



By Mark B. Peterson



Mark Peterson is a business attorney and an adjunct member of our board of directors. He assists companies and their owners in stock and asset transactions and with a wide variety of governance and operational matters, including contracting, licensing, and real estate/leasing matters, as well as litigation. Mark can be reached at PetersonM@moss-barnett.com or 612.877.5428.



**IN THIS ISSUE**

**Page 1:**

*Beware The Boilerplate (or pay attention to the fine print)*

**Page 2:**

*Repeal of the Federal Estate Tax in 2010 - What Does This Mean for You?*

**Page 4:**

*Bill Haug Named Paul Van Valkenburg Award Recipient*

**Page 5:**

*Alerts*

*Moss & Barnett Salutes Susan Rhode*

**Page 6:**

*Options for Managing the Cost of Divorce in a Down Economy*

**Page 8:**

*Moss & Barnett News*

**Page 11:**

*Moss & Barnett Congratulates its Attorneys Included in 2010 Best Lawyers and Rising Stars*

**BEWARE THE BOILERPLATE**

(or pay attention to the fine print)

In contract negotiations, business owners naturally focus on the business terms and may spend little or no time addressing the “boilerplate” provisions typically found at the end of an agreement. These provisions – sometimes under a “miscellaneous” caption – are often skimmed over because they are viewed as “standard” language affecting both parties equally. Dismissing such provisions as mere “legalese,” however, can be costly. In the event of a dispute or litigation, those boilerplate provisions may ultimately determine who wins or loses.

It is important to keep your eyes on the fine print and to tailor these boilerplate terms to your specific circumstances and contractual needs. Here are a few common boilerplate provisions that should be given careful consideration:

**Forum Selection.** In today’s global marketplace, contracts often involve parties from numerous states or countries. A choice of venue or forum selection clause specifies a particular jurisdiction as the exclusive place to litigate contractual disputes. Usually, the “boilerplate” specifies a location friendly and convenient to the party drafting the contract (and one that may be expensive and inconvenient to the other party). If the choice of forum is inconvenient to one party, the mere threat of litigation may be used to extract concessions. Look for and try to avoid a choice of forum provision that requires your business to file or defend a claim in another jurisdiction. The transactional costs associated with litigating in another jurisdiction could make it difficult to justify filing an otherwise valid claim. If the proposed choice of forum is unacceptable, propose a neutral venue or allow venue in either of the preferred states of both parties. In selecting the forum, also consider the location of witnesses and the ability to compel their testimony. Consider also where the other party’s assets will be.

**Governing Law.** A governing law clause lets the parties specify the state whose law will apply to disputes. As with choice of forum, choice of law clauses can make a big difference if you need to enforce your rights under a contract. By way of example, one state may have a longer statute of limitations period than another state, which could affect the time in which you have to bring a contract claim. Regardless of forum, be sure it governs all disputes between the parties arising from the contract, *i.e.*, both contract and tort claims.

**Attorneys’ Fees.** Under the “American Rule,” each of the parties to a lawsuit bears its own attorneys’ fees, unless some statute or contractual provision states otherwise. Boilerplate commonly includes a contractual provision stating that the prevailing party in any dispute will recover its attorneys’ fees incurred in prosecuting or defending a lawsuit. Making the loser pay can act as a litigation deterrent, and such a clause often makes sense. However, attorneys’ fees clauses are often too general and can be difficult to apply. For example, how do you determine which party has “prevailed,” especially if there are multiple parties, issues, and counterclaims? What if the plaintiff recovers substantially less than the damages originally claimed? What about counterclaims? All of these issues should be considered.

**Jury Waiver.** The boilerplate in a contract may include a waiver of the right to trial by jury. Such waivers may make sense if you are concerned with the added costs of trying a case to a jury or you feel the subject matter is too complicated or that a jury may not be sympathetic to the position of your business. Before agreeing to a waiver of the right to trial by jury consider who stands to benefit the most.

**Construction of Agreement.** The general rule in contract interpretation is that any ambiguity in a contract will be construed against the party who drafted the agreement. Thus, if the contract is unclear in some respect, and the parties dispute what it means, a court will generally interpret the agreement against the party whose imprecise drafting caused the confusion. A construction of agreement clause avoids this potential problem for the drafting party by stating that the agreement will be considered to have been drafted by both parties and/or it will not be construed against any one side because it (or its attorneys) drafted it. If you have extensive negotiations over contract terms and the other side has control of the drafting process, you may wish to reject inclusion of such a clause.

**Merger/Integration Clause.** A typical “merger” or “integration” clause will state that, “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.” If an integration clause is included, discussions or assurances that may have occurred during the negotiations will not be considered if they are not reflected in the final agreement. The obvious advantage of such a clause is certainty. It clearly identifies the final version of the main contract between the parties and prevents the introduction of evidence in court that contradicts the agreement. However, there are hidden dangers associated with use of unrefined boilerplate integration clauses. For example, if you are buying a piece of equipment and you were told by the seller that it had certain attributes not identified in the contract, the integration clause would likely preclude any claim that the attributes were misrepresented. In addition, the integration clause may not be true. In a complex transaction particularly, there are often ancillary documents to the main agreement that may cover related issues but remain part of the overall deal. There also may be pre-existing agreements between the parties that are unwittingly superseded by an integration clause. If there is an integration clause, it is a good idea to list all additional agreements by making them exhibits or schedules to the main agreement.

