BOILERPLATE PROVISIONS

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I. INTRODUCTION

Black's Law Dictionary defines "Boilerplate" as: "Language which is used commonly in documents having the same meaning; used to describe standard language in a legal document that is identical in instruments of a like nature."[1] Boilerplate language certainly serves a purpose to reduce transaction costs and avoid protracted negotiation over what, in many instances, are standard terms. But, too often, lawyers rely on this common usage of the term "boilerplate" when examining, or rather glossing over, relatively customary contractual provisions such as recitals, statements of consideration, and the ever-dangerous miscellaneous section. Like other contractual provisions, mere reliance on form boilerplate provisions can yield unintended and often unfavorable results. Therefore, attorneys are cautioned to review these provisions with the same care as they would review the remaining terms of a given contract.

In evaluating the appropriateness of boilerplate language, attorneys should consider the following:

A. What type of agreement is involved?

The above definition makes clear that boilerplate is standard with respect to "instruments of a like nature."[2] For example, an assignment clause in an acquisition agreement will likely be significantly different than a similar provision in a credit agreement or intellectual property license. Further, different types of agreements almost certainly will have their own respective universes of boilerplate provisions, such as language in a consulting agreement regarding the status of a party as an independent contractor or in a supplier agreement where no joint venture is created, which have little to no applicability to another type of agreement.

B. Who are the parties?

Boilerplate provisions should be consistent with the identified parties and take into account how these parties will interact or implement the relevant agreement. For example, acquisition agreements and stockholder agreements often include amendments and waiver provisions that are operative when signed by a seller representative or some percentage of outstanding shares, rather than all parties.

C. What is the intended impact of other contractual provisions?

Although these provisions are "standard," they should be tailored to be consistent with the other terms of the contract. Careless review of boilerplate provisions may result in terms that conflict with or counteract heavily negotiated contractual terms, such as indemnification and remedies.

This article provides sample language for various common boilerplate provisions, along with relevant law and tips to assist practitioners in the understanding, negotiating, and drafting of these provisions. Appendix A to this article includes forms of additional boilerplate provisions not discussed herein. Appendix B includes additional sources that were influential in the preparation of these materials and which provide additional guidance for practitioners regarding various boilerplate provisions.

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[1] BLACK'S LAW DICTIONARY 198 (9th ed. 2009).

[2] *Id.*

II. PRELIMINARY MATTERS

Every contract should contain an introductory paragraph that sets forth the exact names of the contracting parties. The identity of the parties should be clearly set forth (*i.e.*, a "Texas limited liability company" or "an individual resident of the state of Texas") and the parties should be clearly defined (*i.e.*, "Seller," "Debtor," etc.) so that they can be easily referenced throughout the contract. Further, the identification should include any limits on the purposes for which any parties are bound to the contract (*e.g.*, "solely in his capacity as seller representative" or "solely for the purpose of Sections X and Y"). The effective date of the contract should be included as well. While this may seem like an unimportant exercise, these descriptions could become very critical in the event questions arise later as to the proper parties to the contract.

A. Recitals

Recitals are not technically part of a contract unless it appears that the parties intended for them to be (or specifically made them a part of the contract).[3] However, it is a prudent practice to include recitals in a contract in order to help identify the intentions of the parties and the reasons for entering into the contract. Recitals can also be particularly helpful for explaining complex factual situations that led to the contract. Finally, a drafter should also consider whether to make the recitals an express part of the contract. It is usually prudent to do this to assure that the recitals will be admissible in interpreting the contract's substantive provisions.

B. Statement of Consideration

Every lawyer learned in his or her first year contracts class that every contract must be supported by consideration in order to be enforceable. Accordingly, contracts should contain a description or recital of the consideration being given. By including a recital, the drafter creates a presumption that the consideration contained in the contract is sufficient.[4] As a result, there will often be a statement to the following effect between the recitals and the actual operative provisions of the contract:

> NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do agree as follows:

While this language does create the presumption that the contract is supported by consideration, that presumption can be rebutted. Furthermore, it does not prevent evidence that any promised consideration was never delivered. If a formal recital regarding consideration is successfully rebutted, the contract may be unenforceable for lack of consideration.[5]

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[3] *See* Universal Health Servs., Inc. v. Thompson, 63 S.W.3d 537, 543 (Tex. App.—Austin 2001, no pet.).

[4] *See* Hoagland v. Finhold, 773 S.W.2d 740, 743 (Tex. App.—Dallas 1989, no writ).

[5] *See generally* Gary Safe Co. v. A.C. Andrews Co., Inc., 568 S.W.2d 166, 168 (Tex. Civ. App.—Dallas 1978, writ ref. n.r.e.) (finding no consideration to support alleged contract).

III. DISPUTE RESOLUTION

A. Governing Law

Absent a valid choice of law provision, the law of the state with the most significant relationship will govern the enforcement of a contract.[6] The enforcement of choice-of-law provisions in commercial transactions is generally governed by Chapter 271 of the Texas Business & Commerce Code. The general rule is that the parties' choice will be enforced if their choice is in writing and bears a reasonable relation to the jurisdiction whose law is chosen.[7] If the transaction is a "qualified transaction" (*i.e.,* involves consideration in excess of one million dollars), the parties' choice will be enforced regardless of whether it bears a reasonable relation to the transaction.[8] The following is a typical choice of law provision:

> Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of Texas, without regard to conflicts of law principles.

