BOILERPLATE

Boilerplate, the fine print of standard contracts, is more prevalent than ever in commercial trade and in electronic commerce. But what is in it, beyond legal technicalities? Why is it so hard to read and why is it often so one-sided? Who writes it, who reads it, and what effect does it have?

The studies in this volume question whether boilerplate is true contract. Does it resemble a statute? Is it a species of property? Should we think of it as a feature of the product we buy? Does competition improve boilerplate? Looking at the empirical reality in which various boilerplates operate, leading private law experts reveal subtle and previously unrecognized ways in which boilerplate clauses encourage information flow but also reduce it; how new boilerplate terms are produced, and how innovation in boilerplate is stifled; and how negotiation happens in the shadow of boilerplate and how it is subdued. They offer a new explanation as to why boilerplate is often so one-sided and identify models for regulating the content of boilerplate. With emphasis on empiricism and economic thinking, this volume provides a more nuanced understanding of the "DNA" of market contracts, the boilerplate terms.

Omri Ben-Shahar is the Kirkland and Ellis Professor of Law and Economics at the University of Michigan and the director of the Olin Center for Law and Economics at Michigan.

Dr. Ben-Shahar teaches courses in contracts, electronic commerce, intellectual property, and economic analysis of law. He holds a B.A. in economics and an LL.B. from Hebrew University and an LL.M., S.J.D., and Ph.D. in economics from Harvard. He is the Chair of the Contracts Section of the American Association of Law Schools and a board member of the American Law and Economics Association.

Dr. Ben-Shahar writes in the fields of contract law and products liability. His work has been published in many journals, including the *Yale Law Journal, University of Chicago Law Review, University of Pennsylvania Law Review, Journal of Legal Studies*, and *American Law and Economics Review*.

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The Foundation of Market Contracts

Edited by

OMRI BEN-SHAHAR

Kirkland and Ellis Professor of Law and Economics
University of Michigan Law School

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In Memory of Gili, 1965–2000

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PREFACE
Or: A Boilerplate Introduction

It is tempting to open this volume with yet another "boilerplate" salute to the challenge that standard-form contracts pose for contract law doctrine. You may have seen many tributes to this fundamental problem. If I were to offer my own variation on this familiar introduction, I would have perhaps tried to come up with an original spin to induce you to read forward another paragraph or two. I would probably have talked about a major divide within contract law between the "law of negotiations" and "product regulation." The former is the body of doctrines that determine the legal consequences of bargaining behavior; the latter is the assortment of substantive limitations on terms of bargains – some general to all contracts, others industry- or area-specific. I would then have argued that the study of standard form belongs to the latter, not the former, and that this distinction can help overcome many difficulties in contract law doctrine.

Such would surely be an appropriate overture for a discussion on boilerplate. Boilerplate, recall, is the building blocks of standard-form, nonnegotiated contracts. The enforceability of boilerplate is very much the legal locus where the philosophical debate over the regulation of markets hits the road. Boilerplate employment arbitration terms, for example, are the core of one of the most intriguing and fundamental debates in current contract law over the scope of the unconscionability doctrine.[1]

And yet, with boilerplate being the theme of this volume, there is a looming paradoxical feature with such an introduction: It would be, in and of itself, a boilerplate introduction! It would satisfy all the attributes that introductions-to-symposia are known to have. It would begin with a general reminder of the importance (and timeliness!) of the topic. It would demonstrate that the stakes are more than just conceptual-scholarly clarity, but also that the business world anxiously awaits academia's last word on the topic – here, the academic gospel concerning the efficacy of market contracts. The standard introduction

would then maintain that the issues are not yet resolved, cite leading scholars who have acknowledged how difficult the issues are, and posit that this lack of resolution is manifested in inadequate development of the doctrine. And, finally, this hypothetical introduction would lay out a set of questions that ought to be addressed and the various ways in which the contributions to the symposium advance the answers to these questions.

