“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
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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