Even where the parties elect to be governed by the law of a particular jurisdiction, there will be areas where Texas courts will apply the laws of another jurisdiction and areas that are governed by the laws of another state, such as provisions regarding the transfer of title to certain assets or properties and the voting of stock or other corporate law matters. In addition, there are instances in which Texas law limits the ability of certain parties to select foreign law, even if it bears a reasonable relation to the transaction.[9]

B. Venue and Forum

In general, parties in Texas can contractually agree to venue in a county that would otherwise be a proper venue. However, Texas law will not enforce the parties' selection if that choice contravenes the Texas venue statutes.[10] In other words, Texas law will enforce the venue selected by the parties if the parties could have brought the suit in that venue regardless of the venue selection provision. The only exception to this general rule is for "major transactions" under section 15.020 of the Texas Civil Practice & Remedies Code. In transactions involving consideration greater than one million dollars, the parties may contractually agree to venue regardless of the general venue statutes.

Venue selection, however, should not be confused with forum selection in which the parties contractually agree to both jurisdiction and venue of another state. Forum selection clauses in Texas are generally enforceable.[11] Below is a customary venue and forum selection provision:

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[6] *See, e.g.,* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

[7] *See* TEX. BUS. & COM. CODE ANN. § 271.005(a) (West 2009).

[8] *See id.*

[9] *See, e.g.,* TEX. BUS. & COM. CODE ANN. § 272.001(b) (providing that a contractual provision selecting foreign law is voidable at the contractor's option if the project is for the construction or repair of an improvement to real property in Texas).

[10] *See* Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972) (refusing to enforce contractual venue selection based on public policy).

[11] *See* Sw. Intelecom, Inc. v. Hotel Networks Corp., 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, pet. denied).

> Forum. Each party agrees that any suit, action or proceeding brought by such party against the other in connection with or arising from this Agreement ("Judicial Action") shall be brought against any of the parties only in any United States federal or state court located in the state of Texas and each of the parties hereto hereby consents to the exclusive jurisdiction of such courts (and of the appropriate appellate courts) in any such judicial action and waives any objection to venue laid therein. Process in any such judicial action proceeding may be served on any party anywhere in the world, whether within or without the state of Texas.

Note that this provision is particularly careful to include both state and federal courts. In this regard, a preposition can be significant with courts "of" Texas having a different meaning than courts "in" Texas.[12]

C. Arbitration

The decision of whether to include an arbitration provision should never be considered a "boilerplate" decision. But in those instances where the parties agree that arbitration is appropriate for all or certain disputes that may arise in their dealings, there are a number of elements to consider in determining whether a particular arbitration clause is appropriate. In this regard, it is worth noting that the parties have considerable flexibility in crafting the form of the arbitration that they believe is best for them. As one court has noted:

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as any other terms in their contract.[13]

That being said, there are seven elements that should be considered in reviewing any arbitration provision:

> (1) *Scope* – Is it a broad provision (*e.g.,* "any and all disputes arising out of or related to this Agreement") or a narrow one (*e.g.*, "disputes concerning pricing adjustments under Article X")?
>
> (2) *Parties* – Is the agreement applicable just to the contracting parties or to their affiliates and third-party disputes as well? Can multiple parties to the same transaction be joined in the same arbitration? For example, this is frequently an issue in construction disputes regarding whether the owner can join both the contractor and the architect in the same proceeding.
>
> (3) *Administration of the Arbitration* – Will the dispute be administered through an arbitral institution such as the American Arbitration Association, JAMS or the London Court of International Arbitration, or will it be handled *ad hoc* by the parties themselves? If it is *ad hoc*, what are the governing rules?

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[12] *See, e.g.,* Dixon v. TSE Int'l Inc., 330 F.3d 396, 397-98 (5th Cir. 2003) (per curium) (holding that a forum selection clause stating "The Courts of Texas, U.S.A. shall have jurisdiction …" constituted a waiver of right to federal court); Berry v. WPS, Inc., A.H.-05-2005, 2005 WL 1168412 (S.D. Tex. May 16, 2005) (providing that a provision specifying courts "in" Harris County, Texas did not constitute a waiver of federal courts).

[13] Baravati v. Josephtal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

(4) *Arbitrator number, selection and qualification* – Will the dispute be governed by a single arbitrator, a panel of three, or possibly one or the other depending on the amount in controversy? How will the arbitrators be selected? Are there any minimal qualifications of those that will serve as arbitrator?

(5) *Place of Arbitration* – Of these elements of a good clause, this one may have the most significant legal consequence, particularly with regard to international transactions. In this regard, the place chosen should be a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). As a general proposition, fixing the place of arbitration in a country that is a signatory to the New York Convention both increases the likelihood that the award will be enforced and minimizes the likelihood that courts will interfere with the arbitration proceeding.

(6) *Language of Arbitration* – In what language will the proceedings be conducted and the award rendered?

(7) *Discovery* – Generally, arbitration rules apply a more streamlined discovery process as part of the perceived increased speed and reduced cost of arbitration, as compared to traditional litigation. However, the parties are free to specify a more robust discovery procedure or apply specific limits on depositions and the like.

*Appendix C includes various model arbitration clauses.

