

Boilerplate clauses



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Introduction

This paper provides some common examples of boilerplate clauses (standard clauses) and explains why these clauses should, as a matter of good practice, be included in all contracts.

Example boiler plate clauses

Governing law

An example standard clause for specifying the governing law of a contract is:

This contract will be interpreted under and governed by the laws of [].

It is fundamental for the parties to agree on the governing law of a contract. This is because legal concepts and drafting will differ depending on the chosen governing law. For example, the treatment of liquidated damages and exclusion for consequential losses under English, New York, Hong Kong and Australian law is different to the treatment under the laws of the United Arab Emirates, India and many jurisdictions in Asia.

In the absence of a governing law clause, the courts will apply the rules of private international law to determine the governing law of the contract. That result may be contrary to the intention of the parties.

In general, courts will normally give effect to the agreed chosen law as the proper law unless the choice is not made in good faith or is made to avoid mandatory provisions of the law which would otherwise be the proper law of the contract. There is also a growing body of authority which suggests that the law chosen by the parties must have a substantial, though not necessarily predominant, connection with the contract.

Jurisdiction

An example standard clause for specifying the jurisdiction which the parties agree disputes will be heard is:

The parties submit to the [non-exclusive/exclusive jurisdiction] of the courts of [] and any courts that may hear appeals from those courts in respect of any proceedings in connection with this contract.

In most circumstances, the parties will agree to submit to the non-exclusive jurisdiction of a particular jurisdiction. This means that there is at least one jurisdiction where the parties have agreed that disputes can be heard. This provides certainty to the parties because unless the court itself decides that it has no jurisdiction to hear the dispute, the dispute can be heard in the jurisdiction chosen.

Unless there are compelling reasons to submit to an exclusive jurisdiction, it is preferable to nominate a "non-exclusive" jurisdiction. The main reason for this position is that when a dispute arises, a party may decide that it would, in fact, be preferable to commence the action in a different jurisdiction to the jurisdiction agreed as the exclusive jurisdiction. However, depending on the governing law, a party may be bound by the "exclusive" jurisdiction clause and be prohibited from bringing the action in a different jurisdiction. It is also important to consider whether a submission to the exclusive jurisdiction clause is valid in the chosen jurisdiction.

Entire agreement

An example standard entire agreement clause is:

This contract constitutes the entire agreement between the parties and sets out a full statement of the contractual rights and liabilities of the parties in relation to the works and no negotiations between them nor any document agreed or signed by them prior to the date of this contract in relation to the works is of any contractual effect.

The purpose of an entire agreement clause is to make it clear that the agreement between the parties in relation to the subject matter of the contract is completely dealt with in that contract and that any prior agreements or

negotiations in relation to that subject matter are superseded. For this reason, when using this clause care must be taken to ensure that all side letters or other arrangements and understandings between the parties are properly incorporated in the contract.

Although an entire agreement clause will usually bind the parties in accordance with its terms, its inclusion is not always determinative. For example, an entire agreement clause will not overcome the effect of pre-contract conduct or representations which is or are fraudulent. An entire agreement clause will also not prevent the implication of additional terms which are consistent with the express terms of the contract, unless the clause expressly provides that no implication should be made.

Interpretation

An example standard interpretation clause is:

In this contract, unless the contrary intention appears:

- a) A reference to this contract or another instrument*
- b) Includes any variation or replacement of either of them*
- c) The singular includes the plural and vice versa*
- d) A reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns*
- e) If a period of time is specified and dates from a given day or the day of an actual event, it is to be calculated exclusive of that day*
- f) Where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning*
- g) Headings are for reference only and do not form part of this contract*
- h) The words "including" and "include" mean "including, but not limited to"*

The purpose of an interpretation clause is to provide clear rules of interpretation which apply when interpreting the contract. These rules provide certainty and avoid the need for repetition throughout the contract. For example, the effect of paragraph (g) in the example clause is that the word "include" can be used without the need to state "include, but not limited to." The extent of the interpretation clause will depend on the specific circumstances of each project.

