



## Beyond the Basics: Impact and Enforceability of Jury Waivers and Arbitration Provisions in Commercial Leases

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*Foster Swift Finance, Real Estate & Bankruptcy Law News*

February 25, 2019

Most commercial leases, like other business contracts, are filled with provisions (often called “boilerplate”) the parties to the contract pay little attention to; that is, until a dispute arises. At that point, these provisions become critical to the outcome.

In this installment of the “Beyond the Basics” series, we will address two common issues that arise in the negotiation and enforcement of commercial leases—specifically, agreements to arbitrate and jury trial waivers. These provisions are critically important when a lease needs to be enforced.

Without careful consideration, and review by an experienced attorney, such “boilerplate” provisions can have a significant impact on the outcome of a case.

### **The Michigan Summary Proceeding Process**

When a dispute arises over non-payment of rent, and no resolution can be reached through negotiations, a landlord will often move to evict the tenant through Michigan’s Summary Proceedings Act (MCL 600.5701 et. seq.). Through this process, landlords can, ideally, move non-payment eviction cases through the court system more quickly than other types of litigation.

Often times, based on the assumption that a jury is typically more sympathetic to tenants in eviction proceedings or because a jury trial can delay the conclusion of the case, a tenant will opt for a jury trial in a summary proceeding. However, through careful drafting and negotiation, a commercial landlord can, in some circumstances, avoid a jury trial when a case goes to court.

In other instances, the parties to a commercial lease can agree to avoid the court system altogether by including an agreement to arbitrate in their contract. However, as discussed below, landlords should think carefully about the scope of an arbitration provision

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because an overly broad one can result in losing the ability to utilize summary proceedings for the purpose of evicting a tenant.

### **Arbitration Provisions in Commercial Leases**

It is becoming increasingly common in commercial leases for tenants and landlords to agree to arbitration in connection with disputes that may arise between them. Arbitration is a form of alternative dispute resolution where an arbitrator (an expert as opposed to a judge) presides over an arbitration proceeding. This means that parties do not go to court for disputes, but to a private finder of fact.

Therefore, if choosing to include an arbitration provision, a commercial lease agreement should spell out the rules being agreed upon, such as whether an arbitration is binding or non-binding, and whether a single individual or a panel of arbitrators will preside over the proceeding.

While Arbitration can be a useful tool, landlords should carefully think through the scope of an arbitration provision with legal counsel. Many boilerplate arbitration provisions direct that all disputes between parties shall be submitted to an arbitration process. But in certain situations it's not advisable for a landlord to give up its rights to enforce a lease through the court system. One of those situations is retaining the ability to use a summary proceeding to evict a tenant for non-payment of rent.

If an arbitration provision covers every dispute, a landlord may find itself in the undesirable position of having an arbitrator decide whether a tenant can be evicted rather than using the more streamlined summary proceeding process. Accordingly, if a landlord chooses to include an arbitration provision in a commercial lease, they may want to consider including an exclusion for situations involving monetary defaults under the lease.

### **Jury Waivers in Commercial Leases**

If an arbitration provision is not included, a landlord can still seek to alter the finder of fact in a traditional court by including a contractual jury waiver where parties agree that they will not seek a jury trial for any dispute between them. The legislature views the waiver of a jury right as so impactful that it is prohibited in residential leases. MCL 554.633(1)(f).

While the Michigan Courts of Appeal have enforced jury waivers in commercial leases, the issue may not be completely settled. In the context of considering the enforceability of other contractual terms, the Michigan Supreme Court has held that provisions that conflict with Michigan statutes and court rules, such as those that establish venue for lawsuits, are unenforceable. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 317, 596 NW2d 591, 597 (1999). Pursuant to the Michigan Summary Proceedings Act, the "finder of fact" for a summary proceeding for eviction of a tenant can be either a judge or a jury.

However, a tenant's right to a jury trial in a summary proceeding can be lost under certain circumstances, including: (i) the tenant fails to demand a jury or pay the required fee, (ii) the tenant fails to pay rent in accordance with a court-ordered escrow account, or (iii) the parties contractually agree to waive the right to a



jury trial. Since the right to a jury trial in summary proceedings is established by statute and court rules, it remains to be seen whether a tenant will be able to successfully challenge a contractual jury waiver in the future by relying upon this Michigan Supreme Court precedent. Nevertheless, it is a “best practice” to include such a provision if a landlord wants to try to avoid a jury trial in any dispute with its tenant. Such provision should be visible, understandable, and clear in its purpose in order to maximize the likelihood of enforcement.

**Conclusion**

Arbitration provisions and jury waivers, while seeming like minor, insignificant boilerplate terms, can make a big difference when a commercial lease needs to be enforced. That’s why it’s important to work with experienced legal counsel when negotiating and documenting the terms of a commercial lease. If you have further questions about how to tighten commercial leases, contact Rob Hamor at 248.785.4737 or at [rhamor@fosterswift.com](mailto:rhamor@fosterswift.com).