# BOILERPLATE AND BEYOND: IMPACT & ENFORCEABILITY OF BOILERPLATE CLAUSES

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"Boilerplate" is the term used to refer to certain standard clauses that usually appear at the end of a contract. Unfortunately, boilerplate provisions are commonly overlooked in contracts as standard non-negotiable clauses. These clauses often establish essential rights and can be tailored to favor one party or the other and warrant careful consideration both at the drafting stage and in litigation.

## I. FORCE MAJEURE

Force majeure clauses are commonly found in all types of contracts, including leases, manufacturing/supply agreements, and construction contracts. In general terms, the effect of a force majeure clause is to free the parties from performance obligations if extraordinary events prevent performance.

> Force majeure, French for greater force, describes any event that is unexpected by all parties, not caused by any party, and affects the relationship between them, limits the ability of either to perform a duty, or requires one to intrude on a privilege of the other. Contracting parties may use a "force majeure clause" to indicate that a party owes no liability to the other in the event force majeure makes performance impossible. Force majeure may require acts of necessity to save lives or property. In most contexts, an act of God is also force majeure, although force majeure includes not only natural events but also acts by a human agency, such as war or labor unrest, that are usually not within the scope of acts of God. Bouvier Law Dictionary.

The definition of the force majeure clause varies. The Department of Natural Resources (DNR), Oil and Gas Division defines force majeure as "war, riots, acts of God, unusually severe weather, or any other cause beyond the unit operator's reasonable ability to foresee or control and includes operational failure to existing transportation facilities and delays caused by judicial decisions or lack of them." *Alaskan Crude Corp. v. State*, 261 P.3d 412, 415 (Alaska 2011)

Many force majeure clauses limit the provision to "acts of God." Typically, the term 'act of God' is meant those events and accidents which proceed from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc." *Potter v. Battle Creek Gas Co*., 185 N.W.2d 37, 39 (Mich. 1970). The "nature cause" has been interpreted to be limited to events of nature such as weather and climate. *Dir.-General of R.Rs. v. Bryant's Adm'r.,* 105 S.E. 389, 392 (Va. 1920)(holding an act of God applies "only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. And that rule must be regarded as the proper one."

Force majeure clauses in contracts generally supersede the common law doctrine of impossibility. *See e.g. Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 855 (N.D. Ill. 1990). They are not however broad, catchall basis for non-performance. In Texas, a "force majeure clause does not relieve a contracting party of the obligation to perform, unless the disabling event was unforeseeable at the time the parties made the contract. An economic downturn in the market for a product is not such an unforeseeable occurrence that would justify application of the force majeure provision, and a contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated.

*TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d 176, 183 (Tex. App. 2018). In Illinois "a force majeure clause will only excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party's nonperformance. *Northern Ill. Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984)

As with all contracts, the language of the force majeure will control. Consider the following term:

> UNAVOIDABLE DELAY OR FAILURE IN PERFORMANCE EXCUSED. Any delay or failure by Company X in performing this Contract because of strike, fire, flood, **epidemic**, acts of terrorism, acts of God, inability to obtain Goods in a timely or commercially feasible manner, **or any other causes beyond the reasonable control of Company X** shall be excused and shall not be breaches of this Contract.

An epidemic is defined as "an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population." MERRIAM-WEBSTER. A pandemic refers to an illness that has spread over several countries or continents, usually affecting a large number of people. On March 11, 2020 the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. By definition all pandemics are also epidemics, but all epidemics are not pandemics.

Another common term in a force majeure clause is an unforeseen governmental action. Consider this clause:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by. . . laws, governmental action or inaction, orders of government…

Governmental shut down or stay-in-place orders certainly qualifies as governmental action or order; however, the scope of the governmental order will likely play into whether it justifies complete non-performance under a force majeure clause. In the case of *Gap Inc. v. Ponte Gadea N.Y. LLC*, Gap brought an action against the landlord for breach of contract and unjust enrichment, and seeking a declaratory judgment, rescission and/or reformation of the lease claiming that as a result of the COVID-19 pandemic and shut down of retail business it should be released from its lease obligations. The landlord counterclaimed for non-payment of rent. Force Majeure was defined in the Lease to mean "a strike or other labor trouble, fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control." Gap's argued various theories in support of its claims including frustration of purpose, impossibility, failure of consideration, and mutual mistake. The Court ultimately dismissed all of Gap's claims and found for the landlord on its counterclaim for hold over rent.

