

## *Examining Contract Boilerplate and Why It Matters*

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“Boilerplate”:

“Any text that is or can be reused in new contexts or applications without being greatly changed from the original”

“Formulaic or hackneyed language”

1. Introduction
  - a. Why are contracts so long?—Blame litigators and technology
  - b. Why are contracts written so poorly?—Blame the author and tradition
2. Letter of Intent/Understanding:
  - a. *“The parties agree that this is a letter of understanding only and that this letter is **not** a legally binding contract **nor** an agreement to negotiate. No party intends that the preliminary understandings contained herein represent a final agreement between the parties, and no such final agreement shall be deemed to have been reached unless and until the parties have executed the written final and definitive agreement pertaining thereto.”*
  - b. Some jurisdictions will have implied duty to negotiate in good faith, which is why the carve-out in this paragraph is essential.
3. Parties and defined terms
  - a. Avoid problems by paying attention and being consistent
  - b. Parol evidence rule—In Kansas, “extrinsic evidence is not admissible to contradict, alter, or vary the terms of a written instrument, but it is admissible to aid in the construction of a silent or ambiguous contract.” May also be admissible to establish mutual mistake.
  - c. Rule varies by jurisdiction.
4. Recitals
  - a. Appearance of formality: “Whereas . . .”
  - b. Confirmation of consideration: “For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows...”
5. Representations vs. Warranties vs. Covenants
  - a. Sometimes terms are used interchangeably but they mean different things (although this is not necessarily acknowledged by courts)
  - b. A representation is a **statement of fact** regarding current or prior circumstances intended to induce someone to act.
    - i. Breach may provide basis for fraud action seeking rescission of agreement or damages.

- ii. *“XYZ is specifically relying upon the representations, warranties, covenants and agreements contained in this Section and such representations, warranties, covenants and agreements constitute a material inducement to enter into this Agreement.”*
    - c. A warranty is a statement that if the fact is not true, the party making the warranty shall take some action to protect the other party from any resulting damage/loss.
      - i. Breach may provide basis for claim to loss of value.
    - d. An affirmative or a negative covenant is a **promise** to either do something or not to do something.
      - i. Breach of **material** covenant may excuse non-breaching party’s performance
6. “Sandbagging” Provisions
- a. Purchaser’s Version: *“The representations, warranties, covenants and obligations of Seller, and the rights and remedies that may be exercised by Purchaser, shall not be limited or otherwise affected by or as a result of any information furnished to, or any investigation made by or knowledge of, Purchaser.”*
  - b. Seller’s Version: *“For purposes of this Agreement, no representation or warranty of Seller shall be deemed to be or to have been inaccurate if, at any time on or before the Closing Date, Purchaser or any of its Representatives had knowledge of the inaccuracy of, or of any circumstances constituting or resulting in the inaccuracy of, such representation or warranty.”*
7. Best Efforts vs. Reasonable Efforts vs. Commercially Reasonable Efforts
- a. What’s the difference?
  - b. Some jurisdictions say both mean “commercially reasonable under the circumstances.”
8. Modification of Statute of Limitations for Breach of Contract
- a. Statute of limitations for breach of contract varies from state to state.
  - b. Contract may attempt to lengthen or shorten these statutory time periods—both Missouri and Kansas place limitations on contractually modifying these time periods.
9. Confidentiality/Trade Secret
- a. All trade secrets are confidential, but not all confidential information is a trade secret.
  - b. Disputes regarding whether or not something is “confidential.”
10. Boilerplate—Common Provisions
- a. **Integration:**
    - i. *“This Agreement constitutes the complete and entire agreement between the parties and supersedes any prior written or oral agreements or understandings with respect to the subject matter hereof.”*

- ii. Must make certain these provisions don't have unintended consequences regarding superseded documents.

**b. Non-reliance:**

- i. *"Each party is acting without reliance on any representations or warranties made by the other parties, except representations or warranties expressly set forth herein."*
- ii. Attempt to avoid fraud claim, which may allow admission of parol evidence despite general prohibition.

