Updating Your Boilerplate / Negotiating the Difficult Provisions

Presented by:
Ralph I. Miller
Michael A. Saslaw

May 22, 2008
Discussion Topics

- Introduction
- Forum Selection Clauses
- Choice & Conflicts of Law Clauses
- Indemnification Clauses
- Limitation on Liability Clauses
- Purchase Price Adjustments
- Arbitration Clauses
- Attorneys’ Fees Shifting Provisions
- Jury Waiver Clauses
- Liquidated Damages Clauses
- Merger & Integration Clauses
- Contractual Limitations Periods
- Force Majeure Clauses
- Material Adverse Change Clause
Introduction

- No Such Thing as “the Perfect Agreement”
  - Agreements must be tailored to the specific situation
  - No one right way to do it
- Consider From the Outset:
  - The parties with which you might be in a possible dispute
  - The subject of a possible dispute
  - Which state’s law might apply
- Remember – One Way to Avoid Legal Fees Later is by Proper Drafting!
Forum Selection Clauses
Generally

- Provision whereby parties agree that any litigation resulting from a contract will be initiated only in a specific forum
- Example: “The parties hereto consent to the exclusive jurisdiction of the courts of Harris County, Texas.”
- Generally enforceable unless the resisting party can show the forum to be unreasonable under the circumstances
- Pros and cons of forum selection:
  - You gain agreement up front on a choice of forum
  - You may lose the right not to be subject to jurisdiction in that forum
  - May encourage settlement if the parties do not want to litigate (or if litigation is difficult) in the selected forum
- A federal court may enforce a forum selection clause in a variety of ways. See Asoma Corp. v. SK Shipping Co., 467 F.3d 817, 822 (2d Cir. 2006) (noting that the Supreme Court has not been clear as to the proper mode for forum-selection clause dismissal and listing possible theories (i.e. motion for summary judgment, lack of jurisdiction or forum non conveniens, motion to decline jurisdiction, improper venue)).
Forum Selection Clauses
Pitfalls

- Forum selection does not equal choice of law
- Should carefully consider selecting a governing law that is different from the forum jurisdiction
- Parties cannot create federal jurisdiction by contract.
- Alternatively, a motion for transfer or dismissal under a transfer of venue or forum non conveniens statute
- In Texas, when a trial court erroneously declines to enforce a forum selection clause, mandamus relief is available. See In re Automated Collection Techs., 156 S.W.3d 557, 558 (Tex. 2004).
Choice & Conflicts of Law Clauses

Generally

- Provision whereby parties agree that the law of a particular jurisdiction will govern disputes arising under the contract
- The clause may also expressly exclude the application of the conflicts of law provisions of the designated law
- Example: “This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas, without regard to principles of conflicts of law thereof.”
- Clauses are generally enforceable.
Choice & Conflicts of Law Clauses

Pitfalls

- Choice of law does not equal forum selection.
- Selecting a state that does not bear a reasonable relationship to the agreement may render the provision unenforceable.
- Should check choice of law statutes in the chosen state and the state that has the most significant contacts for specific requirements or exceptions.
- A narrowly drafted provision can result in application only to the construction and interpretation of the contract and not to extra-contractual claims.
- State law may still allow for independent remedies regardless of drafting:
  - New York law provides for an independent remedy in tort for parties with a breach of contract claim.
  - Texas law allows both a breach of contract claim and a tort claim for intentional or negligent misrepresentation in a contract.
Indemnification Clauses
Generally

- Provision whereby parties may set forth specific indemnities for certain claims or liabilities
- Example: “The parties hereby agree to indemnify and hold harmless each other from and against all liability, claims and demands on account of injury to persons arising out of or in any manner connected with the performance of the contract.”
- No exact formula, but the provision must be clear as to the intent of the parties to indemnify and the scope of its coverage
- The clause generally provides for an obligation to defend.
- Clauses are strictly interpreted and courts generally refuse to broaden or narrow the scope beyond its plain meaning.
- Courts will use general principles of contract construction to resolve ambiguities (general vs. specific provisions, interpret against drafting party, etc.).
Indemnification Clauses
Pitfalls