Some courts have held that COVID-19 and related government measures fall within broad, catchall categories of force majeure provisions. *See e.g. Lampo Grp., LLC v. Marriott Hotel Servs., Inc.*, 2021 WL 3490063 (M.D. Tenn. Aug. 9, 2021) ("It appears that the COVID pandemic plus the attendant restrictions on business operations could, indeed, be deemed a force majeure that would authorize termination of the Agreement."); *JN Contemp. Art LLC v. Phillips*

*Auctioneers LLC*, 507 F. Supp. 3d 490, (S.D.N.Y. 2020) ("The pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force majeure clause.")

A significant amount of legal commentary fixated on the narrow question of whether COVID-19 fits within the terminology of boilerplate force majeure clauses, courts however seem less focused on that threshold question. Rather, many courts have bypassed the threshold question entirely and instead have focused directly on whether the pandemic is the cause of the alleged nonperformance or delayed performance, assuming without deciding that the pandemic falls within the scope of the force majeure clause. See e.g., *Future Street Ltd. v. Big Belly Solar, LLC*, 2020 WL 4431764 (D. Mass. July 31, 2020)("Even assuming arguendo that the pandemic and effects of same are a force majeure under the Agreement, [plaintiff] has not shown that its failure to perform its obligations under the Agreement were caused by same. . .").

The post-COVID era seems fraught with opportunity to utilize force majeure clauses. However, force majeure clauses are strictly and narrowly construed, and the evidentiary showing necessary for a successful impossibility argument is a high bar. Drafters of force majeure clauses should consider the purpose of the clause and the effect of governmental orders on their client's business if trying to address stay-at-home related government orders.

Even in the absence of a force majeure clause a party's performance may be excused by frustration of purpose, impracticability, and/or impossibility.

## II. CHOICE OF LAW

### A. What Is It?

Choice of law clauses determine, regardless of the venue, what law applies to this dispute. The purpose of a choice-of-law clause is to provide certainty as to the applicable governing law in the case of a subsequent dispute. The way the clause is drafted can affect whether the substantive law, procedural law, or both apply to the dispute and the scope of the claims subject to the choice of law clause.

**Example Language:**

> This Agreement shall be governed by, and construed in accordance with, the laws of the State of Colorado.
>
> *versus*
>
> This Agreement, and all claims or causes of action (whether in contract, tort or statute) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), shall be governed by, and enforced in accordance with, the internal laws of the State of Colorado, including its statutes of limitations.

### B. Why do they Matter?

The choice of law clause can determine the rights and obligations of the parties, for example which statute of limitation applies to a dispute[1], or if any particular caps apply as to damages. Consider the distinction between choosing the substantive law of the chosen jurisdiction versus choosing that jurisdiction's procedural law—which is a distinction between the law governing the enforcement of a party's rights (procedural law) and the law governing the creation of those rights (substantive law). For example, statutes of limitations are generally deemed procedural rights.

A choice of law clause may apply to tort claims if the contact expressly encompasses tort claims. *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 769-70 (Del. Ch. 2014) (contractual choice-of-law provision may apply to fraud claim if contract so provides); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148 (Cal. 1992)(contractual choice of law applies to breach of fiduciary duty claim); *Wise v. Zwicker & Associates*, 780 F.3d 710 (6th Cir. 2015) (contractual choice of law provision may apply to a claim "sounding in tort").

The choice of law may impact a host of rights under the contract, including things like statutes of limitations and damages. Choice of law also may impact applicability of frustration of purpose, impracticability, and/or impossibility. For example, New York requires objective impossibility of performance and requires the force majeure clause to have a specific trigger whereas California is laxer and may excuse performance upon a showing of unreasonable expense to perform.

