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Everything you wanted to know about contractual boilerplate: Don't forget about the end-game

Focusing on the oft-neglected contractual dispute-resolution mechanisms, such as those relating to arbitration, jurisdiction, venue and choice of law

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The first article in this series introduced the importance of considering the unforeseen consequences of boilerplate terms in commercial agreements. The second article emphasized the need to identify and avoid potential pitfalls associated with specific boilerplate, risk management and allocation terms. This final segment focuses on oft-neglected contractual dispute-resolution mechanisms, such as those relating to arbitration, jurisdiction, venue and choice of law. Often, these mechanisms are addressed by provisions inserted at the end of contracts, frequently lifted from prior agreements without much consideration. While litigation may be a "last resort" and is rarely a priority consideration at the drafting stage, cut-and-paste contract terms may significantly impact the outcome of a dispute and invite disastrous consequences.

In contract negotiations, a threshold question in assessing potential disputes down the road is whether your interests are best served by arbitration or traditional in-court litigation. Since arbitration is billed as a quicker, easier, cheaper and more private alternative, lawyers sometimes reflexively include arbitration provisions when drafting agreements. Depending upon the complexity of the matter, resolving a dispute through arbitration may be more expeditious than one docketed in a busy commercial part in an overburdened and severely back-logged state courthouse. Swift justice is the real attraction of arbitration, where the rules often preclude dispositive motion practice and limit the availability of discovery devices, such as depositions and interrogatories, in order to streamline the process. The rules of evidence are more relaxed than traditional litigation, further expediting the process. And with rare exception, there are no expensive and time-consuming appeals from arbitration awards. Parties can also agree to build mandatory mediation provisions into arbitration agreements, in the hope of reaching consensus and avoiding combat altogether. The less formal arbitral process is usually quicker and cheaper than its courthouse counterpart. But in many instances, it is not necessarily better.

In traditional litigation, the parties have substantial opportunities to gather important evidence and to seek valuable pre-trial court rulings. In addition to a wide array of written discovery requests, the depositions of direct and third parties as well as specific key witnesses often yield critical proofs. The filing of dispositive motions at various stages can potentially short-circuit frivolous claims or defenses, thereby avoiding an otherwise expensive and protracted trial. While your judge will be selected at random (as opposed to arbitrators who are selected by the parties), a fully developed appeals process is available to unsuccessful litigants. In contrast, there are extremely limited grounds for challenging an arbitration award. While judges are not free from their own idiosyncrasies, they may be less likely to "split the baby" than some arbitrators. In addition, many federal courts, state commercial divisions and other courts seek to move at an expedited pace, so the traditional delays and expense of litigation are not always huge factors.

As contract negotiations unfold, press the fast-forward button to consider whether your client is more likely to be the plaintiff demanding money or the defendant resisting judgment; whether they will need to take substantial discovery or if a speedy result is important; and whether costs,

privacy and appeal rights may be significant considerations. A start-up business with limited resources, or an investment fund intent on limiting disclosure of its trading practices, may desire the often cheaper, quicker and more private arbitration forum. If so, careful attention is required in order to define the scope of arbitration clauses, the process for initiating arbitration, location, the governing law and rules, the number of arbitrators and their qualifications, the parameters of permissible discovery, confidentiality issues, and the form of the award. On the other hand, if the parties are more concerned about unpredictable and inconsistent arbitration awards which are not necessarily tethered to sound legal reasoning, or if they want robust discovery and fulsome judicial review, they may prefer traditional litigation. The decision to arbitrate or litigate — and precisely how this choice may impact your business interests — should be carefully considered at the outset.

If the parties agree to resolve their disputes in the courthouse, a jurisdiction and venue provision fixing the locale of the litigation, should be included in the contract. A New York litigant, for instance, would most likely prefer to resolve a commercial dispute in New York, where commercial law is well developed and the courts are accustomed to adjudicating commercial matters. Why would a New York company want to litigate a dispute with its Idaho customer in an Idaho court which may rarely preside over the parties' particular type of controversy?

If drafted inartfully, the boilerplate jurisdiction and venue provision will lull an unsuspecting party into a false sense of security. For example, a provision stating "the parties agree to the jurisdiction and venue of the federal and state courts in the State of New York" seemingly requires the parties to litigate all of their disputes in New York. Not so. In the event a dispute arises between the New York company and the Idaho customer, the Idaho customer would not be prohibited from commencing suit in Idaho. While this jurisdiction and venue provision permits a lawsuit to be filed in New York, it *does not require* one to be filed in New York. The preferable jurisdiction and venue provision would read "the parties agree to the *exclusive* jurisdiction and venue of the federal and state courts in the State of New York, and they agree not to bring any action in any court other than a federal or state court in the State of New York." The last thing your officers and directors want to do is trek across the country for depositions, court appearances and trial in an unfriendly venue simply because "boilerplate" was plugged into the contract without the proper analysis.

Without careful attention to details, litigants also can get burned by seemingly benign choice of law provisions. Just because the parties agree on a jurisdiction and venue provision does not necessarily mean they agree on the governing law — and vice versa. An unsuspecting party can find itself in "the right" state's court but with the law of another state being applied to adjudicate the controversy. This is not ordinarily the intended outcome. When agreeing to the choice of law, especially where the governing law differs from that of the exclusive forum, it is important to understand the nature of the applicable law and how it may impact your rights. Using our example, if Idaho law controls, then the New York company might find itself obligated to reimburse its customer's legal fees in the event the customer prevails. Not so in many other states, though — including New York. Parties should agree to choice of law provisions only after some serious thought. Otherwise, they can be in for a rude awakening, whether it is shifting the burden of legal fees and costs, the availability of treble damages, or a higher or lower standard of proof. The selection of a state's law that bears no reasonable relationship to the parties' contract may render the provision unenforceable, so parties should exercise caution when drafting these provisions. At the same time, a narrowly drafted governing law provision in many states can result in its application only as to the interpretation and enforcement of the agreement, but not to extra-contractual claims, like fraud or equitable remedies. It is essential that these issues be reviewed carefully with counsel and that the choice of law provision be drafted thoughtfully.

As emphasized throughout this series, "boilerplate" terms are deceivingly innocuous — but they are not. While tailored boilerplate terms may not be as important as a purchase price or other

material deal terms, thoughtful and strategic advance planning can mean the difference between a favorable outcome and extreme disappointment.

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