Contract Boilerplate for Non-Lawyers

By: Will Marshall
wmarshall@ubmlaw.com

In negotiating contracts, the business deal points understandably receive the lion's share of attention. These are the terms that constitute the core economic exchange usually foremost in the minds of the parties. Often the miscellaneous terms at the end of agreements, so called boilerplate, receive little or no input from the business people. However, in the event of a dispute, these provisions can have an enormous impact on outcomes that far exceed what the contracting parties would imagine. Given that these provisions often are similar from contract to contract, business owners and others responsible for negotiating agreements should familiarize themselves with typical boilerplate provisions, what they mean, and how their presence, absence and structure can affect outcomes. With some general knowledge of boilerplate, business people can better work with their legal counsel to make sure agreements conform to their intent. It is better to learn these lessons outside of a transaction than in the context of a painful and unexpected litigation outcome.

In this article, I offer examples of common boilerplate provisions followed by brief explanations and commentary. For those interested, each provision includes a more detailed discussion section following the summary. I have excluded some provisions, such as arbitration, as beyond the scope of this article as well as more self-evident provisions such as notice and counterparts.

Please note that this article is not offered as nor should it be relied on as legal advice. The sample provisions and analyses are offered solely as general information and should not be used in connection with any specific matter without the advice of qualified legal counsel.

No Assignment

Sample Provision:

> *No Assignment*. This Agreement may not be assigned by either party without the [written] consent of the other party.

Summary:

An anti-assignment provision attempts to prohibit one party from assigning or transferring its interests and obligations in an agreement to some other person or entity without the consent of the other party (or at all). Assignments can be deliberate stand-alone acts by a party or they can occur by operation of law in connection with a merger or acquisition. The policy of courts is to favor assignability so these provisions may prevent an isolated assignment, but often will not prevent an assignment that occurs by operation of law. Note that even in a successful assignment, the assigning party generally remains secondarily liable on the contract. Compare this with a novation, which is a total substitution requiring the consent of the non-assigning party.

Discussion:

The parties to a contract have rights (e.g. the right to be paid) and duties (e.g. the obligation to deliver goods). Technically, one *assigns* rights and *delegates* duties, however, the term assignment is often used to mean both assignment and delegation and the basic provision like the one above reflects this usage. As a policy matter, courts and the common law generally support assignability of contracts. If a contract is silent as to assignability, courts will generally deem rights under the contract to be assignable with a few exceptions based on common law or statute (for example, one generally cannot assign a tort claim) and provided the assignment does not substantially increase the obligations of or risk to the non-assigning party. Duties are also generally delegable absent a provision to the contrary and provided it does not substantially diminish the quality or likelihood of performance flowing to the non-assigning party; however, there are more instances where a court might deem a duty non-delegable. For instance, duties that are so personal in nature that delegation would materially change performance are non-delegable. A famous singer's contractual obligation to perform or a person's confidentiality obligations in a non-disclosure agreement are two examples. Where there is an anti-assignment clause, courts will tend to construe the provision narrowly against the non-assigning party. Provisions prohibiting or limiting assignment should therefore be explicit. Courts' history of favoring assignability has resulted in at least two issues to consider.

Assignment by operation of law or merger. Courts would generally deem an anti-assignment provision such as the sample above to nevertheless allow the assignment of the contract by operation of law (e.g. a bankruptcy) or by merger unless there is express language prohibiting it. The case law on this is mixed, but typically favors assignability. Therefore, a well drafted provision will expressly address this issue if the intent is to prohibit such an assignment. Bear in mind, it is not possible to completely avoid the possibility of assignment particularly of this kind. A bankruptcy court, for example, has broad powers and can easily disregard even express contractual prohibitions on assignment.

The right to assign vs. the power to assign. In the effort to favor assignability, case law has developed a distinction between language that restricts the *right* of a party to assign ("no party may assign") versus language that takes away the *power* to assign ("no party may assign and any purported attempt to assign is void"). In the former, a court might deem an assignment effective, despite an anti-assignment clause, and let the non-assigning party simply sue the assigning party for damages, whereas the latter will more likely serve to prevent an effective assignment. Therefore, when non-assignability is important, it is best to include language indicating that a purported assignment is "ineffective," "null," or "void."

