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Boilerplate Clauses in Commercial Contracts: Avoiding Unintended Consequences, Implementing Practical Solutions

Choice of Forum, Choice of Law, Force Majeure, Dispute Resolution, Assignment, and Other Key Clauses

TUESDAY, MARCH 1, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Boilerplate Clauses in Commercial Contracts – Resource Materials

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Outline

- General rules
- Choice of law
- Choice of forum
- Personal jurisdiction
- Risk-allocation provisions
- Assignment + anti-assignment
- Arbitration + dispute resolution
- Statute of limitations
- *Force majeure*
- Sale contract issues
- Third-party beneficiaries
- Pre-trial jury waiver
- Attorneys fees
- Notice
- Counting of days
- Severability
- Integration
- Signatures

Know the law behind the boilerplate

- Understanding the law relevant to the boilerplate provision yields better drafting of the boilerplate
- Just because the boilerplate term is in the 'form' does not mean that it should stay in the agreement

Sample language and quotes from decisions

- Sample agreement language in slides is taken from external agreements or court decisions, for teaching purposes
  - Sample language is not suggested or recommended language
- All emphasis is added, unless otherwise indicated

Don’t draft like a 19th Century lawyer

‘The assignment provision of the Indemnity Agreement is a ***jaw-breaking***, 497 word run-on sentence. Parsing this passage requires a ***high pain threshold***, a law degree and preferably some familiarity with ***19th century legal writing***.’

Dwyer v. The Insurance Company of The State of Pennsylvania, American International Companies (In re Pihl, Inc.), 560 B.R. 1 (Bankr. E.D.Mass. 2016)

Don’t use visually impenetrable language

‘The agreement is a ***paragon of prolixity***, only slightly more than a page long but written in an extremely small font. The ***single dense paragraph*** covering arbitration requires 51 lines. As the Court of Appeal noted, the text is ‘***visually impenetrable***’ and ‘challenge[s] the limits of legibility.’ [¶] The substance of the agreement is similarly opaque. The sentences are complex, filled with statutory references and legal jargon. The second sentence alone is 12 lines long. … A layperson trying to navigate this block text, printed in tiny font, would not have an easy journey.’

OTO, L.L.C. v. Kho, 8 Cal.5th 111 (2019)

Don’t use ‘impenetrable’ language

‘***Impenetrable vagueness*** and uncertainty will not do … definiteness as to material matters is of the very essence in contract law.’

Denson v. Donald J. Trump for President, Inc., No. 20 Civ. 4737 (PGG), 2021 WL 1198666 (S.D.N.Y. Mar. 3, 2021)

Consider the audience

'When the Court considers the indemnity clause here, even if the Court was kind in its description, it would have to guess that it was written by ***counsel who never litigate***, whose days are filled with the excitement of writing contract terms that only they will understand or can reasonably interpret, and who obviously have ***lost the ability to write in a clear and common-sense manner.*** While this may be a well-respected and sought-after art form, it does not help the client insure their expectations and demands are understood by all parties. Instead, the Court is left with the challenge of ***deciphering terms*** that were perhaps in vogue in the nineteenth century but whose days have clearly passed.'

TranSched Sys. Ltd. v. Versyss Transit Sols., LLC, 2012 WL 1415466, at *3 (Del. Super. Mar. 29, 2012).

Does the client really want the provision?

'For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. … The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in ***irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate***. This hypocrisy will not be blessed, at least by this order.'

Abernathy v. Doordash, Inc., 2020 WL 619785 (N.D.Calif. February 10, 2020)

Don’t overreach (too much)

‘We agree with Lennar that there is nothing generally absurd or unconscionable about prevailing party clauses. Civil Code section 1717 specifically authorizes courts to enforce contractual provisions requiring payment of attorney fees and costs to the prevailing party in a dispute … But Lennar chose a different course in drafting the contracts at issue, seeking to impose a provision that purports to have much broader effect than a typical prevailing party clause. If we were to enforce the indemnity clause as if it were a typical prevailing party clause, we would in essence be endorsing Lennar’s ***overreach***, allowing Lennar to continue to benefit from the *in terrorem* value of the language it drafted and imposed on its customers. In other words, under the circumstances of this case, only by refusing to enforce the indemnity clause at all do we provide Lennar any ***incentive*** to conform the language of its contracts with consumers to the limits of enforceability under California law.’

Lennar Homes of California v. Stephens, 232 Cal.App.4th 673 (2014)

Contract interpretation

'With contracts with substantial stakes, negotiated between ***commercially sophisticated parties***, we interpret contracts "literally" because such parties "know how to say what they mean and have an incentive to draft their agreement carefully.'"

Sterling National Bank v. Block, 984 F.3d 1210 (7th Cir. 2021)

The role of grammar

"***Grammatical*** parsing" can be useful but not when there is a "plain meaning" to the language.

Express Scripts, Inc. v. Bracket Holdings Corp., No. 62, 2020, 2021 WL 752744 (Del. Feb. 23, 2021)

Know your grammar

Do the words "in a civil matter" at the end of this statute modify each of "witness", "victim" and "party", or just "party" :

> (a) **Offense defined**.--A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or **a** party *in a civil matter*.

The court generally applied a "common sense" approach, but and then delved into a "grammatical analysis". The court concluded that the use of the indefinite article "a" before "party in a civil matter" "interrupted" the "***parallel structure***" of "witness, victim" (which are *not* preceded by "a") so that the third item in the series was not "party" standing alone but rather the phrase"party in a civil matter" and thus "in a civil matter" did not modify "witness" and "victim".

Commonwealth of Pennsylvania v. Nevels (Supreme Court Pa. 2020)

Courts look for meaning – the role of parallel construction

'-"A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or ***a*** party in a civil matter." … But the Legislature's use of the indefinite article "a" in the middle of the series undermines that reading. If the nouns in Section 4953(a) were intended to be placed in a series, traditional English grammar would suggest usage of a ***parallel structure***. The Legislature instead used a ***parallel structure*** for victim and witness, and then it interrupted that parallelism by placing "or a" before "party in a civil matter." It is therefore questionable at best to read "in a civil matter" as limiting anything other than "party.""

Commonwealth Of Pennsylvania v. Nevels, 234 A.3d 1101 (Pa. 2020)

General drafting points – don't use the passive voice

'… The Operating Agreement provisions … do not specify which party has the obligation to perform them; both are written in the ***passive voice***.'

DG BF, LLC v. Ray, No. 2020-0459-MTZ, 2021 WL 776742 (Del. Ch. Mar. 1, 2021)

General drafting points – commas

'Mason notes that there is no ***comma*** between the phrase "or any merger, consolidation or share exchange of the corporation with any of its subsidiaries" and the "which" clause that introduces the 5% Rule. Invoking a rule of grammar known as the rule of last antecedent, Mason argues that the rules of grammar dictate that because there is no ***comma*** between the word "which" and the phrase that comes before it, the saving clause applies only to "mergers, consolidations and share exchanges with a subsidiary," and not to any of the other transactions listed in Subsection E… For want of a ***comma*** between the saving clause and the clause immediately preceding it, Mason urges the Court to drive a wedge between transactions that all have the same practical economic outcome.'

Mason Capital, Ltd. v. Kaman Corporation, 2005 WL 2850083 (D.Conn. Oct. 31, 2005)

General drafting points – redundancy

'… drafters of contracts … may 'intentionally err on the side of redundancy' to "capture the universe.'"

Sterling National Bank v. Block, 984 F.3d 1210 (7th Cir. 2021)

Courts look for meaning – 'definitions'

Court interprets word based on definition in agreement even though the particular use is ***not capitalized*** to indicate that it is intended to have its defined meaning

Hot Rods, LLC v. Northrop Grumman Systems Corporation, 242 Cal. App. 4th 1166 (2015)

Courts look for meaning – 'definitions'

References to "fraud" that are not modified by contract include ***common law*** fraud's inclusion of recklessness. A contract's reference to "deliberate" fraud does not include reckless conduct because "deliberate" means an "intentional" act.

