

Tackling 'boilerplate clauses'

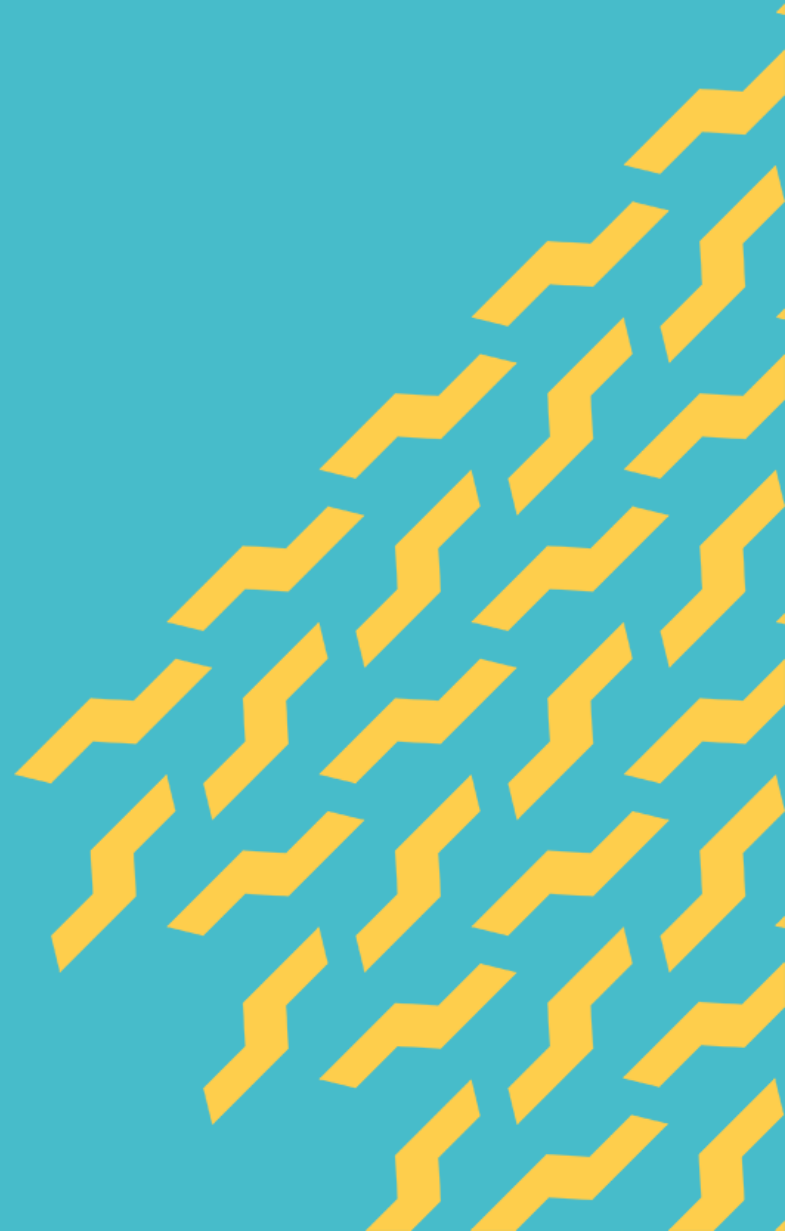
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Structure of Session

- Boilerplate clauses – what are they and why used
- Some common examples:
 - Entire Agreements
 - Non-Reliance / Misrepresentation
 - No waiver clauses
 - Priority clauses
 - No oral variations
 - Assignment
 - Prohibition on Subcontracting
 - Notices
 - Force Majeure
 - Termination
 - Set-Off
- Drafting tips
- Q&A

Boilerplate clauses



Boilerplate clauses

- Such clauses are often thought of as standard and are often included in the “miscellaneous” provisions section.
- These provisions can be overlooked / not generally negotiated. Temptation not to pay them much attention - but this is a very dangerous view to adopt.
- Boilerplate provisions generally fall into the following main categories:
 - Do not add much – confirm or restate the application of general rules of law to the contract, e.g., severance / survival / rights and remedies preserved
 - Trying to preserve rights - that may otherwise be lost – e.g., non-waiver
 - Trying to exclude rights - extinguish or exclude claims under the contract where claims might ordinarily exist at law, e.g., Entire Agreements clause & Third Party Rights clause
 - Granting rights that are not otherwise recognised by general law, e.g., Force Majeure / termination

Examples of boilerplate drafting



- An Entire Agreement Clause provides that only those terms set out in the actual signed agreement form part of the contract
- Without Entire Agreement Clause – could create a side agreement under common law

Example Entire Agreement Clause:

“This Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all prior agreements, understandings, negotiations and discussions, whether oral or written. There are no warranties, covenants, conditions or other agreements, express or implied, collateral, statutory or otherwise, between the parties in connection with the subject matter of this Agreement except as specifically set out herein.”

- An Entire Agreement Clause excludes prior contracts and methods and practices which at law form a contract
- The Entire Agreement Clause should expressly carve out any pre-existing contracts that are intended to remain in force

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Entire Agreements Clauses

- The purpose of an Entire Agreement Clause was stated in the *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611, as being:

“... to preclude a party to a written agreement threshing the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim ... For [an entire agreement] clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations ... shall have no contractual force, save in so far as they are reflected and given effect in that document.”

- Inclusion of an Entire Agreement Clause will not always preclude the bringing of a claims for implied terms or claims resulting from events after execution of the contract

- The law of misrepresentation applies to representations and statements made before a contract is formed where the representation (i) is false, (ii) relied upon by a party, and (iii) induces the other party to enter the contract.
- When a representation is false, it is known as a misrepresentation
- Non-reliance clauses operate to:
 - exclude reliance on precontractual representations, and
 - establish that the parties have not relied on any matter other than what appears in the contract itself

Example Non-Reliance/Misrepresentation Clause:

“Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.”