D. Waiver of Jury Trial

It is settled law in Texas that a party can contractually agree to waive its right to trial by jury if the waiver is knowing and voluntary.[14] A waiver of jury trial should be conspicuous.[15]

> **WAIVER OF JURY TRIAL.** NO PARTY TO THIS AGREEMENT OR ANY ASSIGNEE, SUCCESSOR, HEIR OR PERSONAL REPRESENTATIVE OF A PARTY SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE BASED UPON OR ARISING OUT OF THIS AGREEMENT OR ANY OF THE ANCILLARY AGREEMENTS OR THE DEALINGS OR THE RELATIONSHIP BETWEEN THE PARTIES. NO PARTY WILL SEEK TO CONSOLIDATE ANY SUCH ACTION, IN WHICH A JURY TRIAL HAS BEEN WAIVED, WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THE PROVISIONS OF THIS SECTION _____ HAVE BEEN FULLY DISCUSSED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS. NO PARTY HERETO HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY HERETO THAT THE PROVISIONS OF THIS SECTION _____ WILL NOT BE FULLY ENFORCED IN ALL INSTANCES.

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[14] *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 132-33 (Tex. 2004) (concluding that public policy does not forbid a party's ability to contract away a right to a jury trial).

[15] *See id.* at 134 (noting the jury trial waiver was not concealed or in fine print); *In re* Bank of America, 278 S.W.3d 342, 345 (Tex. 2009) (recognizing that the contractual waiver of jury trial was one of five clauses in the entire real estate purchase agreement which included a bolded introductory caption and that the words waiver and trial by jury in the provision were hand-underlined).

However, one cautionary note is that not all states look upon waivers of jury trials as kindly as Texas. While New York law will generally enforce waivers, other states like California and Georgia may not.[16] For instance, California has specific constitutional limitations on when a jury trial may be waived and those provisions are fairly strictly construed by the California courts.[17]

IV. MISCELLANEOUS PROVISIONS

A. Amendments & Waivers

Most every contract includes provisions specifying the manner in which the parties may change the terms of their contractual relationship through amendments and waivers. Generally, these provisions require that amendments and waivers be accomplished in a writing signed by the parties:

> Amendment. This Agreement may be amended or modified in whole or in part at any time only by an agreement in writing among the parties.
>
> Waivers. No waiver of any term or provision of this Agreement shall be binding unless executed in writing by the party entitled to the benefit thereof.

Unless a contract is required to be in writing under the statute of frauds or other applicable law, Texas courts may enforce an oral amendment or waiver notwithstanding such contractual limitations.[18] Further a contract may be modified by course of dealing or a provision waived by the conduct of the parties.[19]

The application of amendment and waiver provisions in agreements with just two parties is fairly straightforward. However, where contracts have multiple parties such as credit agreements, stockholders agreements, and acquisition agreements, customary amendment or waiver provisions like those set forth above can result in unacceptable veto rights and increased difficulty in contract management. Therefore, amendment and waiver provisions in multiple party agreements often permit amendments and waivers to be adopted by only a subset of the parties, such as a majority of stockholders or lenders or a seller representative.

In these situations, it is important that there is a consistent standard for amendments and waivers. In addition, practitioners should ensure that clients retain approval rights over any particularly important or specifically granted rights. Although negotiations often lead to specific approval rights where they result in a "material and adverse" or "disproportionate" effect on one or more parties, such language may only have limited value based on the specific circumstances of each transaction and the contemplated amendment and may increase the like-

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[16] *See, e.g.,* Barclays Bank of N. Y. v. Heady Elec. Co., 174 A.D.2d 963, 964-65 (N.Y. App. Div. 1991) (enforcing jury waiver); Bank South, N.A. v. Howard, 444 S.E.2d 799, 800 (Ga. 1994) (refusing to enforce jury waiver).

[17] *See* CAL. CONST. art. I, § 16; *see also* Grafton Partners v. Super. Ct., 116 P.3d 479, 492 (Cal. 2005).

[18] *See* Mar-Lan Indus., Inc. v. Nelson, 635 S.W.2d 853, 855 (Tex. App.—El Paso 1982, no writ); *see also* TEX. BUS. & COM. CODE ANN. § 2.209(b) (giving effect to provisions requiring modifications in writing).

[19] *See* TEX. BUS. & COM. CODE ANN. § 2.202(1); Carpet Servs., Inc. v. George A. Fuller Co. of Tex., Inc., 802 S.W.2d 343, 346 (Tex. App.—Dallas 1990) *aff'd*, 823 S.W.2d 603 (Tex. 1992); TEX. BUS. & COM. CODE ANN. § 2.209(d) cmt. 4.

lihood of a dispute regarding whether the approval right has been triggered.

B. Notices

A contract should always include a provision that sets forth how the parties are to deliver notices to each other. This will allow the parties to avoid misunderstandings and confusion regarding how communications regarding the contract are to be sent. There are a number of methods that can be used to deliver notice under a contract. Some of the more common methods are: hand delivery, United States mail (either with or without return receipt requested), overnight courier service, telecopy (fax), or e-mail. The use of e-mails to deliver notice has become more popular in recent years, although it is admittedly difficult to confirm delivery in many cases. Therefore, using a confirmation of delivery or similar feature and also providing notice by more traditional method is advisable.