In the absence of a choice of law provision federal courts will ordinarily apply the state choice of law rules where the courts are located. *Klaxon Co. v. Stentor*, 313 U.S. 487 (1941) (citing to *Erie v. Tompkins*, 304 U.S. 64 (1938).

### C. Are they Enforceable?

Yes, if properly drafted, choice of law clauses are generally enforceable.

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

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[1] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 Del. Ch. LEXIS 171, at *56 n. 138 (Del. Ch. Aug.7, 2012) (choice-of-law provision applies to statute of limitations if choice of law provision if does so explicitly); *Tanges v. Heidelberg N. Am., Inc*., 710 N.E.2d 250 (N.Y. 1999) (statute of limitations of state whose law governs the substantive claim applies if the statute of limitations of that state is part of the substantive law of that state); *Hambrecht & Quist Venture Partners v. Am. Med. Int'l*, 46 Cal. Rptr. 2d 33 (Cal. Ct. App.1995) (contractual chosen-law provision applies to determine applicable statute of limitations).

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)

Generally, courts will enforce a choice-of-law provision so long as the chosen law bears a reasonable relationship to the parties or the transaction. Including such a provision demonstrates the parties' intent that courts need not conduct a conflict-of-laws analysis unless the parties expressly indicate otherwise. An exception exists "where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal". *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 368 (2015)(NY courts will not enforce otherwise enforceable choice-of-law clause if the chosen jurisdiction's law is truly obnoxious). "The party seeking to invoke the exception bears a heavy burden of proving that application of the chosen law would be offensive to a fundamental public policy of this State". *Id.* "Although [courts] possess the power to set aside agreements on this basis, [the courts'] usual and most important function is to enforce contracts rather than invalidate them on the pretext of public policy, unless they clearly contravene public right or the public welfare." *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 361 (2019).

## III. FORUM SELECTION CLAUSES

### A. What Are They?

A forum selection clause allows the parties to agree that any disputes relating to that contract will be resolved in a specific forum. These include requirements that a dispute be subject to arbitration.

### B. Examples

Mandatory Venue Clause:

> The parties agree that the sole and exclusive jurisdiction for any lawsuit related to or arising under this Agreement shall be in the United States District Court for the Western District of Virginia. Employee waives any objection to jurisdiction and venue which Employee otherwise may have to this venue for any such lawsuit.

Permissive Venue Clause:

> This Agreement and the Party's [sic] actions under the Agreement shall be governed and construed under the law of the state of Colorado, without reference to conflict of law principles, and agree to adjudicate any actions or proceeds [sic] in Pitkin County, Colorado. The parties hereby expressly consent to the jurisdiction and venue of the federal state courts within the state of Colorado.

Arbitration Clause:

> Any controversy or claim arising out of or relating to this Agreement including, without limitation, any claim that this Agreement or any part thereof is invalid, illegal or otherwise voidable or void, as well as all civil claims based on public policy and federal, state and local statutes, regulations and ordinances (including claims based on federal, state or local laws pertaining to granting or establishing franchises and deceptive and unfair trade practices), shall be submitted to arbitration for determination by one arbitrator before and in accordance with the commercial arbitration rules of the American Arbitration Association ("AAA").

**C. Are They Enforceable?**

Forum selection clauses are generally enforceable, unless application of the selected forum is unfair or unreasonable or was induced by fraud. *ABC Mobile Systems, Inc. v. Harvey,* 701 P.2d 137, 139 (Colo. App. 1985) (Babcock, J.) (affirming dismissal of action based upon forum selection clause in franchise agreement); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972) (declaring that forum selection clauses are "prima facie valid and should be enforced" unless shown to be unreasonable); *Edge Telecom, Inc. v. Sterling Bank*, 143 P.3d 1155, 1161 (Colo. App. 2006) (forum selection clause will be enforced unless the party seeking to avoid its effect proves that its enforcement would be unfair or unreasonable or that it was fraudulently induced). Whether a clause raises to the level of "unfairness or unreasonableness" is generally a fact specific question. *D'Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708, 712 (D.C.R.I. 1983)( the party "seeking to avoid the strictures of the forum selection clause must convince the court of the reality of 'a set of qualitative factual circumstances warranting denial of enforcement'" and that "the designated venue will *de facto* deprive [it] of [its] day in court.").