You likely have read, by now, many such introductions-to-symposia and can recognize their boilerplate structure, their adherence to the how-to-write-an-introduction protocol. But if this hypothetical introduction – the one I eventually decided not to write – is indeed standard and predictable, it does not only introduce the topic of boilerplate; it also embodies that very phenomenon. Thus, ironically, it must satisfy many of the characteristics of boilerplate that the articles in this volume describe. Writing an introduction about boilerplate, it turns out, is also producing boilerplate!

Perhaps the most obvious analogy between boilerplate contracts and boilerplate introductions is the following. Like boilerplate contracts, boilerplate introductions-to-symposia are not read by anybody. (Why, then, are they written, you may naïvely wonder. I will say something about this later.) The "un-readness" property is of course a troubling phenomenon, both for contracts and for symposia introductions. Luckily, some of the contributions to this symposium address this un-readness feature of boilerplate. Robert A. Hillman, for example, investigates whether advance disclosure mechanisms can help consumers know what's in the contract or whether they would merely backfire against the interests of consumers;[2] Michelle E. Boardman suggests that in some industries the un-readness (and unreadability) of boilerplate is a perfectly reasonable – in fact, desirable – feature of a system in which contract terms are written not to expropriate value but to stabilize meanings.[3]

Here is a second analogy between boilerplate terms and symposium introductions: They appear objective, but they are often one-sided. You can probably recall some introductions to past symposia that you read (despite their un-readness . . .), in which the introducer put on a mask of neutrality, acknowledged all the relevant and conflicting perspectives, provided broad-as-possible context and normative appeal, and yet planted in all of that objectivity his or her own controversial agenda, building on a set of selective assumptions and skewed observations. I am sure I can recall some such introductions, and I'm pretty sure I even wrote one.[4] Similar to introductions, this buried one-sidedness is also a very familiar feature of boilerplate contracts. Disguised by "legalese," they are often unbalanced, favoring their drafter. Although the one-sidedness of consumer contracts is hardly a discovery, several contributions to the volume offer a new understanding of this phenomenon. Lucian A. Bebchuk and Richard

A. Posner, in one chapter,[5] and Jason Scott Johnston, in another chapter,[6] argue that self-serving boilerplate terms may not be as bad as they seem. They argue that one-sided terms are a general feature of contracts written by firms who care about their reputations and who do not intend to strictly enforce such terms. These two chapters argue that firms write one-sided terms in order to have the option to enforce them selectively to fend off consumer opportunism but otherwise let their honest clients off. Johnston nicely calls it "tailored forgiveness"; Bebchuk and Posner attribute this feature to the observability but nonverifiability of opportunism – that is, to the difficulty of proving it in court. Both these articles portray a reality in which one-sidedness poses less of a concern than previously thought.

Against this view, Ronald J. Mann examines one-sided boilerplate in credit card contracts and concludes that they continue to burden debtors.[7] He suggests that contract law doctrine may be inadequate in dealing with this problem and explores the case for prohibitions against some such terms or even a regulatory promulgation of more balanced mandatory clauses. Along this line, Clayton P. Gillette explores an intermediate form of intervention. Instead of regulating terms, the government can preapprove standard terms. The approval will shield the drafter from ex-post judicial scrutiny.

Paradoxically, the only way to know if the un-readness of boilerplate indeed leads to one-sidedness is to read the terms (in the same way that you are currently reading a normally unread Preface). Several studies in this symposium do just that. They measure the bias of terms in specific sectors, such as software licensing and heavy manufacturing. Surprisingly, they find that in areas where everyone would have expected there to be a bias, it does not exist;[8] and, in areas where a bias should not exist, it is substantial.[9]