We can pull these points together into a general anti-assignment provision that addresses the above issues.

> *Assignment and Delegation*.
>
> (a) No party may assign any of its rights or delegate any performance under this Agreement, except with the prior written consent of the other party, which shall not be unreasonably withheld or delayed. The foregoing includes all assignments of rights whether they are voluntary or involuntary, by merger, consolidation, dissolution, operation of law, or by any other manner. For purposes of this Section,
>
> (i) a "change of control" is deemed an assignment of rights; and
>
> (ii) "merger" refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.

> (b) Ramifications of Purported Assignment or Delegation. Any purported assignment of rights or delegation of performance in violation of this Section is void.

In this revised provision, we start by specifically addressing assignment of rights versus delegation of duties. We add a provision to allow assignment only by consent, but temper this by not allowing the arbitrary withholding of consent. The second sentence and the definitions in (i) and (ii) attempt to cover various technical distinctions a court might use to allow assignability in the context of mergers, involuntary assignments, and the like despite our prohibition. Again the law is not always clear here and favors assignability so this portion may not always be effective. Finally subsection (b) covers the right to assign versus the power to assign distinction by adding the magic word, "void."

Successors and Assigns

Sample Provision:

> *Successors and Assigns*. This Agreement is binding upon, and inures to the benefit of, the parties and their respective [permitted] successors and assigns.[1]

Summary:

This provision is ubiquitous in contracts, but often misunderstood. Its purpose is to provide that, in the event of an assignment of the agreement to a third party, the non-assigning party is bound to treat the new party as they would the assigning party. Nevertheless, as to the details, courts have interpreted these provisions in a variety of ways. If assignment is a sensitive issue, steps should be taken to more specifically and expressly address the issue in the agreement.

Discussion:

The confusion surrounding this provision is illustrated by the various and conflicting court interpretations of what this provision means. In general, however, it is meant to describe, in the event of an assignment of an agreement by one party (the "assignor"), the relationship between the non-assigning party and the third party to whom the agreement has been assigned (the "assignee"). A provision like the one above simply reiterates the common law rule that a non-assigning party is bound to treat the assignee of the agreement as they would the assignor. However, some courts have also concluded that the presence of this provision is also evidence of intent that the assignee (i.e. the "new" party) is legally bound and has assumed the contract. Other courts have concluded that the provision has no bearing on whether the assignee has assumed the contract. Moreover, courts have sometimes used the presence of the provision as evidence of the assignability of the contract itself. Much litigation has stemmed from this typically short provision. Nevertheless, it is very common to see the provision in a form close to the one above. If one wants to be extra careful, one can expand the provision to expressly address the areas of confusion reflected in the case law. For example, one might explain in the provision that it is not intended to address whether rights are assignable or duties delegable under the contract.

[1] Note that if one or both of the parties is a natural person, one may also see reference to such parties' respective heirs, executors, administrators, and legal representatives in addition to successors and assigns.

Choice of Law and Forum Selection

Sample Provision:

> *Governing Law; Venue*. This Agreement will be governed and interpreted in accordance with the laws of the State of [_____] without regard to its laws of conflicts. Any legal action brought concerning this Agreement or its subject matter will be brought only in the state and federal courts located in [indicate state and county], and both parties agree to the exclusive jurisdiction and venue of these courts.

Summary:

Provisions such as this attempt to dictate the substantive law the parties wish to use in interpreting the contract, particularly in the event of a dispute, as well as the venue or geographic location where claims must be brought and litigated. Generally, as long as there is some nexus between the parties and substance of the agreement and the law and venue chosen, courts will enforce these provisions.

