



Boilerplate Provisions In Agreements **How Important Are They? What Do They Mean?**

What are boilerplate provisions?

The term “boilerplate” refers to any text that is or can be reused in new contexts or applications without being changed much from the original. It has been adopted by lawyers to refer to “standard language” provisions that are usually grouped together at the end of an agreement. Those provisions are also sometimes referred to under the titles “Miscellaneous” or “General”.

Are they important?

Although boilerplate provisions are typically found at the end of an agreement, these provisions are extremely important and are just as much a part of an agreement as the purchase price, closing date, representations and warranties or covenants of the parties. Although they may seem “standard”, they should not just be copied from other agreements but should be tailored to fit specific contracting arrangements. Boilerplate provisions are especially important in the event of a dispute between the parties because they determine such things as how disputes will be resolved, how a court will enforce the agreement and who will be responsible for fees, including attorneys’ fees.

What do they mean?

Below are examples of some common boilerplate provisions and their meanings.

Choice of Law – determines which state’s laws will be used to interpret and/or enforce the agreement. The parties can designate a particular state law even if they are not physically located in that state. Keep in mind that in the event of a dispute, local counsel may need to be hired that is more familiar with that state’s laws, which may be an additional expense.

Ex.: “This agreement shall be construed in accordance with and shall be governed by the laws of the State of New York.”

Jurisdiction – determines in which state and county the lawsuit must be filed in the event of a dispute between the parties. This can be an important issue when negotiating an agreement, especially when the parties are in different locations, because it may require a party to travel in the event of a dispute.

Ex.: “The parties agree that the Supreme Court of New York, Nassau County, shall have jurisdiction over and be the proper and exclusive venue for any litigation brought under or in connection with this agreement.”

Costs and Attorneys' Fees – allows the prevailing party in a lawsuit to collect any court costs and attorneys' fees he or she incurred in connection with the lawsuit. Bear in mind that the term “costs” refers to all related costs, including filing fees, fees for serving the court papers, fees to pay a court reporter to transcribe depositions and in-court testimony, and, in the case of a jury trial, to pay the daily stipend of jurors, which can be significant.

Ex.: “In the event of any litigation arising from or related to this agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including court costs, attorneys' fees, and all other related expenses incurred in such litigation.”

Arbitration – the parties can agree that any disputes related to the agreement must be resolved through arbitration proceedings, not through a court proceeding. Although arbitration is generally a quicker and more cost-efficient process than going to court, it is also virtually impossible to appeal a binding arbitration ruling. Keep in mind that the parties can agree to arbitrate a dispute later, when it actually arises, even if the agreement did not contain an arbitration provision.

Ex.: “All claims and disputes arising under or relating to this agreement are to be settled by binding arbitration in the state of New York which shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any decision or award as a result of any such arbitration proceeding shall be in writing and shall provide an explanation for all conclusions of law and fact and shall include the assessment of costs, expenses, and reasonable attorneys' fees. An award of arbitration may be confirmed in a court of competent jurisdiction.”

Waiver – permits the parties to give up the right to sue for breach of a particular provision of the agreement without giving up any future claims regarding a subsequent breach of the same provision. If a party is fearful that the other party may breach the agreement, this provision will protect the non-defaulting party if such party determines to excuse the other party's breach but determines to enforce its rights down the line.

Ex.: “The waiver by any party of a breach of any term or provision of this agreement shall not be construed as a waiver of any subsequent breach.”

Severability – allows a court to take out an invalid provision from the agreement while keeping the rest of the agreement intact. In the absence of this provision, it is possible that if a single clause is held invalid, the entire agreement will be rendered null and void.

Ex.: “If any provision of this agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be

affected or impaired thereby and such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability.”

Integration; Entire Agreement – specifies that the written agreement represents the final agreement of the parties, and that any prior understandings between the parties (which includes any term sheets and letters of intent) are replaced by the written agreement and that any further modification to the agreement must be in writing. A party entering into an agreement which includes this provision should make sure that all understandings between the parties have actually been included in the written agreement; otherwise it may be impossible to enforce those unwritten promises.

Ex.: “This agreement constitutes the entire understanding between the parties and supersedes any and all prior understandings and agreements between the parties, whether oral or written, with respect to the subject matter hereof. This agreement can only be modified by a written amendment signed by both parties hereto.”

Further Assurances – provides that the parties will provide cooperation and assistance to each other in executing their respective duties under the agreement. This provision is especially helpful when negotiations between the parties have been hostile or difficult.

Ex.: “Each party shall do and perform, or cause to be done and performed, all such further acts and things, and shall execute and deliver all such other agreements, certificates, instruments and documents, as the other party may reasonably request in order to carry out the intent and accomplish the purposes of this agreement and the consummation of the transactions contemplated hereby.”

Assignment – affects the ability of the parties to transfer their rights under the agreement to another party. Keep in mind that, other than in a few specific situations, an assignment will generally be permitted unless there is an express limitation in the agreement, so a party that wants to limit the other party’s right to assign the agreement should make sure this provision is included.

Ex.: “This agreement may not be assigned, transferred or hypothecated by either party without their prior written consent of the other part, which shall not be unreasonably withheld.”

Successors and Assigns – binds a party’s successors or assigns to the terms of the agreement in the event of an assignment. This type of provision is especially important when dealing with smaller companies because they are more likely to be purchased or merged, and the non-assigning party will want to make sure that the party who takes over remains liable.

Ex.: “This agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective representatives, successors and permitted assigns.”

Amendment – requires that any amendments to the agreement be made in writing and signed by both parties. This provision is crucial because without it, a party can claim that an oral conversation modified the agreement.

Ex.: “This agreement may not be amended, modified, or supplemented except by a written instrument executed by all of the parties hereto.”

Remember: Every provision of every agreement can be negotiated, even the boilerplate provisions, so it is important to consult with your attorney to determine which clauses are relevant to your particular transaction and how they can be drafted in your favor.

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