



MINTZ

# **The Fine Print Matters – Boilerplate Contract Clauses Through the Litigator’s Lens**

*Randy Jones, Natalie Prescott, Nikki Rivers, Andrew Skale*

April 21, 2023

# Today's Agenda

---

1. Introduction to Speakers
2. Choice of Law: Where did you just agree to?
3. The Problem with Boilerplate Arbitration Clauses
4. Control the Variables to Control the Process
5. Arbitration Agreements in the California Employment Context
6. Questions

# Speakers



**Randy K. Jones**

Member, Litigation Practice

**Mintz**

---

**San Diego & San Francisco**

[RKJones@mintz.com](mailto:RKJones@mintz.com) // +1.858.314.1510



**Natalie Prescott**

General Counsel & Vice President

**Fulgent Genetics**

---

[nprescott@fulgentgenetics.com](mailto:nprescott@fulgentgenetics.com)



**Nicole M. Rivers**

Associate, Employment Litigation & Arbitration Practice

**Mintz**

---

**San Diego**

[NMRivers@mintz.com](mailto:NMRivers@mintz.com) // +1.858.314.1897



**Andrew D. Skale**

Member, Litigation Practice & Intellectual Property Practice

**Mintz**

---

**Los Angeles & San Diego**

[ADSkale@mintz.com](mailto:ADSkale@mintz.com) // +1.858.314.1506

**Choice of Law:  
Where did you just agree to?**

# Choice of Law

- Decide if you want it to apply to every instance
  - Or only certain claims
- Decide if exclusive or non-exclusive
- Forum and choice of law can differ
- Choose choice of law that is most favorable on biggest issues

# Choice of Law (cont.)

- Forum selection matters
  - Different courts can mean different results
  - Important to know where you are agreeing

# Choice of Law (cont.)

- State law issues can impact your agreement
- California:
  - 1542 Waiver
  - Very pro-consumer/plaintiff
  - Do not accidentally provide for California for non-California employees
- Delaware
  - Pro-business

# Choice of Law (cont.)

- Arizona
  - Arizona provides for a discretionary award of attorney's fees to a prevailing party in a contract action
    - A.R.S. § 12-341.01(A)
  - Fee shifting can occur if an settlement offer is made, but at trial recovery is less than the offer



## Choice of Law (cont.)

- Most states require a “reasonable relationship” to the agreement
- But New York law allows a party without New York contacts to use New York law for its contract if the value of the transaction exceeds \$25,000
- New York General Obligations Law (“GOL”) Section 5-1401
- This helps make sure New York as a choice of law will be enforced

## Choice of Law (cont.)

- Make sure it says “internal laws of State of \_\_\_\_.”
- Some courts have said the language “without regard to conflict-of-laws principles” does nothing
- But that still has issues, because many states distinguish between substantive law and procedural law

## Choice of Law (cont.)

- *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at \*3 (Del Super. January 4, 2016)

“Under Delaware law, choice-of-law provisions in contracts do not apply to statutes of limitations, unless a provision expressly includes it. If no provision expressly includes it, then the law of the forum applies because the statute of limitations is a procedural matter.”

- Contact had New York choice of law (“including without regards to the conflict of laws” language)
- Court used Delaware statute of limitations, not New York (3 years vs. 6 years)

## Example

This Agreement, and all claims or causes of action (whether in contract, tort or statute) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), shall be governed by, and enforced in accordance with, the internal laws of the State of Delaware, including its statutes of limitations, without regard to any borrowing statute that would result in the application of the statute of limitations of any other jurisdiction.

# Choice of Law (cont.)

- Important for international parties
  - Note service issues
  - Foreign parties
  - Email service

## Choice of Law (cont.)

- Can be written to apply to third parties
  - Meaning someone else can sue you in that jurisdiction, depending on the clause
- So be careful agreeing to a jurisdiction you do not want to be in

# **The Problem with Boilerplate Arbitration Clauses**

## Arbitration Variables

- All arbitrations ultimately must address many or all of several questions:
  - What disputes will be arbitrated?
  - What rules apply?
  - What, if any, issues are carved out?
  - How many arbitrators?
  - How are arbitrators selected?
  - Where will the case be arbitrated?