**c. Amendment/Course of Dealing:**

- i. *"This Agreement cannot be amended, supplemented, or modified except by an instrument in writing signed by the parties, and no subsequent course of dealing or conduct of the parties shall result in a modification or of this Agreement."*
- ii. There are cases that have held that conduct can, indeed, alter a contract even if the contract contains language to the contrary...

**d. Consequential Damages:**

- i. *"Notwithstanding any provision of this agreement to the contrary, neither party hereto shall be liable for any consequential, special, indirect, incidental, exemplary or punitive damages of any kind or nature whatsoever, or for loss of revenue, income or profits, regardless of whether arising from breach of contract, tort or otherwise, and even if advised of the possibility of such loss or damage or if such loss or damage could have been reasonably foreseen."*
- ii. Notwithstanding underlined language, Direct Damages and Consequential Damages are commonly viewed in following way:
  - 1. Direct Damages are those damages (a) that a reasonable, ordinary, and prudent person would expect the non-breaching party to suffer from a breach, (b) where the reasonable, ordinary, and prudent person, though comparable to the breaching party, is a stranger to this particular contract. Tied to what the reasonable, ordinary, and prudent stranger would expect at the time the parties entered into their contract.
  - 2. Consequential Damages are those damages (a) beyond the direct damages suffered by the non-breaching party, (b) that a reasonable, ordinary, and prudent person would *not* expect, (c) because consequential damages require a more intimate familiarity, not only with the contract itself, but also with: (i) what the non-breaching party has at stake in the contract, and (ii) what fall-out the non-breaching party will suffer if a breach occurs.

**e. Prevailing Party:**

- i. *"If any adversarial proceeding between the parties arises out of this agreement or the matters referred to herein, the prevailing party shall be*

*entitled to recover from the other party, in addition to any other relief awarded, all costs and expenses incurred by the prevailing party in such proceeding, including all attorneys' fees, disbursements and expenses (including those incurred in the course of any appeal), and all experts' fees and expenses."*

- ii. In the absence of such provision (or an indemnity provision), default rule is generally that each side must bear all of its own attorney fees and costs for breach of contract claim.
- iii. Often leads to further fight over meaning of "prevailing party."

**f. Nondisparagement:**

- i. *"You agree that you will not, in any communication with any person or entity, including any actual or potential customer, client, investor, vendor or business partner of Company, or any third-party media outlet, make any derogatory, disparaging or critical negative statements, orally, written or otherwise, against Company or any of Company's managers, directors, officers and employees. Nothing herein shall prevent you from testifying truthfully in connection with any litigation, arbitration or administrative proceeding when compelled by subpoena, regulation or court order to do so."*
- ii. *"Party X agrees to take no action that is intended, or would reasonably be expected, to harm Party Y or its reputation, or that would reasonably be expected to lead to unwanted or unfavorable publicity to Party Y."*
- iii. Can "disparagement" be determined objectively?

**g. Notices:**

- i. *"All notices, communications and waivers under this Agreement shall be in writing and shall be (i) delivered in person or (ii) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (iii) sent by overnight express carrier, addressed in each case as follows:*

*To \_\_\_\_\_:*  
*Attn: \_\_\_\_\_*

*To \_\_\_\_\_:*  
*Attn: \_\_\_\_\_*

*or to any other address as to either of the parties hereto as such party shall designate in a written notice to the other party hereto. All notices sent pursuant to the terms of this Section shall be deemed received (i) if personally delivered, then on the date of delivery, (ii) if sent by overnight, express carrier, then on the next business day immediately following the day sent, or (iii) if sent by registered or certified mail, then on the earlier of the third business day following the day sent or when actually received."*

- ii. Note very fundamental problem with this very common provision: e-mail!

