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12. Boilerplate Clauses

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Abstract

This chapter examines some standard clauses found in commercial contracts today (often known as ‘boilerplate clauses’). The focus is on commercial contracts and terms that will, in all probability, have been drafted by lawyers. After first setting out some general considerations that relate to the structure of modern contracts, the discussion moves on to examine some standard form clauses to be found in such contracts. These include general clauses, retention of title clauses, price escalation clauses, clauses making provision for the payment of interest, force majeure clauses, choice of law clauses, arbitration clauses, jurisdiction clauses, hardship clauses, entire agreement clauses, no oral modification clauses, termination clauses, assignment, and, albeit briefly, exclusion and limitation clauses.

Keywords: English contract law, contract terms, commercial contract, boilerplate clause, force majeure clause, arbitration clause

Central Issues

1. Contracting parties frequently have a set of standard terms and conditions which they seek to incorporate into all the contracts which they conclude. In the case of more complex contracts they will also have a set of clauses (generally referred to as ‘boilerplate clauses’) which they will attempt to incorporate into these contracts. Some of these standard terms can be the subject of

protracted negotiations between the parties or their lawyers (given that the boilerplate clauses frequently relate to matters of concern to lawyers rather than the commercial executives). These standard terms therefore assume considerable significance in commercial practice.

2. The aim of this chapter is not to examine the content of these standard terms in detail. Rather, it is to identify, and briefly examine, some of the standard terms and to outline the structure of modern commercial contracts.

12.1 Introduction

The aim of this chapter is not to examine contracting practices as such. Such an enterprise would require not only a separate book but a major research project to examine the diverse contracting practices that exist throughout the country. While there have been some extremely valuable analyses of contracting practices in certain sectors of the economy or certain geographical areas (see, for example, H Beale and A Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law and Society* 45 and R Lewis, 'Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9 *Journal of Law and Society* 153), there remains a great deal to be done in terms of obtaining information about the way in which contracts are concluded and their content. The study carried out by Beale and Dugdale in the early 1970s consisted of interviews with 'representatives of nineteen firms of engineering manufacturers, mainly in Bristol, about their firm's contracts of purchase and sale'. One of the principal points that emerged from this study was the
p. 394 relatively limited use ↵ that was made by the parties of the law of contract in the regulation of their relationships. But it would be dangerous to generalize from this study and conclude that contracting parties generally make little use of the rules of law. Thus Beale, Bishop, and Furmston (*Contract Cases and Materials* (5th edn, Oxford University Press, 2008)) conclude (at p. 83):

> [A]lthough this study suggests that some businesses make only limited use of contract law, it must be remembered that it was studying only a small sample from one industry. Other trades may well demonstrate a much more 'legalistic' approach: for instance, a glance into Lloyd's Reports, which concentrate on commercial cases, suggests that businesses in some commodity trades and in the charter markets litigate much more regularly—frequently taking points that lack any real merit in order to escape unprofitable contracts … The contracts seem to have been planned in quite some detail. …

Even in those cases where the relationship between the parties is heavily influenced by informal understandings, it should not be assumed that this is to the exclusion of the formal terms of the contract. In many cases the relationship between the parties is governed both by informal understandings (or 'relational norms') and by the formal contract document and the rules of contract law. The extent of the influence of these different factors is likely to depend upon the circumstances of the individual case (see generally C Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the "Real" and the "Paper" Deal' (2009) 29 *OJLS* 675).

The aim of the chapter is to examine some of the principal standard terms used in commercial contracts today. The examination is limited in two important respects. First, it is confined to commercial contracts. Contracts concluded informally between members of the public are not examined at all. Contracts between businesses and consumers also fall largely outside the scope of this chapter. They are included to the extent that many businesses seek to incorporate their standard terms and conditions into contracts with consumers as well as with other businesses. But the regulation of these standard terms as they apply to consumer contracts raises distinct issues which are examined in Chapter 14. Secondly, this chapter is confined to terms that will, in all probability, have been drafted by lawyers. It therefore examines the clauses very much through the lens of a lawyer. It does not purport to examine more informal methods of contracting that may be developed by businesses (important though these methods may be in practice).

