jurisdiction of the courts of this state.”
 - N.Y. Gen. Oblig. Law § 5-1402 provides a similar rule for New York venue
 - Statutory thresholds are typically \$1 million, rather than the \$250,000 for selecting a state law to govern

Let's Play: Mandatory or Permissive Forum Selection

- "This Agreement shall be governed by the law of Ontario, Canada and any claims arising hereunder shall, at the Johnsons' election, be prosecuted in the appropriate court of Ontario." *Original Foods, Inc. v. National Hockey League Players Ass'n* (1995) 39 CA4th 1347, 1352.

Mandatory Forum

- "The courts of California, County of Orange, shall have jurisdiction over the parties in any action relating to and in subject matter of the interpretation of this contract." *Hunt Wesson Foods, Inc. v. Supreme Oil Co.* (5th Cir 1957) 817 F2d 75, 76.

Permissive Forum

- "To the extent permitted by the applicable laws the parties elect Hamburg to be the place of jurisdiction." *Intershop Communications, Inc. v. Superior Court* (2002) 104 CA4th 191, 198.

Mandatory Forum

- "The company has expressly submitted to the jurisdiction of the State of California and United States Federal courts sitting in the City of Los Angeles, California for the purpose of any suit, action or proceeding arising out of this offering." *Beig v. ITC Electronic Technols. Co.* (1998) 61 CA4th 349, 357.

Permissive Forum

Choice of Forum: Textual Analysis (Breadth of Language)

- **Choice-of-forum clause almost always covers enforcement and interpretation of the agreement containing it.**
- **Beyond that, the scope of a choice-of-forum clause is governed by its wording, much the same as a choice-of-law clause.**
- **Consider the Following Clauses:**

- **“arising from”**

Often viewed as claims that ***grow out of the contractual relationship***, or if “the gist” of those claims is a breach of that relationship. *Anselmo v. Univision Station Group*, 1993 WL 17173 (S.D.N.Y. Jan.15, 1993).

VS.

- **“relating to” | “in connection with” | “arise in connection with”**

Often viewed as “***all claims that have possible relationship with***” the contract. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 389 (2d Cir. 2007).

Choice of Forum: Textual Analysis (Continued)

- **“Of” a specified state limits actions to state courts.**

- **“In” a specified state includes both state and federal courts.**

[In any action between the parties hereto arising out of or relating to this Agreement or any of the transactions contemplated by this Agreement each of the parties irrevocably and unconditionally consents and submits to the exclusive jurisdiction and venue of either the state courts located in [_____] County, [_____] or the United States District Court for the [_____].

- **Always better to qualify language whenever possible.**

Parties irrevocably and unconditionally (i) agree that any action or proceeding arising out of or in connection with this Agreement shall be brought only in the Chancery Court of the State of Delaware (the “Delaware Court”), and not in any other state or federal court in the United States of America or any court in any other country, (ii) consent to submit to the exclusive jurisdiction of the Delaware Court for purposes of any action or proceeding arising out of or in connection with this Agreement, (iii) waive any objection to the laying of venue of any such action or proceeding in the Delaware Court, and (iv) waive, and agree not to plead or to make, any claim that any such action or proceeding brought in the Delaware Court has been brought in an improper or inconvenient forum.

Choice of Forum: Public Policy Considerations

- **Can be invalidated if (i) it results from fraud or overreaching, (ii) It violates a strong public policy, or (iii) enforcement of the clause would deprive a party of its day in court.**

- **Effectively deprives a party of its day in court and, therefore, substantively unconscionable, if (i) it makes a party – particularly one with few resources – litigate in a distant place and (ii) because of unforeseen circumstances, the chosen forum is extremely inconvenient.**

- **A forum-selection clause is prohibited by statute and precedent in some types of contracts.**
 - Franchise agreements must have venues within CA. *CB&P Code 50040.5*
 - Consumers Legal Remedies Act voids purported waivers of consumers' rights.
 - Employment law contracts
 - Not enforceable absent a showing that enforcement would not impair employee's rights under the Labor Code. *Verdugo v Alliantgroup, L.P. (2015) 237 CA4th 141.*

“Venue” Refers to Geographical Place of Litigation

- **Venue selection clauses have been held void as against public policy to the extent that they contravene the venue provisions of the Code of Civil Procedure, which determine location of the proper court to hear an action. See *Battaglia Enters., Inc. v Superior Court* (2013) 215 CA 4th 309, 315**
- **Superior Court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action. *California Code of Civil Procedure* § 395**
 - A business entity may be sued in the county where contract is made or performed, or where obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated. *California Code of Civil Procedure* § 395.5

3. Entire Agreement (No Oral Modifications)

No supplement, modification, termination or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto.

