

DRAFTING BOILERPLATE CLAUSES IN COMMERCIAL CONTRACTS 2

In the part 1 of this article we had two dictionary definitions of boilerplate clauses. First was as “all purpose text you can type in once, save and recycle in other documents” or the other one was “a thick plate of iron used in the production of boilers”. We concluded that these definitions stressed “constancy” and in relation to commercial contracts boilerplate clauses refer to clauses that are a constant feature. The danger with boilerplate clauses is that because of their constancy even the best of lawyers get so familiar with them that they are paid little attention. We would in this article continue the review of some typical boilerplate clauses viewing the legal/commercial implications and intricacies.

1. NOTICES

Most agreements provide for parties to the agreement to pass information and make demands on one another as pertaining to the contract from time to time. These correspondences are called “Notices”. The modalities for serving and receiving these notices are often defined by the contract and have evolved with technological advances. From post, to telegram, to fax, today we have the email. In all these my thinking is that best practice is to bear in mind the peculiarities of the parties and the need to achieve “actual notice” and “proof of delivery”. It does happen today that correspondence is sent by fax (with fax “Sent Ok” print out) or by email (not returned undelivered) yet the other party did NOT receive the fax or the email. If your mode of sending a notice is strictly faxes and emails you are bound to suffer technological glitches that may be costly. Do not get me wrong, I see the benefits of modern technology, but practical reality is a constant in all situations. How many times do you forget to call to confirm that the other party received the fax only to realize later it never came through? What of emails that just disappear into cyberspace? I sent an email to a colleague in Argentina and he received it three weeks later. What if there is a power failure and faxes stored in memory are wiped out before morning? So much can happen! My thinking is that if the Notice required to be sent is not merely perfunctory but of great importance, then the registered mail, courier service and other

form of hand delivery with physical proof of receipt is still the best mode. The most dangerous part of this clause is the “deemed receipt” aspect which is usually inserted or implied by the rules of evidence. It assumes that if a letter was sent by regular mail then it is deemed to have been received by the other party within the period that such a letter is ordinarily expected to have arrived its destination. Does this always work as clock work? I think not. Such assumptions should not be readily adopted in agreements without an extra thought of the consequences. If for example it is a cross border contract and your client is in Nigeria, it follows that “regular mail” to the British means putting a stamp and posting the letter. If an overseas sender does not include a P.O Box in Nigeria it may never be delivered to your doorstep. Some agreements provide that “Notices if so served shall be effective from the date of mailing”. This is an attempt by one party to begin the count down from the day of mailing rather than delivery. Be wary of such attempts to be smart by half.

2. TERMINATION

In many agreements the issue of termination is either not provided for or very scanty in the detail. Termination is a hard fact of commerce. Relationships break down and issues arise. It is not enough to provide for grounds for termination, we must look at the likely issues that may arise with termination. Post termination disputes are easier to handle when principles are laid down on issues like severance packages, post termination obligations, asset sharing, subsisting monetary obligations, employees, and more. Many court cases are in existence or prolonged because the rules regarding termination were not spelt out and rather left to chance. The typical areas to consider in termination clauses are: What are the circumstances that warrant a termination? What are the obligations of the parties prior to and post termination? For example in a partnership what happens when one or more partners opt out. Existing clients, assets etc become issues for discussion. A road map should be provided ahead of such an eventuality. We should always be careful to terminate the agreement without giving room for wise arguments that all subsisting obligations are erased with the termination. Therefore many termination clauses wisely start with “Without prejudice to---- (mention the obligations that should subsist even after termination). These are usually pecuniary benefits accrued before termination, confidentiality clauses, non-compete clauses and others. We should be careful to ensure priority in payment in the event of termination due to bankruptcy, liquidation, dissolution or winding up of a Company. One may also consider including a “sweep up” clause stating that upon termination the obligations of the parties to one another shall be only as contained in the agreement. Such a clause is only advisable where the termination clause has been extremely detailed on consequences of termination, and the parties see the need to draw a line thereafter.

3. EXEMPTION CLAUSES

Exemption clauses are a regular feature in commercial contracting. They seek to limit

or exclude liability of a party to the contract. For example: exclude warranties that may be implied by law (i.e fitness for purpose in Sale of Goods); allow a party to unilaterally vary obligations under the contract (i.e change the time of delivery); limit liability to a fixed amount of money or exclude liability for consequential losses. How are exemption clauses viewed by the courts? The current judicial posture is that the courts are more disposed to clauses limiting liability rather than those excluding liability entirely – *E.E Caledonia Ltd v Orbit Valve plc* (1995) 1 All ER 174, CA. Also if the wording of the clause is unclear and ambiguous the contra proferentem rule of interpretation shall apply – i.e it shall be interpreted against the interest of the party seeking to rely on it. See *Tai Hing Cotton Mill Ltd V Liu Chong Hing Bank Ltd* (1984) 1 Lloyd's report 555. Can an exemption clause cover a fundamental breach or a complete non performance by a party? Whilst there is no absolute principle that says such situations cannot be covered there is a school of thought that argues that such exemption clauses deviate from the whole concept of binding contracts and makes it simply a statement of intent. It is however clearly established under English Law that an exemption clause will not relieve a party from liability caused by his own negligence unless the exemption clause is specifically drafted to exclude liability for negligence. See *Shell Chemicals UK Ltd and Shell UK Ltd v P&O Roadtanks Ltd* (1995) 1 Lloyd's Rep 297, CA

4. **WAIVERS**

Usually agreements come with obligations and corresponding rights. In certain situations a right accrues to a party under the agreement and for whatever reason that party fails to enforce it or make a requisite demand. In such a situation, the other party may argue if enforcement of the right is sought that because such a party has been slack in claiming the right, it is deemed to have been waived. And in certain circumstances a court may uphold this defence. To avoid the possibility of raising this defence a standard clause is usually inserted to provide that failure of a party to enforce any right at the time it accrues is not to be deemed as a waiver of that right. A typical clause reads: "No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy". A solicitors' decision to adopt such a clause depends on which party you are acting for. The rule of thumb is that the dominant party with the most rights to enforce will need this clause more than the weaker party. For example in acting for a Lessor of commercial property it is most likely that the Lessor will have more rights that are likely to be waived, whilst the Lessee's situation will usually depend on the whims of the Lessor. The Lessee's lawyer would not be in a hurry to include such a clause whilst the Lessor's solicitor will want to ensure that if his client forgets for example to take advantage of the Lessee's breach he is not foreclosed from doing so at a later date. Even where such a clause is not contained in an agreement, it is advisable for a party who intends to be

slow in enforcing a right to write a letter to the other party stating that for whatever reasons you do not intend to enforce that right at that time and this should not be interpreted as a waiver.

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