In drafting a notice provision, consideration should be given to whether notice shall be "deemed" received if specified steps are taken. Deeming notice will prevent a party from avoiding the notice (whether through a move or otherwise) and thus avoiding the consequences of that notice. A sample notice provision that deems notice to be given would read as follows:

> Notice. All notices and other communications required or permitted by this Agreement shall be in writing and shall be deemed given to a party when (a) delivered to the appropriate address by hand or by nationally recognized overnight courier service (costs prepaid); (b) sent by facsimile or e-mail with confirmation of transmission by the transmitting equipment, or (c) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the following addresses, facsimile numbers or e-mail addresses designated below (or to such other address, facsimile number or e-mail address as a party may designate by notice to the other parties):

Texas law allows parties to waive service of process.[20] As a result, drafters also may be able use a notice provision to contractually alter otherwise applicable service of process requirements by inserting language such as:

> Each party hereto agrees that service of process upon such party at the address referred to in this Section ___, together with written notice of such service to such party, shall be deemed effective service of process on such party.

C. Assignment

With limited exceptions, contracts, and the rights provided thereunder, are assignable unless prohibited by law.[21] Therefore, agreements should include any prohibition on assignment intended by the parties in a provision similar to the following:

> Assignment. This Agreement and the rights, duties, and obligations hereunder may not be transferred or assigned by either of the parties [, whether directly or indirectly by merger, consolidation, reorganization, dissolution, operation of law or otherwise,] without the prior written consent of the other party. Any attempted

[20] *See, e.g.*, TEX. R. CIV. P. § 124; Werner v. Colwell, 909 S.W.2d 866, 869-70 (Tex. 1995).

[21] Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 596 (Tex. 1992).

> transfer or assignment without consent in violation of the foregoing shall be void. Subject to the foregoing, this Agreement and the provisions hereof shall be binding on the parties and their respective permitted successors and permitted assigns.

A merger does not constitute an assignment in Texas.[22] As a result, practitioners can further restrict assignments to include mergers and various assignments by operation of law by including the bracketed text in the above form.

Under Texas law, there is no implied covenant to act reasonably in withholding consent.[23] Consequently, it is common for parties to include a qualifier such as "such consent not to be unreasonably withheld, delayed, or conditioned."

Although Texas courts have not provided guidance on what constitutes reasonable conduct with respect to a consent to assignment, a consenting party should be able to consider: (1) the current and historical financial condition of the proposed assignee, (2) the experience and business acumen of the proposed assignee, (3) the proposed use of the assigned rights by the proposed assignee, and (4) the honesty and good-faith of the proposed assignee.[24] However, personal taste and convenience are not proper considerations, and it is unreasonable to withhold consent solely to extract an economic concession or improve economic position.[25] Accordingly, if there are certain potential assignees, such as direct competitors or "vulture" funds that may be unpalatable to either of the contracting parties, attorneys should identify them as specific exclusions in the assignment paragraph.

Similarly, there may be instances in which one or more of the parties' desires or needs to have a limited ability to assign the Agreement to third parties without the necessity of consent. Common instances include assignments to subsidiaries or affiliates, a sale of all or substantially all of a party's assets, and collateral assignment to lenders. Practitioners can include these "permitted" assignments by qualifying the consent requirement through specific language such as:

> [P]rovided, however, that either party may assign this Agreement without such consent to: (i) any of such party's subsidiaries or affiliates, in which event such party shall remain responsible for the performance of its obligations hereunder, (ii) an unrelated buyer of all or substantially all of the assets of such party, or (iii) any lender to such party or any of its subsidiaries as security for indebtedness to such lender.

D. Third Party Beneficiaries

The presumption in Texas is that parties to a contract do not intend to benefit any third party unless the agreement contains an express provision to the contrary.[26] Notwithstanding this presumption, it is common for agreements to include a provision such as the following to disclaim third party beneficiary status:

> Third Party Beneficiaries. This Agreement is for the sole benefit of the parties

[22] TEX. BUS. ORGS. CODE ANN. § 10.008(a)(2)(C) (West 2008).

[23] Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App.—San Antonio 1987, writ denied).

[24] *See* Chapman v. Katz, 862 N.E.2d 735, 745 (Mass. 2007); Fladeboe v. Am. Isuzu Motors Inc., 58 Cal. Rptr. 3d 225, 240-41 (Cal. Ct. App. 2007).

[25] *See Chapman*, 862 N.E.2d at 745.

[26] *See* MCI Telecomm. Corp. v. Tex. Utils. Elec. Co., 995 S.W.2d 647, 651-52 (Tex. 1999).

> hereto and their respective successors and permitted assigns. Nothing herein shall give or be construed to give any person or entity, other than the parties hereto and their respective successors and permitted assigns, any legal or equitable rights hereunder.

Agreements often include various rights that are intended to benefit third parties, such as indemnification, waiver, and release provisions that run to affiliates, subsidiaries, stockholders, and other persons not subject to the agreement and provisions that are enforceable by third party lenders. In these cases, attorneys should qualify the above form to include these third party beneficiaries specifically by using language like, "[e]xcept as otherwise provided in this Agreement" or "[e]xcept for the persons entitled to indemnification under Section X and the persons entitled to benefits of the waivers under Section Y."