There is another, more subtle feature of introductions-to-symposia, which they again share with boilerplate terms. In a typical introduction, the collection of articles in the symposium being introduced is not a result of a tournament or competition between able scholars. The list is solicited and tailored, and the writer of the introduction is usually the person who put together this list and shaped it to correspond with what he or she perceives to be the ideal agenda. In the same way that the introduction describes a substance that is not negotiated but rather unilaterally tailored, the boilerplate contract stipulates a substance of a transaction that is not negotiated or bilaterally dickered but, rather, dictated – unilaterally drafted. Of course, this raises difficult questions about the relationship between boilerplate and the power to dictate. Douglas G. Baird demonstrates in this symposium some of the fallacies that have become all too common in addressing this relationship.[10] He argues that the evils of concentrated economic power have nothing to do with boilerplate. Revisiting

some of the classic cases from the folklore of contract law, he shows that it is not the fine print that makes some clauses troublesome. But in a rich and original chapter, David Gilo and Ariel Porat show a variety of previously unrecognized ways in which boilerplate terms do operate in an anticompetitive fashion, such as to price-discriminate, facilitate collusion among sellers, and deter entry by new sellers.[11] The unilateral drafting of boilerplate is also studied by James J. White and me in a merchant-to-merchant context. We examine the contracts between automotive companies and their suppliers, one of the most important form contracts (in terms of economic stakes) ever drafted.[12] We uncover several ways in which the drafters of these contracts prevent negotiations and tailoring from ever occurring to bolster their economic rents.

If there is a significant boilerplate element to the craft of writing an introduction – if introductions are indeed standard and predictable – this raises the question: Why bother writing them? Similarly, if a form contract is boilerplate to be used and replicated by many similarly situated parties, why would any single individual have the incentive to draft it? A boilerplate contract is a public good – an item that is copied freely by others – and we should therefore expect a problem of underproduction. This question is studied directly by Kevin E. Davis, who identifies the production paradox and looks at the role of nonprofit organizations in generating boilerplate contracts.[13] It is also studied by Stephen J. Choi and G. Mitu Gulati, who look at the incentives of boilerplate drafters and define their crucial role in giving interpretive meaning to boilerplate.[14] Choi and Gulati's study is even more ambitious: It suggests that a better way to understand the emergence of boilerplate – and to interpret it when ambiguous – is to conceive of it as *statute* and apply statutory interpretation techniques to dispute resolutions.

I have noticed another thing about published symposia: Readers rarely sit down to read an entire symposium from the introduction to the last article. Rather, most readers may bump into one or a small subset of individual symposium articles that are of particular interest to them. This suggests that, other than for the participants in the conference, there is really no audience for introductions. Summarizing to the hypothetical symposium reader what the articles of the symposium are about is a service that future readers do not really need and of which very few would make use. In other words, symposia introductions are a wasteful – *inefficient*? – scholarly effort. This conclusion is every bit as unorthodox as the idea that boilerplate contracts also may be inefficient. And yet the claim that boilerplate could be inefficient is a more difficult proposition to defend. There is a long tradition in law and economics arguing for the efficiency of standard-form contracts. Several of the contributions in this volume, however, suggest otherwise and provide either evidence or new

theoretical underpinnings for the inefficiency conjecture.[15] Choi and Gulati, studying the evolution of boilerplate in sophisticated transactions, show why it is often unlikely that boilerplate converges to the most efficient terms.[16]

If I somehow got you to read this far, you may recognize that this introduction includes two types of information. The first type is specific to the forthcoming symposium and conveys its particular context (for instance, my references to the specific articles and to the prior standard-form contracts literature). The second type of stuff you read is more general and can be used, with almost no changes, to introduce other symposia on a variety of topics. This distinction roughly corresponds to what Henry E. Smith, in his important contribution to this symposium, calls intensive and extensive communications.[17] Contracts, when drafted ad hoc, are highly intensive information-rich rights. Property, in contrast, is less context dependent, less information specific, and therefore more extensive. Smith suggests that boilerplate represents a shift of contractual rights toward the status of property. He argues that the *modularity* feature of boilerplate is what allows it to have its extensive appeal.