Express Scripts, Inc. v. Bracket Holdings Corp., No. 62, 2020, 2021 WL 752744 (Del. Feb. 23, 2021)

Courts look for meaning – 'definitions' taken from statutes

'Second, the word "assume" is a term of art in bankruptcy that applies only to executory contracts. … Here, the APA is to be "construed in accordance with federal bankruptcy law." …. The Investors do not offer any persuasive arguments that the APA deviated from the Bankruptcy Code.'

In re Weinstein Company Holdings LLC, 997 F.3d 511 (3d Cir. 2021)

Courts search for meaning –'so'

'… exceeds authorized access," which means "to access a computer with authorization and to use such access to obtain . . . information in the computer that the accesser is not entitled ***so*** to obtain."

Van Buren v. United States, _ U.S. _ (June 3, 2021)

General drafting points – 'arising' v. 'relating'

'As a general matter of contract interpretation, disputes "***arising under***," "***arising out of***," or "***arising from***" the terms of an agreement ***must have their inception in the agreement itself***. That language does not encompass matters "***related***" to the agreement or the relationship of the parties. The phrase "***arising out of***" is construed by courts to be narrower than phrases such as "***with reference to***," "***relating to***," or "***in connection with***."'

Chebotnikov v. Limolink, Inc., 2015 WL 8664206 (D. Mass. 2015)

General drafting points – 'arising' v. 'relating'

'We have held that forum-selection clauses covering disputes "***arising out of***" a particular agreement apply ***only*** to disputes "relating to the interpretation and performance of the contract itself." … By contrast, forum-selection clauses covering disputes "**relating to**" a particular agreement apply to ***any*** disputes that reference the agreement or have some "logical or causal connection" to the agreement. … The dispute need not grow out of the contract or require interpretation of the contract in order to ***relate*** to the contract.'

Sun v. Advanced China Healthcare, 901 F.3d 1081 (9th Cir. 2018)

General drafting points – 'arising' v. 'relating'

'We concluded in … , that all disputes the resolution of which arguably depend on the construction of an agreement "***arise out of***" that agreement for purposes of an arbitration clause. …. We cannot imagine why the scope of that phrase would differ for purposes of a forum-selection clause.'

Omron Healthcare, Inc. v. Maclaren Exports Ltd., 28 F.3d 600 (7th Cir. 1994)

General drafting points – 'arising' v. 'relating'

'To "***arise out of***" means "to originate from a specified source," … and generally indicates a ***causal connection***, …. We do not understand the words "arise out of" as encompassing all claims that have some possible relationship with the contract, including claims that may only "***relate to***," be "associated with," or "arise in connection with" the contract.'

Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007)

General drafting points – 'arising' v. 'relating'

'The Arbitration Provision is narrow in scope. It compels arbitration with respect to "any dispute, controversy or claim between Members ***arising out of or relating to*** this Agreement." The LLC Agreement sends disputes not between Members, or not arising out of that Agreement, to the courts. Because the Arbitration Provision is narrow, I will evaluate "if the cause of action pursued in court ***directly relates*** to a right ***in*** the contract" to determine whether each count should be arbitrated.'

360 Campaign Consulting, LLC v. Diversity Communication, LLC, 2020 WL 13208909 (Del.Ct.Ch. March 20, 2020)

General drafting points – 'arising' v. 'relating'

'As just noted, our most common formulation of the rule demands that the suit "arise out of or ***relate*** *to* the defendant's contacts with the forum."… The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a ***causal showing***. That does not mean anything goes.'

Ford Motor Company v. Montana, _ U.S._ (March 25, 2021)

'To say that the Constitution does not require the kind of proof of causation that Ford would demand—what the majority describes as a "strict causal relationship," … is not to say that no ***causal*** link of any kind is needed.' [Alito, concurring]

General drafting points

'***Notwithstanding*** clause' has 'dominance' over other, inconsistent provisions.

Veneto Hotel & Casino, S.A. v. German American Capital Corporation, 2016 NY Slip Op 31978 (NY Sup.Ct. 2016)

Courts Courts search for meaning – ‘and’ + ‘or’

‘Although the plain meaning of ‘***and***’ is ‘***conjunctive***’ and the plain meaning of ‘***or***’ is ‘***disjunctive***’, the meaning of words in a contract depend on ‘the context and usage in a particular contract’ to implement the ‘intent’ of the parties.

Court said that those words could each have the opposite meanings, depending on the ‘context and usage’

BOKF, N.A. v Caesars Entertainment Corporation, 144 F.Supp.3d 459 (S.D.N.Y. 2015)

Courts Courts search for meaning – 'and' + 'or'

"In law, semantics matter. Courts must frequently ascertain the meaning of words and phrases in writings. The use of the word "or" often presents an especially treacherous lexical conundrum due to its high risk of ambiguity. …" ' "***Every use of 'and' or 'or' as a conjunction involves some risk of ambiguity***." … "The fact is that there is nothing very plain about the use of the connective 'or' in legal drafting." …" 'Sometimes it joins alternatives; sometimes it doesn't. Sometimes or means and; sometimes it doesn't[].' " Additionally, if "or" is a disjunctive connector, sometimes it connects words in the inclusive sense (i.e., A or B, or both); other times, it connects words in the exclusive sense (i.e., A or B, but not both). Thus, the potential ambiguity created by "or" is not one-dimensional.

Dow v. Honey Lake Valley Resource Conservation District, 63 Cal.App.5th 901 (Cal.Ct.App. 2021)

Courts search for meaning – 'a'

'To trigger the stop-time rule, the government must serve "a" notice containing all the information Congress has specified. To an ordinary reader—both in 1996 and today—"***a***" notice would seem to suggest just that: "***a***" single document containing the required information, not a mishmash of pieces with some assembly required. … Admittedly, a lot here turns on a small word.'

Nitz-Chavez v. Garland, 141 S.Ct. 1474 (April 29, 2021)

Common words – 'material'

"***Material***" is a slippery term in the law in general and in contract law more specifically. It is best to get beyond labels and focus on consequences and remedies, as we try to do here. To explain, courts say in broad terms that a material breach is one that goes to the "heart" of the contract.'

KR Enterprises, Inc. v. Zerteck Inc., 2021 WL 2253374 (7th Cir. June 3, 2021)

What's conspicuousness is not always 'conspicuous'

- *Balram v. Etheridge*, 449 N.Y.S.2d 389, 391 (1982) (clause in lease unenforceable because of failure to conform to minimum ***point size*** required by statute)
- *Fairfield Leasing Corp. v. Technigraphics, Inc.*, 607 A.2d 703, 706 (N.J. Super. Ct. Law Div. 1997) (finding no waiver because clause was 'utterly ***inconspicuous***')
- *Colgate Constr. Corp. v. Hill*, 334 N.Y.S.2d 1002, 1004 (1972) (finding waiver invalid because clause located ***inconspicuously*** on back of home improvement contract).
- *In re Bassett*, 285 F.3d 882 (9th Cir. 2002) (text in all capital letters may not be conspicuous; '. . . there is nothing magical about capitals. . . . Lawyers who think their caps lock keys are instant 'make conspicuous' buttons are ***deluded***.')

Choice of law and choice of forum – general comment

'A plaintiff may think that as the initiator of a lawsuit he is the lord and master of where the litigation will be tried and under what law. But if he is a party to a contract that contains forum selection and choice of law clauses his view of himself as ruler of all he surveys may, like an inflated balloon, ***suffer considerable loss of altitude***.'

Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007)

Choice of law – basic rules

- *Klaxon Co. v. Stentor*, 313 U.S. 487 (1941) (Under *Erie v. Tompkins*, 304 U.S. 64 (1938) federal courts will ordinarily apply the state choice of law rules where the courts are located)
- *Restatement (Second) Conflict of Laws* § 187 (choice of law clauses generally enforced if there's a 'substantial' relationship with the chosen state and no fundamental policy issues)
  - *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364 (NY 2015) (NY courts will not enforce otherwise enforceable choice-of-law clause if the chosen jurisdiction's law is 'truly obnoxious' or if the application of the chosen jurisdiction's law violates 'some fundamental principal of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' of New York)
- UCC § 1-301 – 'reasonable relation' to chosen state
- *NuVasive, Inc. v. Miles*, C.A. No. 2017-0720-SG (September 28, 2018), 2018 WL 4677607 (Del.Ch. 2018) (employee's covenant not to compete not a fundamental policy in the circumstances)
- *Cabela's, LLC v. Wellman*, 2018 WL 5309954 (Del.Ch. October 17, 2018) (employee's covenant not to compete is a fundamental policy in the circumstances)

Choice of law statutes – inbound

- Examples:
  - N.Y. GOL § 5-1401
  - Del. Code. tit. 6, § 2708
  - 735 Ill. Comp. Stat. § 105/5-5
  - California Civil Code § 1646.5
- Inbound only
- Does not require reasonable relationship
- Fundamental policy issues?
  - *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 310 (2012) (no fundamental policy exception)

Choice-of-law clauses applies to tort claims?

Choice-of-law provision may control law that applies to tort claims if the provision says so:

- *Restatement (Second) of Conflict of Laws*, § 201 (1988) (contractual choice of law provisions may apply to ***misrepresentation***)
- Restatement (Third) of Conflict of Laws § 6.08 (Preliminary Draft No. 2, 2016) ("Parties may choose the law to govern a ***tort*** before its occurrence by mutual agreement ….").
- *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)
- *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-35 (Del. Ch. 2005), aff'd, 894 A.2d 407 (Del. 2005) (contractual choice of law applies to ***breach of fiduciary duty*** claim)
- *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*, _ F.3d _ (6th Cir. 2015) (contractual choice of law provision may apply to a claim '***sounding in tort***')
- *Masters Group Int'l. v. Comerica Bank*, 2015 WL 4076816 (Mont. 2015) (contractual choice of law provision may apply to ***tort*** claims if provision interpreted to cover them)

Choice-of-law clauses applies to tort claims?

If the choice-of-law clause should apply to tort claims, say so:

- *Krock v. Lipsay*, 97 F.3d 640 (2d Cir. 1996) (Choice-of-Law provision must be '***sufficiently broad***' to encompass the entire relationship between the contracting parties" in order to cover tort claims.)
- *Schuster v. Dragone Classic Motor Cars, Inc.*, 67 F. Supp. 2d 288 (S.D.N.Y. 1999) (court must determine whether "the express language of the [choice-of-law] provision. . . is ***sufficiently broad*** as to encompass the entire relationship between the parties.")
- *Turtur v. Rothschild Registry International*, 26 F.3d 310 (2nd Cir. 1994) (contract that provides that 'this note shall be governed by, and interpreted under, the laws of the State of New York applicable to ***contracts***'. . . does not cover tort claim.)
- *In re Libor-Based Financial Instruments Antitrust Litigation*, 2015 U.S. Dist. LEXIS 107225 (S.D.N.Y. August 4, 2015) (choice-of-forum provision may apply to both contract and tort claims arising out of the contract where contract provides that choice-of-law clause applies to claims '***relating***' to the contract)
- *FdG Logistics LLC v. A&R Logistics Holdings*, 131 A.3d 842 (Del. Ch. 2016) (Choice-of-law clause may cover ***tort*** claims relating to the enforcement of the agreement)

Effect of choice-of-law clause on statute of limitations

- *Restatement (Second) of Conflict of Laws* § 142 (1988) (generally the state whose substantive law applies to a ***claim*** will also be the state whose statute of limitations will apply to the claim)
- *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)
- *Bear Stearns Mortg. Funding Trust 2006-SL1 v. EMC Mortgage LLC*, No. 7701-VCL, 2015 WL 139731, at *9 (Del. Ch. Jan. 12, 2015) ('***general*** choice of law rules' determine which state's statute of limitations applies)
- *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***)
- *New England Tel. & Tel. Co. v. Gourdeau Constr. Co., Inc.*, 647 N.E.2d 42 (Mass. 1994) (adopting *Restatement* ***§ 142***).

Choice-of-law: role of local law

No need to say 'except for local law'

- *Restatement* § 187 **Law of the State Chosen 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.')
- *DirecTv v. Imburgia*, 136 S.Ct. 463 (2015) (agreement had a California choice-of-law clause; court held that reference to '***law***' did not include case law subsequently abrogated)
- *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 310 (2012) (New York ***substantive law*** applies when parties include an ordinary New York choice-of-law provision, even if NY choice-of law rules are not excluded)
- *Ministers and Missionaries Benefit Board v. Snow*, 26 NY3d 466 (N.Y. 2015) (all contracts that select New York law in a choice-of-law clause should be interpreted to select New York substantive law, regardless of what law would apply under New York conflicts-of-laws principles, ***unless the contract specifically states otherwise***)

Sample: choice-of-law

'All matters ***relating to or arising out*** of this Agreement or any Contemplated Transaction and the rights of the parties (***whether sounding in contract, tort, or otherwise***) will be governed by and construed and interpreted under the laws of the State of _____ ***without regard to conflicts of laws principles*** that would require the application of any other law.'

Choice of forum general rules (state to state)

- Generally enforceable:
  - *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.')
  - *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 . . .')
- What if court closed due to pandemic or other similar cause?

Choice of forum general rules (federal to federal)

- *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013) (When different federal courts are involved, in all but the most unusual cases the interest of justice is served by holding parties to their bargain on forum selection)
- *Sun v. Advanced China Healthcare, Inc.*, No. 16-35277 (August 22, 2018), 901 F.3d 1081 (9th Cir. 2018) (*Atlantic Marine* applies to transfers from federal court to state and non-US courts)
- *Ramos v. Winston & Strawn* (Cal. App. 2018) (choice of forum in Chicago not unconscionable)

Choice of forum general rules – reading the words

'A forum selection clause that vests 'exclusive jurisdiction and venue' in the courts '***in***' a county provides venue in the state and federal courts located in that county.'

Simonoff v. Expedia, Inc., 643 F.3d 1202 (9th Cir. 2011).

Choice of forum general rules – reading the words

'Venue for litigation shall be in ***Linn County***, Oregon.' … CH2M removed the case under 28 U.S.C. § 1441 to the United States District Court for the District of Oregon. Linn County lies within the district court's Eugene Division, but ***there is no federal courthouse located in Linn County***. The federal courthouse is located in the City of Eugene, which is in ***Lane County***.

'…

'In short, the venue-selection clause at issue here precludes litigation in federal court because no federal courthouse is located in Linn County. Accordingly, the only way to effectuate the parties' agreement is to limit venue for litigation to the state court in Linn County.'

City of Albany v. CH2M Hill, Inc., 924 F.3d 1306 (9TH Cir. 2019)

Choice of forum general rules – fairness issues

'A mandatory forum selection clause such as the one at issue here is generally given effect unless enforcement would be unreasonable or unfair, and the party opposing enforcement of the clause ordinarily bears the burden of proving why it should not be enforced. However, the burden is "reversed when the ***claims at issue are based on unwaivable rights*** created by California statutes [in which case] the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually designated forum 'will not diminish in any way the substantive rights afforded . . . under California law.'

Handoush v. Lease Finance Group, LLC, 41 Cal.App.5th 729, 254 Cal.Rptr.3d 461 (2019)

What law applies to the interpretation of the forum selection term

'When a contract contains a forum selection clause, this court will interpret the forum selection clause in accordance with the law chosen to govern the contract.' Choice of law provisions control so long as the jurisdiction selected bears some material relationship to the transaction.'