- Courts are unpredictable when construing an indemnification provision that purports to cover “all injuries and damages.”
- Should specifically include all types of damages that are expected to be covered, especially for those that are customarily not covered (e.g. attorney’s fees).
- Certain types of indemnification may be invalid due to their subject matter (violations of law, negligence, etc).
- Some states, including Texas, require conspicuous drafting for certain types of indemnification.
- For clauses with duty to defend, the parties should clearly specify when the duty is triggered, who can control the defense, when and how settlement may be made, etc.
- Indemnification for “loss or damage” vs. indemnification for “liability.”
- Punitive damages might not be recoverable under an indemnification agreement.
Limitations on Liabilities Clauses
Generally

- Provision that allows parties to exclude certain types of damage recoveries under a contract

- Example: “No party shall, in any event, be liable to any other person for any consequential, incidental, indirect, special or punitive damages of such other person.”

- Clause may also be drafted to limit or cap certain types of damages.

- Generally disfavored by courts, so language must be clear and unequivocal
Limitations on Liabilities Clauses

Pitfalls

- Easy to exclude damages that were intended to be covered
- “Consequential damages” have been held to include lost revenues and lost profits—generally unclear outside the sale of goods context.
- Damages resulting from negligence may not cover negligent misrepresentation unless explicitly stated.
- Consider whether tax or insurance proceeds should be addressed
- Consider “anti-sandbagging”
Purchase Price Adjustment Provisions
Generally

- Commonly used in private transactions involving the sale/purchase of stock or a collection of assets constituting a “business”
- Based on the balance sheet of the acquired entity, usually at closing
- May or may not be audited
Purchase Price Adjustment Provisions

Generally

- Generally address either working capital or shareholders’ equity, although often highly negotiated
  - Adjustment provisions should be tediously drafted
  - Best practice indicates a schedule of any agreed adjustments should be negotiated and attached
  - The final language should be reviewed by the auditor for both the buyer and the seller

- Disputes are often referred to an independent auditor for resolution
  - No New York, Texas or Delaware case law on this common practice
  - Unclear whether a hotly disputed determination eventually is decided by a court

- In any event, critical to have seasoned, experienced counsel advise in drafting these mechanisms
Arbitration Clauses

- Is arbitration even an option?
- Does arbitration favor your client?
- If so, how do you get the best clause for your client’s situation?
- How do you select a panel?
Is Arbitration An Option?

- “Yes” in almost all commercial contexts
- “Maybe” in consumer contracts
  - Prohibited in some states. Example: Mandatory arbitration clauses are null and void under New York law in consumer contracts for goods or services. NY General Business Law § 399-c.
  - Presumably valid in Texas and most states
  - Courts may find clauses unconscionable, especially if fees paid by consumers are high.
Do You Want Arbitration or Litigation?

**Pros of Arbitration**
- Allows expert analysis of complex issues
- Generally faster
- Confidential
- Greater finality
- Neutrality (important in international arbitration)
- No runaway juries

**Cons of Arbitration**
- Very limited judicial review (no “appeal”)
- Harder to delay results
- Uncertain rules and procedures
- Limited checks on arbitrator’s powers
- Experience of arbitrators often differs widely
Does Arbitration Favor Your Client

- **Arbitration** is likely to be best if:
  - You want to force payment of money quickly
  - You may otherwise be exposed to an unfavorable judicial forum, such as:
    - A “deep pocket” facing jury trial in a dangerous venue
    - You would be a foreigner in a foreign court
    - You need confidentiality rather than public trial
  - You need careful analysis of complex issues
**Litigation** is likely to be **best** if:

- Your primary need is **injunctive relief**
- You have a favorable "**home court**" forum
- You may need to **resist performance criticism**
- You may **want to delay resolution**
- You need to **rely on novel legal theories**
- Your opponent wants to avoid public trial
How to Get the Best Arbitration Clause

- Many “standard” clauses are incomplete and unclear
- The clause should be tailored to ensure the features your client needs most. Examples:
  - For speed, select an established organization: AAA, JAMS, ICC. (They force progress to collect fees.)
  - For fairness, consider three neutrals rather than “I pick” and “you pick” clauses.
  - Consider “injunctive carve outs” (e.g., non-competes)
Arbitration Agreements or Clauses - Drafting Considerations