12.2 Boilerplate Clauses and Standard Terms

Standard terms can be divided into two broad groups. The first consists of standard terms that are inserted into a written contract which has been drawn up by the contracting parties (more usually, their lawyers). These are often known as 'boilerplate clauses'. The second consists of a set of standard terms and conditions which a business attempts to incorporate into all of its contracts. These terms are often appended to an order form or are incorporated into the standard documentation sent out on behalf of the business whenever a transaction is concluded. The distinction between these two groups is a very loose one. A term can be both a boilerplate clause inserted into a written contract and a term that is included in a standard set of terms and conditions. The distinction that is drawn relates not to the substance of the term itself but to the process by which the contract is concluded. The first group consists of cases where two parties negotiate a contract and
p. 395 then draw up a formal written contract which ↵ records the agreement that the parties have reached. The second group is made up of those cases in which one party sends out an order form on his own standard terms of business and the other party 'accepts' the order and in doing so often sends back his own terms and conditions (the so-called battle of the forms discussed at 3.3.1.1). In the first situation it is important to see the boilerplate clauses in their context. The first extract, taken from a book by Richard Christou, does this by locating the discussion of boilerplate clauses within the structure of the agreement as a whole. The second extract, taken from *Schmitthoff's Export Trade*, sets out a list of commonly used standard form clauses. These are particularly suitable for incorporation in a set of standard terms and conditions but they can also be incorporated into a written contract as one of the boilerplate clauses. The section that follows these two extracts is devoted to a brief examination of the standard clauses listed in *Schmitthoff* and will also include one or two other boilerplate clauses not included in that list.

R Christou, *Boilerplate: Practical Clauses* (8th edn, Sweet & Maxwell, 2020), paras 1-002–1-004 and 1-009–1-

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1-002 The term ‘boilerplate’ is most properly used in its widest sense to describe the clauses, common to nearly all commercial contracts, which deal with the way in which the contract itself operates, as opposed to the rights of the parties under the particular transaction that they have agreed upon and embodied in the substantive clauses. Boilerplate clauses regulate, control, and in some cases modify, these substantive rights and their operation and enforcement. They are thus a vital part of every contract, without which the substantive rights of the parties embodied in the agreement would have little meaning.

1-003 If one can take an analogy from the field of computing, boilerplate is like the operating system of a computer, while the substantive content of the contract relating to the particular transaction could be likened to the application software. All commercial contracts have an underlying ‘operating system’ that is (at least in the jurisdictions based on common law and even in some others) approximately the same.

1-004 In the absence of boilerplate the parties must rely on the general system of law applicable to the contract, and ask the court to apply this in settling disputes. In extreme cases, however, even the systems of law to be applied, and the question of which court has jurisdiction, would have to be decided by reference to some system of private international law. This approach defeats the whole aim of commercial contracts: to create certainty in dealings between the parties, and to provide an easy method of enforcement of rights where necessary. …

The different parts of a commercial contract

(a) Designation of the parties

1-009 At the head of the contract it is usual to set out the names and identifying details of each of the parties. Although it is not uncommon to preface this section with a statement such as ‘This Agreement is made the … … … day of 20 … …’, this is not legally necessary. It is vital, however, that the agreement states from what date it is effective. The actual date upon which the agreement is signed (if this is different to the effective date) is therefore desirable but not essential.

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(b) Recitals

1-010 After the details of the parties, a set of paragraphs called recitals will usually appear. These set out the background to the transaction and the purpose for which the parties are entering into the transaction. It is not legally necessary to include recitals in a contract, but it is customary to do so. However … current drafting practice is to keep recitals as short as possible. Without express words later on in the agreement, recitals are not

regarded as a part of the agreement which actually gives rise to legal obligations, and yet they will, at the least, be taken into account by a court which has to interpret the substantive portion of the agreement. Even worse, a court may regard them as, or as evidence of, pre-contract representations, the breach of which would ground an action for misrepresentation. ...

(c) Definitions

1-014 Although it is possible to insert definitions in any of the foregoing or in substantive parts of the agreement, where there are a great many definitions it is usual to arrange them together in a separate section straight after the recitals. As a drafting tip, it can be easier to insert definitions throughout the agreement, as drafting the clauses throws up the need for them, and then to remove these definitions at the end, collect and edit them, and arrange them in a suitable order (either alphabetical or logical) in the initial definition section.

1-015 The definitions form part of the substantive agreement because they prescribe that certain terms shall mean certain things. This prescriptive language can take various forms. The most unambiguous is: 'In this Agreement A shall mean B'. Another form often used, is: 'Where the context so admits, in this Agreement A shall mean B'. A third form provides a partial definition: 'In this Agreement [where the context so admits] A includes B'. An example of this is: 'In this Agreement "taxation" includes income tax, corporation tax and value added tax'. We do not have a complete definition of 'taxation', but do know some items which are included in the term. The parties are left free to argue, by reference to the ordinary dictionary meaning of taxation, whether other items such as stamp duty or inheritance tax fall within the definition or not. ...

