The Fine Print Matters: Negotiating Boilerplate Contract Clauses Through the Litigator’s Lens

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Speakers

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Dana Davenport is a commercial attorney with demonstrated success advising business stakeholders across a broad range of complex legal issues, minimizing legal risks and increasing profitability. She has experience both in private practice and with industry-leading publicly traded companies.

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LisaMarie is a seasoned litigator with a robust complex commercial litigation practice. She has helped steer clients to successful resolutions in a variety of complex civil matters, and has a deep understanding of the litigation issues facing both public and private companies in a number of industries including, financial services, sports and entertainment, and health care.

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Meredith is a seasoned technology litigator focused on both disputes and on IT, licensing and outsourcing transactions, particularly in the financial services and technology sectors. Her extensive litigation and arbitration experience provide a unique and valuable perspective at the front-end of developing critical business relationships. Meredith recognizes that the most successful collaborations and contracts are created with a full understanding of how to allocate risk between parties and a pragmatic understanding of how contract language is likely to be deployed in practice or interpreted by a judge or arbitrator should a dispute arise.
Entire Agreement
Entire Agreement

This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement.
Purpose

- Also known as the Integration Clause or Merger Clause
- “Courts and commentators addressing the substantive and procedural aspects of New York commercial litigation agree that the purpose of a general merger provision … is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.” Primex Int'l Corp. v. Wal-Mart Stores99, 657 N.Y.S.2d 385, 388, 679 N.E.2d 624, 627 (N.Y. Ct. App. 1997).

- Ensures that the obligations and intentions of the parties are set forth in a single contractual document constituting the final and complete agreement between the parties
- Seeks to promote certainty and prevent the parties from relying on statements made in pre-contract negotiations or during the course of the contractual relationship
Core Concepts from a Litigator’s Perspective

- When a contractual dispute arises, the Entire Agreement clause serves as protection.
- Write what you mean and mean what you write!
  - When contract terms are unambiguous, courts will interpret the contract based on its “plain language” and the Entire Agreement clause should govern.
- When contract terms are unambiguous, previous agreements or statements that conflict with the terms covered by the Entire Agreement clause may not be considered.
- If contract terms are deemed ambiguous, courts will allow parol evidence to interpret the meaning of the contract, including course of dealing.
No Waiver / All Amendments in Writing
No Waiver / All Amendments in Writing

The parties may not amend or waive this Agreement, except pursuant to a writing executed by the party or parties against whom any amendment or waiver is sought to be enforced.
Purpose

• No Waiver / Amendments in Writing clauses preserve the terms of the parties' agreement and their intent at the time the contract was executed
• Parties use these clauses as guideposts for their actions during the life of the contract
• The intention of these clauses is that one party’s failure or delay to enforce its rights or remedies, following a breach of contract by the other party, does not result in the loss of those rights or remedies
• What is in the contract, and only what is in the contract should control
Core Concepts from a Litigator’s Perspective

• Lawyers draft contracts to allocate risks and obligations among parties. Any changes to those allocations should be reflected in a binding writing.

• Accommodations that may occur during the contractual relationship are not intended to modify the contract or bind the parties.

• Parties to a dispute often argue that course of dealing dictates the intent of parties to a contract. Not true! A well-drafted contract with a solid “No Waiver / Amendments in Writing” clause should control!
Third Party Beneficiaries
This Agreement does not and is not intended to confer any rights or remedies upon any Person other than the Parties.
Purpose

- Only the parties to the contract should have rights under the contract and be able to enforce the counterparty’s obligations
- Under New York law, in order to enforce a contract to which the complainant is not a party, the complainant must be an intended beneficiary. *See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 44, 495 N.Y.S.2d 1, 4, 485 N.E.2d 208, 211 (1985).
- In order for a contract to confer enforceable third-party beneficiary rights, it must appear that no one other than the third party can recover.” *See Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 82, 615 N.Y.S.2d 689, 692 (App. Div. 1st Dept. 1994).

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Core Concept’s from a Litigator’s Perspective

- Most contracts contain an unqualified "no third-party beneficiaries" clause in the boilerplate section of the contract, which expressly states that the agreement is not intended to have any third party beneficiaries.
- A Third Party Beneficiary clause must be complete, clear, and unambiguous to be enforceable.
- Contracting parties should review the contract and determine whether they want certain third parties (or classes of third parties) to have the power to enforce any obligations in the contract. If the parties intend for certain third parties to benefit from the contract, they should qualify the clause accordingly.
- Important block or gate to bringing or defending a claim, depending on who your client is …
Equitable Remedies
Equitable Remedies

Each Party acknowledges and agrees that any failure by such Party to perform its obligations under this Agreement may result in irreparable harm to the other party, because monetary damages alone will not provide sufficient relief, and that the other Party is therefore entitled to seek specific performance or an injunction (without any need or requirement to post a bond) from any court of competent jurisdiction to enforce all of its rights under this Agreement in accordance with the terms of this Agreement.
Purpose

