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Boilerplate language in business contracts, part 1 of 2...

Though sometimes touted as inconsequential, this language can minimize problems later if drafted to fit the specific situation

By Michael Dayton*



I believe the reason we Iowans put up with the sweltering summers is our wonderful autumns. Open windows, crisp air and colorful leaves cleanse the spirit. And football pushes away all of the bad memories of the most recent Chicago Cubs season gone awry; nothing is more cleansing than that.

I guess when it comes down to it, I am really a fan of the seasons in general because of the changes they bring. How boring would life be in San Diego where it is sunny and 70-80 degrees year round? How mundane to not rake leaves or shovel snow? Change is really the spice of life.

San Diegoans are not the only ones plagued by monotony. As a corporate attorney I must deal with some things not changing. One of those constants is the “boilerplate” — the voluminous pages of mind-numbingly dull provisions at the end of an agreement that prompt our clients to say “do you get paid by the word?”.

Boilerplate has been defined as “inconsequential, formulaic or stereotypical language” in an agreement, or “a set of standard terms, which have not been revised to fit the particular situation.” However, when drafted properly, the boilerplate provisions, though formulaic and generally standard, are not inconsequential and should be revised to fit a particular situation (with the selection of which boilerplate to use in which situation falling into this revision category). Most of these provisions actually mean something and have been drafted based on the common law interpretation of contracts.

In this article I will start first with just two provisions, hopefully located at the very end of your agreement (if you desire to include, or are able to include, such provisions). The two are “forum selection/consent to jurisdiction clauses” and “waiver of jury trial provisions.” In a subsequent article, I will write about a few other boilerplate provisions.

Before discussing the specifics of these provisions, there are a few points to keep in mind while drafting. First, Iowa courts will generally construe an ambiguous boilerplate provision against the drafter. (You can attempt to add a “negotiated agreement” provision to supplant this construction, but we can discuss the efficacy of such provision in a different article).

Second, these two provisions must be conspicuous to be enforceable. Place them at the end of the agreement, put the choice of jurisdiction or forum selection provision in boldfaced type, put the waiver of jury trial provision in all caps and boldfaced type, and consider placing the waiver of jury trial provision directly on the signature page of your agreement (to the extent you are using an orphaned signature page).

Third, make these provisions, by their terms, “unconditional” and “irrevocable,” so arguments to the contrary are more difficult to make.

Finally, since the analysis of these provisions is under Iowa law, I have assumed the agreement will be governed by Iowa law, so include an Iowa governing law provision if you want this article to have any meaning whatsoever.

Forum Selection and Consent to Jurisdiction Clauses

At the outset, it is important to differentiate between these two related clauses. Forum selection clauses, by their nature, are exclusive — the parties shall bring any claims arising out of or relating to the agreement in a specific jurisdiction.

Consent to jurisdiction clauses, on the other hand, do not exclude the jurisdiction of other courts; the clauses provide that a specific court or courts contractually will have jurisdiction over a party so that the party cannot assert lack of personal jurisdiction in the event a claim is brought in such court.

Forum selection clauses, though disfavored, are not necessarily void under Iowa law. Iowa courts will generally not uphold a forum selection provision if it “would deprive Iowa courts of jurisdiction they would otherwise have...but Iowa courts will consider them as one factor when determining whether to exercise jurisdiction.” *Holiday Inn Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730 (Iowa 1995). Consent to jurisdiction clauses have long been recognized under Iowa law. Essentially, the parties contractually replace the court’s personal jurisdiction analysis. If conspicuous, the court will uphold such a provision.

When should you use these provisions, and which should you use? The short answer, of course, is “it depends.” A consent to jurisdiction clause that gives your home court jurisdiction over the other party to the contract is always beneficial. Filing a claim in your home court can give you a substantial economic and strategic advantage (legal fees, client travel expenses, familiarity with the judiciary, etc.) over

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an out-of-state defendant. But a consent to jurisdiction clause just gives your home court personal jurisdiction over the other party, potentially creating a race to the courthouse (at least in situations where another court might exercise *in personam* jurisdiction over your client).

