

Chapter 1

INTRODUCTION

*Tina L. Stark*¹

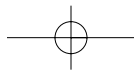
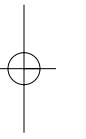
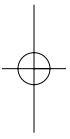
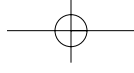
Adjunct Professor of Law²
Fordham University School of Law
New York, New York

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¹ The author thanks Frances Kulka Browne for drafting § 1.03 *infra*.

² Ms. Stark is also principal of In-house Legal Education, Inc., a New York City consulting firm that develops and conducts continuing legal education seminars.





§ 1.01 This Book's Thesis

Traditionally, lawyers use the term “boilerplate” to refer to any standardized, “one size fits all” provision. This text takes a more focused view and limits the term’s reach to those provisions that generally appear towards the end of a contract. Classic examples are the choice of law provision, the notice provision, the *force majeure* provision, and the assignment and delegation provision.

These provisions supply a road map, telling the parties how to govern their relationship and administer the contract. The provisions are said to serve housekeeping functions, arguably, matters of secondary importance. The placement of these provisions towards the end of the contract, under a caption of “Miscellaneous” or “Administrative Provisions,” furthers the impression that these provisions are but an afterthought. Consequently, they are usually ignored by lawyers and lampooned by legal commentators and critics.³

The thesis of this book is that “boilerplate” is a misnomer as applied to these provisions and that lying in wait within each of them are significant business and legal issues. The phrase “lying in wait” was chosen deliberately. It connotes stealth, something dangerous and unanticipated. For example, imagine using the following provision, a time-honored clause straight from the precedents file:

The laws of the State of New York, without giving effect to its choice of law principles, govern all matters with respect to this Agreement.

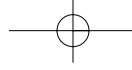
Who would have thought that this provision failed to cover all matters? Excluded are tort claims such as fraudulent inducement. In order to embrace these claims, the drafter must restate the provision in one of the following two ways:

The laws of the State of New York, without giving effect to its choice of law principles, govern all matters with respect to this Agreement, *including all tort claims.*

or

The laws of the State of New York, without giving effect to its choice of law principles, govern all matters *arising under or relating to* this Agreement.

³ See, e.g., Darmstadter, “Does the Pony Express Still Stop Here?,” *Bus. L. Today* 16, 17 (Sept./Oct. 1998).



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The second version might be particularly startling since it uses a couplet—“arising under or relating to.” Generally couplets should be banished from contracts as legalese. This couplet, however, serves a purpose. Other boilerplate provisions have different surprises. However, the point remains the same. Not knowing what lurks in each provision is dangerous.

§ 1.02 Boilerplate Provisions in Contracts

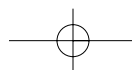
Deal lawyers most frequently come into contact with boilerplate provisions at 2:00 A.M., after the business portions of the contract have been hammered out or reviewed—hardly a propitious time to begin extensive, critical analysis. Nonetheless, it is reality.

The inclination to gloss over the boilerplate provisions is hard to resist. Typically, these provisions either restate or override the common law and have been in the firm’s precedents for ages, garnering ever more hallowed status as time passes. In addition, there are multiple benefits of using a standardized form. First is drafting efficiency. It takes less time and costs less money to input the standard provision. Second, cutting and pasting from the precedent reduces the likelihood of errors. Third, a provision that has been used repeatedly presumably has been modified to take into account any judicial interpretations. It has been blessed. Finally, a standard provision is familiar to the legal and business community, thereby reducing the cost of reviewing and negotiating the provision, as well as fostering a uniform interpretation.

Problems arise, however, when the provisions become iconic and drafters no longer think through whether the standard, off-the-rack provision actually fits the needs of the contract and the parties. For example, imagine a noncompete agreement that requires an employer to pay an employee \$3 million, in return for which the employee agrees not to compete anywhere in the world for ten years. Imagine further that the court holds that the noncompete is overly broad and unenforceable. Did the drafter really understand the import of the severability provision that states that if one provision is unenforceable the others remain intact? Imagine how unhappy the employer/client will be when it learns that it must pay \$3 million even though the employee is not bound by the noncompete. Now imagine the complaint and the allegations of malpractice.