Discussion:

Contracts typically have a boilerplate provision that designates the desired state law to be used in interpreting the agreement and the desired forum (e.g. courts in a certain county) for dispute resolution to take place. Generally these provisions are enforceable provided there is some nexus between the parties and circumstances and the law and forum chosen. Note that choice of law and forum need not be the same. For example, two businesses in San Diego County might choose San Diego state courts as their chosen forum, but choose to apply Delaware law because they are both Delaware corporations and the agreement pertains to corporate matters. Typically the forum will be a location convenient to both parties or to the party with more negotiating leverage. Where there are multiple appropriate options, choice of law and forum can be a strategic decision to discuss with your attorney. State laws can vary widely, affecting the outcome of litigation and a forum far from a party's headquarters can add significantly to its litigation costs. One final note – these provisions are typically drafted to exclude application of any of the chosen state's laws that would have the unintended effect of applying another state's law. For example, if a lawsuit was filed in Nevada concerning a contract with a California choice of law provision, the Nevada court might look at California's choice of law rules and determine that instead Nevada law should govern, contrary to the intent of the parties. This is why generally the provision will include a phrase such as "without regard to its laws of conflicts" as in the above sample or refer to the "internal" laws of the state. If there is no choice of law or forum selection provision in an agreement, the result will depend upon circumstances such as where the parties are located, where the contract was executed, where a party elects to file a lawsuit and other factors.

Cumulative Remedies and Limitations of Remedies

Sample Provision:

> *Cumulative Remedies*. All rights and remedies provided in this Agreement are cumulative and not exclusive of any other rights or remedies that may be available to the parties, whether provided by law, equity, statute, in any other agreement between the parties, or otherwise.

Summary:

A cumulative remedies clause simply states that a party may seek all remedies available under the agreement and applicable law and that the availability, granting or express provision of one or more remedies does not, in itself, exclude the party from seeking or being granted other remedies. This states the general rule that would apply in the absence of such a provision. Nevertheless, parties such as lenders or leasing companies will often include these provisions in their form agreements because their agreements often specify in detail enumerated remedies they have in the event of default by the other party and this provision is included to help insure that such specificity is not interpreted by a court to mean that the listed remedies are their only remedies.

Discussion:

Remedies provisions directly fall under the category of topics that contracting parties often do not want to discuss when entering into an agreement, but that can nevertheless have a major impact on the outcome of a dispute. Parties can often either have conscious or unconscious misconceptions about what remedies may be available to and from them or they can fail to consider the issue at all. The variety of possible remedies is beyond the scope of this article. However, the usual remedy in contract disputes is to receive compensatory damages (the right to payment) of an amount meant to bring the non-breaching party to the position it would have been in had the contract not been breached or possibly, if such damages are very difficult to calculate, equitable remedies, which include things such as specific performance (a court ordering a party to do or refrain from doing some act).

A provision allowing a party to pursue cumulative remedies is an effort to insure that a party or parties are not limited in what legal remedies they may seek. The availability of cumulative remedies is the modern default rule even in the absence of such a provision. So why add a cumulative remedies provision if it is already the default rule? In part, it is because the older default rule was that a suing party had to first choose among inconsistent remedies in crafting their claim in court; a cumulative remedies provision helped to insure this old rule was not somehow applied by a court. Secondly, if the agreement provides for the availability of one or more specific remedies, a cumulative remedies provision can help insure that by including those specific remedies, it is not deemed by implication to be the only remedies available for the specified breach. A pitfall can occur where the parties intend for a specific remedy to be in fact the *only* remedy (e.g. the ability to terminate the agreement or to collect a fixed amount of liquidated damages[2]), but they do not provide that this is the sole and exclusive remedy and worse, they include a boilerplate cumulative remedies provision. A party may have thought their downside was limited to contract termination and a fixed amount of damages, when in fact, poor drafting has allowed broader remedies to the other party. Also keep in mind that, generally, statutory remedies and remedies for claims such as product liability cannot be avoided by contract. Be careful whenever you think that you understand and have narrowed your maximum legal exposure in a contract. It usually takes more careful drafting than is realized to cap liability exposure.

Another remedy related provision to watch out for concerns consequential damages. Consequential damages refer to damages for losses that stem from, but are not directly related to, a breach. They

[2] Liquidated damages are an amount of damages determined in advance for a breach, which is used where damages would be difficult to determine and the parties place a value on knowing their exposure. Just remember that a liquidated damages provision by itself does not insure that other remedies are not available. One can couple it with an exclusive remedy provision if that is the intent.

include items such as lost profits and opportunities and legal fees. Very often parties want to avoid exposure to the each other's consequential damages and excluding them is a fairly routine drafting measure in many agreements.