E. Integration

The insertion of a standard integration clause similar to the following allows parties to invoke the protection of the parol evidence rule:

> Integration. The Agreement and the agreements and documents referred to herein (including the Exhibits and Schedules hereto) contain the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, whether written or oral, relating to the subject matter hereof. There are no other agreements [representations, or warranties] between or among the parties other than those set forth in this Agreement and the agreements and documents referred to herein.

The parol evidence rule provides that a writing intended by the parties as a final expression of their agreement may not be contradicted by any other inconsistent prior agreement or oral contemporaneous agreement.[27] Consequently, the inclusion of the above provision is not necessary under Texas law, but it does help establish that the parties' intended the contract in question to constitute a final expression of their agreement.[28]

The breadth of the integration provision should be consistent with the parties' intended final agreement. For instance, attorneys should consider specifically referencing in the integration clause any prior agreements, such as letters of intent or non-disclosure agreements that are intended to be superseded by the final agreement. Likewise, practitioners should consider including any additional agreements such as escrow agreements, non-compete agreements, purchase orders, or similar documents which supplement the final agreement. If such additional documents are named, further consideration should be given to the insertion of a "conflicts" provision to avoid possible inconsistencies between the documents. Finally, a broadly drafted integration provision, which includes the bracketed text above regarding representations and warranties may be the equivalent of a non-reliance clause thus depriving a party of the ability to successfully make a fraud or 10b-5 claim.[29]

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[27] *See* TEX. BUS. & COM. CODE ANN. § 2.202; ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., Inc., 234 S.W.3d 711, 719-20 (Tex. App.—Eastland 2005, pet. denied).

[28] *See* TEX. BUS. & COM. CODE ANN. § 2.202; ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., Inc., 234 S.W.3d 711, 719-20 (Tex. App.—Eastland 2005, pet. denied); Edascio, L.L.C. v. Nextiraone L.L.C., 264 S.W.3d 786, 796 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

[29] *See generally* Playboy Enter. Inc., v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 258-59 (Tex. App.—Corpus Christi, no pet.) (barring a plaintiff's fraudulent inducement claim because the contract contained a merger clause stating that there were "no representations, promises, warranties or undertakings other than those contained in

F. Time of the Essence

Most contracts contain a variety of time-specific provisions (e.g. payment dates, delivery dates, etc.). However, under Texas law, time is generally not considered to be of the essence in a contract unless it is specifically provided or if the circumstances clearly indicate that it was the intention of the parties.[30] As a result, the parties may not receive the benefit of negotiated performance dates unless they include a specific provision such as:

> Time of the Essence. Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period provided for in this Agreement.

G. Severability

Texas recognizes a presumption that each provision of a contract is dependent on the others.[31] Thus, a single illegal provision could result in the entire contract being unenforceable. However, courts will strike an otherwise invalid or illegal provision that is not an essential part of the agreement.[32] Further, severability provisions similar to the following provide a clear expression of the parties to have the agreement remain in effect notwithstanding a finding that a particular provision is unenforceable:

> Severability. If one or more provisions of this Agreement are held to be unenforceable under applicable law, such provisions shall be excluded from this Agreement and the balance of the Agreement shall be interpreted as if such provisions were so excluded and shall be enforceable in accordance with its terms.

With respect to non-compete provisions, Texas follows the equitable modification doctrine, which allows a court to revise the scope and duration of the non-compete to be enforceable to the maximum extent possible.[33] In contrast, "blue pencil" jurisdictions will merely strike the offending language.

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this Agreement"); Spring Window Div., Inc. v. Blindmaker, Inc., 184 S.W.3d 840, 869-70 (Tex. App.—Austin 2006, pet. granted, judgm't vacated w.r.m.) (enforcing a merger clause in a license agreement as a disclaimer of reliance to bar a fraudulent inducement claim predicated on the subject of the contract); *but see* Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 293 (Tex. 1957) (holding an integration clause did not preclude a fraudulent inducement claim); Warehouse Assocs. Corporate Centre II, Inc. v. Celotex Corp., 192 S.W.3d 225, 239 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

[30] *See* Laredo Hides Co., Inc., v. H&H Meat Prods. Co., Inc., 513 S.W.2d 210, 216 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); Siderius, Inc., v. Wallace Co., Inc., 583 S.W.2d 852, 863-64 (Tex. Civ. App.—Tyler 1979, no writ).

[31] *See* John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 86 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[32] *See* Beaumont v. Int'l Ass'n of Firefighters Local Union 399, 241 S.W.3d 208, 215 (quoting Williams v. Williams, 69 S.W.2d 867, 871 (Tex. 1978)).

[33] Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 388 (Tex. 1991); *see also* TEX. BUS. & COM. CODE ANN. § 15.51(c).

H. Interpretation

Although an unambiguous agreement will be construed and enforced as written, parties often agree to deliberately ambiguous language to close negotiating gaps, preferring to leave certain troublesome provisions to the good faith future implementation of the contract.[34] This practice is potentially troublesome, as ambiguities in a contract will generally be interpreted against its drafter.[35] Accordingly, attorneys may avoid this result by including a provision similar to the following:

> Interpretation. No provision of this Agreement will be interpreted in favor of, or against, any of the parties hereto by reason of the extent to which any such party or its counsel participated in the drafting thereof or by reason of the extent to which any such provision is inconsistent with any prior draft hereof or thereof.