Germaninvestments AG v. Allomet Corporation, 2020 WL 414426 (Del.Supr. 2020)

What law applies to the interpretation of the forum selection term

'… under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice of law provision …'*

Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007) (emphasis in original)

Choice of forum general rules – fairness issues

Don't make the forum ***too*** difficult:

- *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)
- *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544 (2005) (forum, selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable because it '***deprives***' the plaintiff of her day in court)
- *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141 (Ct.App. 2015) (forum-selection provision is not enforceable where it is likely that chosen forum will not enforce ***non-waivable statutory right*** available in forum where clause is being contested)
- *Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911 (9th Cir. 2019) (Under *Atlantic Marine*, court may decline to enforce choice-of-forum provision on basis of 'extraordinary circumstances unrelated to the convenience of the parties'; Bremen is still good law to the extent enforcing a choice-of-forum clause would violate a "strong public policy")

Forum selection statutes – inbound

- Examples:
  - N.Y. GOL § 5-1402
  - 735 Ill. Comp. Stat. § 105/5-10
  - Calif. Code Civ. Proc. § 410.40
- Inbound only

Sample: forum selection

'… any Proceeding ***arising out of or relating to*** this Agreement … shall be brought in the courts of the State of _____, County of _____, … and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now or hereafter have to venue or to ***convenience of forum***, agrees that all claims in respect of such Proceeding shall be heard and determined only in any such court, and agrees not to bring any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction in any other court.'

Personal jurisdiction

Even with forum selection, need personal jurisdiction in selected forum:

- Personal jurisdiction in absence of an agreement:
  - *Daimler AG v. Bauman*, 134 S.Ct. 746 (2013) (No ***general*** jurisdiction in a jurisdiction unless a person is '***at home***' in the jurisdiction)
  - *Walden v. Fiore*, 134 S.Ct. 1115 (2013) (No ***specific*** jurisdiction unless the defendant itself has 'purposefully' created contacts with the forum state)
  - [•]

Consent to personal jurisdiction

- May obtain jurisdiction by consent:
  - *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (Consent to personal jurisdiction enforceable where agreement is 'freely negotiated')
  - Might be ***inferred from forum selection agreement***
    - *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013)
- *Brown v. Lockheed Martin Marietta Corporation*, 814 F.3d 619 (2d Cir. 2016) (state does not have general personal jurisdiction over corporation registered to do business in the state where the corporation does significant business in the state; registration to do business is not 'consent' to jurisdiction and corporation is not 'at home' in the state where it is not formed under the law of that state)
- *Aybar v. Aybar*, 2019 NY Slip. Op. 00412 (App. Div. 2nd Dep. January 23, 2019) (same)

Contractual risk allocation provisions -- background

- *Restatement (Third) of Torts: Apportionment of Liability*

  § 2 **Contractual Limitations on Liability**

  'When permitted by contract law, substantive law governing the claim, and applicable rules of construction, a contract between the plaintiff and another person absolving the person from ***liability for future harm*** bars the plaintiff's recovery from that person for the harm.'

- *Restatement (Third) of Torts: Apportionment of Liability*

  § 2 **Contractual Limitations on Liability,** Comment *d*

  'A contract that limits liability must be expressed in ***clear, definite, and unambiguous*** language . . . .'

Contractual risk allocation provisions -- background

- *Restatement (Second) of Contracts*

  § 195 **Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently**

  'A term exempting a party from tort liability for harm caused **intentionally or recklessly** is **unenforceable** on grounds of public policy.'

- *Restatement (Second) of Contracts*

  § 196 **Term Exempting from Consequences of Misrepresentation**

  'A term **unreasonably** exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy.'

Contractual risk allocation provisions -- background

- *Severn Peanuts Co., Inc. v Industrial Fumigant Co.*, 807 F.3d 88 (4th Cir. 2015) (applying North Carolina law) ('By allowing parties to bargain over the allocation of risk, freedom of contract permits individuals and businesses to allocate risks toward those most willing or able to bear them. Parties who allocate risks away from themselves thereby cap their future expected litigation and liability costs. Parties assuming risks often receive benefits in the form of lower prices in exchange.')
- *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities*, LLC, 797 F.3d 160 (2d Cir. 2015) (applying New York law) (a 'valid disclaimer must contain explicit disclaimers of the particular representations that form the basis of the fraud claim' (emphasis in original))
- *Bombardier Aerospace Corp.* v. SPEP Aircraft Holdings, LLC (Tex Supreme Court February 1, 2019) (limitation of no punitive damages OK, but waiver of fraud not)

Indemnity – basic wording

A 'hold harmless' clause may not be enough

- *Alcoa World Alumina LLC v. Glencore Ltd.*, C.A. 15C-08-032 EMD CCLD (Del. Superior Court February 8, 2016) ('hold harmless' clause generally ***not*** sufficient to create broad indemnity)
- *Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 589 (Del.Ch. 2006) ('hold harmless' language is ***synonymous*** with 'indemnity' language).
- *Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal. 4th 541 (2008) ('defend' language requires the provision of a legal defense but does ***not*** necessarily provide for any damages that the beneficiary of the promise has to pay).

Indemnity – 'strict' interpretation against indemnitee

Be as specific as possible:

- RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. d (2000) ('A contract that limits liability must be expressed in ***clear, definite, and unambiguous*** language . . . .'); *id.* at § 22 cmt. f (an indemnitee may enforce indemnity for own culpable conduct only if the provision is 'clear on that point').
- *Alcoa World Alumina LLC v. Glencore Ltd.*, C.A. 15C-08-032 EMD CCLD (Del. Superior Court February 8, 2016) (indemnification agreements are construed '***strictly***' against the indemnitee; an indemnification agreement must have an 'unequivocal undertaking' before there is an obligation to indemnify for a contractual liability that the indemnitee has assumed from the indemnitor)

Indemnity – 'clear' does not mean only easy to see

Be as specific as possible:

> An exculpation clause must be clear, however "capitalized lettering does not alone make the clause ***clear***". *Shaffer v. Amazon Services LLC (In re Potential Dynamix LLC)*, No. 2:11-bk-28944 (Bankr. D. Ariz. Feb. 15, 2021) –

Indemnity – third party claims only?

Indemnity may apply only to third-party claims against indemnitee, unless agreement clearly applies to second party claims:

- *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital*, 2014 N.Y. Misc. LEXIS 1885 (N.Y. Sup. Ct. 2014) (a provision for 'indemnity' applies only to losses suffered by the indemnitee from claims of third parties, unless the provision is '***unmistakably clear***' that it applies to claims between the parties)
- *MEG Holdings, LLC v. Sapphire Power Finance LLC*, 126 A.D.3d 608 (N.Y. Sup. Ct. 2015) (indemnity provision does not cover claims between the contracting parties unless it does so in '***unmistakably clear***' language)
- *Goshawk Dedicated Limited v. Bank of NY*, 2010 U.S. Dist. LEXIS 25498 (S.D.N.Y. 2010) (indemnity does not apply to costs arising from indemnitor's breach unless agreement ***clearly*** *provides for that result)*
- *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC, 2015 WL 139731 (Del. Ch. 2015)* (a provision for 'indemnity' applies only to losses suffered by indemnitee from claims of third parties, unless contract is '***unmistakably clear***' that it applies to claims between the parties)
- *Bear Stearns Mortgage Funding Trust 2007 ARZ v. EMC Mortgage LLC*, 2013 WL 164098 at *2 (Del. Ch. Jan . 15, 2013) (applying New York law) ('[A] party seeking indemnification for first party claims must be able to point to ***specific*** language that is applicable to such claims. Here there is no such specific language. Rather the indemnification provisions contain language that indicates that they apply only apply to third party claims.').

Indemnity – third party claims only?