## Arbitration Variables (cont.)

- Many arbitrations will also address:
  - Is discovery allowed?
  - Is discovery limited?
  - How many witnesses?
  - Will there be formal openings?
  - Is the hearing live?
  - Is provisional relief available?
  - What qualifications are required of arbitrators?
  - How are issues sequenced?

## Arbitration Variables (cont.)

- Many arbitrations will also address:
  - Limits on testimony time? Limits on exhibits?
  - Tutorials? Formal closings?
  - Pre-arbitration briefs? Limits on briefs? Post arbitration briefs?
  - Reasoned decision?
  - Confidentiality?
  - Are expert witnesses allowed? Limited?
  - Arbitrator qualifications?

# Boilerplate Often Leaves Variables to Chance

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”



What does this common clause really mean?

# Boilerplate Often Leaves Variables to Chance

- We agree to arbitrate any disputes related to this contract, using a set of rules that largely lacks a robust body of interpretive authority . . .
- . . . before an unspecified number of strangers with unspecified qualifications...
- . . . for an uncertain number of days . . .
- . . . calling a number of witnesses to be debated after our positions are adverse and hostile . . .
- . . . after filing an unlimited number of briefs of any length...

# Boilerplate Often Leaves Variables to Chance

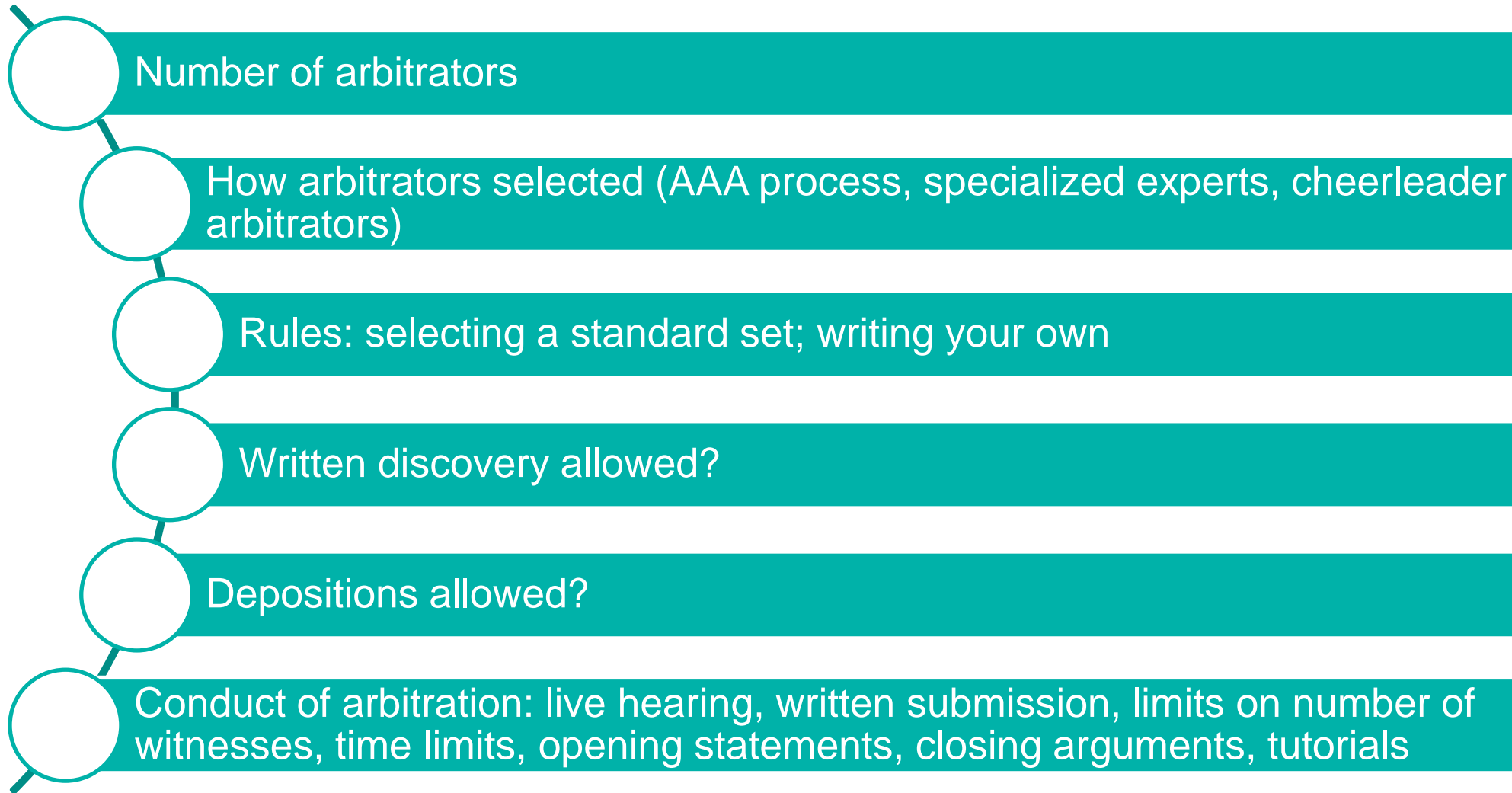
- . . . with any number of exhibits.
- We agree the arbitration process can be as long as either of us makes it, limited only by the discretion of a stranger or panel of strangers. ..
- . . . who we will be paying hundreds of dollars or more per hour.