However, deliberate ambiguity is not the same as potentially ambiguous or poorly drafted language that a party knows is intended by the other party as conveying a specific interpretation. In the latter case, where one party's subjective understanding has been manifested objectively, courts will interpret the ambiguity against the other party if it knew or should have known of such understanding.[36]

V. CERTAIN DEFINED TERMS

A. Best Efforts

Agreements often require parties to use their respective "best efforts," "commercially reasonable efforts," or another similar standard in performing certain obligations. The prevailing belief among most contract lawyers is that "best efforts" is the most onerous of the efforts formulations requiring that the obligated party use its total capabilities or exhaust its available alternatives, regardless of cost. In comparison, they view "commercially reasonable" efforts as implying good faith action in light of relevant costs, difficulty and other relevant factors. However, Texas does not distinguish between these standards and will apply a measure of reasonableness even where the contract purports to require best efforts.[37]

As a result, if parties intend best efforts to require a heightened standard of performance, they should provide a specific definition. The following is a fairly commonly used formulation:

> "[B]est efforts" means the efforts that a prudent person desirous of achieving a result would use in similar circumstances to ensure that such result is achieved as expeditiously as possible.

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[34] Birnbaum v. Swepi LP, 48 S.W.3d 254, 257-58 (Tex. App.—San Antonio 2001, pet. denied).

[35] Republic Nat'l Bank of Dallas v. Nw. Nat'l Bank of Ft. Worth, 578 S.W.2d 109, 115 (Tex. 1978).

[36] *See* United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 845 (Del. Ch. 2007) (defining the foregoing as the principle of the "forthright negotiator").

[37] *See* TEX. BUS. & COM. CODE ANN. § 2.306(b), cmts. 2 and 5 (stating the essential test for best efforts is good faith, implying reasonable diligence in performance and requiring reasonable effort and due diligence); Herrmann Holdings Ltd. v. Lucent Tech. Inc., 302 F.3d 552, 558 (5th Cir. 2002) (measuring the quality of best efforts by comparing performance to that of an average, prudent, comparable person).

In comparison:

> "[C]ommercially reasonable efforts" means, with respect to a given outcome, the efforts, consistent with its past practice as well as consistent with the practice of comparable companies with respect to comparable products, that a reasonable person would use to achieve such outcome; provided, however, that such efforts shall not include any action or expenditure that is unduly burdensome under the circumstances.

As you can see, even the above "best efforts" language incorporates terminology often associated with a reasonableness standard. Therefore, if possible, the definition of best efforts should specify any goals or guidelines and include specific actions or examples of the scope and nature of the required efforts.

B. Material Adverse Effect

Parties in various types of agreements use "material adverse effect" or "material adverse change" to allocate risk or establish a threshold for breach or termination. Usually, a "material adverse effect" or "material adverse change" is thought to be such a particularly severe and, most likely unanticipated, event that it defeats the fundamental value or nature of the parties' agreement. Although agreements may just use the terminology without further definition, a defined term such as the following is more typical, especially in acquisition, investment and credit agreements:

> "[M]aterial adverse effect" means any event, circumstance, development or change that, individually or in the aggregate, has had a material adverse effect on the business, financial condition or results of operations of such person and any subsidiaries of such person taken as a whole.

Unfortunately, even this customary language does not really shed much light on what does or does not constitute a material adverse effect, and a party attempting to establish that a material adverse effect has occurred faces a difficult burden.[38] Accordingly, if possible, practitioners should identify specific, objective conditions that the parties agree would satisfy the definition of a material adverse effect.[39]

Although the absence of a specific event from the definition makes it more likely that the occurrence of such event will not constitute a material adverse effect, parties often negotiate strongly to exclude certain items from the operation of the definition. These excluded events tend to be of a more general nature, which allow parties to gain comfort in making representations regarding, or providing a termination right based upon, the occurrence of a material adverse effect from a particular date.

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[38] *See* Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008) (holding that the buyer in an acquisition must demonstrate that "there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months").

[39] *See, e.g.,* Nip v. Checkpoint Sys. Inc., 154 S.W.3d 767, 769-70 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (finding the occurrence of a material adverse effect where the relevant definition included a monetary threshold); Borders v. KLRB, Inc., 727 S.W.2d 357, 359 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.) (noting that a material adverse effect did not occur for a decline in radio ratings where the related definition did not include such metric).

Common exclusions are any effects resulting from:

(A) changes to the industry or markets in which the business of the company and its subsidiaries primarily operate that are not unique to such business;

(B) changes in economic or financial or capital markets conditions generally;

(C) a change or proposed change in any accounting standard, principle or interpretation;

(D) a change or proposed change in any law;

(E) the announcement or the execution of this Agreement, the pendency or consummation of the transactions contemplated hereby or the performance of this Agreement;

(F) the compliance with the terms of this Agreement or the taking of any action required or contemplated by this Agreement;

(G) any natural disaster;

(H) any acts of terrorism or war or the outbreak or escalation of hostilities or change in geopolitical conditions; provided that with respect to clauses (A), (B), (C), (D), (G) and (H), such matter does not disproportionately affect the company and its subsidiaries as compared to a similarly situated business operating in the principal business in which the company and its subsidiaries operate.

