

HOW TO

Improve Your Company's Form Software License Agreement

PART 6: BOILERPLATE



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ATTORNEYS

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Every word in your form software license agreement matters.

While many businesses and their attorneys spend the majority of their time and effort on the most material provisions of a software license agreement (license grant, payment terms, limitation of liability, indemnity, etc.), often times disputes (and your likelihood of success therein) will be significantly impacted by the less negotiated terms.

A prime example of this is what attorneys call the “boilerplate” provisions of a contract. These are typically found at the end of the contract, often times labeled as “Miscellaneous”, and rarely do businesses and attorneys give these provisions the attention they deserve. Below is a brief discussion of three common “boilerplate” provisions in a contract, along with some quick and easy practical tips for addressing these critical but often overlooked provisions in your form software license agreement.

Dispute Resolution (choice of law and venue)

All software license agreements should contain choice of law and choice of venue provisions. The choice of law provision tells the court the parties’ intent regarding the *substantive law* that should govern any disputes arising out of the contract. Choice of forum (also known as submission to jurisdiction) provisions specify which court shall adjudicate any disputes arising out of the parties’ contract and, indirectly, the *procedural law* that governs these disputes.

Choice of law and forum provisions that are not given proper attention could result in unintended issues if disputes arise out of the contract. For example, if a business agrees to a choice of forum where the entity is not qualified to do business, it may not be able to bring claims in that forum. The forum court could apply its choice of law rules, leaving the choice of governing law outside the parties’ control. Additionally, a choice of forum that has no relationship to the

parties or the agreement could be unenforceable in some jurisdictions. With respect to choice of law, certain states may have unfavorable substantive law. Finally, using an improper nexus phrase (“arising out of” or “relating to”) when defining what claims are governed by the choice of law/forum provisions may result in too many or too few claims being governed by the choice of law/forum provisions.

When drafting your choice of law and forum provisions, remember the following:

- Pick a governing law/forum that is enforceable;
- Check the relevant substantive law applicable to the transaction;
- Consider policy preferences of the selected state and the depth of their substantive law on relevant issues that would likely govern the transaction at hand;

- Add language as needed to ensure all desired claims related to the agreement are brought in the chosen forum, not just the claims directly arising from a breach of the agreement; and
- Consider carving out claims for equitable relief; availability of equitable relief may be limited if choosing another state as the forum for all claims.

Entire Agreement Clauses

Entire agreement provisions (also known as “Merger” or “Integration” provisions) serve as strong evidence that your license agreement expresses the parties’ complete agreement regarding the agreement’s subject matter. Any prior or contemporaneous understandings, agreements, representations and warranties cannot serve to contradict the terms of the license agreement if it is fully integrated. While courts differ on the amount of deference given to an entire agreement provision, most find it to be sufficient evidence that there is a fully integrated agreement between the parties.

It is important to draft an entire agreement clause and with two questions in mind:

- (1) is this truly the entire agreement between the parties with respect to the subject matter at hand; and
- (2) is the provision appropriate in scope in order to capture the parties’ intent and to be enforceable?

With respect to the first question, often times parties give little to no consideration as to whether an agreement is actually the entire agreement of the parties. Is there an NDA in place that should remain in place? If you are a large company, are you sure that there is not another agreement in place that is governing part of the same relationship or purpose? Do your diligence to make sure that the entire agreement provision is actually capturing everything that should be considered the “entire agreement” of the parties on the subject matter.

As for drafting this provision, draft entire agreement provisions with as much specificity as possible to increase their evidentiary value on the question of integration. Define the subject matter appropriately. Include all the documents (Exhibits, Statements of Work, etc.) that should be included.

Notice

Notice provisions create the rules by which notice must be given under your software license agreement. While this may seem simple and immaterial, think about all the ways you might be required to give notice under your contract, and how important notice is to such provisions. Do you want to terminate the contract? To do so will likely require notice within a specific time period. Looking to renew or not renew the contract? You better do it within the defined notice period. Need to make an indemnity claim or make the other party aware of a suspected breach? You guessed it – you will need to provide notice in accordance with the notice provision requirements.

Given how important notice is under a contract, you would think parties would spend more time reviewing the notice provision. Here are a few items to consider when drafting the notice provision in your software license agreement:

- What is the proper method for notice? Is email sufficient? Does it need to be certified mail, return receipt requested? Many old contracts still specify facsimile as an approved method of notice, but is that still appropriate?
- Who is notice supposed to go to? Officers are the most appropriate parties, but consider having a copy of the notice delivered to your attorneys.
- When is notice effective? Is it effective on the date the notice is sent or received? This will likely matter when calculating issues like termination, renewal, fee calculations, expiration, etc.

This article is one part of a ten-part article published by Koley Jessen to help software licensors improve their form software license agreements.

Please contact Koley Jessen’s Commercial and Technology Contracts Practice Group for further assistance.