Arbitration clauses in particular are generally upheld because there is strong public policy in favor of arbitration.

Is the forum selection clause mandatory or permissive? "The difference between a mandatory and permissive forum selection clause is that 'mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do

not prohibit litigation elsewhere.'" *American Soda, LLP v. U.S. Filer Wastewater Group, Inc.*, 428 F.3d 921, 926-27 (10th Cir. 2005)(*quoting Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)).

### 1. State to State

*Restatement (Second) Conflict of Laws* § 80 ('Limitations Imposed by Contract of Parties. The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.')

*M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972)(forum selection clause is presumptively effective and should not be set aside unless the party challenging it makes a strong showing that enforcement would be unreasonable and unjust)

*Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (forum-selection clauses are subject to judicial scrutiny for fundamental fairness; in this case, there was no indication that the cruise line set the forum as a means of discouraging cruise passengers from pursuing legitimate claims)

*Stewart Organization, Inc. v. Ricoh Corporation,* 108 S.Ct. 2239 (1988) ('enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system…')

*Jacobson v. Mailboxes Etc. U.S.A. Inc.*, 646 N.E.2d 741, 743 (Mass. 1995) ("We accept the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so.")

### 2. Federal

Until 2013 there was a split among the circuits as to the application of forum selection clauses. *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas,* 571 U.S. 49 (2013) clarified the issue and held that the parties' contractual choice of forum should be enforced except in the most unusual cases, and that the party resisting the forum-selection clause (i.e., the plaintiff who filed in a different court) has the burden of establishing that public interests disfavoring transfer outweigh the parties' choice. The Court explained:

> [w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.

*Atlantic* also clarified that *forum non conveniens* is the proper mechanism for enforcing a forum selection clause that points to a state or foreign forum. The holding in *Atlantic* is significant as it reinforces that federal policy favoring properly drafted forum selection clauses. This in turn benefits the parties to a contract as it gives them predictability as to where they will litigate a matter should there be a future dispute.

### D. Interplay with Personal Jurisdiction

If a party has freely negotiated to be subject to the forum jurisdiction, they are generally held to be subject to that jurisdiction. *See, e.g. Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)(holding that consent to personal jurisdiction enforceable where agreement is 'freely negotiated'). One exception to this rule is if there is a strong public policy against enforcement of the forum. *See, e.g. M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972) (forum selection clause is presumptively effective and should not be set aside unless the party challenging it makes a strong showing that enforcement will result in the enforcement by that other court of a contractual provision that would contravene a 'strong public policy' of the jurisdiction where suit is brought)

### E. Drafting Considerations for both venue and choice of law clauses

- Part of a freely negotiated contract
- Clear and unambiguous terms, beware of conflicts within the contract
- Severability clause
- Conspicuous, don't bury them
- Recite benefits

## IV. ARBITRATION PROVISIONS

### A. Framework of Law Governing Arbitration Agreements

The United States and Great Britain were pioneers in the use of arbitration to resolve their differences. The Federal Arbitration Act (FAA) of 1925 "expresses a liberal federal policy favoring arbitration agreements" and was enacted to ensure that private arbitration agreements are enforced on their own terms. The first 60 years after the FAA courts did not all arbitration for federal statutory claims under the non-arbitrability doctrine. This changed in the 1980s when the Supreme Court of began to use the FAA to require arbitration if the underlying contract contemplated arbitration would apply to federal statutory claims. Courts routinely enforce arbitration provisions and there is a strong presumption in favor of the existence of arbitration if there is language in the contract providing for arbitration.

The 2010 Supreme Court case of *Granite Rock v. International Brotherhood of Teamsters* endeavored to clarify the proper framework for determining when particular disputes are subject to arbitration. Ultimately, the Court made it clear that the presumption in favor of arbitration has no applicability to the question of whether a contract containing an arbitration clause was formed in the first place. *Granite Rock* also confirms that the threshold issue as to whether a contract was formed in the first place, and therefore the validity of the arbitration agreement, is determined by a court.