1-018 Besides pure definitions, this section will also contain general interpretation clauses ...

(d) Substantive clauses

1-019 After the definitions follow the main clauses of the agreement—the substantive provisions. These clauses are sometimes introduced by: 'Now it is hereby agreed as follows. ...' Although customary, this phrase does not appear to serve any legal purpose, since the substantive clauses will obviously be seen as matters upon which the parties are agreeing.

(e) Schedules

1-020 To ensure that the logical flow of the substantive clauses is not interrupted and obscured with a great deal of detail, it is useful to put many of the more detailed substantive provisions into schedules. A clause in the substantive part of the agreement could read: 'All sales to be made by the Seller shall be upon the terms and conditions set out in

Schedule. ...' The schedule concerned could then set out a detailed set of conditions of sale which, had they been left within the main clauses, would have completely disrupted their sequence.

1-021 Another use for schedules is to remove transaction-specific details so that the main document can be more easily used as a standard form. Standard form distributor or agency agreements, for example, usually place details of the products, territories covered and sales targets within the schedules.

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1-022 Schedules are a substantive and integral part of the agreement, and there should always be a specific provision in the main clauses stating that this is so.

(f) Appendices

1-023 Where documents are referred to in an agreement they are often attached as appendices so that they can be easily referred to. Such appendices are usually signed by the parties by way of identification of the document concerned.

1-024 Such documents are not necessarily part of the agreement. For instance, a warranty can be given that a set of accounts, or a copy of a memorandum and articles attached as an appendix, is true and correct. The document is then attached for reference but its provisions are not incorporated in the agreement. Where a document is actually incorporated by reference (for example a set of standard conditions of sale or a technical specification) the document is sometimes also attached as an appendix. However, even in this case, the *provisions* of the document are incorporated by reference in the main clause, but the appended copy of the document only serves as a record of those terms and is not itself a part of the agreement.

(g) Signature section

1-025 This section should come after the schedules and before the appendices. It is often, but need not be, introduced with wording such as: 'The duly authorised representatives of the parties hereto have hereunto set their hands, the day and year first above written'. A shorter and equally acceptable method is 'Signed by X for and on behalf of ABC Ltd' followed by X's signature.

1-026 Commercial agreements do not normally need witnesses to the signatures: they are certainly not necessary under English law.

1-027 Most commercial agreements are just signed ... and not executed as deeds ... One great advantage (or drawback, depending upon which party is concerned) to the use of a deed under English law, is that the statute of limitations prescribes 12 years for an action on a deed, but only six years for a document under hand.

1-028 Deeds are also used by bodies such as local authorities in England and Wales whose processes for authorisation of signature of contracts are very complicated. ...

1-029 Mention should also be made of the possibilities for the electronic signature of contracts.
...

(h) Counterparts and copies

1-031 Copies of commercial documents are usually supplied for each of the parties: these are signed by all the parties and include a special counterpart clause, inserted to make each of them fully signed original copies for the purposes of enforcement. As an alternative to counterparts, there is sometimes only one original, with the other parties being given certified copies which are regarded as equivalent to originals.

1-032 So-called 'conformed' copies are sometime produced following signature. These are copies of documents which contain manuscript amendments made at the last minute, or illegible signatures. The manuscript words (including the signatures) are reproduced in the documents in typed form. Such copies are obviously not originals and are often just used for ease of reference, but they may also, of course, be certified copies.

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(i) Headings and contents pages

1-033 Headings to clauses, sections and schedules, and contents pages, are often introduced into long documents for ease of reference. Such matters should not constitute part of the agreement or their drafting becomes too complicated and they no longer serve the purpose of providing easy reference guides. Usually a provision appears in the substantive clauses stating that this is the case.

(j) Contract numbering systems

1-034 Numbering systems can vary. Traditionally, they consist of hierarchical mixtures of Arabic and Roman numerals and letters of the alphabet. In a long document one spends more time than it is worth working out and adjusting such hierarchies and keeping them consistent. The aim of all numbering systems is to provide a unique and easy way of referring to each part of each clause of the contract.