- Panel size (1 arbitrator? Panel of 3?)
- Who will administer (AAA, ICC, JAMS, etc.)
- Location, language & governing substantive law
- Special qualifications of the arbitrators
- Time limits & discovery
- Pre-hearing briefing
- Process for resolving pre-hearing disputes
- Format of the final hearing
Arbitration Agreements or Clauses - Drafting Considerations

- Post-hearing briefing
- Timing and form of the award
- Confidentiality
- Appeals
  - In Texas and California, a motion to confirm, vacate, or modify an arbitration award must be filed in the same county where the agreement requires the arbitration be held. Tex. Civ. Prac. & Rem. Code § 171.096(b); Cal. Civ. Proc. Code § 1292.2.
  - Under federal law, in the district court for the district in which the award was made. 9 U.S.C. §§ 10-11.
- Costs
- Consent to entry of judgment (required)
Breadth of the Arbitration Agreement

- Scope
  - Broad clause – “arising out of or relating to”
    - Additions for tort claims
    - Additions for jurisdictional claims
  - Narrow clause
    - Excluding specific claims (e.g., “The following matters are specifically excluded from arbitration...”)


Elements of an Arbitration Agreement

- Arbitral Institution/Rules
  - Why the choice is important:
    - Some institutions administer arbitrations (e.g., serve papers, resolve preliminary issues, appoint arbitrators) and can significantly expedite the arbitration in its initial stages.
    - Award rendered under the auspices of a recognized arbitral institution may help ensure enforcement
    - Rules provide needed structure for proceedings
Sample Arbitral Institutions

- American Arbitration Association (“AAA”)
- CPR Institute for Dispute Resolution (now the International Institute for Conflict Prevention and Resolution)
- JAMS – Endispute
- International Chamber of Commerce (“ICC”)
- London Court of International Arbitration (“LCIA”)
Terms of an Arbitration Agreement

- Situs of Arbitration (especially crucial for an international arbitration)
  - Why important:
    - Often determines location of some or all hearings
    - Determines procedural law of arbitration (unless parties provide otherwise)
    - Place of all challenges to award
  - Things to check
    - Signatory of New York Convention
    - Law of situs favors enforcement of arbitral awards
Terms of an Arbitration Agm’t

- Language
  - What happens if you don't provide for the language?
    - Tribunal decides, usually based on language of contract
  - Can you provide for multiple languages?
    - Yes, but not without possible practical problems, additional costs
Terms of an Arbitration Agm’t

- Governing Substantive Law
  - Options (international arbitration)
    - One national law
    - Dépeçage (multiple national laws for different issues)
    - Anational law (e.g., UNIDROIT, CISG, Lando Principles)
  - Amiable composition, *ex æquo et bono* (i.e., principles of equity)
Terms of an Arbitration Agm’t

- Governing Substantive Law (cont.)
  - What to look for in a governing law:
    - Arbitrability – is subject matter of contract arbitrable under law?
    - Buyer/Seller issues – is law favorable to client?
    - Accessibility – is law established and are texts of it available in translation?
    - Development of law in subject matter – is law developed in particular area that will be subject of dispute?
Terms of an Arbitration Agreement

- Interim or Conservatory (Injunctive) Relief
  - Providing for relief by arbitrators – not necessary if adopt fixed set of rules (such as AAA, ICC)
  - “Carve out” for relief by courts
    - Crucial before the panel can be selected, such as TRO’s, enforcing confidentiality or non-competes
    - May assuage judicial concerns about interference with arbitral process
Terms of an Arbitration Agreement

- Confidentiality
  - Established principle of international arbitration
    - Supported in national arbitration laws of certain countries
    - Supported in treatises on international arbitration
  - No guarantee of confidentiality
    - Few arbitral rules provide for confidentiality
    - Australia and Sweden – confidentiality not implied in arbitration agreement
  - Inherently more confidential than open court
Terms of an Arbitration Agm’t

- Judicial Review
  - Providing for Judicial Review
    - Not enforceable everywhere (usually not in civil law countries)
    - U.S. courts split on issue
  - Providing for Non-Judicial Review
    - Included in some arbitral rules (ICC, ICSID)
    - Not advisable outside framework of arbitral institution