**h. Further Actions (Cooperation Clause):**

- i. *“Party X shall, upon request, execute and deliver such further instruments and documents and do such further acts and things as may be reasonably required to provide to Party Y the rights and benefits contemplated by this Agreement.”*

**i. Governing Law; Jurisdiction:**

- i. *“This Agreement shall be governed and construed in accordance with the laws of the State of Nebraska, without regard to its choice of law rules and without regard to conflicts of laws principles. The Parties agree to submit themselves to the exclusive jurisdiction of the federal and state courts in Douglas County, Nebraska, for the enforcement, interpretation and construction of this Agreement and all other matters regarding or relating thereto.”*

**j. Counterparts:**

- i. *“This Agreement may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Agreement.”*

**k. Severability; Validity:**

- i. *“If any provision of this Agreement is deemed to be invalid by reason of the operation of law, or by reason of the interpretation placed thereon by any administrative agency or any court, the parties shall negotiate an equitable adjustment in such provision in order to effect the purpose of this Agreement to the maximum extent permitted by law, and the validity and enforceability of the remaining provisions hereof shall not be affected thereby and shall remain in full force and effect.”*

**l. Waiver of Jury Trial:**

- i. *“THE PARTIES ACKNOWLEDGE AND AGREE THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT OR WITH RESPECT TO THE TRANSACTIONS CONTEMPLATED HEREBY WOULD BE BASED UPON DIFFICULT AND COMPLEX ISSUES AND, THEREFORE, THE PARTIES AGREE THAT ANY COURT PROCEEDING ARISING OUT OF ANY SUCH CONTROVERSY WILL BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.”*
- ii. Issue can be avoided by providing for alternative dispute mechanism (e.g., arbitration)

**m. Binding Agreement:**

- i. *“This Agreement is binding upon, and shall inure to the benefit of the parties themselves, as well as their respective representatives, successors, permitted assigns, heirs and estates”*

- ii. “Successor”: Third party that acquires original party through merger or purchase (may be contrary to other original party’s desire or intent).
- iii. “Assign”: Third party that is assigned the contract.

**n. No Partnership or Other Relationship:**

- i. *“Nothing in this Agreement is intended to create or propose the creation of an employee, partnership, joint venture, fiduciary or similar relationship between the parties hereto regarding the matters described in this Agreement or any other matters.”*

**o. Understanding of Agreement:**

- i. *“Each party agrees and acknowledges that it has read this Agreement carefully and fully understands all of its provisions. Each party has been advised to consult with legal counsel with respect to this Agreement before executing it, and each party acknowledges that it has had sufficient time to review this Agreement. By signing below, each party acknowledges that it has freely, knowingly and voluntarily accepted the terms and conditions of this Agreement.”*
- ii. Addresses enforceability issues, particularly in an employee severance/release agreement in which certain waivers of statutory rights must be made “knowing and voluntarily” in order to be enforceable (see below).

**p. Employee Waiver/Release Revocation:**

- i. *“If Employee fails to deliver a fully executed counterpart of this Agreement to Employer within 21 [45 if part of reduction in force] days after the date hereof, then this Agreement shall automatically be deemed revoked and without force or effect. (The date on which Employee delivers an executed counterpart of the Agreement to Employer is referred to herein as the “Effective Date”.)”*
- ii. *“Delivery by Employer to Employee of this Agreement shall constitute an offer that may be revoked by Employer by written notice at any time prior to receipt by Employer of an executed counterpart of this Agreement from Employee.”*
- iii. *“Notwithstanding anything herein to the contrary, Employee may revoke this Agreement at any time during the seven day period following the Effective Date by written notice to Employer of such revocation, whereupon all of the rights, duties and obligations of the parties hereunder shall terminate, and any amounts paid hereunder shall be immediately returned by Employee to Employer.”*
- iv. Statutory safe harbor/requirement for valid release of Age Discrimination Claim, but almost always included in employee releases.

**q. Time is of the Essence:**

- i. *“Each Party acknowledges and agrees that time is of the essence with respect to all of such Party’s obligations and agreements under this Agreement.”*
  - ii. In the absence of such provision, “timely” performance may not be deemed to be required.
  