The U.S. Supreme Court has also held however, that when the parties' intent to empower the arbitrator to determine arbitrability is clear and unmistakable, the arbitration agreement should be enforced. For example, if the agreement states it shall be interpreted and enforced under American Arbitration Association ("AAA") rules, then the AAA rules will be used to determine even the threshold question of arbitrability. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S.

440, 449 (2006) (where the Supreme Court held that when a party to an arbitration agreement challenges the validity of the agreement but not the arbitration provisions of that agreement, it is the arbitrator who considers the validity challenge, not the court). Under AAA rules, the arbitrator will decide in the first instance if the case should be arbitrated. "One of those rules states that 'the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.'" AAA Commercial Arbitration Rule 7(b)). The threshold question of arbitrability is also for the arbitrator under AAA rule 7(a), which states: The arbitrator shall have the power to rule on his or her jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

Incorporation of the AAA Rules within the dispute provision "clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator." *Qualcomm Inc. v. Nokia Corp*., 466 F.3d 1366, 1374 (Fed. Cir. 2006). This rule has been followed by courts in at least the following circuits: Federal, 1st, 2nd, 7th, 10th and 11th - and in California.

### B. Basis To Compel Arbitration, Scope Of Arbitration, And Rules Used

#### 1. When is Arbitration Mandatory Versus Permissive

Parties may submit their disputes to arbitration voluntarily or if there is a contract compelling arbitration. Courts have consistently held that the Federal Arbitration Act (or an equivalent state law, if the FAA does not apply) manifests a presumption in favor of arbitration and that this presumption requires the scope of an arbitration clause to be broadly construed. *City and County of Denver v. District Court In and For City and County of Denver*, 939 P.2d 1353, 1363 (Colo. 1997)("Under the Federal Arbitration Act (FAA), the federal counterpart to the UAA, courts resolve any doubts regarding the scope of arbitrable issues in favor of arbitration and apply a presumption of arbitration because of the strong public policy of encouraging alternative dispute resolution.")

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1. *et seq.*, a contract involving interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. There is a strong presumption in favor of arbitration. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n. 1 (1985). Where there is ambiguity or doubt regarding the arbitration provision, arbitration will be favored and "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 501–02 (6th Cir. 2007).

> MANDATORY ARBITRATION. Purchaser and TruGreen agree that any claim, dispute or controversy (Claim) between them or against the other or the employees, agents or assigns of the other, and any Claim arising from or relating to this agreement or the relationships which result from this agreement including but not limited to any tort or statutory Claim shall by resolved by neutral binding arbitration by the American Arbitration Association (AAA), under the Rules of the AAA in effect at the time the Claim is filed (AAA Rules). . . . Each party shall be responsible for paying its own attorneys' fees, costs and expenses, the arbitration fees and arbitrator compensation shall be payable as provided in the AAA Rules. However, for a Claim of $15,000 or less brought by Purchaser

in his/her/its individual capacity, if Purchaser so requests in writing, TruGreen will pay Purchaser's arbitration fees and arbitrator compensation due to the AAA for such Claim to the extent they exceed any filing fees that the Purchaser would pay to a court with jurisdiction over the Claim. The arbitrator's power to conduct any arbitration proceeding under this arbitration agreement shall be limited as follows: any arbitration proceeding under this agreement will not be consolidated or joined with any arbitration proceeding under any other agreement, or involving any other property or premises, and will not proceed as a class action or private attorney general action. The foregoing prohibition on consolidated, class action and private attorney general arbitrations is an essential and integral part of this arbitration clause and is not severable from the remainder of the clause. . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act. 9 U.S.C. Sections 1-16. . . . Neither party shall sue the other party with respect to any matter in dispute between the parties other than for enforcement of this arbitration agreement or of the arbitrator's award. THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTESTHROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE ANY DISPUTES DECIDED THROUGH ARBITRATION.CLASS ACTION WAIVER. Any Claim must be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar basis (Class Action), and the parties expressly waive any ability to maintain any Class Action in any forum whatsoever. The arbitrator shall not have authority to combine or aggregate similar claims or conduct any Class Action. Nor shall the arbitrator have authority to make an award to any person or entity not a party to the arbitration. Any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void, or voidable may be determined only in a court of competent jurisdiction and not by an arbitrator. THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT TO LITIGATE THROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE THEIR CASE AND TO BE PARTY TO A CLASS OR REPRESENTATIVE ACTION, HOWEVER, THEY UNDERSTAND AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY, THROUGH ARBITRATION.[2]