Finally, in many contracts that are otherwise skewed in favor of their drafters, we nevertheless find boilerplate terms that appear to accord some balance. For example, one of the "hidden roles" of boilerplate that Gilo and Porat discover in their article is the provision of true and accessible benefits – but only to those who labor to read the unreadable contract.[18] Likewise, two contributions to this volume are aimed at providing more balance – and more fairness? – to the otherwise dominant law-and-economics presence but, like boilerplate, can be accessible mainly to readers who will labor to read through most of the other chapters. I have asked two of the more influential scholars that have studied standard-form contracts using other approaches to comment on the ideas that are advanced in the volume. Accordingly, Margaret Jane Radin, whose recent work identifies new challenges posed by standardization of contract in the digital age,[19] and Todd D. Rakoff, whose seminal work on contracts of adhesion continues to provide a baseline for the study of form contracts,[20] responded to this challenge.[21] Note that these commentaries are anything but the boilerplate commentaries that sometimes are affixed to symposium articles. Rather, this symposium provides a platform for Radin and for Rakoff to examine the emerging inventory of new ideas about boilerplate – an inventory that is hopefully richer after this symposium – and to reevaluate their own thinking on the topic.

As occasional market transactors, you surely know that many important details of transactions you are about to enter are buried in boilerplate, but you often prefer to read sellers' pamphlets to figure out the big picture – what the bargain is about. What, then, is the big picture coming out of this volume?

What can we write on our pamphlet? I think we can safely say this symposium is breaking new ground in the study of boilerplate and standard forms beyond the general claims about market power, competition for terms, and network externalities. On a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product? On an empirical level, boilerplate is studied in specific contexts, including insurance, credit cards, auto manufacturing, debt financing, and electronic commerce. The contributions to the symposium reveal subtle and previously unrecognized ways in which boilerplate clauses encourage information flow – but also dampen it; increase competition – but also reduce it; how new boilerplate terms are produced – and how innovation in boilerplate is stifled; how negotiation happens in the shadow of boilerplate – and how it is subdued; and offer new explanations as to why boilerplate is so often one-sided. With emphasis on empiricism and economic thinking, this symposium provides a more nuanced understanding of the DNA of market contracts – the boilerplate terms.

This volume presents a collaborative effort by leading scholars of private law to provide a richer understanding of the relation between contracts and markets. Many of the chapters in this book were previously published in full article length in a *Michigan Law Review* symposium issue, Vol. 104, No. 5 (March 2006), which was dedicated to the conference on "Boilerplate" that took place in Ann Arbor, Michigan, in October 2005. The current volume provides a revised and abridged version of these articles, focusing on the theme of this book, along with additional, new contributions.

LIST OF CONTRIBUTORS

Douglas G. Baird is the Harry A. Bigelow Distinguished Service Professor of Law and formerly the Dean at the University of Chicago Law School. He is the author of numerous books and articles on bankruptcy, contracts, and law and economics, including *Game Theory and the Law* (Harvard University Press, 1994) (with Robert Gertner and Randall Picker), *The Elements of Bankruptcy* (Foundation Press, 4th ed., 2006), and *Cases, Problems, and Materials on Bankruptcy* (Foundation Press, 3rd ed., 2000) (with Barry Adler and Thomas Jackson). Baird earned a B.A. from Yale University and a J.D. from Stanford University.

Lucian A. Bebchuk is the William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance and Director of the Program on Corporate Governance at Harvard Law School. He is also a Research Associate of the National Bureau of Economic Research, and an Inaugural Fellow of the European Corporate Governance Institute. Bebchuk holds an LL.M., S.J.D., and Ph.D. in Economics from Harvard University. His main areas of research are corporate governance, law and finance, and law and economics. Bebchuk's recent writings include *Pay without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004, with Jesse Fried), "The Case for Increasing Shareholder Power" (*Harvard Law Review,* 2005), and "The Costs of Entrenched Boards" (*Journal of Financial Economics*, 2005, co-authored with Alma Cohen).