C. Knowledge

In the absence of a specific definition, "knowledge" will likely be limited to actual knowledge.[40] The definition of knowledge is often highly negotiated both in terms of the level of knowledge (i.e., actual vs. constructive) and the persons whose knowledge will be imputed to a particular party. The following form includes multiple options used by parties in a typical knowledge definition:

"Knowledge" means, with respect to the Company, the [actual] knowledge of the following individuals: _____, _____, and _____ [and any other director or officer of the Company or any Subsidiary and any other employee of the Company or any Subsidiary with a title of _____ or above] [without inquiry]. [For purposes of this Agreement, any such individual shall be deemed to have knowledge of a particular fact or other matter if (a) such individual is actually aware of such fact or other matter or (b) a prudent individual could be expected to discover or otherwise become aware of such fact or other matter after reasonable investigation].

[40] *See* TEX. BUS. & COM. CODE ANN. § 1.202.

VI. EXECUTION MATTERS

The signature page is perhaps the most important "boilerplate" part of the contract. No matter how well a contract is drafted, all of the attorneys' efforts will be for naught if the contract is not properly executed by the right parties. Great care should be taken to make sure that the names on the signature blocks are an exact match of the names in the introductory paragraph of the contract. In addition, the identity of the person signing the contract should be clear, and that person's capacity (president, vice president, etc.) should be specified. An example of an execution provision follows:

> IN WITNESS WHEREOF, the parties have executed this Agreement to be effective as of the date set forth above.
>
> XYZ, Inc.
>
> By:_____
> Its:_____
>
> ABC, LLC
>
> By:_____
> Its:_____

In addition, if the subject matter of the contract involves any potential community property rights of a married individual, attorneys should consider whether the signature of the party's spouse is required:

> The undersigned, being the spouse of Jane Doe, does hereby execute this Agreement for the express purpose of being bound by the provisions of Section ____ hereof.

Finally, if there are any other contractual limitations, such as a person executing an agreement under a power of attorney, or as a parent or guardian on behalf of a minor, those facts should be recited in the signature block as well.

VII. SUMMARY & CONCLUSION

Lawyers spend considerable time and effort negotiating various provisions of agreements governing consideration, indemnification, covenants, representations and other matters central to a business arrangement only to see these provisions inadvertently undone or amended by so-called "boilerplate" provisions. As illustrated in this article, while "boilerplate" provisions can be useful to narrow issues or save transaction costs, careful consideration of these provisions is nevertheless necessary to properly protect clients' interests and to ensure that the final agreement is consistent with the parties' intent.

VIII. APPENDIX A: FORMS OF OTHER COMMON BOILERPLATE PROVISIONS

Conflicts. In the event of any conflict in the terms and provisions of this Agreement and the terms and provisions of [Agreement X], the terms and provisions of this Agreement shall control.

Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. Facsimile and .pdf signatures to this Agreement shall be acceptable and binding.

Cumulative Remedies. The rights and remedies under this Agreement are in addition to and not exclusive of any other rights, remedies, powers and privileges whether at law, in equity under this Agreement or otherwise, that any party may have against another. No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude the exercise of any other right, power or privilege. No waiver of any breach of any covenant or agreement hereunder shall be deemed a waiver of a preceding or subsequent breach of the same or any other covenant or agreement.

Expenses. Except as otherwise provided herein, each party shall pay its own costs and expenses incurred in connection with this Agreement and its performance hereunder; provided, however, that if any suit or other proceeding is brought for the enforcement or interpretation of this Agreement, or because of any alleged dispute, breach, default or misrepresentation hereunder, the successful or prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and other costs incurred in connection therewith.

Force Majeure. Neither party shall be liable for any delay or failure in performance due to any reason or unforeseen circumstance beyond the affected party's reasonable control, including, shortages or delays in obtaining materials from suppliers that cannot reasonably be cured by obtaining the needed materials from another source, work stoppages not involving employees of either party that cannot reasonably be overcome, fires, riots, rebellions, wars, acts of terrorism, accidents, explosions, floods, storms, acts of God, and similar occurrences. The obligations and rights of the excused party shall be extended on a day-to-day basis for the time period equal to the period of the excusable delay.

Further Assurances. Each of the parties hereto shall execute and deliver all requested documents and instruments and shall do any and all acts and things reasonably requested (a) in connection with the performance of the obligations undertaken in this Agreement, (b) to perfect and evidence the transactions contemplated by this Agreement, and/or (c) otherwise to effectuate in good faith the intent of the parties and the purposes of this Agreement.

Interpretive Matters. Unless the context otherwise requires, (a) all references to Sections, Articles or Schedules are to Sections, Articles or Schedules of or to this Agreement, (b) the singular form includes the plural form and *vice versa*, (c) "or" is disjunctive but not necessarily exclusive, (d) masculine, feminine and neuter forms all include the other, and (e) the word "including" and similar terms following any statement will not be construed to limit the statement to matters listed after such word or term, whether or not a phrase of non-limitation such as "without limitation" is used.

Liquidated Damages. Notwithstanding any contrary provision contained herein, in the event of a material breach by either party of its obligations under this Agreement, the only damages payable to the Nondefaulting party shall be a lump sum monetary payment equal to $[amount]

plus any attorneys' fees and costs incurred by the Nondefaulting party to obtain, if necessary, a final judgment or arbitration determination that the defaulting party has materially breached its obligations under this Agreement. In the event a party alleged to be in material breach under this Agreement (Defaulting Party) challenges the applicability or efficacy of this provision or if this provision is held to be void or unenforceable for any reason, the Nondefaulting Party shall be entitled to any and all other damages and remedies otherwise provided at law, including attorneys' fees.