Indemnification

Sample Provision:

> *Indemnification*. Seller shall indemnify and defend Buyer against all losses, liabilities, claims, costs, judgment, damages, fees, and causes of action arising from or relating to [any material misrepresentation or breach of warranty by Seller of any representation or warranty set forth in this agreement].

Summary:

Often one sees short indemnities in an agreement such as the one above. Essentially an indemnity is the promise of one party to reimburse the other party for certain claims or losses, usually in relation to a third party. Indemnity is an entire subject in itself and there are many considerations that arise when one seeks to enforce such a provision. These short versions might be better than nothing where pushing for a more detailed provision would scuttle the transaction. However, if you ever need to rely on such a briefly stated indemnity, be prepared to have to resolve a host of issues.

Discussion:

In a typical indemnity, Party A agrees to reimburse Party B for certain types of harm to Party B relating to some certain agreement, promise, matter, or other item. More formally, indemnification is the right of a party who incurs or is faced with a loss to recover that loss from a third party who is the indemnitor. One can think of indemnity as being like a miniature insurance policy as between two parties. It is not a question *necessarily* of who is at fault for the loss. Rather, the parties have negotiated to allocate or shift certain risks to one of the parties. This may be because one party can bear it more easily, because one party is in a better position to manage and minimize the risk, or simply due to one party's lack of negotiating leverage. Indemnification provisions can often be lengthy and subject to intense negotiation and, as such, a full discussion is beyond the scope of this article. However, I offer the following questions and considerations that would very likely not be addressed in a short indemnification provision in order to offer a sense of how complex indemnification can be:

- What is the value of an indemnification provision where the indemnitor has poor credit or would otherwise be unlikely to be able to pay any indemnification amounts? Is there a related deep pocket that can be named as a co-indemnitor? If there are multiple indemnitors, is there joint and several liability and how will the indemnitors be organized and led?
- There may be applicable policy or statutory limits to indemnification. For example, in some jurisdictions, one may not contract to receive indemnification for one's own sole future negligence.
- Consider the practical mechanisms for an actual indemnification. What is the timing of indemnification payments? Is it as costs and losses are incurred or upon a final adverse judgment? Is there a duty to defend or cover the legal costs of defense or of pursuing the indemnity? Who gets to select legal counsel and decide when and for what amount to settle a claim? What about notice to the indemnitor of a potentially indemnifiable event?

- What is the scope of losses, liabilities, etc. covered and how long will the indemnification obligation last?
- Should losses covered by insurance be indemnified? Will the indemnification provision itself limit insurance coverage and how can that be prevented? Should the indemnitor be able to pursue the indemnitee's carrier (i.e. subrogate to the rights of the indemnitee)? What if the indemnitee receives both indemnification and insurance proceeds for the same loss?
- Should there be some threshold amount of losses that have to occur before indemnification kicks in (generally called a "basket")? Should there be a cap on total indemnification?
- Should the indemnitee be able to set off a payment obligation to the indemnitor against an amount owed to it by the indemnitor? For example, buyer buys a company from seller on a promissory note. Buyer incurs an indemnifiable loss. Can buyer deduct that loss from the note payments owed to seller?
- Should indemnification be the indemnitee's sole remedy?

Such issues will often become of critical importance in the event of an indemnity claim. Again, think of indemnification as akin to a type of insurance policy. Now imagine a one sentence insurance policy. Sometimes, a one sentence indemnity is better than nothing, but as the stakes and the likelihood of a claim increase, so should the details of the indemnity provision.

Force Majeure

Sample Provision:

> *Force Majeure*. A party is not liable for failure to perform the party's obligations if such failure is a result of Acts of God (including fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (regardless of whether war is declared), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, government sanction, blockage, embargo, labor dispute, strike, lockout or interruption or failure of electricity or telephone service.

Summary:

A Force Majeure provision excuses or permits the delay of performance by one or both of the parties where such performance has been rendered somehow commercially impracticable or impossible by some unforeseen event. Be careful in including such a provision. One may have bargained for another party to foresee and be prepared to perform despite certain problems. The inclusion of a carelessly worded force majeure provision could undercut the other party's obligations in this regard.