Fears of malpractice claims will certainly motivate some readers to glean whatever wisdom there is from this text. However, malpractice claims are not the only danger flowing from the wholesale, indiscriminate use of boilerplate provisions. One commentator has suggested that using a standard boilerplate arbitration provision may even give rise to an ethical violation on the grounds of failing to meet professional obligations in rendering legal services.⁴ It’s frightening.

⁴ Rome, “It’s a New Day for ADR: From Boilerplate to Professional Responsibility,” *Business Law Today* 11, 12 (Jan./Feb. 1999). See generally: Model Rules of Professional Conduct, Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”) and Model Rules of Professional Conduct, Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).





§ 1.03 Boilerplate Provisions and Litigation

As illustrated by the prior Section's example relating to an employment contract, poorly drafted boilerplate provisions may contribute to, rather than solve, problems in the execution of a contract. As a consequence, the parties are placed in the unenviable position of implementing a business transaction with potentially unintended consequences. Unfortunately, the next step is often litigation, a process that is frequently expensive, time-consuming and risky, and thus eschewed by most rational business people. Indeed, it has been said that one of the best things an attorney can do for a client is to make sure that the client stays out of the courtroom.⁵

This book suggests that one way to keep the client out of the courtroom is by giving careful attention to each boilerplate provision, including considering how it is likely to be construed in the event of litigation. Thus, for a few minutes before the contract is signed, the corporate attorney should view each provision from a litigator's perspective. Is the language clear or susceptible of more than one interpretation? Do the provisions come together as a coherent whole or is there a contradiction? Will a court likely enforce the provision against the backdrop of the common law? Each Chapter in this book addresses these sorts of critical litigation issues.

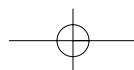
§ 1.04 Organization of this Book

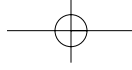
Although this text includes many well-drafted forms, it is intended as much more than a form book. It is intended to give practitioners the analytical framework to decide when the off-the-rack boilerplate provision works and, if it does not, how it needs to be tailored for the transaction.

Towards that end, each Chapter begins with a brief, practical discussion of the common law related to the relevant contract provision. This aspect of the Chapter is key because it becomes the backdrop for the contract provision—the provision being either a restatement or an override of the common law.

After the historical overview, each Chapter analyzes a typical form of the provision, often contrasting a well-drafted provision (highlighted in gray) with a problematic provision (unhighlighted). To aid in the analysis, the Chapter uses "Drafting Notes." Drafting Notes are annotations to the boilerplate provision. Each word or phrase of the provision is followed by a superscript reference that refers to one of the Drafting Notes appearing immediately after the

⁵ Salman, "Litigation Prevention: Some Things You Can Do at the Drafting and Negotiating Stages," 45 *Prac. Law.* 20 (Sept. 1999). See also, Steuer, "A Litigator's Perspective on the Drafting of Commercial Contracts," *Drafting Corporate Agreements* No. 1155, pp. 647, 672 (PLI/Corp. 1999-2000) (asserting that, "[f]oresight and attention to the quotidian details of boilerplate provisions may be worthwhile, as the careful attorney's legacy provides the contractual footholds allowing her client to prevail in arbitration or litigation").





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provision. The relevant Drafting Note then explains the purpose of the phrase and addresses any of a number of questions. For example:

- ▶ How does the phrase reflect the differing business and negotiating postures of the parties?
- ▶ What are the possible alternatives?
- ▶ How does the phrase minimize or increase the risk for each party?
- ▶ What control is a party seeking to exercise and why?

By building on the information in the Drafting Notes, the book's authors then offer more sophisticated and nuanced variations of the basic provision. Again, each provision is annotated with Drafting Notes. Thus, the reader learns the analytic thought process behind the provision, making it possible to critique a provision in the other party's form or to craft a new variation on the theme.

Finally, this book concludes with Chapter 23. That Chapter starts with a brief introduction discussing the merits of the various captions used to refer to boilerplate provisions as a group.⁶ It then sets forth the provisions as an organized, cohesive whole.