- Prevents reliance on the alleged misrepresentation as a contractual estoppel.
- Specific issues to consider:
 - An Entire Agreement Clause is not an automatic defence to an allegation of misrepresentation – clear words are needed to exclude a liability for negligent misrepresentation
 - Exclusion of fraudulent misrepresentation is not enforceable
 - A reference to “representations” does not include misrepresentations
 - Wording which excludes liability for misrepresentation is subject to section 3 of the Misrepresentation Act 1967 – subject to the reasonableness test under UCTA 1977

Implied Terms

- Implied terms are terms that are not expressly set out in the contract, but which are implied into it the Contract for “business efficiency”.
- Case law has considered whether implied terms are separate to the contract and so should be excluded under an Entire Agreement Clause.
- Whether Entire Agreement Clauses can exclude implied terms will depend on whether the implied terms is “Intrinsic” or “Non-Intrinsic”.
- For Non-Intrinsic implied terms include express wording such as “usage or course of dealings” in Entire Agreements Clause.

- A party may lose a right if it waits too long to take action.
- Waiver occurs when a party abandons a legal right by words or conduct – waiver can be express or implied – the other party has acted on the statement or conduct – and it would be inequitable for the innocent party to enforce the legal right.
- Where a party has a legal right and chooses not to exercise it then it usually loses its right to claim for breach of contract – even if it changes its mind later
- No waiver clause tries to preserve all rights being waived - especially for delay

Example Waiver Clause:

“Any delay, omission, indulgence or forbearance by either party to exercise any of the rights not any non-compliance by a party under the contract shall be construed as a waiver of that right, nor shall it impair such right on future occasions.”

- Interpreting contracts: Intention of the Parties; commercial common sense; what the words say?

“..the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed.”

Arnold v Britton [2015] UKSC 36

Example Priority Clause:

“... if there is any discrepancy of inconsistency between the Contract Documents, the following order of precedence shall apply:

- *The Articles of Agreement;*
- *The Contract Conditions;*
- *The Attendances Document;*”



No oral variations / No oral modifications

Example No Variation Clause:

“No variation of this agreement shall be effective unless it is in writing and signed by the parties.”

... the law *“should and does give effect to a contractual provision requiring specified formalities to be observed for a variation”*

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24

Justifications:

1. Prevent attempts to undermine written agreements
2. Oral agreements can give rise to misunderstandings / uncertainty
3. Formality in recording variations assists corporations to police and authorise decisions

Prohibition on Subcontracting

- General Rule: Contractual obligations that do not require personal performance by the contractor may be subcontracted, unless otherwise prohibited by the contract itself.

“...it is to be inferred that it is matter of indifference whether the work should be performed by the contracting party or by some sub-contractor whom he employs”.

Davies v Collins [1945] 1 All ER 247

- Many standard forms will seek to limit or qualify the right to subcontract

Consent to sub-contracting Clause (JCT D&B 2016; Clause 3.3.1)

“... the Contractor shall not without the Employer’s consent sub-contract the whole or any part of the Works.”

- JCT D&B 2016; Clause 1.10 – consent must not be “*unreasonably delayed or withheld*”.

- Contractual benefits are freely assignable in English law without the other party's consent
- If the parties wish to restrict these abilities, they should do so expressly
- JCT D&B 2016; need to obtain consent and Clause 1.10 does not apply to consent to assign
- Note a party's contractual duties (burdens) cannot be transferred without the other party's consent
- Assignment on termination:

“...if so required by the Employer within 14 days of the date of termination, assign (so far as assignable and so far as he may lawfully be required to do so) to the Employer, without charge, the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this Contract.”

- Strict compliance / follow the Contract

“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on a pink paper [...]”.



Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 192

Notices:

- Are they confrontational?
- Quote the contract / keep factual
- Check:
 - How served – many contracts prohibit email for certain notices
 - Where to serve the notice? Other requirements e.g. what language?
 - When do they need to be served by?

- Addresses non-performance due to events beyond a party's control
- English law has no general concept of *force majeure*.
- Needs to be drafted into the Contract to apply.
- *Force majeure* events are usually defined as acts, events or circumstances beyond the reasonable control of the party concerned.
- *Force majeure* clauses often exclude foreseeable and/or foreseen events.
- NEC4 Prevention Event (Clause 19.1):
“....an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it.”

Set-Off

- Acts as a defence to a payment claim.
- Set-off two liabilities: If E owes C £100, C owes E £90 – E to make payment of £10.
- The right to set off arises at law:
 - Litigation set-off
 - Equitable set-off
 - Insolvency set-off
- Contractual set-off

Example Set-Off (exclude for one party):

“All amounts due under this Agreement from the Contractor to the Employer shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).”

Example Set-Off (for one party):

“The Employer may at any time, without notice set off any liability of the Contractor to the Employer against any liability of the Employer to the Contractor, whether either liability is present or future, liquidated or unliquidated, and whether or not either liability arises under this agreement. ”

- Common law rights are limited
 - Renunciation
 - Repudiatory breach – a party acts as if “*he does not mean to accept the obligations of a contract any further.*” Heyman v Darwins [1942] A.C.
 - Breach of a condition
- Express terms required for:
 - Insolvency/bankruptcy
 - Failure to proceed regularly and diligently
 - Termination at will / omission of works
 - Regular breach not remedied
- A common law right to terminate is presumed to exist unless there is an express term excluding such a right in the contract.



Any questions?



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Thank you

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