The presumption in favor of arbitration is not without limits. *See e.g. AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)( "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). Consider the language in the following two clauses:

The parties <u>may</u> submit any disputes arising out of this Agreement to binding arbitration.

The parties <u>shall</u> submit any disputes arising out of this Agreement to binding arbitration.

Most courts addressing the question hold that language providing that a party "may" submit a dispute to arbitration requires mandatory arbitration. *Allis-Chalmers Corp. v. Lueck,* 471 U.S.

[2] Arbitration provision from TruGreen, Inc.'s Service Agreement for a TruGreen maintenance package, as cited in the United States District Court, W.D. Tennessee, Western Division in *Stevens-Bratton v. TruGreen, Inc.*, January 2016

202, 204 n. 1 (1985)("[t]he use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."). The Fourth Circuit held that the arbitration clause mandated arbitration because if it did not, it "would render the clause meaningless for all practical purposes" since parties "could always voluntarily submit to arbitration." *Austin v. Owens-Brockway Glass Container, Inc.* 78 F.3d 875, 879 (4th Cir. 1996). Instead, the court interpreted the use of "may" to give the aggrieved party the choice to arbitrate or abandon the claim. *Id*. Other courts agree. *See, e.g., Local 771, I.A.T.S.E. v. RKO Gen., Inc., WOR Div.,* 546 F.2d 1107, 1115-16 (2d. Cir. 1977) (holding arbitration was exclusive remedy under contract dispute even through the terms specified the parties "may submit" to arbitration); *Atkins v. Louisville and Nashville R.R. Co.*, 819 F.2d 644, 647-49 (6th Cir. 1987) (holding arbitration mandatory where clause uses "may"); *Bonnot v. Congress of Independent Unions,* 331 F.2d 355, 359 (8th Cir. 1964) ("The obvious purpose of the 'may language is to give an aggrieved party the choice between arbitration or the abandonment of its claim."). *United States v. Bankers Insurance Company*, 245 F.3d 315 (4th Cir. 2001), the Fourth Circuit held that an arbitration agreement's use of "permissive phraseology" was not dispositive.

Most state courts similarly hold that the use of "may" is sufficient to compel the parties to arbitration. Moreover, only one party has to compel arbitration; both parties do not have to agree to it when the contract provides for it. Florida courts have not settled the question however on whether the use of "may" makes an arbitration clause permissive rather than mandatory.

> **BEWARE:** If the contract is susceptible to a conflict of laws analysis. "Arbitration under the [FAA] is a matter of consent, not coercion," and the FAA simply pre-empts state laws that regard arbitration agreements differently than other contracts. *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989).

**DRAFTING TIP:** A significant amount of time and expense may be avoided by using "shall" versus "may" in an arbitration clause.

Case Example Interpreting Use of "May"

*Benihana of Tokyo, LLC v. Benihana, Inc*., 2014 U.S. Dist. LEXIS 99933, at *22 (S.D.N.Y. July 22, 2014), a case out of the Southern District of New York interpreting arbitration language under the Federal Arbitration Act. In *Benihana*, the clause at issue specified that a party *may* submit a dispute to binding arbitration, it is merely providing that neither party is in fact *required* to initiate arbitration, but if any party prefers arbitration, that method of dispute resolution will be enforced. Thus, the initiating party may choose to litigate in court, mediate, or commence some other form of dispute resolution. However, if another party prefers to arbitrate, that choice should be enforced. Conversely, if the initiating party chooses to arbitrate in the first instance, the respondent may not move the dispute to a different forum. Thus, despite its permissive-sounding language, such an arbitration clause is in effect mandatory.