C Murray, D Holloway, and D Timson-Hunt, *Schmitthoff's Export Trade: The Law and Practice of International*

***Trade* (12th edn, Sweet & Maxwell, 2012), paras 32-014 and 32-015**

> The importance, for international sales, of well-drafted general terms of business can hardly be exaggerated. They are particularly important where neither uniform conditions of export sales nor standard contract forms are used. Litigation can often be avoided when the seller is able to refer the buyer to a clause in his printed terms of business which was embodied in the quotation or acceptance, and the fact that these terms apply to all transactions concluded by the seller adds persuasive force to his argument.

Some important clauses

The most important clauses which the exporter should incorporate in his general terms of business are:

(a) general clause, which subjects every contract of sale to the seller's conditions of sale;

(b) retention of title clause, which provides that until the seller receives the purchase price fully in cash,

(i) the seller retains the legal property in the goods and is given the irrevocable right to enter the premises of the buyer at any time and without notice in order to retake possession of the goods, and

(ii) the buyer may resell the goods only as an agent of the seller and only in the ordinary course of business to a bona fide repurchaser and, if he does so, shall receive the proceeds of the resale as an agent of and trustee for the seller and shall place the proceeds of sale in a separate account in the name of the seller;

(c) price escalation clause, which provides that unless firm prices and charges are agreed upon, the seller shall be entitled to increase the agreed prices and charges in the same proportion in which the prices or charges of the goods or their components, including costs of labour to be paid or borne by the seller, have been increased between the date of the quotation and the date of the delivery;

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(d) interest, which provides where payment is made after the agreed date, interest shall be paid at a specified rate;

(e) force majeure clause ...;

(f) choice of law clause, which specifies that the contract be governed by English law;

(g) arbitration, which provides that any disputes between the parties are to be settled by arbitration; or

(h) jurisdiction, providing for the jurisdiction of the English courts.

12.3 Boilerplate Clauses: Some Illustrations

This section is devoted to an analysis of some standard or boilerplate clauses. It takes as its starting point the clauses listed in *Schmitthoff*. But it also adds one or two additional clauses. Schmitthoff's list is directed towards export sellers and it is therefore necessary to supplement it by reference to standard terms that are found in other types of contract.

12.3.1 General Clause

While many sellers include such a 'general clause' in their standard terms, it by no means follows that it will be effective. The sellers in *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (3.3.1.1) included such a clause in their standard terms. The clause there stated:

> All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the Buyer's order.

However, the clause was not effective to achieve its goal because the sellers, in signing the buyer's tear-off acknowledgement slip, were held to have entered into a contract on the buyer's standard terms of business. But in other cases a term of this nature may suffice to ensure that all orders are carried out on the seller's terms and conditions, particularly where the buyer signs the document containing the term making provision for the seller's terms and conditions to prevail (see, for example, *TRW Ltd* v. *Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558, discussed at 3.3.1.4).

12.3.2 Retention of Title Clauses

The aim of this type of clause is to protect the seller in the event of the insolvency of the buyer. While such a clause is commonly found in sellers' standard terms and conditions it is by no means certain that it will achieve its goal. The case-law on retention of title clauses is difficult. Retention of title clauses came to prominence as a result of the decision of the Court of Appeal in *Aluminium Industrie Vaasen BV* v. *Romalpa Aluminium Ltd* [1976] 1 WLR 676, where a retention of title clause was held to be effective not only to reserve to
p. 400 the ↵ sellers property in the goods sold to the buyer but also to trace into the proceeds of sub-sales which had been entered into by the buyer, where the goods the subject matter of the sub-sales included goods supplied by the sellers to the buyer. The clause stated:

> The ownership of the material to be delivered by A.I.V. will only be transferred to purchaser when he has met all that is owing to A.I.V., no matter on what grounds. Until the date of payment, purchaser, if A.I.V. so desires, is required to store this material in such a way that it is clearly the property of A.I.V. A.I.V. and purchaser agree that, if purchaser should make (a) new object(s) from the material, mix this material with (an) other object(s) or if this material in any way whatsoever becomes a constituent of (an) other object(s) A.I.V. will be given the ownership of this (these) new object(s) as surety of the full payment of what purchaser owes A.I.V. To this end A.I.V. and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be transferred to A.I.V. and that this transfer of ownership will be considered to have taken place through and at the moment of the single operation or event by which the material is converted into (a) new object(s), or is mixed with or becomes a constituent of (an) other object(s). Until the moment of full payment of what purchaser owes A.I.V. purchaser shall keep the object(s) in question for A.I.V. in his capacity of fiduciary owner and, if required, shall store this (these) object(s) in such a way that it (they) can be recognized as such. Nevertheless, purchaser will be entitled to sell these objects to a third party within the framework of the normal carrying on of his business and to deliver them on condition that—if A.I.V. so requires—purchaser as long as he has not fully discharged his debt to A.I.V. shall hand over to A.I.V. the claims he has against his buyer emanating from this transaction.