So, should you go the next step and attempt to give Iowa exclusive jurisdiction?

It is a risk, but can be a calculated one. First, you must analyze whether you might want to file a claim in a different jurisdiction, even if Iowa is your preference on the date of contracting. Any number of strategic business decisions (including relocation of corporate offices or merger or acquisition activity) could affect this analysis. If there is little practical risk that your client would want to file a claim anywhere outside of Iowa, there is still the risk that an Iowa court would not uphold the provision.

Fortunately, given the fact that Iowa will blue-line a contract to remove offending provisions without declaring the entire provision or agreement unenforceable (include a severability provision, just in case), it seems more likely that an Iowa court would turn a forum selection provision into a consent to jurisdiction clause, than to delete the provision in its entirety. With that in mind, if exclusivity is what you desire, consider drafting the forum selection clause as a consent to exclusive jurisdiction clause.

Whether you use a forum selection or a consent to jurisdiction clause, include in such a clause (i) the provision consenting to jurisdiction (exclusive or not), (ii) a provision waiving any objection to forum non conveniens, and (iii) a provision consenting to service of process pursuant to the notice provisions set forth elsewhere in the agreement (though you will want to exclude fax and email notices from this provision).

Jury Waiver

Jury trial waiver provisions are enforceable in Iowa. However, given the constitutional and fundamental nature of the right to trial by jury, the court will “indulge every reasonable presumption against” such waiver. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937).

Basically, the waiver must be knowing (informed) and voluntary. Though whether the waiver was knowing and voluntary will be a factual inquiry by the court,

there are a number of ways to construct the provision to make it more likely to be enforceable.

You can control the conspicuousness of the provision, so make it conspicuous. If the clause is in caps, in bold, in a separate paragraph labeled “Waiver of Jury Trial” and in a place in the contract that the signer could not possibly miss (preferably at the end and perhaps even on the signature page), it makes it more likely that a court will say the waiver was knowing. You can add a blank for the other party to initial the jury waiver provision, but that blank can backfire if you or the client forgets to have the other party initial the provision.

Consider also adding a provision indicating that the waiving party understands that it is giving up substantial rights (the court will look at the sophistication of the party in connection with such a provision), that those rights have been explained to the waiving party, and that the waiving party had the opportunity to review the provision and has consulted an attorney in connection with the execution of the agreement (though if the party did not actually consult an attorney, the court may simply ignore such provision).

Making the jury waiver provision appear “voluntary” is more difficult. A court will look at the facts of the case to determine if the agreement is a standard form, take-it-or-leave-it, click-wrap-style agreement, or whether the agreement was actually negotiated. In this analysis, the equality of the bargaining power of the parties will be a factor. You can add a “negotiated agreement” provision indicating that the terms of the agreement have been negotiated and prepared at arms’ length, but if that is factually inaccurate, the court will likely ignore the self-serving language.

Now that you know the parameters for drafting an enforceable jury waiver provision, do you even want to use it?

In negotiating contracts and trying to include a jury waiver provision, I often hear: “We want to be able to make that decision at the time of the claim.” I don’t understand that reasoning from large companies; I think the analysis is static and can be made at the time of contracting.

To make my point, I will re-phrase my initial question this way: “When would you ever want a jury to interpret a contract?”

The short answer is: never. It is not the interpretation of the contract for which

a party would seek a jury, but a visceral response from the jury outside the four corners of the contract. The party that chooses to have a jury hear a contract claim doesn’t want six or so laypeople to determine the legal meaning of the agreement; it wants the jury to decide whether it would be equitable for big bad company ABC to push around little old mom ‘n pop. You know whether your client is ABC or mom n’ pop at the time of contracting, so you can make your decision accordingly.

Hopefully you have been able to enjoy this article on your back porch on a Saturday afternoon, though your choice of leisure reading materials leaves something to be desired. Anyway, take a sip of apple cider and swear under your breath at your favorite college football team, the next boilerplate article will greet you soon.

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