**Control the Variables to  
Control the Process**

# Essential Language – Must Haves:

- Define the scope of disputes to be arbitrated. Common language – "any and all disputes arising from or related to this agreement and. . ."
- Party identification
- Final and Binding
- Enforceability
- In some contracts, waiver of trial and jury must be express
- [*Location and administrator*]

# Additional Language to Shape an Arbitration Clause to Your Advantage

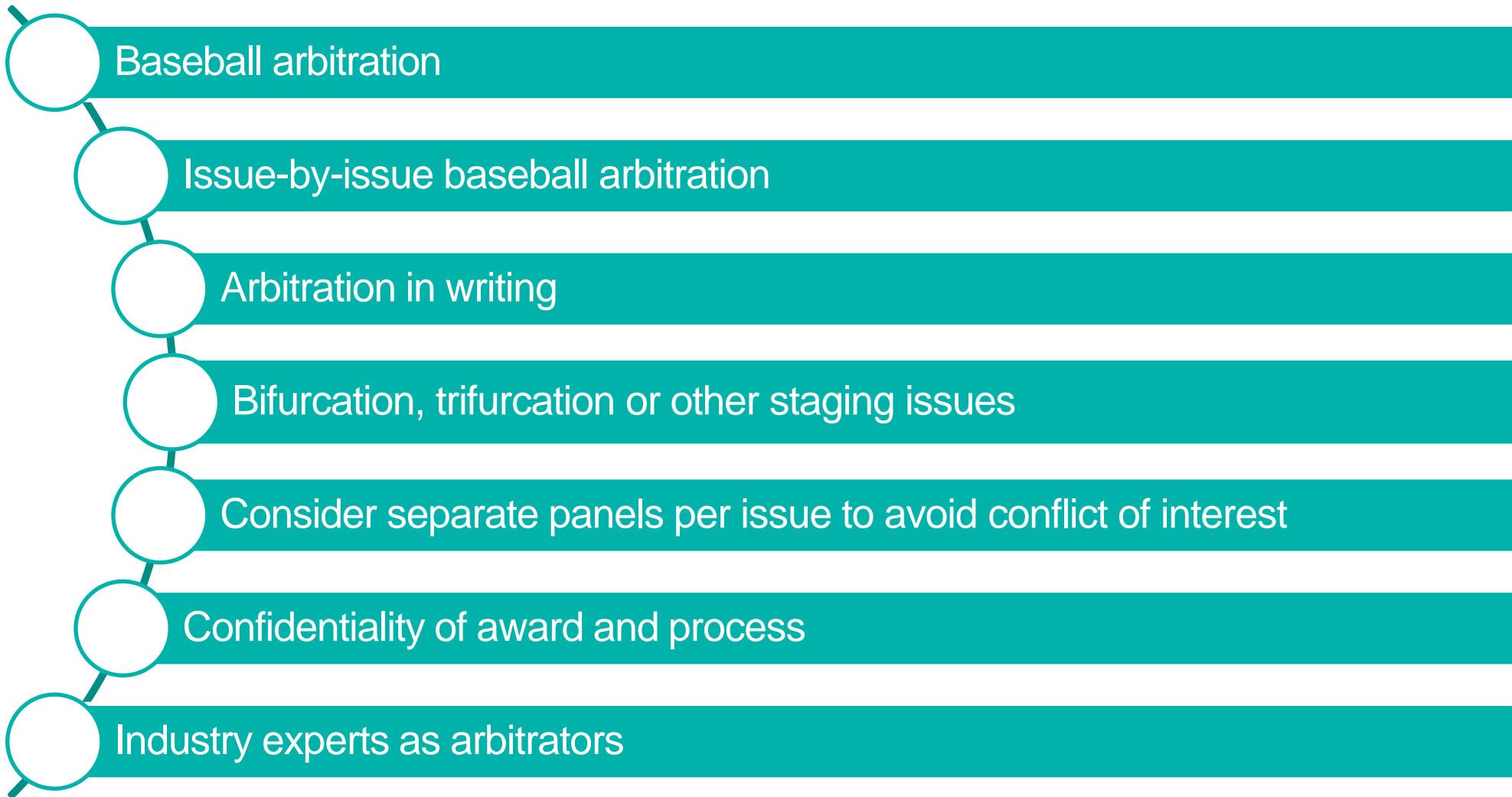




# Additional Language to Shape an Arbitration Clause to Your Advantage

- Individual claims only (i.e., no class arbitration)
- Pre-arbitration briefing
- Post-arbitration briefing
- Page limits on briefs
- Limits on exhibits
- Limits on powers of arbitrators: provisional relief, damages limits
- Judicial review – proceed with caution!

# Creative Uses of Arbitration Clauses:

- 
- Baseball arbitration
  - Issue-by-issue baseball arbitration
  - Arbitration in writing
  - Bifurcation, trifurcation or other staging issues
  - Consider separate panels per issue to avoid conflict of interest
  - Confidentiality of award and process
  - Industry experts as arbitrators

# Seven Critical Dynamics – Understand how they impact your future position before signing

- Are you David or Goliath?
- Are you plaintiff or defendant?
- Do you need discovery?
- Do you need court relief?
- Does finality benefit you?
- Do you sell consumer products?
- How many employees do you have?

# Sample Provisions for Low-Cost Arbitration

- All Disputes shall be decided by a single arbitrator, who shall be a retired federal judge, or a retired California state judge who sat on the Superior Court, Court of Appeal or Supreme Court for at least five (5) years.
