

“Bauhaus Drafting”

Tips and Tricks for Modern English Language Contracts

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Topic 4: Contract Boilerplate

Having completed our discussion of the use of “operative language” in English language contracts (see Bonner Rechtsjournal, Ausgabe 02/2012, S. 207 ff.); we now turn to another essential element of contract drafting, namely, “boilerplate provisions”. The term “boilerplate” is often used to describe the provisions that are found in every contract.¹ These standard provisions are ever-present because they provide a road map as to how the contract as a *legal* document, distinct from the negotiated agreement, is to be interpreted.

These “housekeeping functions,” as they are often known, traditionally are found at the back of the contract, often under the heading ‘Miscellaneous’ or ‘Administrative Provisions’. Many people who work regularly with contracts tend to dismiss these standard provisions as ‘just boilerplate’, but you should not assume that you know what the terms mean without reading them, and you should never underestimate their importance. Therefore, when reviewing English language contracts, one of the first things that a lawyer must do is to review the boilerplate provisions to make sure they are present and that the wording comports with the parties’ intent.

For while English language contracts may have ridden to significance on the coattails of the general ascendancy of the English language in international business, it was perhaps a matter of serendipity that the traditional structure of English language contracts lends itself so naturally to this new international role. The assumption of common law contracts has always been that the document itself must be written in such a manner as to create its own, self-contained legal universe. While many German contracts look to a common law lawyer like a series of academic footnotes strung together with a few sentences, the English language contracts traditionally do not reference statutes and legal provisions outside of the agreement itself. Although

general common law rules of contracts apply, the parties are nearly always free to modify them, and if not, the parties’ silence is a passive acknowledgement of their applicability. Therefore, the document itself is its own self-contained legal universe. This long standing approach toward contract drafting means that English language contracts are uniquely suited for their new international role, crossing jurisdictional lines with great ease. It also means that the general contract rules governing the document itself must be articulated by the drafter in detail. These guiding interpretive legal rules are found in the boilerplate provisions. Since the only document which need be referenced to interpret the contract is the contract itself; it is essential for anyone working with English language contracts to know what the standard boilerplate provisions are, to identify them in each contract, and perhaps most importantly, to notice when they are missing, poorly worded, or disadvantageous to your client. Without these provisions, the parties have little influence on how the contract as a legal document will be interpreted by a court or arbitrator.

Standard boilerplate terms include all of the following:

Severability Clause: Most parties do not want an entire contract to become void (no longer legally binding) because a single clause is not enforceable under the law. In order to avoid this problem, a clause is normally placed in a contract that allows the void clause (or clauses) to be “severed” (cut) out of the contract, so that the rest of the contract is still valid. A typical severability clause looks similar to the following:

The invalidity, in whole or in part, of any term of this agreement does not affect the validity of the remainder of the agreement

Merger Clause: Many times contracts involve extensive discussion and a considerable amount of correspondence over the course of the contract negotiation. So in order for the parties to make it clear that this contract represents *the final and ultimate* agreement between the parties, a merger clause, also referred to as the “integration” or “zipper” clause, is often included. In addition, under basic common law theory, the merger clause serves the important purpose of making sure that a contract will not be altered or supplemented through what is known as parol evidence.

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¹ The term “boilerplate” derives from the 19th Century printing industry. Rather than placing every individual letter by hand, newspapers could purchase printing plates with complete articles already etched on them. These plates were made of thick iron, similar to the iron plating placed around steam engine boilers. Thus, “boilerplate” became synonymous with standard prepared writing.

A typical merger clause reads as follows:

This agreement signed by both parties constitutes a final and exclusive written expression of all the terms of this agreement and is a complete and exclusive statement of those terms.

Note, it is important to describe the agreement being signed as *final and exclusive*, thus establishing that the agreement is fully integrated. In addition, if the parties are signing multiple agreements contemporaneously, you should use a defined term to refer to all the agreements; for example, by referring to them all collectively as the *Transaction Documents*. The merger provision should then state that those documents together constitute the final and exclusive agreement of the parties. Be sure that each of the other agreements being executed includes a merger provision that is exactly the same as the one in the primary agreement.

Force Majeure Clause: Also known as an "Act of God" clause, it protects both parties from being found in breach of contract due to factors beyond the parties personal control. These normally take the form of a list of circumstances that will excuse non-performance:

Force majeure. Deliveries may be suspended by either party in case of acts of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent.

Naturally it is impossible to predict every possible event that could hinder performance, therefore, you must decide how broad or narrow the clause should be to strike the appropriate balance. Normally this is accomplished by mixing specific enumerated events with more general language. Tempting as it may be, this clause should not simply be cut and paste from another existing contract, but rather tailored each time to the particular needs and concerns of the parties involved.

Modification and Waiver Clause: The parties are always free to modify the contract at a later date, but often times this causes major problems. This is particularly true when a contract is modified orally. If later problems arise between the parties, such oral modification can be difficult to prove or disprove. In an attempt to circumvent this problem, most contracts contain a "modification and waiver clause":

All Modifications and Waivers are to be in Writing. This contract may be modified or rescinded only by writing signed by both of the parties.

You must be sure that both "modification" and "waiver" are addressed in the boilerplate provisions, as they are two distinct legal concepts. A modification of contract occurs when *both* parties wish to change part of the contract. A waiver, on the other hand, is when one party gives up, or waives, a right in order to relieve the other party of a duty owed under the contract. For example, if both parties contracted to have the apples delivered on Wednesday, but now both parties wish to have the apples delivered on Friday, this represents a modification of contract. On the other hand, if the seller asks the buyer's permission to deliver the apples this week on Friday, though the contract states the apples are to be delivered on Wednesday, and the buyer gives the seller permission to deliver the apples on Friday (though, legally, the buyer could demand delivery on Wednesday as the contract states), this would represent a waiver on the part of the buyer. The buyer has a legal right to Wednesday deliveries and has no reason to change that provision, but nevertheless allows seller to deliver on another day. Often poorly drafted contracts mention one or the other, but not both.