- r. **Specific Performance; Liquidated Damages; No Waiver of Remedy:**
  - i. *“Given the nature of the damage that would result to Defendant if settlement discussions pursuant to this Agreement were disclosed by Plaintiff and/or their counsel, money damages would not be a sufficient remedy for such breach. Therefore, in addition to all other remedies, Defendant **shall** be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach or threatened breach, and Plaintiff and their counsel waive any requirement for the securing or posting of any bond in connection with such remedy. Moreover, in addition to these remedies and not in lieu of them, Defendant shall be entitled to liquidated damages in the amount of \$100,000 per violation of this Agreement, plus their reasonable attorney’s fees and costs incurred to enforce this Agreement. No failure or delay by Defendant in exercising any right, power, or privilege under this Agreement shall operate as waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power or privilege hereunder.”*
  - ii. Despite provision, specific performance may not be granted without **actual** proof of no other adequate remedy at law--irreparable harm (i.e., simply stating money damages will be inadequate is not enough).
  
- s. **Evergreen Provision:**
  - i. *“The term of this Agreement shall automatically be renewed for additional one year periods at the end of the initial term (or the renewal term, if applicable) provided this Agreement has not been earlier terminated by either party providing written notice of termination to the other no less than thirty days prior to the end of the then current term.”*
  
- t. **Force Majeure:**
  - i. *“Any delay or failure in the performance by either Party hereunder shall be excused if and to the extent caused by the occurrence of a Force Majeure. For purposes of this Agreement, “Force Majeure” shall mean a cause or event that is not reasonably foreseeable or otherwise caused by or under the control of the Party claiming Force Majeure, including acts of God, fires, floods, explosions, riots, wars, hurricane, sabotage terrorism, vandalism. accident, restraint of government, governmental acts, injunctions, labor strikes (other than those of Seller or its suppliers) that prevent Seller from furnishing the materials or equipment, and other like events that are beyond the reasonable anticipation and control of the Party affected thereby, despite such Party's reasonable efforts to prevent, avoid, delay, or mitigate the effect of such acts, events or occurrences, and*

*which events or the effects thereof are not attributable to a Party's failure to perform its obligations under this Agreement.”*

**u. Affiliates:**

- i. *“Affiliates: Two Persons shall be deemed Affiliates if one Person directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with the other Person. The term "control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise. For the purposes hereof, any Person which owns or controls, directly or indirectly, 10% or more of the securities of another Person shall be deemed to "control" such Person.*
- ii. *“Person”: Any individual, firm, corporation, business enterprise, trust, association, joint venture, partnership, limited liability company, governmental body or other entity, whether acting in an individual, fiduciary or other capacity.*
- iii. Without the definition, what exactly does “affiliate” mean in any particular instance?

**v. Indemnification:**

- i. Can inadvertently shift attorneys’ fees and expenses in breach of contract action.

**w. Conflicting Provisions:**

- i. *“If there is any indisputable conflict or inconsistency between any provisions of [the Agreement], as hereafter amended from time to time, and any provision of [this Schedule/Amendment], the provision of [this Schedule/Amendment] shall govern over the provisions of [the Agreement].”*

**x. Arbitration:**

- i. *If any controversy or claim relating to this Agreement hereafter arises, the parties shall negotiate in good faith and attempt to resolve such controversy or claim during the thirty day period following the commencement of such negotiations (or such shorter period if reasonably requested by a party). If the parties are unable to resolve the controversy or claim during such period, then either party may serve upon the other a demand that such matter be arbitrated, which demand shall include a brief description of the claim and a statement of the amount in dispute, whereupon the same shall be resolved by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) in effect at the time the arbitration commences. Unless the parties otherwise agree, the arbitration shall be held in \_\_\_\_\_. The number of arbitrators shall be one, and such arbitrator shall be selected in accordance with the applicable AAA rules.*