General Principles

1. **This clause requires amendments, modifications, supplements and terminations to be in writing and be signed by all parties to the agreement.**
2. **Designed to preclude a party from arguing that there is an oral agreement to modify any of the agreement's terms or conditions.**
3. **Clause is sometimes combined with the waiver clause (i.e., no waivers unless set forth in writing)**
4. **Surprisingly:**
 - **In many jurisdictions (including Illinois, Michigan, and Virginia) contractual clauses prohibiting oral modification of agreements are generally unenforceable, except in contracts for the sale or lease of goods and government contracts, because...**

Entire Agreement (No Oral Modifications)

- **Under Common Law**

- Oral waivers and amendments are enforceable.
- Generally require modifications or amendments be supported by consideration.

- **Common Law Concept has been Abrogated**

- Contracts for the sale or lease of goods (*Article 2 of the UCC*).
- Entirely in some jurisdictions, including California (CCC § 1698); and New York (N.Y. Gen. Oblig. Law § 5-1103), so long as amendments are in writing and/or oral agreement is supported by new consideration.

- **Course of Conduct remains of paramount importance.**

May even override UCC stipulation. (Claim or defense based on waiver, partial performance, estoppel, laches, or course of performance).

- **Consider limiting the persons who have oral modification authority.**

4. Severability Clauses (aka Savings Clauses)

If any term or provision of this Agreement is held to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision.

General Principles

1. **Courts will sever unenforceable provisions from agreement**, leaving remainder in effect, when unenforceable provision not “essential part of the agreed exchange.”
2. **Courts attempt to give effect to intent of parties**, inquiring as to whether the “parties would not have entered into the agreement absent that provision.”
3. **Courts will normally not enforce agreement if primary objective is not met** by severing offending clause, even if contract specifically provides for severability.
4. “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” *Cal. Civ. Code § 1670.5(a)*

Severability Clauses (continued)

- **Trial courts have broad discretion** whether to sever unenforceable provisions, or refuse to enforce the entire agreement.
- **Courts are not to remake parties' agreement by selective editing.**
Kempski v. Toll Bros., Inc., 582 F. Supp. 2d 636 (D. Del. 2008) (declining to enforce severability clause in a manner that would rewrite the contract).
- **California courts will frequently enforce valid portions of an apparently indivisible contract, where interests of justice or policy of law would be advanced.**
- **Best solution is to identify essential terms of the agreement in severability clause and make them exceptions to severance.**
 - Such a severability clause will be enforced as written. *See, e.g., Hill v. Names & Addresses, Inc.*, 571 N.E.2d 1085 (Ill. Ct. App. 1991).

5. Assignment Clauses

Neither party may assign any of its rights [or delegate any of its obligations] hereunder without the prior written consent of the other party[, which consent shall not be unreasonably withheld, conditioned or delayed]. [Any purported assignment [or delegation] in violation of this Section shall be null and void.] No assignment [or delegation] shall relieve the assigning [or delegating] party of any of its obligations hereunder.

General Principles

- 1. Common law** generally permits a party to assign a contractual right, subject to three exceptions (i) substitution of assignee for assignor would materially change duty of obligor or materially increase the risk imposed on the obligor; (ii) assignment violates public policy; or (iii) contract has a valid prohibition on assignment.
- 2. Article 2 of UCC** generally permits both buyers and sellers of goods to assign contract rights. **Article 9 of UCC** overrides most contractual restrictions and legal restrictions on assignment related to assignment of rights to payment.
- 3. Courts** favor the rights of parties to freely contract so they commonly enforce anti-assignment and anti-delegation clauses.