- The law provides that an arbitrator will hear challenges to the validity of the contract as a whole, while a federal court may hear challenges to the arbitration clause itself. See, e.g., *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1263–64 (9th Cir. 2006).
Class Arbitration Waivers in Arbitration Agreements

- An arbitration agreement may include a provision prohibiting class resolution of claims.
- Under New York law, such provisions are enforceable because they are “neither unconscionable nor violative of public policy.”
## Class Arbitration Waivers in Arbitration Agreements

<table>
<thead>
<tr>
<th>Likely Enforceable</th>
<th>Unenforceable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>California</td>
</tr>
<tr>
<td>Louisiana</td>
<td>West Virginia</td>
</tr>
<tr>
<td>Maryland</td>
<td>May or May Not Be Enforceable</td>
</tr>
<tr>
<td>New York</td>
<td>Colorado</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Florida</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Washington</td>
</tr>
<tr>
<td>Tennessee</td>
<td>New Jersey</td>
</tr>
<tr>
<td>Texas</td>
<td>Missouri</td>
</tr>
<tr>
<td></td>
<td>Alabama</td>
</tr>
</tbody>
</table>
Tips for Selecting an Arbitration Panel

- Do your research on potential arbitrators.
- Consult with people experienced with potential arbitrators.
- When picking a party-appointed member, select an arbitrator able to persuade the neutral arbitrator.
- Selecting an arbitrator with prior experience with the subject matter of the case may be helpful.
- Consider a simulation to test best background for your position.
Attorneys’ Fees Shifting Provisions

Generally

- Fee shifting provision provides that the losing party in a dispute relating to the contract will pay attorneys’ fees of the prevailing party
  - In California, “language in [an] agreement providing for attorney[s’] fees to the prevailing party in any ‘lawsuit or other legal proceeding’ to which ‘[the] Agreement gives rise,’” is “sufficiently broad ‘to encompass both contract actions and actions in tort.’” *Lerner v. Ward*, 16 Cal. Rptr. 2d 486, 489 (Cal. App. 1993).

- Pros/Cons
  - Provides a disincentive to litigate
  - Raises the potential cost of vindicating your client’s rights
Attorneys’ Fees Shifting Provisions
Generally

- Fee-shifting provisions are generally enforceable.
- However, even if the contract stipulates that the prevailing party will recover a certain percentage of the damages as attorneys’ fees, the court need not abide by that amount.
- A fee shifting provision may be unenforceable because it is unconscionable. For example, a cost shifting provision for legal fees or arbitration expenses may not be enforceable against a consumer by a company.
Attorneys’ Fees Shifting Provisions
Best Practices

- Carefully Draft Conditions of Recovery – “Prevailing Party” or “Party Who Recovers Damages”?
- Remember Fee Shifting Provisions in Consumer Contracts May Not Be Enforceable
- Make Sure Potential Damages for Dispute Would Merit Award of Legal Fees – Fee Shifting Provision Could Backfire
Jury Waiver Clauses

Generally

- An action for money damages is triable by jury, but this right can be contractually waived.

- Generally, a jury waiver clause is enforceable unless its challenger can articulate an adequate reason to deny enforcement, such as unconscionability.

- Scope of the jury waiver is limited to the contract in which it is contained.
Jury Waiver Clauses
Generally

- Consider the Pros and Cons of Waiving the Right to a Jury:
  - Is the client likely to be a plaintiff or defendant?
  - Where will a case likely be brought?
  - What does the jury pool look like in the potential forum state?
  - Are you more likely to have legal arguments or appeal more to the jurors’ sense of fairness?
Jury Waiver Clauses

Pitfalls

▪ Jury Waiver & Invalidity of Contract:
  ▪ Where a party to the litigation alleges that the contract is invalid — for example, due to fraud — jury waiver provision does not bar a jury determination of the contract’s validity.

▪ Waiver of the Waiver:
  ▪ A party to a contract containing a jury waiver clause may waive protection of that provision by affirmatively demanding a jury trial.
Jury Waiver Clauses
Pitfalls

- The Supreme Court of California has held that pre-dispute jury waivers are not enforceable.