Indemnity may apply only to third-party claims against indemnitee, unless agreement clearly applies to second party claims:

- *Hot Rods, LLC v. Northrop Grumman Systems Corporation*, 242 Cal. App. 4th 1166 (2015) ('indemnity' provision 'generally' relates only to third party claims, but includes '***direct liability***' if the parties use the term in that manner)
- *Starbrands Capital v. Original MW, Inc.*, 2015 WL 5305215 (D. Mass. 2015) (contractual Indemnity clause should be interpreted to give effect to intention of parties and thus should not be interpreted to be limited to third party claims)
- *Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd.*, 259 F.3rd 1086 (9th Cir. 2001) (applying California law) ('indemnity' provision covers compensation for losses ***directly*** caused by the indemnitor's breach and not just those arising from third party liability)
- *Wells Fargo Bank v. Trolley Indus.*, LLC, 2013 U.S. Dist. LEXIS 124326 (E.D. Mich. August 30, 2013) ('traditional' limitation of 'indemnity' provision to third-party claims does not apply where court determines that parties ***intended*** indemnity agreement to apply to losses directly caused by indemnitor).

Sample: indemnity – third party claims only?

'Sellers, jointly and severally, shall indemnify and hold harmless Buyer, the Acquired Companies, and their respective Representatives, shareholders, Subsidiaries, and Related Persons (collectively, the "Buyer Indemnified Persons") from, and shall pay to Buyer Indemnified Persons the amount of, or reimburse Buyer Indemnified Persons for, any Loss that Buyer Indemnified Persons or any of them may suffer, sustain, or become subject to, as a ***result of, in connection with, or relating to***:

'(a) any Breach of any representation or warranty made by Sellers …'

Sample: indemnity – third party claims only?

'The other parties shall jointly and severally indemnify and hold harmless Escrow Agent (and any successor Escrow Agent) from and against, and shall pay to Escrow Agent the amount of, and reimburse Escrow Agent for, any and all losses, liabilities, claims, actions, damages, and expenses, including reasonable attorneys' fees and disbursements, ***arising out of and in connection with*** this Agreement.'

Indemnity – cover indemnitee's own negligence?

Must cover indemnitee's own negligence clearly:

- *Facilities Dev. Corp. v. Miletta*, 584 N.Y.S. 2d 491 (N.Y. App. Div. 1992) (an indemnification provision does not apply to indemnitee's own wrongdoing unless it does so '***clearly***')
- *Gross v. Sweet*, 400 N.E. 2d 306 (N.Y. 1979) (an exculpation provision does not apply to negligent activity unless the agreement ***explicitly*** says so)
- *Margolin v. New York Life Ins. Co.*, 297 N.E. 2d 80 (N.Y. 1973) (an indemnification provision does not apply to negligence of indemnitee unless it does so '***expressly***' or 'unequivocally')
- *American Ins. Grp. v. Risk Enter. Mgmt., Ltd.* 761 A.2d 826, 829 (Del. 2000) ("[w]hile a contract for indemnification may provide for indemnification for [an] indemnitee's own negligence, that intention must be evidenced by ***unequivocal*** language")
- *Stewart v. RTP Holdings, Inc.*, No. 07C-10-177 FSS, 2009 Del. Super. LEXIS 221, at *6–7 (Del. Super. Ct. May 20, 2009) court will enforce the indemnification provision if parties ***clearly and unequivocally*** agree to indemnify one of the parties for its own negligence)

Sample: indemnity – cover indemnitee's own negligence?

'THE PROVISIONS IN THIS ARTICLE 11 SHALL BE ENFORCEABLE REGARDLESS OF WHETHER THE LIABILITY IS BASED UPON PAST, PRESENT, OR FUTURE ACTS, CLAIMS, OR LEGAL REQUIREMENTS (INCLUDING ANY PAST, PRESENT, OR FUTURE ENVIRONMENTAL LAW, OCCUPATIONAL SAFETY AND HEALTH LAW, OR PRODUCTS LIABILITY, SECURITIES, OR OTHER LEGAL REQUIREMENT) AND REGARDLESS OF WHETHER ANY PERSON (INCLUDING THE PERSON FROM WHOM RELIEF IS SOUGHT) ALLEGES OR PROVES THE SOLE, CONCURRENT, CONTRIBUTORY, OR COMPARATIVE *NEGLIGENCE* OF THE PERSON SEEKING RELIEF, OR THE SOLE OR CONCURRENT STRICT LIABILITY IMPOSED UPON THE PERSON SEEKING RELIEF.'

Scope of indemnity

[Indemnification rider]

'[N]o ***Indemnified Person*** shall have any liability to [Flexiti] for or in connection with the Agreement, except for liability for Damages which are finally, judicially determined to have resulted directly from the gross negligence or willful misconduct of the Indemnified Person. In no event shall any Indemnified Person be responsible for any indirect, punitive, special or consequential damages, even if the Indemnified Person is advised of the possibility thereof.'

Stephens Inc. V. Flexiti Financial Inc., 2019 WL 2725627 (SDNY 2019)

Scope of indemnity – application to indemnitee's gross negligence?

Deutsche Bank National Trust Co. v. Morgan Stanley Mortgage Capital Holdings LLC (In re Part 60 Put–Back Litigation), 165 N.E.3d 180 (N.Y. 2020) – Indemnification for breach of *contract*:

- Limitation of liability may apply to gross negligence
- Exculpation (or limitation to nominal damages) may not apply to gross negligence

What does 'gross negligence' mean?

"'Gross negligence,' when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must '***smack of intentional wrongdoing***.' … Intentionally breaching a contract for reasons of economic self-interest, without more, does not rise to the level of intentional wrongdoing."

In re Lyondell Chemical Co., 585 B.R. 41 (S.D.N.Y., 2018)

Liquidated damages

Lease surrender agreement was a new agreement and not the same agreement as the related lease. As such, a liquidated damages clause in the surrender agreement was measured against the amounts owed under the surrender agreement and not against the amounts owed under the lease.

Trustees of Columbia University v. D'Agostino Supermarkets, Inc., 162 N.E.3d 727 (N.Y. 2020)

Damage limitations – 'consequential' damages

Limitations on consequential damages are generally enforceable

Severn Peanuts Co., Inc. v Industrial Fumigant Co., 807 F.3d 88 (4th Cir. 2015) (applying North Carolina law) (parties may 'bargain over the allocation of risk' and ***limitation or exclusion of consequential damages is enforceable*** unless unconscionable)

Damage limitations – 'consequential' damages

Spell out the types of damages that are limited:

- *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 11 N.E. 3d 676 (N.Y. 2014) (damages are '***consequential***' damages when they do not 'directly flow' from the breach, but are not 'consequential' damages when they are the 'natural and probable consequence' of the breach)
- *PNC Bank v. Wolters Kluwer Financial Services, Inc.*, 2014 WL 7146357 (S.D.N.Y. 2014) (applying *Biotronik* definition of '***consequential***' damages)
- *Powers v. Stanley Black & Decker, Inc.* (S.D.N.Y. September 28, 2015) (***diminution in value*** arising from misrepresentation is *not barred* by exclusion of consequential damages)
- *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC* (Tex Supreme Court February 1, 2019) (limitation of no punitive damages OK, but waiver of fraud not)

Damage limitations

- Spell out the types of claims covered:
  - *Sycamore Bid Co. v. Breslin & Anor.*, [2012] EWHC (Ch) 3443 (Eng.) (contractual limitation of damages for breach of '***warranty***' did not apply to a 'misrepresentation')

Sample: damage limitations – 'consequential' damages

'IN NO EVENT SHALL THE ESCROW AGENT BE LIABLE, DIRECTLY OR INDIRECTLY, FOR (i) DAMAGES OR EXPENSES ARISING OUT OF THE SERVICES PROVIDED UNDER THIS AGREEMENT, OTHER THAN DAMAGES WHICH RESULT FROM THE ESCROW AGENT'S FAILURE TO ACT IN ACCORDANCE WITH THE STANDARDS SET FORTH IN THIS AGREEMENT, OR (ii) SPECIAL OR ***CONSEQUENTIAL*** DAMAGES, EVEN IF THE ESCROW AGENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES'

