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One size does not fit all: Beware of "boilerplate" contract provisions

By Paul W. Mengel, counsel, PilieroMazza PLLC

It is common in contract negotiation for parties to devote the majority of their efforts to the business terms and gloss over the "boilerplate" provisions of the contract. You may believe the boilerplate is not as important as the business terms, or you may think that standard terms you have used in past contracts will work just as well for your latest agreement. However, should the arrangement go south, you may end up wishing you had paid more attention to the boilerplate up front. This article addresses several of the critical boilerplate provisions for dispute resolution that you should not ignore.

Litigation vs. Alternative Dispute Resolution (ADR)

The trend for small businesses when entering into contracts has been to specify that disputes will be resolved by some method of alternative dispute resolution, such as mediation or arbitration, rather than litigation. This trend in the private sector has been mirrored by the government. In fact, the American Bar Association has observed that ADR is now the preferred and likely outcome of disputes brought before the Armed Services and Civilian Boards of Contract Appeals, the Court of Federal Claims and the Government Accountability Office.

But is arbitration a better choice for you? While arbitration can be less costly and time-consuming than litigation, there are pros and cons to both processes that should be carefully weighed at the drafting stage, as opposed to the automatic inclusion of an arbitration provision in a contract.

Advantages of arbitration include that it generally leads to a quicker resolution. Another attractive aspect of arbitration is that, unlike in litigation, the parties can select their fact-finder and they have more control of the process than they would in the courtroom. One of the drawbacks of arbitration, however, is that the parties must compensate the fact-finder for his or her time and these fees can be significant. Judges are free to the parties and the federal court system pushes mediation and the use of Magistrate Judges to help settle disputes when possible.

In addition, some court systems are known for expediency – such as the "rocket docket" of the Eastern District of Virginia. If you are in a jurisdiction like this, litigation may be a better choice for you.

Moreover, a party aiming to draw out arbitration might be able to do so, whereas a judge would be able to keep the parties closer in check. Other factors to consider: a judge is a known entity whereas an arbitrator may be selected from a pool of which the parties know very little, other than what is presented on resumes; the arbitrator may not issue a written opinion or an explanatory document; arbitrators are sometimes inclined to "split the difference" rather than come down too hard on any one party; an appeal for the review of arbitration decisions is difficult to obtain; and the parties typically have to go through a second process in court to enforce an arbitration award.

Thus, on balance, litigation may be the better option for you. In our experience, arbitration infrequently is as simple and cost-effective as clients expect it to be.

Choices of Applicable Law and Venue

Other often underemphasized subjects of contract boilerplate are the related concepts of forum selection and governing law. Such provisions are deserving of particular scrutiny in the negotiating process, because often the boilerplate forum selection provision may specify a location for the dispute resolution that is convenient only to the drafting party. This can cause a great deal of expense for the other party that has to travel for a dispute. The inconvenience occasioned by a choice of forum clause could be the determining factor in settling a dispute when a relatively small amount is at stake.

The choice of governing law provision is also typically buried deep within the boilerplate section of a contract. Such provisions are usually friendly to the drafting party and can substantially impact the parties' rights. For example, differences in two states' decisional law or statutes of limitations could strongly favor your opponent if not carefully selected.

Attorneys' Fees Provisions

I have been asked by aggrieved contractors many times: "So, if we sue these guys, can I get my attorneys' fees?" It is surprising the number of contractors that fail to consider the impact of a contractual attorneys' fee provision until it is too late. It is common for a drafter of the contract to include in the boilerplate a provision stating that the loser pays not only for its own attorneys' fees but the fees of the prevailing party as well. If such a provision is omitted, it is unlikely that either side will have to pay for the other side's attorneys' fees. As a general rule, a "loser pays" provision will deter litigation, and these clauses must be carefully drafted in order to achieve the desired result.

Conclusion

In sum, while it may be tempting in these trying economic times to roll out the same old boilerplate you have used in the past, the prudent contractor will devote considerable attention to these provisions at the outset, so at the end of the dispute resolution you will not be looking back and saying "if only we had considered...."

Paul W. Mengel is counsel with PilieroMazza PLLC in Washington, DC and leads the firm's Litigation Group. For over 25 years, PilieroMazza has helped small and mid-sized businesses to successfully navigate a diverse array of legal matters, with a primary focus on government contracting and the SBA's procurement programs. Visit www.pilieromazza.com.