



# Professional Practice in Engineering Management

University of Sydney Faculty of  
Engineering & Information  
Technologies

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# Boilerplate Clauses in Contracts

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# Boilerplates – what and why

- ‘Boilerplates’ – word developed to mean standard text derived from stamping of sheets of metal for boilers.
- The word ‘boilerplates’ can be used to mean anything from:
  - a set of standard clauses and agreements (essentially in the same way we use ‘precedents’)
  - a set of commonly used or ‘bread and butter’ clauses
  - clauses that are included as standard in most contracts



**BACKGROUND**

**DEFINITIONS**

**INTERPRETATION**

**ENTIRE AGREEMENT**

**PARTIES**

**SEVERABILITY**

**TERM**

**INTENTION**

**JURISDICTION / LAW**

**CONDITIONS  
PRECEDENT**

**ASSIGNMENT**

**SUBCONTRACTING**

**SPECIFIC  
OBLIGATIONS**

which are fundamental  
performance standards

how

when

timing

interdependent

**STAMP DUTY, GST +  
OTHER TAXES**

**TERMINATION**

**TITLE**

**RELEASE**

**RISK**

**INDEMNITY**

**WARRANTIES**

**CAP ON LIABILITY**

**NON-COMPETE**

**CONFIDENTIALITY**

**INSURANCE**

**GUARANTEES/  
BONDS**

**FORCE  
MAJEURE**

**COSTS**



## Boilerplates – what and why (cont')

- Some boilerplates are enforceable and effective - embodiments of the parties intention that will be upheld as is.
- However, many boilerplates involve re-statements of general principles of contract law and are therefore not strictly necessary. To the extent that these clauses provide a clear statement of intention they are useful inclusions.
- Others may not be effective at law except to the extent that they show the parties' intentions in relation to the agreement, which may be an influential, but not determinative factor in a court's decision to enforce them.



## Boilerplates – what and why (cont')

- It is extremely important that you always consider the impact of the boilerplates on the particular agreement being drafted or negotiated:
- whether the substance of the clauses is consistent with the rest of the agreement,
- whether the clauses reflect the agreement of the parties.
- To the extent that boilerplate clauses may be included by rote or without appropriate consideration or negotiation, their effectiveness can be undermined.



## Specific clauses – Entire Agreement

- Aim is to limit ‘agreement’ to the substance of the written contract – seeks to do a similar job to ‘parol evidence rule’ and supports that rule. Concept of integration – dependent on intention.
- Cannot exclude the effect of fraudulent misrepresentations or a claim for breach of s 52 TPA or statutory warranties under s 68 TPA, and other consumer protection leg.
- Effectiveness depends on the extent to which the written agreement is clearly a complete representation of the bargain.



## Specific clauses – Variation

- Aim is to limit effective variations to the agreement to those made in writing and provide an agreed method for variation to occur – enable parties to retain control.
- Variation by agreement requires consideration to be effective. By deed does not, but lack of consideration may preclude access to equitable remedies.



## Specific clauses – Variation (cont')

- An apparent variation may in fact be a novation or a discharge by agreement. Important to consider what a variation really amounts to as can have different consequences eg tax.
- Not a 100% guarantee that unwritten variation will not be effective – requirement for writing may be waived. Important to ensure that parties adhere to this clause if they want it to endure.



## Specific clauses – Third party rights

- Aim is to avoid ‘exceptions’ to the privity rule eg: finding of a trust, agent acting for undisclosed principal or extending benefit of an exclusion clause to a third party.
- Privity is concerned with who can enforce an agreement.
- Instructions very important here – client may intend one of the above to occur.



## Specific clauses – Relationship of parties

- Aim is to avoid the agreement giving rise to the finding of a particular legal relationship between the parties (eg partnership, employer/employee), which may give rise to additional obligations.
- This clause is not effective to prevent the finding of a particular legal relationship if one exists at law by reason of the facts.
- However, in ‘borderline’ cases, it may assist in avoiding the finding of such a relationship by providing evidence that the parties did not intend one to exist.



## Specific clauses – Further Assurances

- Further assurances aims to ensure that parties do everything necessary to give effect to the agreement where the detail of those actions cannot be foreseen or covered in the operative part of the contract. Intended as a catch all.
- ‘Assurance’ old term for conveyance – root in property transactions – perfecting title of purchaser.
- May not be necessary as a duty to ‘co-operate’ may be implied into contracts. Provides evidence of parties in this regard but may be reasonably uncertain, so should not be relied upon to the detriment of clear obligations in the main part of the contract.
- Relationship with existence of any implied duty of good faith or co-operation discussed in research paper.