Two points are worth noting about this clause. The first is its length and the second is the fact that it is not very well drafted. Notwithstanding its obvious shortcomings the Court of Appeal held that it was effective to entitle the sellers to claim the proceeds of the sub-sales entered into by the buyer in priority to the secured and unsecured creditors of the insolvent buyer. The result was to confer a right of enormous value on the sellers in the insolvency of the buyers. It is not surprising, in the light of this decision, that sellers immediately began to insert retention of title clauses into their standard terms. Since *Romalpa* was decided, however, the courts have taken a more restrictive view of the efficacy of retention of title clauses. While they continue to be effective where the goods which have been sold to the buyers have not been mixed irrevocably with other goods (*Hendy Lennox (Industrial Engines) Ltd* v. *Graham Puttick Ltd* [1984] 1 WLR 485; *Armour* v. *Thyssen Edelstahlwerke* [1991] 2 AC 339), they are generally not effective where the goods have been mixed irrevocably (*Borden (UK) Ltd* v. *Scottish Timber Products Ltd* [1981] Ch 25) nor in relation to attempts to trace into the proceeds of sub-sales (*Compaq Computer Ltd* v. *Abercorn Group Ltd* [1991] BCC 484). The drafting of the clause in the example given by Schmitthoff is based on *Romalpa* but, in the light of cases such as *Compaq* v. *Abercorn*, it is probably ineffective to enable the sellers to claim the proceeds of any sub-sales. It is necessary to take great care when drafting a retention of title clause but even a well-drafted clause may be held to be ineffective to entitle a seller to trace into the proceeds of sub-sales (see *Compaq* v. *Abercorn*).

12.3.3 Price Escalation Clauses

Price escalation clauses are of considerable importance to sellers in long-term contracts and in cases where there is a time-lag between entry into the contract and the time at which the buyer is to pay for the goods or
p. 401 services supplied by the seller. They can be particularly ↵ important in times of high inflation. The clause that was in issue between the parties in *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corporation (England) Ltd* [1979]

1 WLR 401 was a price variation or a price escalation clause (see clause 3 of the sellers' terms and conditions, set out at 3.3.1.1). As *Butler* demonstrates, it is important not only to ensure that standard terms are properly drafted but also to ensure that they are incorporated into the contracts that the sellers conclude.

12.3.4 Interest

The reason for inserting a clause into the contract dealing with interest is that until recently the common law rule was that interest could not be recovered as damages in respect of a failure to pay a debt when it fell due. It was therefore necessary for the parties to create a contractual right to interest by an appropriately drafted term of the contract. The need for a contractual term entitling a party to recover interest has been reduced by the enactment of the Late Payment of Commercial Debts (Interest) Act 1998. Section 1(1) of the Act provides that:

> It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.

Section 2(1) of the Act states that the Act applies to:

> a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract.

A debt is a 'qualifying debt' unless it consists of a sum to which a right to interest or to charge interest arises by virtue of some other enactment. The parties remain free to make their own provision for the payment of interest (and many contracting parties continue to make their own provision in their contracts), although any attempt to exclude the right to statutory interest in relation to the debt is void unless the contract provides a 'substantial contractual remedy for late payment of the debt' (see sections 8 and 9 of the Act).

12.3.5 Force Majeure Clauses

A force majeure clause is a clause which entitles a party to suspend or terminate the contract on the occurrence of an event which is beyond the control of the parties and which prevents, impedes, or delays the performance of the contract (see more generally E McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press, 2007), p. 233). The precise scope of the clause will depend upon its wording and the details of the clause may be the subject of difficult negotiations between the parties. Force majeure clauses are generally inserted into contracts because the doctrine of frustration operates within very narrow limits (see 21.1). Given that the courts are unwilling to adjust the contract in the event that performance becomes more onerous for one party, contracting parties who wish to preserve to themselves a degree of flexibility in the performance of a contract
p. 402 may agree to insert a force majeure clause into ↵ their contract. An example of a force majeure clause is provided by clause 17 of the contract between the parties in *J Lauritzen AS* v. *Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1 (reproduced at 21.4).