- However, arbitration agreements are an expressly authorized means of waiving the right to a jury trial.
Jury Waiver Clauses
Pitfalls

- A jury waiver clause must be drafted clearly and unambiguously.
- A jury waiver clause will be strictly construed.
Liquidated Damages Clauses

Generally

- Allows parties to look to the future, anticipate breach and agree to settlement in advance
- Permissible if not unconscionable or contrary to public policy
- Need not be reciprocal
- Where agreed sum is *vastly* below actual damages, aggrieved person may be able to void clause and recover actual damages
Liquidated Damages Clauses

Generally

Issues:

- Should NOT offer the aggrieved party an option of either liquidated damages or actual damages
- Courts often narrowly interpret and limit such clauses to the types of breaches specified
- Will not bar equitable relief unless such bar is explicitly set forth
Liquidated Damages Clauses (Texas)

“Under Texas law, a liquidated damages clause is an invalid penalty unless: (1) it was impossible or impractical to estimate damages with any degree of certainty at the time of the contract, and (2) the amount specified as liquidated damages was a reasonable forecast of just compensation. . . [This] rule against punitive liquidated damages clauses applies to agreements that fix damages in advance of a breach.” *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 645 (5th Cir. 1991).
Liquidated Damages Clauses (Delaware)

- “The general rule in Delaware is that an enforceable liquidated damages provision is distinguishable from a penalty where two criteria are found to exist. First, the damages which the parties might reasonably anticipate to result from a breach must be difficult or impossible to prove accurately and second, the agreed upon sum must be reasonable.” Pierce Assoc., Inc. v. Nemours Foundation, 865 F.2d 530, 546 (3d Cir. 1988) (internal quotations omitted).
Liquidated Damages Clauses (New York)

NEW YORK: “[C]ontractual terms providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable. . .

[C]ourts uphold contractual provisions fixing damages for breach when the terms constitute a reasonable mechanism for estimating the compensation which should be paid to satisfy any loss flowing from the breach.” Leasing Serv. Corp. v. Justice, 673 F.2d 70, 73 (2d Cir. 1982) (citations omitted).
Liquidated Damages Clauses (California)

- “‘[The] provision . . . is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.’ Absent a relationship between the liquidated damages and the damages the parties anticipated would result from a breach, a liquidated damages clause will be construed as an unenforceable penalty.”

Liquidated Damages Clauses
Best Practices

- State the rationale or criteria for amount chosen
- Be as specific as possible
- Make damages commensurate with injury due to breach
- Use relevant industry standards, if possible
- Where breaches have varying importance, make liquidated damages vary with type of breach
- Need not be monetary damages
Liquidated Damages Clauses
- Summary

- Must be a fixed amount
- Damages should be difficult to ascertain
- Detailed and explicit provisions are more likely to be enforced
Liquidated Damages Clauses
A Note on Specific Performance

- Specific performance: in situations where money damages are inadequate or damages cannot be accurately ascertained, a court may order the breaching party to perform the contract duties. See, e.g., Gen. Universal Sys. v. Lee, 379 F.3d 131, 153 (5th Cir. 2004).

- Specific performance may be waived in advance by contracting to receive a fixed amount in the form of a liquidated damages provision when used as compensation for any damages suffered as a result of a breach of the contract.

- (TX/DE) Remedy of specific performance isn’t waived when the parties estimate an amount as liquidated damages to be recovered at the promisee’s election in the event of a breach, nor is it waived when the contract requiring one certain act, with a sum specified, as penalty or as damages, to ensure performance. See, e.g., Marker v. U.S., 646 F. Supp. 433, 439 (D. Del. 1986); Huffhines v. Bourland, 280 S.W. 561, 562-63 (Tex. Com. App. 1926).

- Whether contract belongs to one class or the other ultimately depends upon the parties’ intentions and is deduced by contractual construction.
Liquidated Damages Clauses
A Note on United Rentals

- *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007), dealt with an ambiguity in a merger agreement – one section allowed specific performance, but that section was subject to another section specifically disallowing equitable relief.

- *United Rentals* court applied “forthright negotiator principle” to hold that evidence showed that target corporation should have known that acquirer parties understood merger agreement to disallow equitable relief.