Publicity. Upon consummation of the transactions contemplated hereby, except as required by applicable law or stock exchange or similar rules, neither party shall disclose the terms of or the existence hereof (except to advisors and financing sources who have a need to know or who are otherwise subject to a confidentiality restriction) without the other party's prior written consent.

Relationship of the Parties. The relationship of the parties is that of independent contractors. The parties are not, by virtue of this Agreement or otherwise, in an employer-employee, principal-agent, joint venture or partnership relationship with each other, and each party agrees not to represent to any other person, or to assert in any form or forum to the contrary. Neither party is authorized to act as an agent for, or legal representative of, the other party and neither party shall have authority to assume or create any obligation on behalf of, in the name of, or binding upon the other party. Each party acknowledges that it is responsible for its own tax withholding and other obligations with regard to its own employees.

Specific Performance. Each party hereby agrees that irreparable damages would occur in the event that any of the provisions of this Agreement were not performed by them in accordance with the terms hereof and that each party shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or in equity.

Titles & Headings. Titles and headings of sections of this Agreement are for convenience of reference only and shall not affect the construction of any provision of this Agreement.

IX. APPENDIX B: SUGGESTED READING & RESOURCES LIST

Kenneth A. Adams, *Understanding 'Best Efforts' and its Variants (Including Drafting Recommendations)*, 50 PRAC. LAW. No. 4, Aug. 2004.

Mark E. Betzen & Richard Meamber, *Rule 10b-5 and Related Considerations in Acquisition Agreements*, THE METRO. CORP. COUNS., Aug. 1, 2004, at 10.

Shawn Helms, *Analyzing Conventional Wisdom: The 'Best Efforts' Standard*, DALLAS BAR ASS'N. (Headnotes, Dallas, Tex.), Feb. 1, 2007, at 8.

Curt M. Langley & Jason T. Martin, Presentation for the State Bar of Texas Continuing Legal Education: Boilerplate Terms, Rules of Interpretation, and Developments in Drafting Contracts (May 29, 2003).

Tina L. Stark, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE (2003).

Steven O. Weise & Mikel R. Bistrow, *Boilerplate Provisions in Transactional Documents: How to Stay Out of Trouble*, 20 CAL. BUS. L. PRACTITIONER 33 (Summer 2005).

D. Hull Youngblood, Jr. & Seth E. Meisel, Presentation for State Bar of Texas Continuing Legal Education: Seven Deadly Sins of Boilerplate: "Cut-and-Paste Can Get You Sued (April 29-30, 2010).

Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008).

United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810 (Del. Ch. 2007).

X. APPENDIX C: MODEL ARBITRATION CLAUSES

Typical Broad Form Arbitration Clause
Any dispute, controversy, or claim arising out of, relating to, or in any way connected with this Contract, including, without limitation, the existence, validity of performance, breach, or termination thereof, shall be settled by final and binding arbitration in accordance with the following arbitration rules:

[Name governing body]
The seat of the arbitration shall be *[City, Country]*. The language of the arbitration shall be English. Within thirty (30) days of the respondent's receipt of notice of arbitration, each party shall select an arbitrator, and within fifteen (15) days of selection of the second arbitrator the two arbitrators shall select the third, who shall serve as Chair. In the event that any party fails to timely appoint its arbitrator or the two party-selected arbitrators are unable to agree on a third, the [governing body] shall appoint the arbitrator(s) who have not been timely designated. The arbitrator(s) shall be qualified by education, training, or experience to determine the dispute, controversy, or claim.

United Nations Commission on International Trade Law (UNCITRAL) Model Clause:
PERMANENT COURT OF ARBITRATION, *UNCITRAL Rules and Model Clause*, www.pca-cpa.org/showpage.asp?pag_id=1190 (last visited Feb. 17, 2011).
Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.

The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration. The case shall be administered by the International Bureau of the Permanent Court of Arbitration in accordance with the "Permanent Court of Arbitration Procedures for Cases under the UNCITRAL Arbitration Rules."

Note: parties might wish to consider adding:

(a) The number of arbitrators shall be … [one or three].
(b) The place of arbitration shall be … [insert city and country].
(c) The language(s) to be used in the arbitral proceedings shall be … [insert choice].

London Court of International Arbitration (LCIA) Model Clause:
THE LONDON COURT OF INTERNATIONAL ARBITRATION, *Recommended Clauses*, www.lcia.org (last visited Feb. 17, 2011).
Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].
The language to be used in the arbitral proceedings shall be [ ].
The governing law of the contract shall be the substantive law of [ ].

Court of Arbitration of the International Chamber of Commerce (ICC) Model Clause:
INT'L CHAMBER OF COMMERCE, *Int'l Court of Arbitration Dispute Resolution Services*, *Standard ICC Arbitration Clause*,
www.iccwbo.org/court/arbitration/id4090/index.html (last visited Feb. 17, 2011).
All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

[Note: Parties are reminded that] it may be desirable for them to stipulate in the arbitration clause itself the law governing the contract, the number of arbitrators, and the place and language of the arbitration.]