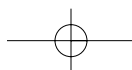
§ 1.05 The Language of Boilerplate Provisions

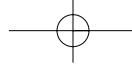
Chapter 2 teaches the reader how to avoid stylistic and grammatical mistakes that occur frequently when drafting boilerplate provisions. The authors and the editors have tried assiduously to adhere to the standards set out in that Chapter. The aim has been to avoid legalese and to use the principles of plain English wherever possible.

The style, for lack of a better term, is that of "contemporary commercial drafting." It recognizes that not all of the principles of plain English apply when drafting complex commercial agreements between sophisticated parties. Nonetheless, contemporary commercial drafting insists on applying those plain English principles that are appropriate. Thus, the authors have eliminated hereby, thereby and hereinafter; banished couplets and triplicates when a single word will do; and used formatting wherever possible to enhance clarity.

The task was not always an easy one. Many of the boilerplate provisions were steeped in firm tradition. Casting aside surplusage was often wrenching, generating an almost visceral fear of omitting the magic words that made the provision enforceable and comprehensive. Nonetheless, each author tackled his or her provisions and made the changes. That the effort was worth the work became evident when the authors reported to the editors that their firms would be using the new, revised boilerplate provision. The rationale? The new provision was clearer, more precise, and a better reflection of the drafter's intent.

⁶ For example, "Miscellaneous" and "General Provisions."





§ 1.06 Going Forward

This book is the distillation of the learning of the authors and the editors. As such, it is a work in progress. As further work is done with these provisions and as the case law develops, so too will this book. The authors hope, however, that the readers will join them in this on-going process. Readers are encouraged to send their provisions along with explanations as to how they differ and why.⁷ Future updates will incorporate these provisions.

A final thought: The mere fact that a provision has become boilerplate is not in and of itself a reason to use it or scrap it. The task is to determine how to take advantage of the benefits of a boilerplate provision while protecting the client from its pitfalls. This book's answer is that the drafter must understand each provision, its history, business purpose, and variations. Only then can the drafter make a considered business and legal judgment and craft an appropriate provision.

Derivation of the Term "Boilerplate"

The term "boilerplate" has two historical sources: one from the shipbuilding industry and the other from the newspaper printing process.

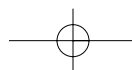
The derivation of the word "boilerplate" dates back to the invention of steam boilers to power ships. However, there are rival theories. The first is that as part of the boiler manufacturing process, iron was rolled one-quarter to one-half inch thickness. Each piece of iron then became a "boiler plate" and was used to build the boiler or to cover the ships.⁸ The second theory is that each boiler had a standard size identification plate attached to it. The identification plate became known as a "boiler plate."⁹

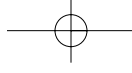
In the newspaper world, the term "boilerplate" had a meaning not too different from the one in the ship manufacturing process. After the Civil War, many small-town newspapers expanded their local papers by including syndicated articles. Initially, the syndicates sent the articles on newsprint so that the articles could be

⁷ Please send comments to Tina L. Stark at tstark@ix.netcom.com.

⁸ *Webster's Third New International Dictionary* 247 (1986). See also, Bast, "A Short History of Boilerplate," 5 *Scribes J. Legal Writing* 155 (1996).

⁹ Rylance, *Legal Writing and Drafting* 110 (1994).

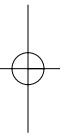
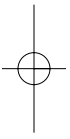




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distributed immediately with the rest of the newspaper. Eventually, however, the syndicates instead made identical plates of the printed matter in a central office and shipped the plates, commonly known as “boiler plate,” to the newspapers. The plates were then used by the local papers to print the articles.¹⁰ Thus, both in the shipbuilding and newspaper industries, boilerplate came to connote something standardized, formulaic.



¹⁰ This Chapter's recounting of the history of the term boilerplate in the newspaper business paraphrases the account in Bast, “A Short History of Boilerplate,” 5 *Scribes J. Legal Writing* 155 (1996). See also, II *The Oxford English Dictionary* 363 (2d ed. 1989).

