

DRAFTING BIOLER PLATE CLAUSES IN COMMERCIAL CONTRACTS (1)

Even as a lawyer certain phrases and terms still leaves one baffled. One of such terms is “Boilerplate clauses”. What are they? Why boilerplate? What is the origin of this name? One modern dictionary defined boilerplate clauses as “all purpose text you can type in once, save and recycle in other documents” Another dictionary defined boilerplate as “a thick plate of iron used in the production of boilers. Going by the two definitions one can say that “constancy” is the key. If ever a boiler in a factory needs to be changed it is never because the iron plate is totally destroyed. By the same token, each agreement has certain clauses that are ever present (like the boiler plate) - subject to certain contextual changes. Boilerplate clauses are concerned with the operation of the agreement - interpretation, notices etc, and they clarify the rights of the parties in certain eventualities - fire, thunderstorm, or assignment etc. Knowing what changes to make, which clauses to include or delete, the circumstances under which to tinker and how to tinker is how legal skill comes into play. A businessman in the heat of negotiations will rather deal with the “commercial issues” and leave the boilerplate clauses to the solicitor. These are dry details for which the solicitor should earn his keep. However many boilerplate clauses have far reaching commercial implications and knowing what changes to make, which clauses to include or delete, the circumstances under which to tinker and how to tinker is how legal/commercial skill comes into play. Let us review some common boilerplate clauses in this light:

1. Arbitration Clause

This clause is becoming quite popular, and gains more popularity as arbitration becomes more acceptable as a means of settling commercial disputes. The import of this clause is that in the event of a dispute the parties must explore arbitration instead of going straight to the court. The question that is valid here is whether an arbitration clause is always advisable? I would categorically say “not always”. Depends on the circumstances of your client, an arbitration clause may be a clog in the wheel of your client - arbitration is not necessarily the haven that some claim. For example in straight forward contracts where the likely redress that your client would seek is to sue for payment of balance of contract sum you are better off resorting to the “quicker” (all things being equal) and cheaper action under the undefended list in court. To buttress this some recent decisions have suggested that in the case of an undisputed debt that can be heard summarily by a court the arbitration clause can be avoided and the party owed can proceed straight to court. If we see the expedience in an arbitration clause then some of the major issues to deal with are: Enforceability: where the contract has parties from different countries, advice should be sort on how the domestic courts of the home countries of the parties enforce arbitral awards. A typical question is whether that country in question is a signatory to the New York Convention as enforcement is usually easier. Other issues for consideration in drafting an arbitration clause are choice of law, choice of arbitrator, and exclusion of appeal to court.

2. Entire Agreement Clause

The aim of an 'entire agreement' clause is to state that all the terms of a contract are contained within a written agreement between the parties to a contract. In essence other documents and statements not forming part of the contract are excluded. A typical entire agreement clause will read: "This Agreement contains the whole agreement between the parties in respect of (subject matter) and supercedes and replaces any prior written or oral agreements, representations or understandings between them in relation to (subject matter). This clause can be a pendulum working hardship to both sides, or one side at a time. It should therefore not be automatically included in a contract. Where it is included then some care should be taken to (a) See that any warranties (written or verbal) which induced your client to enter the contract are itemized in the contract (b) ensure that where the agreement has important Schedules there is a clear statement that the schedules are included, to avoid uncertainty. Therefore the entire agreement clause should begin as "This agreement, (inclusive of the schedules) contains the whole agreement" It should be noted that the courts will not always uphold an entire agreement clause. In *Thomas Witter Ltd vs TBP Industries Ltd (1996) 2 All ER 573* the court refused to accept a clause that sought to exclude liability for pre-contractual misrepresentations. In line with this judicial posture good practice currently dictates that after the usual entire agreement clause, the following exception be included: "Without limiting the generality of the foregoing, the parties confirm that they have not entered into this agreement on the basis of any representation that is not expressly incorporated into this Agreement. However nothing in this contract purports to exclude liability for any fraudulent statement or act.

3. "Best Endeavours" or "Reasonable endeavours"

Many contracts have a clause which reiterates that the "parties shall use their best endeavours" to keep their own covenants. One needs to understand that such clauses are not absolute obligations and they can be problematic. E.g a clause which states that "Mr A shall pay the sum of N1 Million naira on or before 20th January 2006" is usually not subject to varied interpretations because it is an absolute obligation. It is also usually not excusable. However if the same clause was drafted to read "Mr A shall use his best endeavours to pay the sum of N1 Million naira on or before 20th January 2006" then it becomes dicey - a matter of circumstantial interpretation. From the case law on "best" and "reasonable" endeavours we can surmise that reasonable endeavour is considerably less in obligation than best endeavours. The courts seem to allow a party to take some account of its own interests when using its "reasonable endeavours", but it is not easy to predict how far the courts will go. – *Phillips Petroleum Co (UK) Ltd V Enron (Europe) Ltd (1997) CLC 329, CA*. It is suggested that the "best" and "reasonable" parlances should be avoided as much as possible and to the best practices lean more towards specificity. After all it would take a 'reasonable' judge to have a generally acceptable view on acts that constitute "reasonable endeavours". And is reasonableness not a function of understanding the peculiarities of the transaction?

4. Severance & Invalidity Clause

A severance clause takes care of a situation where for some reason a particular clause in a contract becomes void, illegal or unenforceable. The severance clause simply states that the offending clause will be deemed to have been severed and the other clauses remain subsisting and effective. So if for example a subsequent law makes a clause illegal the entire agreement cannot be declared illegal, for as long as that clause does not affect the major aspects of party's obligations. A typical severance clause may read as follows: "If any provision of this agreement is prohibited by law or judged by a court to be unlawful, void or unenforceable, the provision shall, to the extent required, be severed from the agreement and rendered ineffective as far as possible without modifying the remaining provisions of this agreement, and shall not in any way affect any other circumstances of or the validity or enforcement of this agreement". The courts have developed the so called "blue pencil test" as regards this clause. This provides that if the offending clause is struck out and the major terms of the contract still stand then the contract will be allowed to subsist, however if after the offending clause is struck out the essence of the contract is lost, then the contract is lost in its entirety. For example where the offending clause is the consideration – *Goodinson v Goodinson* (1954) 2 All ER 255, CA

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