Assignment Clauses

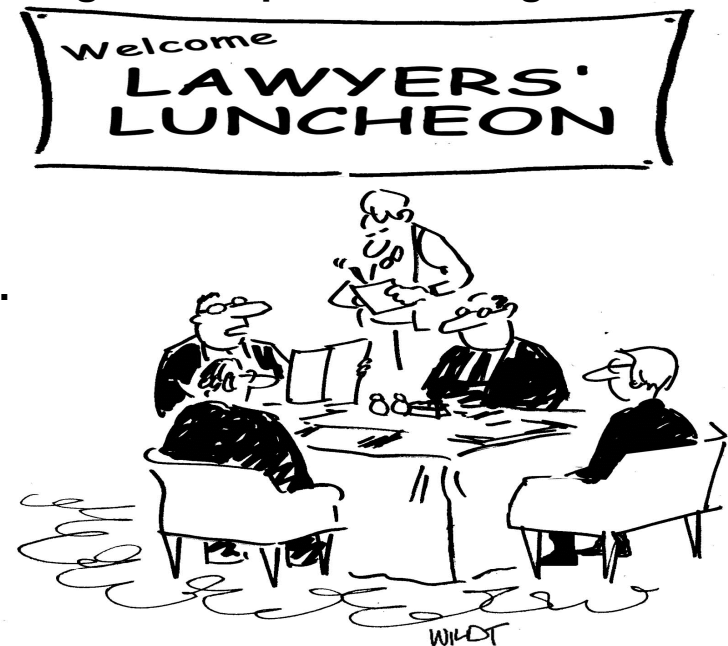
- **Even when the law permits contracting parties to prohibit assignment of rights:**
 - **Several common-law and statutory principles of interpretation limit scope or effectiveness of restrictions on assignment.**
 - Contract term prohibiting assignment of “the contract” normally bars only a delegation of duties; and
 - Contract term purporting to prohibit assignment of contractual rights normally affects only a party’s right - not the party’s power - to assign. As a result an assignment in violation of the prohibition is effective, even though it is also a breach.
 - **Always Exists an Implied Covenant of Good Faith and Fair Dealing.**
 - In Real Estate Leasing, lessor may not arbitrarily refuse consent, even when lessee is prohibited from assigning or subleasing premises

Assignment Clauses

- **In Assignment per Operation of law – validity of assignment depends on whether it affects the interests of the parties protected by the nonassignability of the contract.**
- **Industry practices – and common law – are often incorporated into applicable states.**
 - In the insurance context, in California, for instance, a consent-to-assignment clause has historically been enforceable, precluding a transfer of a right to invoke coverage without insurer’s consent even after the event resulting in payment under the policy had already occurred, with a caveat for when claims against the insured had “been reduced to a sum of money due or to become due under the policy.” *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003)
 - In August 2015, CA Supreme Court reversed this long-held position, and ruled that, regardless of a policy’s consent-to-assignment provision, an insurer’s consent is not required for a valid assignment of a liability insurance policy after a loss. The ruling was “borne of experience and practice, facilitating the productive transformation of corporate entities, and thereby fostering economic activity.” *Fluor Corp. v. Superior Court* (2015)

Summary

- **Boilerplate is anything but standard.**
- **Precise language used, as well as the circumstances and jurisdiction in which they are to be applied, can have a significant effect on the efficacy and enforceability of a contract's terms.**
- **May be appropriate to consider the strategic viewpoint of litigation dynamic.**
- **Avoiding ambiguity is important.**
- **Consider when it is appropriate and not necessary from a business relationship.**



"Four Boiler-Plate Specials."

Speaker

Joshua Geffon is a strategic partner to entrepreneurs, executives and in-house legal teams, collaborating with innovative companies throughout their life-cycles, from nascent stage startups to billion dollar public corporations.

Joshua regularly advises emerging growth companies, conducts mergers and acquisitions for middle market and public corporations, and provides counsel and advice to boards of directors and senior management on corporate governance, intellectual property and technology transactions. Joshua's experience includes a significant number of purchase and sales transactions.

Joshua is the incoming co-chair of the ABA Venture Capital Transactions Subcommittee and is a member of the ABA Mergers and Acquisitions and Legal Opinions Committees.

Joshua has been a Finalist for Corporate Counsel of the Year as identified by the Los Angeles Business Journal in 2015, and recognized as a Rising Star by Southern California Super Lawyers in 2014, 2013 and 2012.



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