Non-reliance provisions must be specific

General statements don't work:

- *Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310 (2d. Cir. 1993) (applying New York law) (a non-reliance provision effective only if it refers to '***specified***' representations)
- *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 24 (S.D.N.Y. 200[•]) (applying New York law) (a 'general sweeping disclaimer' will not disclaim extrinsic fraud and to be effective must address '***specific***' representations)
- *Le Metier v Metier*, _ F. Supp. 2d _ (S.D.N.Y. 2015) (applying NY law) (a non-reliance provision must 'track the substance of the alleged misrepresentation' and '***general disclaimer***' language is ***ineffective*** for this purpose)
- *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 106 A.D.3d 494 (N.Y. App. Div. 2013) (a ***clear*** non-reliance provision will protect seller against its non-contractual fraud)

Non-reliance provisions must be specific

General statements don't work:

- *RAA Mgmt., LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107, 115-16 (Del. 2012) (applying New York law) (a non-reliance provision is ***enforceable*** with respect to representations outside the agreement)
- *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) (a ***clear*** non-reliance provision will protect a seller against its non-contractual fraud)
- *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544 (Del. Ch. 2001) (a non-reliance provision with respect to statements made outside agreement is enforceable, particularly where the parties are ***sophisticated***)
- *Shareholder Representative) Services LLC v. Albertsons Companies, Inc.*, 2021 WL _ (Del. Ch. June 7, 2021) ("And, our law is now settled that "[t]he presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract,… will not suffice to bar fraud claims."

Non-reliance provisions must be specific

General statements don't work:

- *TransDigm Inc. v. Alcoa Global Fasteners, Inc.*, No. 7135-VCP, 2013 Del. Ch. LEXIS 137 (Del.Ch. May 29, 2013) (a non-reliance provision must ***clearly*** apply to alleged misrepresentation)
- *Anvil Holding Corp. v. Iron Acquisition Co.*, No. 7975-VCP, 2013 Del. Ch. LEXIS 129, at *26-27 (Del.Ch. May 17, 2013) (a non-reliance provision must ***clearly*** apply to alleged misrepresentation)
- *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 2015 WL 74361807 (Del.Ch. Nov. 24, 2015) ("non-reliance" analysis applied to provision that ***affirmatively*** stated that buyer relied only on representations and warranties in the agreement, which defined the information that the buyer was and was not relying on; court emphasized the importance of the specificity of the provision)
- *FdG Logistics LLC v. A&R Logistics Holdings*, 131 A.3d 842 (Del. Ch. 2016) (contract's non-reliance clause was not sufficiently '***specific***' and '***clear***' to rule out pre-contractual statements. The court emphasized that the person asserting a claim based on a misrepresentation should ***affirmatively state what it has and has not relied it***. It was not sufficient for the seller to disclaim making other representations)

Sample: non-reliance provisions must be specific

The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, covenant, or obligation ***will not be affected by any investigation*** (including any environmental investigation or assessment) conducted or any Knowledge acquired at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation.

Existence of fiduciary duty in commercial agreements

Fiduciary duties might exist in commercial agreements:

- *Restatement of the Law -- Agency Restatement (Third) of Agency* § 8.01 **General Fiduciary Principle**

  An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

- *Bombardier Aerospace Corp.* v. SPEP Aircraft Holdings, LLC (Tex Supreme Court February 1, 2019) (limitation of no punitive damages not OK when there is a fiduciary duty)

Disclaimer of fiduciary duty

Restatement of the Law – Agency (Third)

§ 8.06 **Principal's Consent**

Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has **reason to know**, or should know would reasonably affect the principal's judgment unless the principal has **manifested** that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

Disclaimer of fiduciary duty

- *Chemical Bank v. Security Pacific National Bank*, 20 F.3d 375 (9th Cir 1994) ('[t]he very meaning of being an agent is assuming fiduciary duties to one's principal'; agreement provided that agent bank not liable 'except for their own gross negligence or willful misconduct'; court held that '***there is no law against parties to a contract relieving themselves of liability by contract***, particularly when they are sophisticated institutions represented by counsel.'
- *First Citizens Federal Savings & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510 (9th Cir. 1990) ('[u]nlike the status-based fiduciary duty which exists, for example, between attorney and client, fiduciary duties among loan participants depend upon the terms of their contract. . . .***[b]anks and savings institutions engaged in commercial transactions normally deal with each other at arm's length*** and not as fiduciaries. . . .[in the context of loan participations] fiduciary relationships should not be inferred absent unequivocal contractual language.')

Sample: disclaimer of fiduciary duty

'Escrow Agent shall have only those duties as are specifically provided in this Agreement, which shall be deemed purely ministerial in nature, and ***shall under no circumstance be deemed a fiduciary*** for any of the other parties.'

Assignment and anti-assignment provisions

- Construed narrowly
  - 'Consent' provisions may require reasonableness
- Cover changes in control:
  - *Airtouch Cellular, Inc. v. Bell Atlantic Corporation*, 281 F.3d 929 (9th Cir. 2002) (Sale of interest in owner of interest in contract is **not** 'assignment' of interest in contract itself)
  - *Meso Scale Diagnostics v. Roche Diagnostics GmbH*, 62 A.3d 62 (Del. Ch. Feb. 22, 2013) (**reverse triangular mergers** do **not** result in the assignment of a target corporation's contracts by operation of law)
  - *North Valley Mall, LLC v. Longs Drug Stores California, LLC*, 27 Cal.App.5th 598 (Cal.App. 2018) (same)
  - *Borealis Power Holdings Inc. V. Hunt Strategic Utility Investment* (Del.Sup.Ct. 2020)

Delegation of duties

Total E&P USA, Inc. V. Marubeni Oil & Gas (USA), Inc. _ F.3D _ (5th Cir. 2020)

> … upon assignment of a right, the assignor's interest in that right is extinguished; however[,] upon the ***delegation*** of a contractual duty, the delegating party remains liable under the contract, unless the contract provides otherwise or there is a novation.

Sample: anti-assignment provisions

'No ***party*** may ***assign any of its rights*** or delegate any of its obligations under this Agreement without the prior consent of the other parties …. Any purported assignment of rights or delegation of obligations in violation of this Section 12.9 will be void. Subject to the foregoing, this Agreement will apply to, be binding in all respects upon, and inure to the benefit of the heirs, executors, administrators, legal representatives, successors, and permitted assigns of the parties.'

Third-party beneficiaries

- Non-existence of third-party beneficiary rights can depend on express disclaimer of rights
- *See generally Restatement of Contracts (Second)* § 302 ('Unless otherwise agreed between the promisor and the promisee …')
- *Philadelphia Indemnity Insurance Company v. Smg Holdings, Inc.*, _ Cal.App. 4th _ (2019) (third party beneficiary status can arise from a party to contract obligated to obtain another contract)

Arbitration – no class arbitration unless affirmative agreement

Right to class arbitration must be ***affirmatively*** stated; silence = no class claims:

- *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (Federal Arbitration Act 'permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but ***not by defenses that apply only to arbitration*** or that derive their meaning from the fact that an agreement to arbitrate is at issue.')
- *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) ('Effective vindication' exception to requirement that arbitration agreements be given effect as written 'would certainly cover a provision in an arbitration agreement ***forbidding the assertion of certain statutory rights***. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable . . . But the fact that it [pursuing a claim] is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy . . .')