Discussion:

In the early common law days, parties to a contract were excused of performance by unforeseen events only in the most extreme circumstances. The modern treatment is more liberal in allowing nonperformance where it is commercially impracticable; however, the case law has been a bit contradictory. Force majeure provisions are added in order to avoid some of the uncertainty on this issue that might exist if one relied solely on default common law rules. These provisions typically have a list of sample events that might excuse performance although such a list is not necessary and more thoughtful contract drafters will often omit them.

Before you include a force majeure provision, review the list of sample events, if any, closely; it may be that some of the events are, in fact, reasonably foreseeable, the risk of their occurring has been bargained for and their occurrence should not excuse performance. By the same token, you may want to expressly exclude certain events that you have contracted the other party to anticipate. For example, you may have procured internet hosting services with 100% uptime and you do not want a force majeure clause to excuse an uptime failure. Also, the failure to pay money is something that you may want to expressly exclude from a force majeure provision, or perhaps excuse it only for a short period. As with indemnification provisions, if the circumstances merit it, one should consider addressing procedures for notification by the party seeking the benefit of the force majeure provision as well as how such party should respond during the event (e.g. mitigate damages, endeavor to overcome the event, etc.). Additionally, a detailed force majeure provision should address the consequences of such an event, including who bears the related costs and whether performance should be resumed or altered after the event or whether the agreement should be terminated after some period.

Amendment

Sample Provision:

> *Amendment*. No amendment of this Agreement will be effective unless in a writing signed by both parties.

Summary:

A typical amendment provision dictates the requirements and procedures necessary to effectively amend the agreement. These provisions usually simply provide that amendments must be in a writing signed by both parties and they are generally not the subject of much negotiation. However, be aware that in most jurisdictions, having a provision that requires amendments to be in writing does not necessarily mean that an oral modification of the agreement will not be enforceable. A court may enforce an oral modification despite a writing requirement particularly where there is clear evidence that both parties intended to orally modify the agreement and there has been some reliance on the oral amendment that would make not enforcing it unduly harsh or detrimental to a party. The same can be applied to oral terminations of a contract where the contract provides that terminations must be in writing.

Waiver

Sample Provision:

> *No Waiver*. No waiver by any party of any of the provisions hereof will be effective unless expressly set forth in writing and signed by the waiving party. No waiver by a party will operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this agreement will operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

Summary:

Contracting parties, during the course of their relationship, commonly fail to require from each other strict performance in accordance with their agreement. This might be because they have put the agreement in a drawer and have forgotten about some immaterial provision (for example, that a report be delivered no later than the fifth day of each month) or it may be because they are having serious performance issues and are trying to work through them. The risk is that a court might deem that a party, by failing to require performance as to the provision, has waived or given up their right to enforce that provision. A no-waiver provision seeks to avoid this result by providing that a failure to enforce in one instance does not constitute a waiver in that instance or future instances and that waivers must be in writing signed by the waiving party.

Discussion:

A waiver is where one party, whether expressly or through carelessness, gives up something to which it is entitled from the other party. Technically, a waiver can occur when one party performs a contractual obligation despite the absence of some required prior performance (a condition precedent) by the other party. For example, if a banking agreement requires that the borrower provide a written request to the bank in order to borrow against a line of credit and despite this, the bank routinely allows the borrower to phone in a request to the bank and borrow against the line that same day, the bank has arguably waived that condition precedent to its lending (i.e. a written request). Practically speaking though, people often think of a waiver as including the instance when a party materially breaches an agreement and the other party decides to nevertheless continue with the contract and overlook the breach.

The aims of a typical waiver provision are generally to attempt to avoid inadvertent waivers and to limit the scope of any waivers that do occur. Nevertheless, courts routinely find provisions requiring that waivers be in writing ineffective and recognize waivers based upon the course of dealing. While it is good to include no-waiver provisions anyway, it is most important to behave in a disciplined way that is consistent with your no-waiver provision. This is done by paying attention to the details and conditions of a contract and, when waiving a condition, putting the waiver in writing specifying exactly what is being waived and indicating that such waiver does not constitute a waiver of any other provision or future incidence of the provision being waived.