Assignment and Delegation: The common law also distinguishes between assignment and delegation. A party assigns *rights* under a contract to 3rd parties. A party delegates *duties* under a contract to 3rd parties. If the parties do not want this to happen, they have to be sure to put a clause in the contract forbidding it. The assignment and delegation provisions are one of the boilerplate provisions that you will tailor most often. When you do, remember that you must deal with both assignment and delegation, not just assignments. Many contracts you come across do not even mention delegation.

Examples:

No right or interest in this contract is to assigned by either Buyer or Seller without the written permission of the other party, and no delegation of performance or any obligation owed by either Buyer or Seller is to be made without the written permission of the other party.

It is important to note that words assigning "the contract" or "all my rights under the contract" are usually construed as including an assumption of the duties by the assignee, unless a contrary intention appears. An anti-assignment provision prohibits a party from assigning rights under a contract. This provision is often paired with anti-delegation provisions to ensure that the parties deal only with each other – the one with whom they originally contracted. However, at least within the American context, the Uniform Commercial Code (U.C.C.) effectively renders such provisions invalid, since courts traditionally find such provisions to be an inappropriate restraint on commerce.

Therefore, making an anti-assignment provision enforceable requires detailed, carefully drawn provisions, and even then it often still does not work! In order to tilt the scales as

much in your favour as possible, draft the anti-assignment provision to prohibit *an assignment of rights under the agreement*. If the provision prohibits only *the assignment of the agreement*, U.S. courts at least will generally interpret the provision as an anti-delegation provision (see U.C.C. §2-210(4) and *Restatement (Second) of Contracts* §322(1) (1981)). As a result, to create an anti-assignment provision that renders an assignment void, you must take away not only the *right* to assign, but also the *power* to assign. To do this, a contract must prohibit the assignment of rights under the contract *and* declare that the “*purported assignment is void*”.

Unlike anti-assignment provisions, anti-delegation provisions are generally enforceable and are easy to draft. The contract paragraph should include a provision stating that neither party may “*delegate performance*”. It is important to use the word “performance” not “duty” because technically “performance” is broader, referring to both duties and conditions.

Sometimes parties will allow for specific, limited delegation. In these situations consider whether the right to delegate should be subject to any condition (for example, creditworthiness). You should also consider requiring the delegate should assume, in writing, the delegating party’s performance obligations. Lastly, if you represent a client that is likely to be the delegating party, secure an agreement that the delegating party is deemed released from its performance obligations upon the signing of the delegation documents. Otherwise, it might be deemed to be secondarily liable.

Choice of Law/Governing Law Provision: In international contracts, it is extremely important to determine which legal system is going to govern the contract. In order to make this clear, the parties normally include a “Choice of Law” clause.

Example: In a contract between a Colorado Company and a German Company, where the parties want Colorado law to govern:

The validity, interpretation, and performances of this Agreement is controlled by and construed under the laws of the State of Colorado, as if performed wholly within the state and without giving effect to the principles of conflict of law. The laws of Colorado govern all matters with arising under or relating to this agreement, including torts. The parties specifically disclaim the UN Convention on Contracts for the International Sale of Goods.

In many commercial transactions, the parties wish New York or Delaware law to govern, even though the transaction has no relationship with the chosen state. This can be done if the amount of the transaction meets statutory thresholds set for in NY and DE law (N.Y. Gen. Oblig. L. §5-1401(1); Del. Code Ann. tit 6 § 2708 (c)). Within the American context,

several factors should be considered when drafting a choice of law provision. First, evaluate whether the law of the jurisdiction under consideration is well developed and predictable. For example, Delaware and New York both have well developed (and thus predictable) bodies of corporate law. This can be done even if the transaction has no relationship with the chosen state, as long as the amount of the transaction meets certain statutory thresholds in each state.

Secondly, it is important to determine whether the particular body of state law is hostile or friendly to the type of client/subject matter being handled in the contract. For example, California courts have traditionally upheld large punitive damages awards.

When drafting a choice of law provision, pay attention to the language defining the scope of the provision:

Wrong

The laws of Colorado govern all matters with respect to this agreement.

The wording “*all matters*” excludes torts, including the tort of fraudulent inducement. Rather, one should use the phrase “*including torts*” at the end of the sentence and replace “*with respect to*” with the phrase “*arising under or related to*”

Correct

The laws of Colorado govern all matters arising under or relating to this agreement, including torts.

Choice of Forum: This clause dictates not what law will be used, but what court will hear the case. This is known as “jurisdiction”. In international contracts, or any contract where there is large physical distance between the parties, this clause can be important. A choice of forum provision which mirrors the choice of law provision will increase the likelihood that the choice of law provision will be enforced:

Any legal suit, action or proceeding arising out of or relating to this Agreement is to be commenced in a federal court in the state of Colorado, and each party hereto irrevocably submits to the exclusive jurisdiction and venue of any such court in any such suit, action or proceeding.

In conclusion, the boilerplate provisions discussed above provides the contract with the necessary legal interpretive framework. These standard provisions appear in every contract for a reason, they are very important to the contract’s interpretation and enforceability. As such, it is necessary for any lawyer reviewing an English language contract to set these basic provisions to memory and to check their existence, wording and legal implications in each English language contract they review.