Arbitration – agreement as to procedural rules

Some rules can't be changed by contract:

- *Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E. 3rd 541 (Mass SJC March 9, 2016) (parties by contract can ***not*** vary the grounds for judicial review of an arbitration decision under the Massachusetts arbitration statute)

Statute of limitations – do you know it when you see it – survival and expiration provisions

'Survival' clause does not always operate as attempted modifications of the statute of limitations:

- *Hurlbut v. Christiano*, 63 A.D.2d 1116 (N.Y. App. Div. 1978) ('intention to establish a shorter period must be clearly set forth in the contract'; a limited '***survival***' provision is *not* sufficient to operate as shortening of statute of limitations)
- *ENI Holdings, LLC v. KBR Grp. Holdings, LLC*, No. 8075-VCG,2013 Del. Ch. LEXIS 288, at *22 (Del. Ch. Nov. 27, 2013) (a provision shortening the statute of limitations does **not** require 'particularly "clear and explicit" language'; a limited 'survival' provision *is* sufficient to operate as shortening of statute of limitations)
- *GRT, Inc. v. Marathon GTF Tech. Ltd.*, No. 5571-CS, 2011 Del. Ch. LEXIS 99, at *42 (Del. Ch. July 11, 2011) (a provision shortening the statute of limitations does *not* have to use '***clear and explicit***' language)

Statute of limitations – can't change the accrual date by agreement

- *Deutsche Bank National Trust Company V. Flagstar Capital Markets Corporation*, No. 96 (New York Court of Appeals October 16, 2018), _ N.E.3d _, 2018 WL 4976777 (NY 2018) (Can't change the accrual date by agreement)
- *Lehman XS Trust v. Greenpoint Mortgage Funding, Inc.* (2nd Cir. February 6, 2019) (same)
- *Mastro v. Mastro* (Supreme Ct. NY December 19, 2018) (when statute accrues for fraud claim)
- *Hensel Phelps Construction Co. v. Superior Court of San Diego County*, Cal.Rptr.3d (Calif. Ct. App. 2020) (when statute of limitations begins running upon 'substantial completion' of project, contract's definition of 'substantial completion' does not control)

Sample: survival provisions

[§ 6.4(f)] Parent ***will operate*** News12 Networks LLC ("News12") from and after [June 21, 2016] [("]the Closing["")] substantially in accordance with the existing News12 business plan (the "News Business Plan"), …

[§ 9.1] This Article IX and the agreements of the Company, Parent and Merger Sub contained in Article IV and Sections 6.8 (*Employee Benefits*), 6.9 (*Expenses*) and 6.10 (*Director and Officer Liability*) shall survive the consummation of the Merger and the Transactions. This Article IX and the agreements of the Company, Parent and Merger Sub contained in Section 6.9 (*Expenses*), Section 6.11 (*Financing*), Section 6.12 (*Indemnification Relating to Financing*) and Section 8.5 (*Effect of Termination and Abandonment*) and the Confidentiality Agreement ***shall survive*** the termination of this Agreement. ***All other representations, warranties, covenants and agreements in this Agreement shall not survive the consummation of the Merger and the Transactions or the termination of this Agreement.***

WLDolan v. Altice USA, Inc., 2019 WL 2711280 (Del.Ch.) (Del.Ch., 2019)

Sample: statute of limitations – do you know it when you see it – survival and expiration provisions

'All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, and any certificate, document, or other writing delivered pursuant to this Agreement ***will survive*** the Closing and the consummation and performance of the Contemplated Transactions.'

Sample: statute of limitations – do you know it when you see it – survival and expiration provisions

'If the Closing occurs, Sellers shall have liability under Section 11.2(a) with respect to any Breach of a representation or warranty …, only if on or before the date that is ***three years*** after the Closing Date, Buyer notifies Sellers' Representative of a claim, specifying the factual basis of the claim in reasonable detail to the extent known by Buyer.'

Statute of limitations – which state's?

Include agreement as to state with most favorable statute of limitations?

- *Restatement (Second) of Conflict of Laws* § 142 (generally the state whose ***substantive*** law applies to a claim will also be the state whose statute of limitations will apply to the claim)
- *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)
- *Bear Stearns Mortg. Funding Trust 2006-SL1 v. EMC Mortgage LLC*, No. 7701-VCL, 2015 WL 139731, at *9 (Del. Ch. Jan. 12, 2015) ('***general choice of law rules***' determine which state's statute of limitations applies)
- *Central Mortg. Co. v. Morgan Stanley Mortg. Co.*, No. 5140-CS, 2012 Del. Ch. LEXIS 171, at *56 n. 138 (Del. Ch. Aug. 7, 2012) (choice-of-law provision may determine applicable statute of limitations if provision does so '***explicitly***')
- *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, _ _ _ (Del. Superior Ct. December 29, 2015) (court will apply forum's statute of limitations unless choice-of-law provision '***expressly***' applies to issues of the statute of limitations)
- *Hambrecht & Quist Venture Partners v. Am. Med. Int'l*, 46 Cal. Rptr. 2d 33 (Cal. Ct. App. 1995) (***contractual choice-of-law*** provision applies to determine applicable statute of limitations)

Statute of limitations – how short can it be made?

Generally OK, but don't be ***greedy*** when shortening the statute of limitations*:*

- *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013) (an agreement may shorten statute of limitations for claim based on federal law if the remaining period is '***reasonable***')
- *Hurlbut v. Christiano*, 63 A.D.2d 1116 (Supreme Ct. App. Div. 1978) (shortened statute of limitations period enforceable if not be '***unreasonable'***)
- *ENI Holdings, LLC v. KBR Grp. Holdings, LLC*, No. 8075-VCG,2013 Del. Ch. LEXIS 288 (Del. Ch. Nov. 27, 2013) (a shortened statute of limitations period must be '***reasonable***'; a fifteen month period within which to bring claims for breach of certain representations and warranties is reasonable)

Statute of limitations – how short can it be made?

Generally OK, but don't be ***greedy*** when shortening the statute of limitations:

- *Herring v. Teradyne, Inc.*, 256 F. Supp. 2d 1118 (S.D. Cal 2002) (applying California law) (a provision shortening the statute of limitations must leave a '***reasonable***' period to bring the claim), reversed on other grounds, *Herring v. Teradyne, Inc.*, 242 Fed. Appx. 469 (9th Cir. 2007)
- *Creative Playthings Franchising Corp. v. Reiser*, 978 N.E. 2d 765 (Mass. 2012) (a provision shortening the statute of limitations would be enforceable if the shortened period is '***reasonable in the particular circumstances***' and is made subject to a 'discovery' rule that might defer the time within which the claim must be brought)
- *Shahin v. I.E.S. Inc.*, 988 N.E. 2d 873, 874-875 (Mass. App. 2013) (a contractual provision shortening statutory period for bringing suit is invalid because it did not ***expressly*** provide for application of the 'discovery' rule)

Statute of limitations – can it be lengthened?

Most states impose limits on lengthening the statute of limitations*:*

- 10 *Del. C.* § 8106(c) (a contract involving at least $100,000 may provide for bringing an action based on the contract for up to ***20 years*** after the accrual of the claim)
- NY General Obligations Law § 17-103:

  1. A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made ***after the accrual*** of the cause of action and made, either with or without consideration, in a writing . . . is effective

  …

  3. A promise to waive, to extend, or not to plead the statute of limitation has ***no effect*** to extend the time limited by statute for commencement of an action or proceeding for any greater time or in any other manner than that provided in this section . . .
- Calif. CCP § 360.5 (may agree to add up to four years)
- Agree to extend as a result of pandemic or other *force majeure* type event?

Pre-trial jury waiver

- New York – ***generally enforceable*** (*Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.*, 174 A.D.2d 963 (1991)
- California – ***not enforceable*** (*Grafton Partners v. Superior Court*, 36 Cal.4th 944 (2005) may *not* recover unless agreed
  - California court may not enforce choice of law other than California as ***unconscionable*** – *Rincon EV Realty LL v. CP III Rincon Towers, Inc.*, 8 Cal.App.5th 1 (2017)

Sample: pre-trial jury waiver

‘EACH PARTY, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY, *WAIVES* ITS RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY CONTEMPLATED TRANSACTION, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE.’