- Practitioners who desire the specific performance remedy should take care to ensure there are no internal consistency problems or obstacles.
Merger and Integration Clauses

Generally

- Merger and integration clauses typically provide that a written instrument embodies the whole agreement between the parties.
  - The parties must intend the writings to serve as the exclusive embodiment. *See LaHaye v. Goodneuz Group, LLC*, 172 Fed. Appx. 733, 735 (9th Cir. 2006).

- The clause may also specifically disclaim any reliance on oral statements, remarks, or representations extraneous to the contract.

- The goal of such clauses is to preclude judicial inquiry into evidence outside the four corners of the contract when a dispute later arises between the parties or to attempt to bar claims for alleged misrepresentations outside of the contract.
Merger and Integration Clauses
Generally

- The parties’ sophistication may determine whether a merger or integration clause is enforceable.
- Merger or integration clauses are more likely to be enforceable when they are tailored to the specific transaction at issue.
Merger and Integration Clauses

Pitfalls

- New York law – A *general* disclaimer is ineffective.
  - A disclaimer most likely satisfies the requisite degree of specificity under New York law when it expressly disclaims reliance on oral representations related to the *subject matter* in controversy.
Merger and Integration Clauses
Pitfalls

- Delaware law
  - Courts will not give effect to “boilerplate waivers,” particularly in contracts of adhesion.
  - Clarity, not necessarily specificity, is the guidepost.
  - Generally, more likely to be enforceable if the waiver is actually negotiated between sophisticated parties.
Merger and Integration Clauses

Pitfalls

Texas courts place greater emphasis on the sophistication of the parties, the extent of the negotiations and the clarity of the provision rather than on the specificity of the waiver (although specificity, again, helps).

To bar extra-contractual claims, a merger and integration clause in a contract governed by Texas law should include provisions that:

- the parties disclaim any duties not expressly provided for within the agreement,
- breach of contract is the sole and exclusive remedy, and
- the parties agree to waive and release all tort claims and causes of action that may arise from negotiation, execution, or performance of the agreement.
Merger and Integration Clauses Pitfalls

- In California, even in an integrated agreement, the court may look to parol evidence to “interpret the meaning of express terms.” In re *Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002).

- In California, “[t]he conception of a writing as wholly and intrinsically self-determinative of the parties’ intent to make it a sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one,” and only contradictory evidence should be excluded. *Masterson v. Sine*, 436 P.2d 561, 564 (Cal. 1968).
Merger and Integration Clauses

Pitfalls

- Even with a specific, well-drafted disclaimer, a claim for fraud will still remain actionable if:
  - the extraneous misrepresentation relates to facts that are peculiarly within the knowledge of the party who allegedly committed the fraud; or
  - the party who allegedly committed fraud concealed a material fact that the party was bound by good faith to disclose.
Contractual Limitations Periods

Generally

- The parties to a transaction may agree to shorten the otherwise applicable statutes of limitation.

- The following is an example of a provision that contractually shortened the otherwise applicable statutes of limitation:

  - “Claims for loss, damage or delay in connection with the shipment of Petroleum Products tendered for shipment under the terms of this [agreement] . . . must be instituted against Carrier within six (6) months . . . .” AMOCO Canada Petroleum Co. v. Lakehead Pipe Line Co., 618 F.2d 504, 505 (8th Cir. 1980).

  - If too narrow, i.e. limiting for “any legal action arising in connection with this agreement,” rather than “all disputes” or “any legal action,” extra-contractual claims may not enjoy the benefit of the shortened limitations period. See, e.g., LeBourgeois v. Rebecca Irene Fisheries LLC, 132 Fed. Appx. 157, 159 (9th Cir. 2005).


Contractual Limitations Periods Pitfalls

- In Texas, Civil Practice & Remedies Code § 16.070 prohibits shortening a limitations period to shorter than two years with one narrow exception.

- In general, the shortening of the statutes of limitation must be reasonable.
  - Courts will not enforce unreasonably short contractual limitations periods.
  - Shortening the limitations period must not result from fraud, duress, or misrepresentation.
Force Majeure Clauses

- Alternative defense that makes parties' performance subject to events such as: acts of God, war, government regulation, terrorism, disaster, strikes [except those involving a party's employees or agents], civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligation.

- Neither market shifts nor the financial inability of one of the parties to perform is covered by a force majeure provision.