- Equitable remedies typically refer to injunctions, specific performance, or vacatur
- Legal remedies typically involve monetary damages
- A court will typically award equitable remedies when a legal remedy is insufficient or inadequate
- An Equitable Remedies clause bolsters the case for a non-breaching party to seek an immediate equitable remedy from the court in the event of breach
Core Concepts from a Litigator’s Perspective

• An Equitable Remedies clause that is tied to specific contract terms gives a non-breaching party an immediate avenue for seeking relief for a breach

• An Equitable Remedies clause provides comfort to the court regarding the availability of an equitable remedy for breach

• The availability of an equitable remedy might be the only one that matters where the breaching party may cause immediate or irreparable harm that cannot be quantified in monetary damages

• Drafting note – watch out for “may” result in irreparable harm when you mean “will” or “shall” result in irreparable harm
Law, Venue, Jurisdiction and Jury Waiver
Choice of Law

Choice of Law. The laws of the State of New York (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement.
**Venue**

**Designation of Forum.** Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement may bring the legal action or proceeding in the United States District Court for the Southern District of New York or in any court of the State of New York sitting in New York City.
Submission to Jurisdiction. Each party to this Agreement submits to the nonexclusive jurisdiction of New York.

Waiver of Right to Contest Jurisdiction. Each party waives, to the fullest extent permitted by law, any objection which it may now or later have to the laying of venue of any legal action or proceeding arising out of or relating to this Agreement brought in any court of the State of New York sitting in New York City, or the United States District Court for the Southern District of New York; and any claim that any action or proceeding brought in any such court has been brought in an inconvenient forum.
Each party, to the extent permitted by law, knowingly, voluntarily, and intentionally waives its right to a trial by jury in any action or other legal proceeding arising out of or relating to this Agreement and the transactions it contemplates. This waiver applies to any action or legal proceeding, whether sounding in contract, tort or otherwise.
Purpose

- Governing law – which state’s law substantively applies to interpretation of the contract
- Venue – where disputes may or must be brought
- Jurisdiction – how to ensure that the where has power over the who
- Jury – who decides issues of fact and applies the law to the facts
Core Concepts from a Litigator’s Perspective

- Clarity and knowing where and what law from the outset benefits everyone
  - Choice of law should match with choice of forum
  - Evaluate whether the law of a potential jurisdiction is well-developed and affords sufficient predictability
  - Consider whether the a particular body of state law is friendly or hostile to the client
  - Negotiate a forum that is convenient and familiar for the parties and the lawyers in the event of a dispute while weighing the risks of a convenient forum (the caseload of the court, the court’s familiarity with the type of dispute)
  - Who wants a jury (and who does not ….)?
    - Trial may be obtained more quickly without a jury
    - May be beneficial to waive a jury trial where the jury is likely to be biased against your client
    - Bench trial is less expensive
    - Non-jury trial may be preferable where issue to be tried are highly technical
    - Are you David or are you Goliath? How “likeable” is your client likely to be?
Arbitration Provisions
Arbitration Provisions

The parties to this agreement will submit all disputes arising under this agreement to arbitration in New York, before a single arbitrator of the American Arbitration Association (“AAA”). The arbitrator shall be selected by application of the rules of the AAA, or by mutual agreement of the parties. No party to this agreement will challenge the jurisdiction or venue provisions as provided in this section. No party to this agreement will challenge the jurisdiction or venue provisions as provided in this section. Nothing contained herein shall prevent the party from obtaining an injunction.
Purpose

- Alternative to litigating a case through the court system
- In theory, arbitrations may be faster and less expensive than litigating through the court system
- Without a written agreement to arbitrate, a party cannot commence an arbitration without the express consent of the adversary
- “In recognition of the fact that arbitration is manifestly a matter of contract, and that parties to an arbitration agreement--like all contracting parties--are free to select the terms under which they will arbitrate, the policy established by the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.” *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 201, 623 N.Y.S.2d 800, 804, 647 N.E.2d 1308, 1312 (1995)
Core Concepts from a Litigator’s Perspective

• Arbitration is private and is generally closed to non-participants and the press
• Little or at least less motion practice (in theory)
• Discovery may be limited, including no depositions
• Arbitration awards are generally final
• Standard provision vs. negotiated provision
  – Arbitrator qualification requirements
  – Discovery
  – Time period for resolution
• Without a tailored provision that includes the number of arbitrators, arbitration body, selection of arbitrators, venue, governing law, a narrow time horizon and/or restricted discovery rights, arbitration may not be faster or less expensive
Key Takeaways

• Do not overlook the boilerplate clauses!
• Common formulations are good – avoid getting creative with boilerplate
• But nothing is standard – every provision needs to be considered in light of the nature of the agreement and the intention of the parties
• When a dispute arises, your litigators will immediately look to the contract’s boilerplate clauses to frame the strategy for prosecuting or defending the dispute
• We focused today on only a few boilerplate clauses. There are others to consider that require the same attention and care (e.g. Assignment, Successors & Assigns, Cumulative Remedies, Force Majeure, Confidentiality, Notices, Severability, Counterparts, Headings)
Questions?