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REVIEW

Negotiating and Drafting Contract Boilerplate

Edited and co-authored by Tina L. Stark

ALM Publishing; 675 pages; $149 ($126.65 for ALI-ABA In-House members, use Promo Code 702606), plus shipping and handling; to order, call (800) 603-6571 or go to www.lawcatalog.com

Reviewed by JoAnne D. Ganek

"*This agreement shall not be assigned by either party without the consent of the other party.*"

Do you recognize this provision from a contract in your firm's precedent file? Do your lawyers know the rule in your state's highest court and in the Court of Appeals in your federal circuit on the enforceability of a forum selection provision? And are you sure that your standard merger clause will be construed to mean that the contract is completely, rather than partially, integrated?

If your answer is "yes" to the first question or "no" to the second or third, there is a new book that should be required reading for every junior lawyer in your firm and for any more experienced practitioner who, after a protracted negotiation over the deal terms in an acquisition agreement, rolls his or her eyes when opposing counsel wants to discuss the boilerplate. To every such eye-roller — and to anyone else who tells opposing counsel that your firm and every other firm of its caliber has used a certain formulation of the boilerplate for the past two centuries and, therefore, to deposit their comments in the wastebasket as they leave — you should quote the immortal words of Edgar Allen Poe for a perfect description of the frequency with which that approach will be tolerated in the future: "NEVERMORE."

The new book is *Negotiating and Drafting Contract Boilerplate*, edited and co-authored by Tina L. Stark, and its thesis is relatively simple: Although the word "boilerplate" means standard, one-size-fits-all language, and although practitioners view the set of provisions that occupy the back pages of every contract in just that way (and routinely wait to give them a cursory review until just before the contract is executed), a major change of attitude is significantly overdue. As the book effectively demonstrates, boilerplate is a materially misleading name for provisions that have long been relegated to a low-priority status, such as Successors and Assigns, Choice of Law, and Severability. These provisions actually contain a myriad of traps for the unwary and undereducated, and these traps, if not recognized and deliberately managed, have the potential to cause totally unintended consequences that could be contrary to the expectations of the contracting parties.

The goals of the book, which are very effectively achieved, are to expose the weaknesses in the standard formulations for 20 different so-called "boilerplate" provisions and to provide one or more alternatives that can be relied upon to be enforced as intended in the event of a dispute. What a mammoth task this turns out to be, and the book takes no shortcuts. The book dedicates a separate chapter to each of the 20 provisions and provides the same substantive examination for each:

- A short introduction that contains a straightforward explanation of the provision and a succinct statement of the principal issues;
- A description of the relevant historical context and applicable common law, state and federal statutes, and U.C.C. provisions;
- An analysis of the issues regarding the enforceability of the provision;
- A discussion of the challenges of drafting and negotiating the provision;
- An explanation of special issues that may arise under certain circumstances; and
- A summary section that recapitulates the earlier discussion and puts the provision in context.

The book also has a separate chapter on general drafting issues and a final chapter that collects in one place the model provisions from all of the preceding chapters.

Ms. Stark, a former partner at Chadbourne & Parke LLP and now a trainer and consultant to major law firms and an

continued on page 2

Review *continued from page 1*

Adjunct Professor of Law at Fordham University School of Law, has assembled an impressive roster of talented practitioners to contribute chapters to this book. Each has extensive background with the issues that arise in drafting, negotiating, or litigating the terms of commercial transactions. And all have been open and generous in sharing their legal wisdom and the benefit of their business experience.

Every chapter has been researched exhaustively and contains extensive citations to relevant decisions in multiple jurisdictions. For example, the discussion of the enforceability of forum selection provisions in Chapter 6 (Governing Law and Forum Selection) includes and categorizes the prevailing views for every federal circuit and every state.

Do not imagine, however, that this book is an academic treatise. As they discuss each provision, the authors examine alternative provisions and identify the strengths and weaknesses of each. Particularly useful are the drafting notes that accompany each sample provision. These notes analyze, explain, and distinguish individual words and phrases. They also raise and answer questions on strategy and recommend an approach for the contract negotiation.

In addition, the book's discussions consider the client's perspective. The authors suggest questions practitioners should ask their clients and advise on protecting various business objectives. For example, Chapter 7 (Waiver of a Jury Trial) does not assume that everyone knows when and why a contract should include this type of waiver; rather, it devotes an entire section to the many reasons why litigants in a commercial dispute might appreciate that this waiver was included in the original agreement.

The authors are not shy about expressing their opinions, and they do so in a straightforward and business-oriented manner. For example, Chapter 8 (Arbitration) explores whether contracting parties should self-administer the arbitration or select an outside organization for that purpose. The benefits of both options are presented, but the author prefers that the parties use an outside organization, and supports that advice with a litany of practical considerations.

The book is very user-friendly. The 20 boilerplate provisions are organized into six sections that bring related provisions together. For example, Part Five (Communications Between the Parties and With Others) covers Confidentiality, Announcements, and Notices, and Part Six (Determining What Constitutes the Contract) includes Amendment and Waiver, Severability, Merger, and Counterparts. Even the book's physical layout, with its use of highlighting and clearly labeled subsections, is designed to help readers find what they need and absorb the complex material. Detailed outlines precede each chapter and diagrams are included where needed for clarity, as in Chapter 3 (Assignment and Delegation), where the sensible use of diagrams illustrates complex interrelationships between parties.

The book treats as boilerplate certain highly complicated topics that are often given their own article in business contracts or are addressed in a separate ancillary agreement, such as Arbitration, Indemnification, and Confidentiality. In these chapters, as well as in the chapters on Force Majeure and Notices, the authors proffer both a long- and a short-form model provision, recognizing the extent to which business pressures may dictate the use of more succinct, less detailed provisions.

The book's use of concrete business situations as the context in which to analyze specific provisions adds clarity and immediacy to the issues discussed. For example, in Chapter 9 (Cumulative Remedies and Election of Remedies), the author posits a situation where a manufacturer fails to deliver certain seasonal goods to a retailer on the specified date. Then, as the discussion of different remedies proceeds, the author returns periodically to the delayed delivery situation, and analyzes the efficacy of those remedies in that context.

This book's value has been enhanced in other ways. There is advice for special situations and new developments. For example, Chapter 6 (Governing Law and Forum Selection) has a separate subsection entitled "Commerce on the Internet." Some chapters include alternative starting points to cover multiple variations, recognizing that even in the considered approach to boilerplate advocated by this book, one cannot always begin from the same place.

It is axiomatic that careless drafting can undermine and even negate all of the efforts that you and your client have dedicated to completing and implementing a business transaction. Careless drafting can increase your client's risks, expand its exposures, or limit its ability to enforce the contract or obtain recovery if the deal comes apart. With this book, Ms. Stark has very effectively achieved two goals: First, she demonstrates convincingly that these truths, which lawyers readily acknowledge apply to the parts of the contract that describe the substantive terms of the deal, are equally applicable to the supposedly less material boilerplate items relegated to the end of the contract. Second, she provides the information practitioners need to protect their clients from the unintended and potentially adverse results that can occur because a boilerplate provision is poorly drafted or under-negotiated. This book deserves to become a standard reference text in law firm libraries and a regular source for any lawyer implementing or litigating a commercial transaction.

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