A rather more complex force majeure clause was the version of clause 22 of GAFTA 100 that was litigated in *Toepfer* v. *Cremer* [1975] 2 Lloyd's Rep 118. It provided:

> Sellers shall not be responsible for delay in shipment of the goods or any part thereof occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or any cause comprehended in the term 'force majeure'. If delay in shipment is likely to occur for any of the above reasons, Shippers shall give notice to their Buyers by telegram, telex or teleprinter or by similar advice within 7 consecutive days of the occurrence, or not less than 21 consecutive days before the commencement of the contract period, whichever is later. The notice shall state the reason(s) for the anticipated delay. If after giving such notice an extension to the shipping period is required, then Shippers shall give further notice not later than 2 business days after the last day of the contract period of shipment stating the port or ports of loading from which the goods were intended to be shipped, and shipments effected after the contract period shall be limited to the port or ports so nominated. If shipment be delayed for more than one calendar month, Buyers shall have the option of cancelling the delayed portion of the contract, such option to be exercised by Buyers giving notice to be received by Sellers not later than the first business day after the additional calendar month. If Buyers do not exercise this option, such delayed portion shall be automatically extended for a further period of one month. If shipment under this clause be prevented during the further one month's extension, the contract shall be considered void. Buyers shall have no claim against Sellers for delay or non-shipment under this clause provided that Sellers shall have supplied to Buyers, if required, satisfactory evidence justifying the delay or non-fulfilment.

There are three principal components of a force majeure clause. The first and most important component is the description of the events that trigger the operation of the clause. There is no legal doctrine of force majeure in English law and so the phrase 'force majeure' is not a term of art (see *Thomas Borthwick (Glasgow) Ltd* v. *Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16, 28). It is therefore for the parties to define the list of events which they intend should fall within the scope of the clause. The events included in the list are generally events that are beyond the control of the parties, such as acts of God and war. Not much significance tends to be attached to the words 'force majeure' themselves. Either the event will fall within the list of specific events listed in the clause or it will fall within the general words at the end of the clause. But it is rare for any dispute between the parties to focus explicitly on the words 'force majeure'. The description of the force majeure events is generally divided into two parts. The first part consists of a list of specific events. The length of the list can vary enormously. Sometimes it is very short; at other times, it can be very long. The second part consists of a general provision which is intended to cover events not included in the specific list. Views differ as to the utility of the specific list. Some draftsmen are of the view that it is largely useless and that it suffices to use general words only. Others prefer the list on the ground that it can help reduce disputes over whether events, such as strikes, fall within the scope of the clause (although in the case of internal industrial action it can be difficult to persuade a court that it falls within the scope of a force majeure clause: see *B & S Contracts and Design Ltd* v. *Victor Green Publications Ltd* [1984] ICR 419).

p. 403 ↵ The second component of a force majeure clause consists of the obligations of the parties in relation to the reporting of the occurrence of a force majeure event. Not all force majeure clauses set out the obligations of the parties in this regard. The clause in *Super Servant Two* does not, whereas the more elaborate clause in

Toepfer does set out the procedure to be followed by the parties. The reporting obligations of the parties should cover matters such as the person to whom the report is to be made, the time at which the report is to be made, the form it should take, and the consequences of a failure to make a report in the prescribed fashion.

The third component consists of the remedial consequences of the occurrence of a force majeure event. Once again, the clause in *Super Servant Two* is in a simple form in that it only provides for a right to cancel the contract. The clause in *Toepfer* is a little more elaborate in that it makes provision for the extension of the contract as well as the possibility of cancellation. Force majeure clauses in fact give to the parties a high degree of remedial flexibility. Thus provision can be made for the granting of extensions of time, the suspension or variation of the contract, or even the termination of the contract. It is common for parties to make provision for the initial suspension of the contract which can lead to termination should the force majeure event continue to prevent or impede performance for a considerable period of time (such as twenty-eight days). The remedial flexibility that a force majeure clause potentially affords to the parties compares favourably with the remedial rigidity of the doctrine of frustration (on which see 21.6).