- Notice may be required to invoke.

- A party availing itself of a force majeure clause must be prepared to defend against the assertion that there is an alternative explanation for nonperformance.

- Note that Texas law holds that a force majeure defense does not exempt a party from liability when negligence that is a proximate cause of the injury concurs with an act of God. *Luther Transfer & Storage v. Walton*, 296 S.W.2d 750, (Tex. 1957).

- Parties to sale contract are not precluded by the UCC from making a force majeure clause broader than the “commercial impracticability” defense.
Material Adverse Change (MAC)

- Used to allocate risk presented by adverse business or economic developments occurring between signing and closing.
- Example: “A ‘Material Adverse Change’ shall mean any result, occurrence, fact, change, event or effect (whether or not constituting a breach of a representation, warranty or covenant set forth in this Agreement) that, individually or in the aggregate with any such other results, occurrences, facts, changes, events or effects, is or would reasonably be expected to be materially adverse to the Company’s historical or near-term or long-term projected (i) business, (ii) operations, (iii) assets, (iv) liabilities, (v) financial condition or (vi) results of operations (including EBITDA or cash flow), in each case, of the Company and its Subsidiaries taken as a whole.”
Material Adverse Change (cont’d)

- Can provide for exceptions for unavoidable circumstances, such as changes to general industry conditions or natural disasters.
- Beware the tense: A buyer should draft a MAC clause to be immediate and prospective so as to cover events that may be more difficult to measure (e.g., the discontinuing of a major business relationship).
- The materiality of an event is a question for the factfinder. To guide the inquiry, a buyer should seek to broadly define materiality; a seller should attempt to draft the definition as narrowly as possible.
- Note that a judicial evaluation of a MAC clause is fact-specific.
  - Example: A MAC clause in a highly leveraged transaction requiring financing by a short-term speculator may more likely to be judged on a short-term basis making such changes as a first-quarter drop-off in earnings “material,” while those changes may not be material to a long-term acquirer (which would be more likely took at the seller’s long-term earnings). See, e.g., In re IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001).
MICHAEL A. SASLAW is a partner in the Dallas office of Weil, Gotshal & Manges. Prior to joining Weil Gotshal in June 1998, he was a partner in the firm of Baker & Botts, L.L.P. Mr. Saslaw also practiced law with the firm of Johnson & Wortley, P.C. (f/k/a Johnson & Gibbs, P.C.) from May 1982 through January 1995, where he was named a shareholder in January 1989. Mr. Saslaw’s primary practice areas are mergers & acquisitions, securities offerings, financings, restructurings, real estate investment trusts and corporate counseling. He has extensive experience with businesses in a variety of industries, including media, real estate, retail, consumer products and manufacturing. Mr. Saslaw is listed in *Chambers USA - Leading Business Lawyers* and the *International Who’s Who of Corporate Governance Lawyers*. Clients who Mr. Saslaw has represented include: Bear Stearns & Co., Inc., Bell Helicopter Textron, Inc., Citigroup, Citicorp Venture Capital Ltd., Covad Communications Group, Inc., Crestview Capital Partners, Electronic Data Systems Corporation (EDS), General Electric Company, General Motors Corporation, Hollywood Casino Corporation, J.C. Penney Company, Inc. and Lone Star Funds. Mr. Saslaw holds a B.S., *magna cum laude*, from Miami University, Oxford, Ohio (1979) and a J.D. from the University of Pennsylvania Law School (1982). Mr. Saslaw was an editor of the *University of Pennsylvania Law Review* (1980-82). He is admitted to practice in both Texas and New York.
RALPH I. MILLER is a senior partner in the firm’s Complex Commercial Litigation Group, with offices in Dallas and Washington. Mr. Miller serves regularly as lead counsel in cases and arbitrations with hundreds of millions of dollars in issue, including several with more than a billion dollars in issue. During more than 30 years of trial practice, Mr. Miller has had substantial experience in antitrust, arbitrations, business tort cases, contract disputes, insurance coverage actions, professional malpractice matters, securities class actions, and general commercial litigation. He has spoken regularly at professional education programs on numerous trial-related topics, such as litigation management, simulation techniques, and courtroom technology.