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## READ THE BOILERPLATE! 5 Commonly Overlooked Provisions

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By the time you get to reading the "General" provisions located at the end of the contract, you may be half asleep and just wanting to be finished with your review. But don't fade yet, because there are still some important provisions to consider!

Boilerplate language (the somewhat "standard language" in contracts, usually near the end) may be written as if affecting both parties equally, but the impact of that wording is not always equal in practice. It is very important to consider this language and its relevance to your specific circumstances.

Depending on the negotiating strength of the parties, boilerplate language can be difficult to modify, but regardless of whether it ultimately changes, you need to know the consequences of that language.

Here are a few provisions to keep an eye on:

**Governing Law** - This section identifies *which state's law controls* the agreement. Generally, the drafting party picks their own state; however, in some cases, this may not be best. For example, if you are entering into a technology deal with a company in Nebraska, you may want to push for

California law over Nebraska law, given the fact that California has more case law within the technology field. More populated states generally have more law (and cases interpreting that law), which may give greater predictability to the ultimate outcome.

**Venue** - This is a very different concept than governing law. Venue provisions dictate *where disputes are heard*, and it's quite possible to have California law control (the governing law) but require all disputes to be heard in New York (the venue). Obviously, as the distance increases between where you are and where the dispute is to be heard, your expenses in bringing or defending a lawsuit may increase as well. A company in New York, with a New York venue provision, is counting on the fact that someone in California is going to have consider the additional expense before bringing suit against them, and they may also use the threat of commencing litigation in New York as a way of getting concessions. Three possible solutions: (i) pick a neutral venue, (ii) leave the venue "silent" by removing the provision, and let legal principles decide the proper jurisdiction, or (iii) allow the preferred venues of both parties.

**Time is of the essence** - This provision basically states *"it has to happen by this date, and we really mean it!"* - with this provision in place, failure to perform by the stated date gives the other party the opportunity to terminate the contract. This provision may be found in real estate contracts where financing needs to be secured by a certain date, or in other contracts where the timely delivery of goods or services is critical. But if your agreement is not as time sensitive, this boilerplate language may not be desirable (particularly if you are the party required to deliver the goods or services).

**Attorneys Fees** - Allowing this provision, which states *the "prevailing party" is awarded their reasonable attorneys fees*, works out great when you are clearly on the right side of

the argument. However, when it's a closer call, you may not like the risk of having to pay both your attorney fees and their attorney fees if you lose. If you are weaker financially, you may really need to consider moving forward in a case against that larger company if this provision is in place. In the absence of this clause, the general rule is that both sides pay their own attorneys fees. So consider both options carefully.

**Arbitration** - Agreeing to *binding arbitration sometimes leads to a faster, less expensive resolution* of the dispute. However, you also need to be aware that your dispute is being heard without the benefit of a court system, jury and judge - although many arbitrators are retired judges and attorneys. Also, your right to appeal is generally eliminated (except, if specifically provided, you can appeal errors in applying the law). Since arbitration keeps the matter away from a jury and keeps the proceedings more private, corporations generally prefer it. Lastly, consider that arbitrators often "split the baby," awarding some but not all of what is demanded in the dispute. So, it makes a 100% victory in a dispute less likely. However, given potential savings in costs and time, the tradeoff may be worth it.

**So stay awake!** While the boilerplate may be boring to read, it can be the decisive factor in your dispute.

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