Attorneys fees

- American Rule – may *not* recover unless agreed
  - Sometimes part of indemnity claim
- Agreements generally enforced
  - Must be ***reciprocal*** in California in favor of prevailing party' – Civil Code § 1717
  - *Lennar Homes of California v. Stephens*, 232 Cal.App.4th 673 (2014) (non-reciprocal provision factor in determination of ***unconscionability***)
  - ***Choice of law*** other than California may not be given effcct – *ABF Capital Corp. v. Grove Properties Co.*, 126 Cal.App.4th 204 (2005)

Time is of the essence

§ 242 Circumstances Significant in Determining When Remaining Duties are Discharged

In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance under the rules stated in §§ 237 and 238, the following circumstances are significant:

> …
>
> (c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

Comment d. *Effect of agreement*. The agreement of the parties often contains a provision for the time of performance or tender. It may simply provide for performance on a stated date. In that event, a material breach on that date entitles the injured party to withhold his performance and gives him a claim for damages for delay, but it does not of itself discharge the other party's remaining duties. Only if the circumstances, viewed as of the time of the breach, indicate that performance or tender on that day is of ***genuine importance*** are the injured party's remaining duties discharged immediately, with no period of time during which they are merely suspended. It is, of course, open to the parties to make performance or tender by a stated date a condition by their agreement, in which event, absent excuse …, delay beyond that date results in discharge …. Such stock phrases as '***time is of the essence***' do not necessarily have this effect, although under Subsection (c) they are to be considered along with other circumstances in determining the effect of delay.

Sample: time is of the essence

- 'With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.'
- Qualify if there are *force majeure* type events?

Force majeure

Restatement of Contracts (Second)

§ 264 Prevention by Governmental Regulation or Order

If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

Comment:

a. Rationale. … The rule stated in this Section does not apply if the language … indicate[s] the contrary

Commercial impracticability

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller ***may have assumed a greater obligation*** and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Commercial impracticability

§ 2-615. Excuse by Failure of Presupposed Conditions.

Comment 8. The provisions of this section are made subject to assumption of greater liability ***by agreement*** and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. … The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express ***agreements*** as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

Arbitration – use as forum if courts not available due to pandemic or other cause?

- Trigger use of arbitration due to *force majeure* type events?
- Special procedural rules?

How to count

Don't use your fingers – provide rule and deal with holidays:

- *Legras v Aetna Life Insurance Company*, _ F.3d _ (9th Cir. 2015) (As a matter of Federal common law, when counting days within which an act must occur, if the ***last day falls on a weekend***, add a day)
- NY General Construction Law § 20: ('A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such ***period is a period of two days, Saturday, Sunday or a public holiday must be excluded*** from the reckoning if it is an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.')
- California Civil Code § 10 ('The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.') and 11 ('Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be ***performed upon a particular day, which day falls upon a holiday***, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.')

Notice

'The Agreement required notice within ten days, but only after a party became "*aware* of" the claim, and it required a demand with "reasonable detail." This combination makes for an ambiguous mess, at least as applied to this dispute. The parties disagree about just how much Sterling needed to know before being "*aware* of" its claim against the Sellers …'

Sterling National Bank v. Block, 984 F.3d 1210 (7th Cir. 2021)

Incorporation by reference

'In the law of contracts, parties may incorporate writings together into one agreement. However, a ***general reference*** in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document reference, (1) the writing must make a ***clear reference*** to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must ***describe*** the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be ***certain*** that the parties to the agreement had ***knowledge*** of and ***assented*** to the document so that the Incorporation will not result in surprise or hardship.'

Kourt Security Partners, LLC v. United Bank, Inc., State of West Virginia Supreme Court of Appeals (2020)

Incorporation by reference

'Relatedly, "a document is incorporated by reference into the parties' contract only if the parties intended its incorporation." …. "Such intent to incorporate must 'be **clear** and **specific**.'" …. Accordingly, courts applying Illinois law have concluded that the "**[m]ere reference** to another contract or document is not sufficient to incorporate its terms into a contract.'"

Contract language from decision:

> 'We order acc. to the last version of our purchasing conditions.'

Components for Industry v. Auto Kabel North America, Inc., _ *F.Supp.*_ _ (N.D.Ill. 2020)

Integration provisions

Integration clauses don't integrate everything:

- *Kanno v. Marwit Capital Partners II, L.P.*, 18 Cal.App.5th 987 (2018) – ('If a writing falls within level 1 (the writing is a final expression) then a prior or contemporaneous oral agreement is admissible if it does not contradict the writing, and evidence of consistent additional terms may be used to explain or supplement the writing. … If a writing falls within level 2 (complete and exclusive statement) then evidence of consistent additional terms may not be used to explain or supplement the writing.')
- *Aviation West Charters LLC v. Freer*, C.A. No. N14C-09-271 (Del. Super. Ct. July 2, 2015) – Corporate officer could be personally liable for corporate act where there is sufficient personal participation in corporate fraud. Standard integration clause in agreement did not operate a non-reliance provision for pre-contractual misrepresentations because it did not '***explicitly***' disclaim reliance.

Sample: integration provisions

'This Agreement ***supersedes*** all prior agreements, whether written or oral, between the parties with respect to its subject matter (including any letter of intent and, upon the Closing, any confidentiality obligation to which Buyer is subject) and constitutes (along with the Disclosure Letter, the exhibits, and the other documents to be delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to the subject matter of this Agreement.'

Severability – not always a good idea

A party may ***want*** the contract to fail:

- *Restatement (Second) of Contracts*:

  § 183 When Agreement Is Enforceable as to Agreed Equivalents

  > If the parties' performances can be ***apportioned*** into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct

- *Shoptalk Ltd. v. Concorde-New Horizons Corp.*, 897 F.Supp. 144, at n. 6 (1995) ('when a contract is ***separable*** or divisible into a number of elements or transactions, each of which is so far independent of the others that it might stand or fall by itself, and good cause for rescission exists as to one of such portions, it may be rescinded and the remainder of the contract affirmed.')
- *First Savs. & Loan Ass'n v. Am. Home Ins. Co.*, 277 N.E.2d 638, 639 (N.Y. 1971) (contract 'is considered ***severable*** and divisible when by its terms, nature and purpose, it is susceptible of division and apportionment. . . as a general rule, a contract is entire when, by its terms, nature and purpose, it contemplates and intends that each and all of its parts and the consideration therefor shall be common each to the other and interdependent.')
- California Civil Code § 1599 ('Where a contract has ***several distinct objects***, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the res.')

Sample: severability

'If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will ***remain in full force and effect.*** Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.'

Signature requirements

- *PSM Holdilngs Corp. v. National Farm Financial Corp.*, 339 Fed.App'x. 693 (9th Cir. 2009) (Contract not enforceable without all signatures):

  'This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of ***all of the parties*** reflected heron as signatories.' [emphasis added by court]

- *Clifford v. Trump*:

  '… this Agreement, when signed by ***all Parties***, is a valid and binding agreement, enforceable in accordance with its terms.'

Signature requirements

"Martinez's signature is adjacent to the certification paragraph, which refers to all terms of the agreement sought to be enforced. In this situation, that Martinez did not also initial the subject paragraph does not provide a basis for concluding the parties did not mutually assent to the arbitration agreement."

Martinez v. Baronhr, Inc., _ Cal.App.4th _ (2020)

Agreement to use electronic signature and record

'In sum, Aerotek's evidence of the security procedures for its hiring application and its operation is such that reasonable people could not differ in concluding that the Employees could not have completed their hiring applications without signing the MAAs. The Employees' simple denials are no evidence otherwise.'

Aeroteck, Inc. v. Boyd, 2021 WL _ (Tex. Supreme Court May 28, 2021)

Signature requirements

- Identifying the position of someone signing for another:
  - Signing for an entity
  - Signing for a principal
- Possible need for signatures of co-owners and spouses
  - *E.g.*, California Family Code § 1102 (signature of both spouses needed for certain real property transfers)