Severability

Sample Provision:

> *Severability*. If any provision of this agreement is held to be unenforceable, the enforceability of the remaining provisions of this agreement are not affected and will remain in full force as though the unenforceable provision were omitted from the agreement.

Summary:

Contracts that are illegal are void and not enforceable. Sometimes, a contract is legal and enforceable except for a certain provision that is not. In these instances, courts generally decide whether the agreement without the offending portion would still contain a reasonable exchange or whether the unenforceable provision is so integral to the bargain that the contract fails entirely without it. In the former instance, the court may well enforce the contract without the unenforceable provision. In the

latter, the court would likely deem the entire contract unenforceable. Severability provisions are intended to tip a court in favor of 'severing' or deleting anything deemed unenforceable and enforcing what remains, although a court may nevertheless still opt to void the entire contract.

Discussion:

Often these provisions are included in agreements as a matter of course. As a practical matter, a court would be unlikely to enforce a severability provision in the above form literally without considering whether the offending provision is material to the underlying agreement. Certain types of agreements may especially benefit from such a provision such as agreements consisting of or including indemnity, damages or penalty provisions that may be deemed usurious or harsh, and agreements with non-compete provisions the enforceability of which may be questionable. Other agreements might have certain provisions that are, for whatever reason, very important to one party, but that to a third party reviewing the agreement might seem immaterial. That party may not want to include a severability clause that could sway a court to delete the important provision if it were found unenforceable and stricken from the contract, particularly if the enforceability of the provision is in doubt. Alternatively, the party may propose a severability clause that specifically calls out the seemingly immaterial provision as essential to the bargain (with language clarifying that it is not the only essential provision).

Integration or Merger

Sample Provision:

> *Entire Agreement*. This Agreement constitutes the final and exclusive agreement between the parties relating to this subject matter and supersedes all other prior and contemporaneous negotiations, discussions, and agreements of any kind, whether written or oral, concerning such subject matter.

Summary:

When negotiating a contract there is almost always a trail of rejected terms and proposals that do not wind up in the final agreement. Moreover, often there are undocumented, even unconscious assumptions of the parties about the transaction that do not make it into written form at all. In the event of a contract dispute, a party may seek to introduce these and other items that were not included in the final agreement. An integration or merger clause is a very common provision that seeks to reduce the potential that any such outside terms, agreements, and other communications (so called "parol evidence") are admissible in resolving a dispute. Through such a provision, the parties are stating that all the discussions leading up to the final agreement were integrated or merged into that final agreement, which supersedes everything not expressly stated in the agreement.

Discussion:

Where there is an ambiguous or vague provision in a contract (intentionally or inadvertently), parol evidence is generally always admissible to aid in interpretation, regardless of whether the agreement has an integration clause. However, whether a court goes beyond mere clarification to materially supplement or even contradict the final agreement depends upon whether the court determines that the agreement is partially or fully integrated. A court may look at a variety of factors including the apparent completeness and detail of the final agreement or even parol evidence in deciding to what extent the final agreement was intended by the parties to be the sole and exclusive embodiment of

their agreement. The inclusion of a well drafted integration provision is intended to push a court toward the determination that the agreement is, in fact, the sole, exclusive agreement and that extrinsic evidence should not be admitted to vary, supplement, or contradict its terms. However, this is not always effective and some courts will disregard an integration clause if they find that the agreement lacks a certain level of completeness. A prominent and explicit integration clause agreed to by all parties and a comprehensive and well-drafted agreement are the best safeguards against the inclusion of extrinsic evidence to vary a contract's terms. At the same time, make sure the integration clause does not unintentionally supersede contemporaneous or prior agreements that concern the same subject matter (e.g. a set of related documents for single transaction or a series of promissory notes or other financings) by specifically addressing them in the provision.

Will Marshall is a partner and co-founder of UBM Law Group. He represents private companies in general corporate matters, contract drafting and negotiation, and private placements across a range of industries. He has experience in corporate governance as well as software licensing and related agreements. He can be reached at (858) 746-9500 x700 or wmarshall@ubmlaw.com.