2. Scope of Arbitration Agreement

In addition to establishing an agreement to arbitrate, the agreement must define the scope of the disputes subject to arbitration. Arbitration is a matter of contract and a party cannot be

required to submit to arbitration any dispute which he has not agreed to submit. *Mediterranean Enterprises, Inc., a California Corporation v. Ssangyong Corporation, a Korean Corporation, Ssangyong Construction Company, Ltd., a Korean Corporation*, 708 F.2d 1458 (9th Cir.1983); *United Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960). Parties may elect to arbitrate all disputes (including related tort claims, statutory claims, fraud and fraud in the inducement claims, etc.) or to limit the clause to claims directly arising out of the subject agreement. Arbiters have the authority to determine their own jurisdiction where there is "clear and unmistakable" evidence that the parties intended to grant such authority.

Parties sometime carve out portions of the disputes. For example, parties may set forth a procedure in which they use experts and/or industry professionals to resolve portions of the dispute. Examples may include establishing fair market value of a business, shareholder buy out price, or resolution of technical issues. It is important to understand the differences and consequences of a broad arbitration clause versus a narrow arbitration clause. The broader the clause the more likely the parties will be compelled to arbitration for all claims and the harder it is to challenge an award. A narrow arbitration clause risks carving out certain claims, or taking the matter out of arbitration altogether, an increasing the basis to challenge an award.

**DRAFTING TIP:** Be very clear on what is and is not covered by arbitration. Uncertainty in the scope can lead to protracted litigation, including an increased basis to challenge an arbitration award.

## SAMPLE BROAD FORM ARBITRATION CLAUSES[3]:

***Commercial (U.S. domestic)*** - Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

***Construction*** - Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

***Employment (employment plan)*** - Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

***Employment (individually negotiated employment contracts)*** - Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association

[3] Cited from the AAA, https://www.adr.org/Clauses

under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

***Labor*** - Any dispute, claim, or grievance arising from or relating to the interpretation or application of this agreement shall be submitted to arbitration administered by the American Arbitration Association under its Labor Arbitration Rules. The parties further agree to accept the arbitrator's award as final and binding on them

**SAMPLE NARROW FORM ARBITRATION CLAUSES:**

- *"All disputes arising under this Agreement..."* [precludes arbitration of matters that, while related to the agreement, do not arise out of it]

- Disputes regarding the determination of fair market value of the business and the procedure and amount for buying out a shareholder under article 4 of this Agreement shall be resolved by arbitration with a business valuation expert.

### C. Post-Termination of the Underlying Contract

Another consideration is whether the arbitration clause survives termination of the underlying agreement. Parties often intend for the arbitration clause to survive termination. Termination of an agreement where arbitration is not explicitly included in a survival clause raises the issue of whether an arbitration clause will survive termination.

**DRAFTING TIP:** It is important to expressly state the parties' intent regarding the survival of the arbitration clause.

## V. DEFINING APPLICABLE LAW, ARBITER SELECTION, AND METHOD OF ARBITRATION

### A. Defining the Applicable Law

Define which state's law applies.

- Define which rules apply (*e.g.* AAA Rules).
- Verify the arbitration clause choice of law is consistent with the choice of law of the remainder of the agreement.
- Analyze applicable laws in the potential states whose law may apply and consider their effect on potential disputes, including statutes of limitations, limitations on damages, enforcement of arbitration provision, and liability considerations.

### B. Arbiter Selection

A key part of the arbitration clause is the method for selecting arbitrators, including the number of arbitrators. Some common methods:

- Parties may request a "strike" list of arbitrators.
- Parties to an arbitration may confer and agree on a single arbitrator whom they wish to hear a particular dispute.
- Some parties mutually appoint a panel of arbitrators to be selected on a rotating basis.
- In certain types of arbitration a panel is appointed.

