

Boilerplate Clauses in English Law Contracts

When one drafts or reviews an agreement, one often concentrates on the operative terms and conditions of the agreement and pays less attention to those provisions usually buried at the end of the agreement – boilerplate clauses. Such boilerplate clauses nevertheless serve an important function. This briefing explains the underlying purpose of certain boilerplate clauses commonly found in English contracts.

What is boilerplate?

Boilerplate clauses are not only a common feature of many English law contracts but have also been adopted in many other jurisdictions' contracts, including Japan. Such term refers to the relatively standardised clauses in contracts, which are often agreed with little or no negotiation and found towards the end of an agreement. While perhaps not as commercially sensitive as other terms in a contract and consequently often overlooked, they nevertheless perform a valuable and useful purpose in a contract.

Most boilerplate clauses clarify the relationship between the contracting parties. Generally, subject to statutory restrictions and illegality, the parties to an English law contract are free to define their contractual relationship between each other. By including boilerplate clauses, the parties to a contract can better define the relationship between themselves, which provides certainty if terms in the contract are ever disputed.

Omitting such boilerplate clauses may create uncertainty and expose certain elements of the relationship or agreement between the parties open to interpretation in a court of law, which is often an expensive and unpredictable exercise.

Common boilerplate clauses

Entire agreement

Entire agreement clauses provide that the contract in question constitutes the entire agreement and understanding between the parties with regard to the subject matter of the contract. By having an entire agreement clause, the contract will supersede any previous agreements and understandings between the parties, and therefore avoids the risk of any agreement made orally or in writing prior to the execution of the written contract being interpreted as being part of the legal contract between the parties. The clause therefore ensures clear legal relations between the parties and clarity on the exact terms agreed.

Conversely, when entering into a contract which contains an entire agreement clause, care must be taken that the terms of any previous understandings or agreements are reflected in the final written contract.

No representation/no reliance clause

Under English law, pre-contractual misrepresentations and reliance on such misrepresentations by another party may have significant adverse consequences for the contracting party who made such misrepresentations. No representation and no reliance clauses are used to avoid the risks of a claim for misrepresentation being brought by one of the parties to the contract.

Key issues

- What is boilerplate?
- Common boilerplate clauses

The rules on pre-contractual misrepresentations in English law are strict and onerous. If one party to a contract relies on a material misrepresentation of fact by the other when entering into the contract, the innocent party is entitled to rescind the contract, i.e., to treat the contract as if it had never been entered into and recover payments made pursuant to the contract. If the misrepresentation was made negligently, the innocent party can also recover damages on the wide basis available in fraud, even for losses that could not have been foreseen at the time the misrepresentation was made. Even if a representation appears to be one of opinion rather than of fact and therefore seemingly outside these strict rules, the representation will often be construed as carrying with it the implication of fact that the maker had reasonable grounds for holding such opinion, and thus be subject to these rules.

The purpose of a no representation and no reliance clause is to provide that the parties have not made any pre-contractual representations and, even if they have, that neither party has relied on any representation made by the other that is not set out in the contract itself.

This clause provides protection against pre-contractual representations, but does not guard against representations contained within the contract that are untrue and parties should take care to ensure that they do not misrepresent facts within the contract.

No waiver clause

A breach of contract will often give the non-defaulting party the right to terminate a contract, whether under the express terms of the agreement or under general contract law. The non-defaulting party does not have to exercise its right of termination immediately on learning of such breach, as it is entitled to some time to consider its options. However, if the non-defaulting party does nothing for too long a period of time, there is a risk that it will be treated as having affirmed the contract.

More significantly, a right to terminate will be lost by the non-defaulting party doing something that is inconsistent with termination. A waiver of a right to terminate a contract requires: (a) knowledge of the facts giving rise to the right to terminate; and (b) clear and unequivocal notice to the other, whether by words or conduct, of the waiver of an election to terminate.

No waiver clauses generally provide that a failure or delay in exercising a right will not constitute a waiver of that right and thus aim to preserve termination (and other) rights, and can avoid inconsistent acts constituting a waiver of a contractual right of termination. Of course, these have no application where the contract sets out the steps a party must take (and by when) in order to terminate the contract and the non-defaulting party has not followed such steps.

Severance

At times, certain clauses of a contract may be held void or unenforceable due to illegality, invalidity or unenforceability. This may occur for example by a change in regulatory laws after a contract is signed which make certain obligations set out in such contract illegal to perform, or if a restrictive covenant in an employment agreement is considered to be too broad.

Without a severance clause, a void clause may cause the entire contract to become void. A severance clause provides that, instead of the entire contract terminating or becoming void, only the offending clauses will be void or unenforceable and the rest of the contract will remain intact.

There are limitations as to what a severance clause can achieve and at times a contract may not avoid being found to be void or unenforceable despite the existence of such clause, because the void terms are so fundamental to the contract that the contract has no meaning without such provisions. Care should therefore be taken to ensure all key terms of the contract are legal and fully enforceable, whether or not such contract incorporates a severance clause.

Counterparts

Signing in counterparts is when a party signs a separate physical copy of a document to the physical copy signed by the other party (or parties) to the contract. This is in contrast to where the same physical document is signed by all parties. This method is commonly used where documents are signed electronically and has advantages in terms of logistics and timing on complex cross-border contracts. Another advantage of this method is that the parties are able to sign the documents in advance and release the signed documents simultaneously to make the contract effective.

Execution in counterparts however requires a counterparts clause to ensure that executing documents in this fashion is sufficient to create a binding contract between the parties. A counterparts clause should therefore be included in a contract if execution by counterparts is a possibility.

Third party rights

The Contracts (Rights of Third Parties) Act 1999 ("**Third Parties Act**") gives a person who is not a party to a contract a right to enforce a term of a contract (including relying on a disclaimer) if: (i) the contract expressly provides for it; or (ii) a term purports to confer a benefit on the third party, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

The Third Parties Act applies to all contracts governed by English law. Since there is a risk that such rights may be conferred implicitly, contrary to the intentions of the parties named in the contract, a clause excluding this right is often included in English law contracts.

A clause excluding third party rights may also be modified to suit the parties' agreement. It is for example possible for the clause to grant specific rights to a third party, while excluding all other rights of third parties.

Conclusion

Each boilerplate clause has a purpose and can achieve different results depending on how it is drafted. It is therefore important that these clauses are reviewed by legal counsel in conjunction with the operative terms to ensure that they reflect the final agreement between the contracting parties.

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