- The arbitrator shall have the authority to compel adequate discovery for the resolution of the dispute and to award such relief as would otherwise be permitted by law; provided, however, that in no event shall the right to discovery granted to the parties to this Agreement exceed 25 interrogatories, 35 document requests, reasonable third party subpoenas, and three depositions (of not more than seven hours each), including third-party depositions, per side.
- The award of the arbitrator shall be final and binding and shall be enforceable in any court of competent jurisdiction.

# **Arbitration Agreements in the California Employment Context**

# Are They Allowed?

- “A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”

- Cal. Civ. Pro. § 1281

# Key Terms: The *Armendariz* Factors

1. Neutral Arbitrator
2. Sufficient Discovery
3. Written Decision
4. All Civil Relief
5. No Unreasonable Costs → Employer Must Pay Costs of Arbitration

# Scope: What Can Be Arbitrated

- Sexual harassment claims?
- Discrimination, retaliation, and other forms of harassment?
- Wage and hour?
- PAGA?
  - *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022)
  - *Adolph v. Uber Tech., Inc.* (on review by Cal. Supreme Court)



# Practical Takeaways and Tips

- Keep it mutual
- Make it easy to read and understand
- Don't bury it
- Consider invoking the FAA
- Cite the applicable arbitration rules
- Include a severability clause
- Be careful what you ask for!

**Questions?**





MINTZ

**Thank You!**