Omri Ben-Shahar is the Kirkland and Ellis Professor of Law and Economics and the director of the Olin Center for Law and Economics at the University of Michigan. He holds a B.A. in economics and an LL.B. from Hebrew University and an S.J.D. and Ph.D. in economics from Harvard University. Ben-Shahar teaches courses in contracts, electronic commerce, intellectual property, and economic analysis of law. He writes in the fields of contract law and products liability. He previously edited the conference "Freedom *From* Contract" (*Wisconsin Law Review*, 2004).

Michelle E. Boardman is an Assistant Professor of Law at George Mason University. She holds a J.D. from the University of Chicago Law School. Boardman clerked

for Judge Frank Easterbrook at the Seventh Circuit Court of Appeals and served as Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice. She writes in the area of insurance law and contracts.

Stephen J. Choi is the Murray and Kathleen Bring Professor of Law at New York University. He previously taught at the University of Chicago Law School and at University of California, Berkeley, where he was the Roger J. Traynor Professor of Law. He holds an A.B., J.D., and Ph.D. in economics from Harvard University. Choi is the author of *Securities Regulation: Cases and Analysis* (Foundation Press, 2005) (with Adam Pritchard) and more than forty articles, primarily on corporations and capital markets.

Kevin E. Davis is Professor of Law at New York University. Davis received his B.A. in Economics from McGill University, an LL.B. from the University of Toronto, and an LL.M. from Columbia University. He previously taught at the University of Toronto. Davis writes in the areas of contracts, commercial law, and law and development.

Clayton P. Gillette is the Max E. Greenberg Professor of Contract Law and Vice Dean at the New York University School of Law. He was previously a Professor of Law at the University of Virginia and Boston University. Gillette earned his J.D. from the University of Michigan and a B.A. from Amherst College, and he clerked for Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. Gillette writes on commercial law and local government law. He is the author of casebooks on local government law (with Lynn Baker) and payment systems and credit instruments (with Alan Schwartz and Robert Scott) and a textbook on municipal debt finance law (with Robert S. Amdursky).

David Gilo is an Associate Professor of Law at Tel Aviv University, where he teaches antitrust and corporate law. He earned a B.A. and LL.B. from Tel Aviv University and an S.J.D. from Harvard University. He writes in the areas of antitrust, regulated industries, and industrial organization.

G. Mitu Gulati is a Professor of Law at Duke University Law School. He previously taught at University of California, Los Angeles, and Georgetown University. Gulati writes in the areas of securities regulation, international debt transactions, corporate law, employment discrimination, and judicial behavior. His most current research is on odious debt. Gulati earned an A.B. from the University of Chicago, M.A. from Yale University, and J.D. from Harvard University Law School.

Robert A. Hillman is the Edwin H. Woodruff Professor of Law at Cornell University Law School. He has written extensively on contracts and commercial law and is the author of several books, including *Principles of Contract Law* (West, 2004), *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Kluwer, 1997), and *Contract and Related Obligation: Theory, Doctrine,*

and Practice (with R. Summers) (West, 4th ed., 2000). A graduate of Cornell University Law School, Professor Hillman clerked for Judges Edward C. McLean and Robert J. Ward, of the Southern District of New York. He is currently the reporter for the American Law Institute's Principles of the Law of Software Contracts.

Jason Scott Johnston is the Robert G. Fuller, Jr., Professor of Law and Director, Program on Law, the Environment, and Economics at the University of Pennsylvania Law School. He previously taught at the University of Vermont and Vanderbilt University. Johnston writes in the areas of contracts, environmental law, law and economics, and natural resources law and policy. He recently organized a conference on the law, economics, and science of liability for global warming. He earned an A.B. from Dartmouth College and a J.D. and Ph.D. in economics from the University of Michigan.