Under the FAA, 9 U.S. Code § 5:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Arbiter selection may also refer to the procedures employed by arbitration providers. For example AAA and JAMS have their own rules attendant to arbitration.

### C. Three Panel Procedure

The usual method for a three-member panel:

- Each party picks one arbitrator.
- The chair is picked by the party-appointed arbitrators or the arbitral institution.
- Award is decided by a majority.

### D. Method of Arbitration

1. Binding Arbitration. Similar to a trial. Involves the presentation of evidence to the arbitrator or arbitration panel for issuance of a binding decision.

2. Mediated Arbitration. Commonly known as "med-arb," this is a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. When an impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute. In some cases, med-arb utilizes two

outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the true disputes.

3. Non-binding Arbitration. Presentation of a dispute to an arbitrator or arbitration panel for issuance of an advisory or non-binding decision. Non-binding arbitration is appropriate for use when some or all of the following characteristics are present in a dispute: (1) the parties are looking for a quick resolution to the dispute; (2) the parties prefer a third party decision maker, but want to ensure they have a role in selecting the decision maker; and (3) the parties would like more control over the decision making process than might be possible under more formal adjudication of the dispute.

### E. Issues Related To Confidentiality

Arbitration proceedings and awards are not public; however, the proceedings are not necessarily confidential. The parties have no general obligation to keep the existence or content of the arbitration confidential. For this reason, specific language is often added to the arbitration agreement to keep the existence or content of the arbitration confidential. Certain arbitration rules or legal provisions in certain jurisdictions contain confidentiality provisions.

Parties who wish to keep the arbitration confidential should say so in the arbitration clause. Confidentiality can encompass the following issues:

- Existence of the arbitration itself;
- Documents prepared or created for the arbitration (including pleadings and other submissions to the tribunal);
- This can be addressed during proceedings through a protective order;
- Any evidence submitted by the parties (except for documents that are publicly available); and,
- Any correspondence from the arbitral organization or the tribunal (including procedural orders, interim and final awards, etc.).

## VI. JURY WAIVER

Jury waiver agreements are contractual agreements in which the parties agree that if a dispute arises and suit is filed, the parties waive their right to a trial by jury.

### A. Contents

*Waiver of Jury Trial.* The Company waives any right to a trial by jury in any action or proceeding to enforce or defend any rights under the Credit Agreement as herein amended or under any amendment, instrument, document or agreement delivered in connection herewith or arising from any banking relationship existing in

connection with the Credit Agreement as herein amended, and agrees that any such action or proceeding shall be tried before a court and not before a jury.

### B. Enforceability

"Jury trial may be waived if done knowingly and intentionally, but courts will indulge every reasonable presumption against waiver." *Dreiling v. Peugeot Motors of America, Inc*., 539 F.Supp. 402, 403 (DC Colo. 1982). "In view of this strong presumption the defendants have a very heavy burden of proving that the plaintiffs knowingly, voluntarily and intentionally agreed upon the jury waiver provision in the 1978 Agreement. A constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract." *Id.* Generally, a jury waiver provision in a contract or lease affects only the rights of the parties to that contract or lease. *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992)

"The right to a jury trial in the federal courts is governed by federal law." *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988)

**DRAFTING TIP:** Caution must be used in the preparation of such agreements. Jury waiver agreements must be "knowing and voluntary." Jury waiver language tucked away "in small type or hidden in lengthy text" of a larger agreement may violate this principle and result in a court finding the waiver to be unenforceable.

### C. Are There Public Policy Exceptions

No. Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy. *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988)(citing *McCarthy v. Wynne*, 126 F.2d 620, 623 (10th Cir.), cert. denied, 317 U.S. 640, 63 S.Ct. 31, 87 L.Ed. 515 (1942); see *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir.1986) (right to jury trial, although fundamental, may be knowingly and intentionally waived by contract); *K.M.C. Co. v. Irving Trust Co*., 757 F.2d 752, 755 (6th Cir.1985) (considering it "clear that the parties to a contract may by prior written agreement waive the right to jury trial")

If you have any follow up questions, please feel free to contact me.

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