## Specific clauses – Consents and Approvals

- Aim is to set a default for the manner in which a party's discretion to give or withhold any consent under the agreement may be exercised.
- Drafting notes contain 'not to be unreasonably withheld' alternative and other suggestions for 'fall back' positions including the addition of indemnities in the case of delay etc.
- Standard to be exercised if there is a criteria of 'reasonableness' may be difficult to ascertain – see discussion on good faith etc in the 'Further Assurances' research paper



## Specific clauses – Survival and merger

- Concepts of very similar in effect – dealt with as two arms of the one clause. Aims to prevent finding that rights/obs have merged on completion and to ensure clauses survive termination.
- Merger – concept that specific rights/obligations ‘merge’ into the larger rights acquired once the ‘main’ transaction fulfilled, and therefore ‘smaller’ rights no longer actionable (eg breach of warranties).
- Originated as a real property concept in the context of easements. Unclear whether applies in commercial context (some decisions suggest it might) therefore clause included as a precaution.
- Merger depends on intention of the parties so to the extent this clause is necessary at all, it is probably effective.



## Specific clauses – Survival and merger (cont')

- Survival beyond termination also depends on intention, so this clause is also probably effective.
- However, even if parties clearly intend terms to survive, courts will also consider the effect of a party's breach or repudiation and public policy in allowing terms to survive.
- May not be necessary in relation to clauses that are meaningless unless they are intended to survive (eg confidentiality) but extremely important in relation to other clauses.



## Specific clauses – Severability

- Aim is to show the parties' intention that terms or parts of terms should be severed where possible to the extent of any invalidity rather than void the entire contract.
- Ability to sever terms is a discretionary power the courts have in relation to contracts regardless of the presence of this clause. In borderline cases, as it shows the parties' intention, may influence the court to choose severance rather than void the whole contract.
- Intention is a relevant consideration where courts exercise their discretion to sever terms, but it is not the sole criteria.
- Severance will not be allowed where it results in the agreement intended by the parties being 'radically altered'.



## Specific clauses – Waiver

- Aim is to prevent a presumption that a party has ‘waived’ rights under the agreement by failing to act on breaches or enforce obligations unless done in accordance with a particular procedure.
- ‘Waiver’ imprecise term, can mean election between rights or loss of ability to enforce rights through estoppel – see further research paper.
- Has evidentiary value as to intentions only – may only be of value in ‘borderline’ cases. Whether waiver in the sense of estoppel or election has in fact occurred is a matter for the courts having regard to the facts and the law.



# Specific clauses – Cumulative Rights

- Closely related to the concept of election dealt with in the Waiver clause.
- Aims to demonstrate the parties' intentions that the fact that rights/remedies are provided for under the contract is not intended to constitute an election either between those remedies or any others provided at law at the time of making the contract.
- Function is to make it clear that, to the extent permitted by law, all rights and remedies remain available to parties until an election is actually made (if it is made at all). Election in this sense refers to a choice between inconsistent rights or remedies and the rule against double recovery.



# Specific clauses – Assignment, Novation and Other Dealings

- Aims to ensure that any assignments, novations etc may only occur with the express consent of other parties. Additional provision for giving/withholding of consent as may wish different standard to apply.
- Novation may not be unilateral but does not require writing and may be implied - this clause is important in attempting to limit the way in which novation may occur.
- May not be effective in relation to the creation of equitable interests by operation of law, but 'other dealings' attempts to cover this.
- If client wishes to limit assignments by way of a change in control, it is recommended that this be dealt with specifically, either as an addition to this clause or as a separate clause.
- Requirement may be waived as per variation.



## Specific clauses – Costs, Notices, Counterparts

- These are straightforward clauses that are likely to be effective as they are (subject to other vitiating factors common to all contractual provisions).
- Costs – default drafted so that each party bears own costs but a single party pays any applicable stamp duty..
- Notices – Short form, places risk of non-delivery on sender. Long form/risk with receiver option available. No e-mail. (\*postscript: has now been reversed to default long form and risk with receiver).
- Counterparts – such a well-recognised mode of exchanging contracts that may not be necessary for validity to be recognised, but included as a precaution.



## Specific clauses – Governing Law, Jurisdiction

- Aim – governing law: select a system of law applying to the interpretation of the contract and its meaning (substance of rights, obligations)
  - Aim – jurisdiction: to select a forum (and a system of procedural law) for disputes.
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## Specific clauses – Governing Law, Jurisdiction (cont')

- Governing law – usually effective. Not enforceable in Australia where a selected foreign law permits an action unlawful in Australia, or where an Australian law overrides governing law clauses (for example, certain TPA provisions). Important to include for certainty of meaning of contract and obligations.
- Jurisdiction – may be exclusive/non-exclusive. Non-exclusive recommended where the client's jurisdiction of choice not selected. Exclusive recommended where the client's jurisdiction of choice is selected, but is not guarantee that another court might find it has jurisdiction regardless.



# Specific clauses – Interpretation

- Aims to set defined rules for interpretation of the document.
- Many of these rules are statements of principles of contractual construction, some vary these principles
- Open to parties to include express instructions re interpretation of an agreement, otherwise general contractual interpretation rules apply.
- Important to ensure appropriate to transaction. In particular consider: default currency, Business Days, Time (check against Notices clause), joint or joint and several promises