Severability

An example severability clause is:

If any provision of this contract is prohibited, invalid or unenforceable in any jurisdiction, that provision will, as to that jurisdiction, be ineffective to the extent of the prohibition, invalidity or unenforceability without invalidating the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction, unless it materially alters the nature or material terms of this contract.

This example clause reflects the common law position. It is included to try and ensure that an invalid clause does not render an entire contract invalid. However, if the severed clause is central to the commercial agreement between the parties severing may have unintended consequences. Therefore, this clause may not be appropriate for all contracts.

Counterparts

An example counterparts clause is:

This contract may be signed in any number of counterparts which, when taken together, will constitute one instrument.

The purpose of a counterparts clause is, as the clause suggests, to enable a contract to be signed in two different places and at two different times. Therefore, unless there is going to be a signing ceremony and all the parties are present to sign the contract at the same time a counterparts clause must be used. Each party should sign at least as many copies of the contract as there are parties, retain one and distribute the other copies to each of the other parties. Given the time taken to distribute hard copies it is common for faxed copies of the execution clauses to be distributed immediately following execution. However, to minimise the potential for disputes over execution and enforceability, parties must ensure that they receive an actual copy of the entire contract. This is because it is the entire contract that is the counterpart, not merely the execution clauses. If this issue is of concern the parties may wish to make receipt of all the counterparts a condition precedent to commencement of the contract. However, this is not common practice.

Notices

A typical notices clause is:

N.1 Method of Service

- a) Unless otherwise stated in this contract, all notices to be given under this contract must be in writing and sent by personal delivery, courier or facsimile to the address of the relevant party provided that:
- b) Any notice sent by personal delivery must be acknowledged as having being received by the receiving party by stamping a copy of that notice with an acknowledgement of receipt stamp which specifies the time and date of receipt.
- c) Any notice sent by courier will be deemed (in the absence of evidence of earlier receipt) to have been delivered three days after dispatch and in proving the fact of dispatch, it is sufficient to show that the envelope containing that notice was properly addressed and conveyed to the courier service for delivery by courier.
- d) Any notice sent by facsimile is deemed to have been delivered on the date of its transmission, if it is a business day, on receipt by the sender of a delivery confirmation report.
- e) Either party may by three days' notice to the other party change its delivery address, facsimile address or addressee for receipt of those notices.

N.2 Next Business Day

If a notice delivered by hand or sent by facsimile is delivered or sent (as the case may be) after 5:00pm on a day, the notice will be deemed to have been received on the next business day.

N.3 Notices

In this contract, notices include any approvals, consents, instructions, orders, directions, statements, requests and certificates or other communication to be given under this contract.

There are two main rationales for including a notices clause. The first is to establish the valid means of giving notices and the second is to deem when those notices have been delivered. The second is particularly important given the deadlines that are often included in project documents for the giving of certain notices.

You will note that the example clause does not include the giving of notices by email (see PwC Paper for more information on this issue).

In addition, for some types of agreements and in some jurisdictions, the notices clause may have to be modified to ensure the giving or receipt of a notice does not create a nexus for stamp duty purposes.

Clause N.3 is not necessary for all agreements. It is most relevant to construction type agreements where there will be a plethora of communication.

Non-waiver/exercise of rights

An example clause is:

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise. A party is not liable for any loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising the right, power or remedy.

This clause is included to ensure that a party is not deemed or implied to have given up its rights. Rights can only be waived if done so explicitly. This is important because, in the absence of this clause, equity will often imply consent from a course of conduct. This clause only applies to rights specifically provided for in the contract. Therefore, for example, in the case of email notices, discussed above, it is open to a court to imply consent into a course of conduct because the contract is silent on that issue.

Conclusion

The above clauses and explanations are examples only. Whilst they are boilerplate clauses their inclusion should, nonetheless, be considered on a contract-by-contract basis to ensure they are relevant.

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