12.3.6 Choice of Law Clauses

A choice of law clause assumes considerable significance when dealing with a contracting party from another jurisdiction. Take the example of a contract concluded between a seller in England and a buyer in France. The seller is likely to wish to have the contract governed by English law, whereas the buyer will, in all probability, wish to ensure that the contract is governed by French law. This gives rise to what is known as the conflict of laws. What is to happen in such a case? The answer depends upon the parties. The law allows the parties considerable freedom to choose the law that is to govern the transaction. Article 3 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (generally referred to as 'Rome I'), which now takes effect within the UK as part of retained EU law, provides:

> A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

A number of points should be noted about this provision. First, it gives effect to the principle of party autonomy as it clearly sets out the freedom of contracting parties to choose the law that is to govern their contract. Secondly, the choice made by the parties must be the choice of a 'law' which, for this purpose, is to be equated with the law of a domestic legal system. Thus, to revert to our example, the parties could choose as the law to govern their contract either the law of England or the law of France. However, it is also open to them
p. 404 to choose the law of another jurisdiction, for example, the law of Spain, although there are practical ↵ reasons which might incline the parties against making such a choice. In particular, contracting parties can be expected to be slow to choose a law with which neither party is familiar and which would require both parties to incur the expense of instructing lawyers who practise in that jurisdiction. That said, neither party may be willing to agree that the contract should be governed by the law of the other party and in such a case they may agree to accept the law of a third country, possibly a jurisdiction which is seen by both parties to be both suitable and neutral, rather than leave the issue unresolved. The requirement that the parties choose a 'law' has the consequence that the choice of the Unidroit Principles or the Principles of European Contract

Law does not satisfy the requirements of Article 3 given that neither is legally binding and therefore cannot constitute a 'law' for this purpose. A similar conclusion applies where the parties choose 'general principles of law' or the *lex mercatoria* to govern their contract because neither qualifies as law in the sense in which that term is used in Article 3.

Thirdly, the choice must be made 'expressly or clearly demonstrated'. The responsibility is thus placed on the parties to make an actual choice of the governing law. It is not for the court to imply or to infer a choice of law. Finally, the freedom of the parties extends to choosing a law to govern part only of the contract so that parties need not choose a single law to apply to the whole of their transaction (although there are often strong practical reasons which support the choice of a single law to govern the transaction rather than seeking to parcel out the different parts of the contract across different laws).

Greater difficulty arises in the case where the parties do not make an express choice of law. In such a case Article 4 of Rome I sets out various rules which are to be applied in determining the law that is to govern the contract. While these rules go some way to providing some certainty in terms of the identification of the governing law, they are no substitute for an express choice of law and so contracting parties who deal with foreign parties should wherever possible insert a choice of law clause into their contracts and into their standard terms and conditions of business.

12.3.7 Arbitration Clauses

Parties frequently make provision in their contracts for the dispute resolution mechanism that is to apply in the event of a dispute between them arising out of their contract. The principal choice which the parties must make is between arbitration and litigation (although mediation and alternative dispute resolution ('ADR') are becoming increasingly common in commercial practice). Arbitration is commonly associated with international contracts. Arbitration is claimed to have a number of advantages. First, it is private. It does not take place in a public court and the result of the arbitration is not publicly available. Secondly, it can have the appearance of neutrality in that it can take place at a neutral venue (unlike litigation which will often take place in the courts of the country of one of the parties to the contract). Thirdly, arbitration is more flexible in that the parties can choose where and when to arbitrate, they can often choose their arbitrators, and they can also decide, albeit within limits, the form that the arbitration is to assume. Party autonomy is a very important principle in international arbitration. Fourthly, arbitration is said to be speedier than litigation and finally it is often claimed to be cheaper.

These arguments are not, however, conclusive. Arbitration does have its disadvantages. It can be very expensive and it is not necessarily quick. A party who loses an arbitration may decide to appeal to the courts
p. 405 and, if the courts accept that they have jurisdiction to hear the ↵ appeal, the parties' privacy is lost as may be all hope of a quick and relatively inexpensive conclusion to the proceedings. Some of the awards issued by arbitrators are also of rather doubtful pedigree. The quality control in litigation appears to be much higher than in the case of arbitration. The parties therefore have to make a choice as to the form of dispute resolution mechanism that they wish to utilize. There is no requirement that they make that choice at the moment of entry into the contract. They can defer the decision until such time as a dispute occurs between the parties. But many parties do make the decision at the time of entry into the contract.

