

Boilerplate Ain't Boilerplate No More

By Jim Wagstaffe



Lawyers—young and old—have varying experiences drafting and reading contracts, yet all the while focusing on the main “deal points” (e.g. price, quantity, delivery). In doing such work, we intuitively sense reaching what we were told years ago in law school was the boilerplate provisions, *i.e.*, the “standard” paragraphs at the end that often brokered no debate between parties wearied at the end of extended back-and-forth negotiations.

However—and thanks in no small part to a stealth judicial revolution—boilerplate ain't boilerplate no more. For these “end of contract” clauses recently have been infused with strength and extraordinary meaning, addressing where and who will be the dispute resolver, the law that will govern the matter, and what rules of interpretation and remedies will or won't be in play.

These clauses, seemingly innocuous in their inception, often provide the fulcrum for success or failure in ensuing litigation. They include the following types of provisions: forum grabbers (consent to jurisdiction and forum selection), alternative dispute resolution commands (mediation and arbitration), law trumpers (governing law and remedy door closers) and rules for interpretation (e.g. non-*contra preferendum* clauses). And amazingly, there is even new case law on the hardly-noticed “approved as to form” clauses adorning the very end of such documents.

As a long time trial attorney (and author of the widely used LexisNexis federal practice guide), I have many times litigated and now regularly write about the meaning of such clauses, and have come to understand that increasingly such provisions are not boilerplate at all. See [The Wagstaffe Group Practice Guide: Fed. Civil Proc. Before Trial](#) (LN 2019). The impact of what we previously thought were “minor” contractual paragraphs now can be quite dramatic, often becoming absolute litigation game changers.

Pre-Designating the Dispute Forum Ain't No Small Thing

Anyone who says it's “no big deal” *where* the contract-dispute litigation will take place and before whom has never litigated a major case to its completion. In fact, there has been a judicial revolution in the last few years as to the enforcement of what I call “forum grabber” clauses such as consent to jurisdiction and venue forum selection clauses.

There is no more important case on this topic than [Atlantic Marine Constr. Co. v. U.S. Dist. Ct.](#), a Justice Alito opinion cited over 2,000 times in the past five years.¹ There, the forum selection clause identified Virginia as the designated venue notwithstanding that the underlying dispute was filed in Texas because the payment dispute arose out of construction at Fort Hood located in that state. Although virtually all witnesses and documents were located in Texas, the Supreme Court held that if valid, “a contract is a contract” and don't bother with consideration of the plaintiff's choice of forum, the private interests of witnesses or (except in rare cases) even the interests of justice or the judicial system. As in that case, the party with the superior bargaining power (the Virginia-based entity selecting the local subcontractor) got its way.²

Courts have applied the same presumptive enforcement for forum shopping clauses framed as “consent to personal jurisdiction” provisions. Since consent is a traditional basis for jurisdiction untethered by minimum contacts limitations, enforcement of such seemingly boilerplate clauses can indeed provide yet another game changer in terms of winning and losing. For if, as the courts tell us, the clause can be enforceable even if contained in a cruise lines ticket,³ as part of an online reservation,⁴ in a bill of lading,⁵ or in a term of use in the shrink wrap,⁶ then there is little doubt that such

a provision ordinarily will be enforceable in the boilerplate of a written contract itself.

Further, courts have also now been reading contractual clauses selecting only a state court forum as constituting a waiver of the otherwise existing right to remove the case to federal court on federal question or diversity jurisdiction grounds.⁷ Importantly, if only one of the parties to the suit has agreed exclusively to state court, this nevertheless constitutes a waiver of the removal right for *all* parties.⁸ Thus, be sure to read (or draft) the clause with an eye to determining its scope and desired applicability to your case or transaction.

ADR and Arbitration Clauses Ain't No Boilerplate

For many decades both state and federal courts have placed their imprimatur on contractual provisions mandating pre-lawsuit procedures (e.g. mediation) and other alternative dispute resolution commands such as compelled arbitration—so much so that all doubts will be resolved in favor of such provisions.⁹ Since such a large percentage of contracts, including consumer contracts, compel arbitration as an alternative to a jury trial, it can hardly be argued that such clauses in any way come within the meaning of boilerplate.

