



An Eye for Detail

Boilerplate Provisions may be added late in the drafting process, but they still demand full attention.

By Francesco Giraldi and Giovanni Scognamiglio

“BOILERPLATE” IS THE term used for the provisions inserted at the end of almost every business agreement.

The boilerplate clauses do not contain rights and duties of the parties but declare some rules the parties have agreed to follow in certain circumstances. Boilerplate provisions cannot be disregarded just because they appear in every contract. Drafters should not simply incorporate standard provisions without a case by case analysis. It is essential to take a second look to determine whether the boilerplate provision is in fact the same term found in most contracts or whether it has been altered or tailored to fit the transaction. Boilerplate provisions frequently make use of the following features.

Merger

This clause provides that the agreement is the only and exclusive agreement between the parties with respect to its subject matter and prevents the parties from arguing that there are other agreements or understandings that are not set forth in the contract. Example: “This Agreement constitutes the final, complete, and exclusive statement of the terms of the agreement between the parties as to the subject matter hereof, and supersedes all prior and contemporaneous agreements, representations and understandings of the parties.”

Modification

This provision makes sure that any amendments to the contract should be

made in writing and signed by all parties. Example: “The parties may amend this Agreement only by a written agreement, signed by the parties, that identifies itself as an amendment to this Agreement.”

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Assignment and Delegation

A general principle of contract law is that a party’s rights and duties under a contract can generally be “assigned,” or legally transferred, to another person. However, not all contracts are or should be freely assignable especially in cases where a contract requires a party to perform unique or personal services. In those cases it is important to include a contract provision that one or both parties may not assign without receiving the other’s advance approval. Example: “No party may assign any of its rights under this Agreement, except with the prior written consent of the other party.”

Anti-Waiver

The general legal rule is that if a party is not vigilant in precisely enforcing a right in one instance, it has agreed to a “waiver” and cannot insist on precisely enforcing it later. An anti-waiver clause states that if someone doesn’t always enforce a provision of the contract, that part is not later precluded from insisting on strict compliance. With an anti-waiver clause, the parties’ course of conduct will not supplant the actual terms of the agreement. Example: “No failure or delay in exercising any right or remedy, or in requiring the satisfaction of any condition, under this Agreement, and no act, omission or course of dealing between the parties, operates as a waiver of any right, remedy or condition under this Agreement.”

Force Majeure

A “Force Majeure” provision says that a party’s failure to perform certain obligations under an agreement may be excused where there is an unexpected cataclysmic event. This prevents parties from incurring liability for breach of contract due to events wholly outside of their control. Example: “Neither party shall be liable in damages or have the right to terminate this agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including but not limited to acts of God, government restrictions (including the denial or cancellation of any export of other necessary license), wars, insurrections and/or any other



cause beyond the reasonable control of the party whose performance is affected (including mechanical, electronic, or communications failure).”

Severability

This clause keeps the agreement in force even if some parts of it are illegal or unenforceable. The invalid provision is “severed” from the rest of the agreement that continues to operate as originally written. However, if the severed clause is central to the commercial agreement between the parties severing may have unintended consequences, so this clause may not be appropriate for all contracts. Example: “If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain

valid, binding, and enforceable.”

Headings

This provision prevents the parties from making arguments based on headings that are incorrect or badly written. Example: “The descriptive headings of the Articles, Sections and subsections of this Agreement are for convenience only, do not constitute a part of this Agreement, and do not affect this Agreement’s construction or interpretation.”

Notices

This provision identifies how a party will provide notices to another party and include also rules on when the notice is deemed to have been received. Example: “Unless otherwise stated in this Contract, all notices to be given under this Contract must be in writing, and sent by personal delivery, courier or facsimile to the address

of the relevant party”.

Boilerplate provisions are essential to the effective enforcement of your rights under the contract and in some instances may grant or take away important rights. The advice is to not blindly use boilerplate standard clauses and to draft those provisions with the view to being able to effectively enforce them when necessary. SBR

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