Ronald J. Mann is the Ben H. and Kitty King Powell Professor of Business and Commercial Law and Co-Director of the Center for Law, Business, and Economics at the University of Texas at Austin School of Law. A graduate of the University of Texas School of Law, Mann clerked for Judge Joseph T. Sneed on the Ninth Circuit of the U.S. Court of Appeals and Justice Lewis F. Powell, Jr., of the U.S. Supreme Court. He previously taught at Washington University in St. Louis and the University of Michigan Law School. Mann is the author of several books, including *Charging Ahead: The Growth and Regulation of Payment Card Markets Around the World* (Cambridge University Press, 2006), *Payment Systems and Other Financial Transactions: Cases, Materials, and Problems* (2nd ed., 2003), and *Electronic Commerce* (with Jane Winn) (2nd ed., 2005). He recently served as the reporter for the amendments to Articles 3 and 4 of the Uniform Commercial Code.

Florencia Marotta-Wurgler is an Assistant Professor of Law at New York University School of Law. Previously the Wagner Fellow for Law and Business at New York University, she earned a B.A. from the University of Pennsylvania and a J.D. from New York University. Marotta-Wurgler writes in the areas of contracts and commercial law.

Ariel Porat is the Alain Poher Professor of Law and former Dean at Tel Aviv University Faculty of Law. He earned his LL.B. and J.S.D. from Tel Aviv University. Porat taught as a Visiting Professor at the University of California at Berkeley, the University of Chicago, Columbia University, and the University of Virginia. He writes in the areas of torts and contracts and is the author of *Contributory Fault in the Law of Contracts* (1997), *Tort Liability under Uncertainty* (with Alex Stein) (Oxford University Press, 2001).

Richard A. Posner is a judge on the U.S. Court of Appeals for the Seventh Circuit (since 1981). He previously was the Lee and Brena Freeman Professor of Law at the University of Chicago Law School, where he is now a senior lecturer. Judge Posner has written a number of books, including *Economic Analysis of Law* (6th ed., 2003),

The Problematics of Moral and Legal Theory (1999), *Antitrust Law* (2nd ed., 2001), *Law, Pragmatism, and Democracy* (2003), *Catastrophe: Risk and Response* (2004), and, most recently, *The Little Book of Plagiarism* (2007).

Margaret Jane Radin is the William Benjamin Scott and Luna M. Scott Professor of Law at Stanford University. She received an A.B. from Stanford University and a J.D. from the University of Southern California. Radin writes in the areas of property theory, intellectual property, contracts, and the jurisprudence of cyberspace. She is the author of *Contested Commodities* (Harvard University Press, 1996) and *Reinterpreting Property* (University of Chicago Press, 1993).

Todd D. Rakoff is Byrne Professor of Administrative Law at Harvard University Law School. He earned a B.A. from Harvard University and Oxford University and a J.D. from Harvard University Law School. He writes in the areas of contracts and administrative law. Rakoff is the author of *A Time for Every Purpose: Law and the Balance of Life* (Harvard University Press, 2002) and numerous casebooks, including *Cases and Materials for the Course in Contracts* (3rd ed., 2004).

Henry E. Smith is Professor of Law at Yale University Law School, where he teaches in the areas of property, intellectual property, natural resources, and taxation. Previously, he clerked for the Hon. Ralph K. Winter, U.S. Court of Appeals, for the Second Circuit and taught at the Northwestern University School of Law. In 2003, he was awarded a Berlin Prize Fellowship by the American Academy in Berlin. Professor Smith has written primarily on the law and economics of property and intellectual property, including *Self-Help and the Nature of Property*, *Exclusion and Property Rules in the Law of Nuisance*, and *The Language of Property: Form, Context, and Audience*. He holds an A.B. from Harvard University, a Ph.D. in Linguistics from Stanford University, and a J.D. from Yale University.

James J. White is the Robert A. Sullivan Professor of Law at the University of Michigan Law School. White has written on many aspects of commercial law and has published the widely recognized treatise, *Uniform Commercial Code* (with Robert Summers). He is also the author of several casebooks on commercial, bankruptcy, and banking law. White has served as the reporter for the Revision of Article 5 of the Uniform Commercial Code and has served on several American Law Institute and National Conference of Commissioners on Uniform State Law committees dealing with revision to the Uniform Commercial Code. White earned his B.A. from Amherst College and his J.D. from the University of Michigan Law School.