**Severability.** A severability clause provides that if any provision in the contract is found to be unenforceable (e.g., because of vagueness, illegality, or other factors), the court will “sever” it, but the remainder of the contract terms will be preserved and enforceable. Courts will only do this if the unenforceable portion of the agreement is not so enmeshed in or important to the remainder of the contract

that its severance would taint the whole agreement. A severability clause may be particularly useful where provisions of the agreement could be rendered illegal by virtue of a change of law. If the parties have a number of interrelated agreements, however, it is important to consider the effect if a key provision in one of the agreements fails.

**Notice.** A notice clause identifies the method and timing for any notices required under the agreement (such as notice of intent to terminate or notice of assignment). The notice provision may state that notice is to be sent in a particular manner, *i.e.*, by mail, overnight courier, fax, or even email, and to a particular address. The form of notice selected should reflect the likely communications methods between the parties. Often the prescribed method is certified mail, which is antiquated and cumbersome. The clause may also include rules on when the notice must be sent or when it is deemed to have been received (e.g., three days after mailing). Each party needs to remember if it changes locations to send the other party notice of its address change. Be alert to whether a notice provision includes additional language that requires notice before certain rights can be exercised. Failure to comply with such a notice provision could impact your ability to seek a remedy under the contract.

**No Assignment.** 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. Contracts often include a provision that overrides this general rule by stating that one or both parties may not assign without receiving the other’s approval. A provision requiring written consent of the other party may be an obstacle if you want to sell all or substantially all of your assets or transfer the contract to a wholly-owned subsidiary. Even if you are willing to require consent of the other party, consider limiting the other party’s discretion by requiring that consent “not to be unreasonably withheld, conditioned, or delayed.”

**Anti-Waiver Clause.** The general legal rule is that if a party fails to act to enforce certain rights under a contract in one instance, it has agreed to a “waiver” and cannot insist on enforcing it later. For example, if the parties engage in a course of dealing that is different from the performance required under their contract, the law may not allow one side suddenly to insist on strict enforcement, especially if that would result in a default or penalty. If you do not want to be required to insist on strict performance in each instance, consider adding language that states that failure to timely exercise any right under the contract does not constitute a waiver of that right. You may also consider describing circumstances that will not constitute





a waiver, such as accepting partial payment or requiring that any waiver be in writing.

**No Oral Modifications or Amendments.** It is common to see a clause prohibiting contract amendments except by an agreement in writing. Such a “no oral modification” clause prevents claims by one side that the terms of the deal were “changed” after the contract was signed by casual conversation or course of dealing. You may wish to consider supplementing your no oral modification clause with a provision stating that contract changes can be made only by a writing specifying the change or modification that is signed by designated representatives of the parties.

**Time is of the Essence.** When an agreement states that “time is of the essence,” it means that failure to meet the deadlines specified in the contract is a material breach. If the boilerplate includes such a clause, consider carefully the significance of the time frames in the contract and your ability to perform within them.

**Force Majeure.** A “*force majeure*” (often referred to as “Acts of God”) clause allows a party to suspend or terminate the performance of its obligations under a contract in the event of an unexpected cataclysmic event, such as a flood, an earthquake, or other “act of God.” This prevents a party from incurring liability for breach of contract due to events not reasonably foreseeable or wholly outside of its control that render the performance of its obligations so difficult or costly as to make such performance commercially unreasonable. Take a hard look at the boilerplate *force majeure* clause. Is it drafted too broadly? Does it allow the other party

to avoid contractual obligations it should be required to honor? Is “commercially unreasonable” defined? Does smaller profit excuse performance? Does an event allow a party to suspend performance or to terminate the contract? Your *force majeure* clause should be customized to fit the parties, the industry, and the specific type of contract involved. Be sure to include language clearly defining *force majeure* events and stipulate what is required of each party when a particular event occurs.

**Counterparts.** A counterparts provision merely says that each side may sign a separate – but identical – copy of the agreement and that the “counterpart” signature pages, together with the body of the agreement, will be considered one unified agreement. These are particularly useful when the parties cannot be together in the same place at the same time to sign the agreement. But there are risks even with this simple clause. You need to be sure that the agreement copies provided to each party are identical. With word processing and email allowing the rapid exchange of multiple drafts, a party may sign something other than the final draft of the agreement.

## **CONCLUSION**

Standard boilerplate provisions are found in almost every contract and can help make the drafting of contracts more efficient and cost-effective. But thoughtless inclusion can fundamentally impact a contract’s legal meaning, defeat the contractual intent of the parties, and cause significant losses. No matter how standard these provisions may appear, it is best to check with legal counsel before signing any agreement.