A highly prominent series of Supreme Court cases have uniformly been approving and enforcing clauses that mandate individual—rather than class wide—arbitration. In fact, if a class arbitration right is to exist, it must be clear since an ambiguous contract will not suffice.¹⁰

The “boilerplate” ADR or arbitration provision can be particularly significant because parties generally are free to stipulate to any procedure and to the person or persons who will decide the dispute. As such, litigation might be avoided or deemed not worth it if the chosen approach seems weighted in favor of an overly expedited or industry-friendly process.¹¹

Other Formerly Boilerplate Provisions

In addition to forum grabbing and jury-avoiding clauses, the formerly end-of-contract standard provisions also can make a large difference in modern litigation. These include the following:

- Law trumping clauses such as choice of law provisions.
- Remedy door-closing clauses such as provisions limiting or eliminating consequential damages.



- Interpretation changes such as a provision underscoring that the contract was drafted by both sides and hence there is no *contra preferendum* (interpret against the drafter) aspect to later litigation conflicts.

And there is even law now in some jurisdictions that the boilerplate of boilerplate aspect of a contract in the form of an attorney signing solely “to approve as to form and content” might have real meaning. Just this year, the California Supreme Court held that if an attorney signs the contract with this formulaic phrase, e.g. as to compelled confidentiality, it could result in a factual finding that counsel both recommended their clients sign and intended to be bound by the provision themselves.¹²

The Hot Issues Affecting So Much of What Used to Be Boilerplate Provisions

Since the former “boilerplate” provisions affecting forum designation, arbitration and interpretation can be so important, much of the action in recent cases centers on whether such provisions are valid and enforceable. Generally, such clauses will be enforced if they (1) are reasonably communicated to the parties, and (2) would not be unreasonable, unjust or otherwise violate a strong state public policy.¹³

Many states have enacted statutes that limit the enforceability of selected forum, choice of law or arbitration clauses in certain types of situations and cases (e.g. identified consumer cases, employment contracts, subcontract construction cases, franchisor-franchisee contracts, etc.). So, one must be sure to check your local law as to such state public policies in this area.¹⁴

And finally, what has become one of the hottest issues regarding what we used to think of as boilerplate clauses is whether they can apply to non-signatories (e.g. third-party beneficiary of a contract). Whether such clauses will apply to

such non-signatories as third-party beneficiaries, successors, subsidiaries, or corporate employees and officers often will depend on the severability of the action as well as the relationship between the signing and non-signing parties.¹⁵

The Final Word on Meaningful Words

Finally and happily, there is at least one boilerplate term that plainly remains so in this modern age. A provision allowing counterpart signatures, while fairly common, typically is meaningless as signing a contract in this format (*i.e.*, signing different copies of the identical contract) is superfluous since court holdings in most jurisdictions (and laws authorizing electronic/digital signatures) allow enforcement of

agreements in this format even if there is not a counterparts clause.¹⁶ So, some boilerplate remains so.

However, the main thing to remember about the effect of various boilerplate provisions is that the law is ever changing. You can stay abreast of such changes by reading our many discussions in [The Wagstaffe Group Practice Guide: Fed. Civil Proc. Before Trial](#) as well as going online and using our Current Awareness component of TWG that provides weekly updates on the hottest new cases in litigation practice. And remember the words of General Eric Shinseki: “If you don’t like change, you’re going to like irrelevance even less.”



Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation’s top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

¹ *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 568 (2013).

² The impact of the decision cannot be overestimated as in that case forcing the Texas party and their local attorneys to litigate their \$150,000 construction dispute in a geographically inconvenient (and expensive) forum no doubt could in future cases lead to unfavorable settlements or even abandonment of claims in their entirety. See also *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (forum selection clause results in dismissal of Washington State securities suit for re-filing in Silicon Valley).

³ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991) (forum selection clause in cruise ticket).

⁴ *Decker v. Circus Circus Hotel*, 49 F.Supp.2d 743, 748 (D. N.J. 1999) (venue transferred on basis of online forum selection clause); *Rudgayzer v. Google, Inc.*, 986 F.Supp.2d 151, 155 (E.D. N.Y. 2013) (click-wrap agreement reasonably communicated to email account holders).

⁵ *Kukje Jwajae Ins. Co. v. M/V Huyundai Liberty*, 408 F.3d 1250, 1254-1255 (9th Cir. 2005) (bill of lading forum selection clause enforceable).

⁶ *Taxes of Puerto Rico, Inc. v. Taxworks, Inc.*, 5 F.Supp.2d 185, 189 (D. P.R. 2014) (venue selection clause in end user provision in software package).

⁷ *City of Albany v. CH2M Hill, Inc.*, 924 F.3d 1306 (9th Cir. 2019); *Bartels v. Saber Healthcare Group, LLC*, 880 F.3d 668 (4th Cir. 2018); *Medtronic Sofamor Danek, Inc. v. Gannon*, 913 F.3d 704 (8th Cir. 2019); *Grand View v. Helix Electric*, 847 F.3d 255 (5th Cir. 2017); TWG S8-VIII[A][2].

⁸ *Autoridad de Energia Electrica v. Vitol SA*, 859 F.3d 140 (1st Cir. 2017).

⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 298 (2010); TWG at § 13-VII[H].

¹⁰ *Lamp Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1419 (2019); see also *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (court confirms enforceability of class action waivers in arbitration agreements); *AT&T Mobility LLC v. Cponception*, 563 U.S. 33 (2011) (same).

¹¹ See *Baravai v. Josephtal, Lyon & Ross, Inc.*, 28 F.3d 704,709 (7th Cir. 1994) (parties free to specify idiosyncratic terms of arbitration).

¹² *Monster Energy Co. v. Schechter*, 7 Cal 5th 781 (2019).

¹³ See *Martinez v. Bloomberg L.P.*, 740 F.3d 211, 219 (2d Cir. 2014) (forum selection clauses); *Al Copeland Invs., LLC v. First Specialty Ins. Corp.*, 884 F.3d 540 (5th Cir. 2018) (strong presumption to enforce forum selection clause unless obtained through fraud, selects a gravely inconvenient forum, is fundamentally unfair or violates a strong public policy of the forum); *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019) (arbitration clause in “terms and conditions” section on product seller’s website was not clear and conspicuous as to require arbitration); cf. *Dicent v. Kaplan University*, 2019 U.S. App. LEXIS 872 (3d Cir. 2019) (court compelled arbitration based on clause in an agreement electronically signed by a student taking online courses).

¹⁴ See, e.g., California Labor Code sec. 1241—employers cannot condition employment on employee’s agreement to forum selection or choice of law clauses as to states other than where employment takes place; Conn. Gen. Stat. sec. 42-133ff(F)—state public policy limiting suits outside state against local franchisees; see also *Gemini Tech. v. Smith & Wesson*, 931 F.3d 911 (9th Cir. 2019) (forum selection clause not enforceable since it violates clear state public policy invalidating clauses requiring litigation out-of-state).

¹⁵ See In re: *McGraw-Hill Global Education Holdings LLC*, 909 F.3d 48 (3d Cir. 2018)—non-signatory not bound if not “closely related”; In re *Howmedica Osteonics Corp.*, 867 F.3d 390, 407 (3d Cir. 2017); see also *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, cert. granted*, No. 18-1048 (2019) (certiorari to decide if a non-signatory can compel arbitration in an international setting).

¹⁶ See, e.g. *Espejo v. Southern California Permanente Medical Group*, 246 Cal. App. 4th 1047, 1060-1061 (2016) (authenticated electronic signature per Cal. Civil Code sec. 1663.1 et seq. on arbitration agreement valid and enforceable).