Parties who wish to ensure that disputes arising out of their contract are referred to arbitration rather than litigation must draft a suitably worded arbitration clause and the clause must be drafted with care. It is not necessary to go into the drafting details here. It suffices to give two examples of an arbitration clause, one taken from an international arbitral institution and the other from a clause in the contract between the parties in one of the leading contract cases in recent years. The clause taken from the international arbitral institution is the UNCITRAL Model Arbitration clause which provides:

> [A]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The clause taken from the leading case is the opening part of the arbitration clause agreed between the parties in *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518 (discussed in more detail at 23.3.2). Clause 39.1 of the contract provided:

> When the Employer or the Contractor require a dispute or difference as referred to in Article 5 to be referred to arbitration then either the Employer or the Contractor shall give written notice to the other to such effect and such dispute or difference shall be referred to the arbitration and final decision of a person to be agreed between the parties as the Arbitrator, or, upon the failure so to agree within 14 days after the date of the aforesaid written notice, of a person to be appointed as the Arbitrator on the request of either the Employer or the Contractor by the person named in Appendix 1 to the Conditions.

One of the interesting features of the litigation between Panatown and McAlpine was that the corporate group of which Panatown was a member had a choice between litigating the dispute with McAlpine in the courts or invoking the arbitration clause in the contract between Panatown and McAlpine. They chose the latter option. With the benefit of hindsight it can be seen that the choice was a dubious one because McAlpine exercised its rights under the contract to appeal to the High Court against the provisional award of the arbitrator. So, in the event, the parties found themselves embroiled in complex litigation as well as arbitration (see further E McKendrick, 'The Common Law at Work: The Saga of *Alfred McAlpine Construction Ltd* v. *Panatown Ltd*' (2003) 3 *Oxford University Commonwealth Law Journal* 145). The choice between arbitration and litigation is an important one that must be made with some care.

12.3.8 Jurisdiction Clauses

If litigation is the preferred method of dispute resolution then consideration ought to be given to the jurisdiction in which the dispute is to be litigated. Jurisdiction is, however, a complex subject and it has
p. 406 become even more complex as a result of the departure of the UK ↵ from the EU. Prior to the UK's departure from the EU, contracting parties had considerable freedom of choice in relation to the selection of the appropriate jurisdiction (see Article 25(1) of EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, more commonly known as Brussels 1 recast) and, further, parties had confidence that judgments given by the

chosen court would be enforced within the EU. However, to the disappointment of many commercial practitioners, the UK revoked the Brussels Regulation on its departure from the EU. The gap has to some extent been filled by the UK acceding to the Hague Convention on Choice of Court Agreements 2005 (the details of which are beyond the scope of this book) but the latter Convention has a narrower focus than the Brussels Regulation because it only applies to exclusive jurisdiction clauses and, more generally, it does not have the same proven efficacy as the Brussels Regulation and, as a result, choice of jurisdiction has become a more difficult matter for practitioners in the UK than was previously the case. We shall, however, encounter jurisdiction clauses in the context of the important decision of the Privy Council in *The Mahkutai* [1996] AC 696, a case which is discussed at some length at 25.3.4.

Some other standard terms not mentioned in *Schmitthoff* are as follows.

12.3.9 Hardship Clauses

A clause which is frequently inserted into a contract to deal with unforeseen events which make performance of the contract more onerous than originally anticipated is a hardship clause. The practical significance of hardship clauses has increased significantly because of the current COVID-19 pandemic where hardship clauses offer to contracting parties a means by which they might seek to share the losses suffered by many businesses as a result of the ongoing pandemic. An example of such a clause can be found in *Superior Overseas Development Corporation* v. *British Gas Corporation* [1982] 1 Lloyd's Rep 262, 264–265 in the following terms:

> (a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic hardship then parties shall (at the request of either of them) meet together to consider what (if any) adjustments(s) in the prices … are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship caused by such change.
>
> (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments (if any) in the said prices … the matter may forthwith be referred by either party for determination by experts. …
>
> (c) The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made … and any revised prices or any change in the price revision mechanism so determined by such experts shall take effect six (6) months after the date on which the request for review was first made.

Such a clause should define the circumstances in which 'hardship' exists and should then lay down a procedure to be adopted in the event that these circumstances occur. The vitally important matter is to ensure
p. 407 that the clause provides a mechanism or a sanction to ↵ be applied in the event that the parties fail to reach agreement or refuse to enter into negotiations with a view to adjusting the contract. A common

sanction, employed in *Superior Overseas Development Corporation*, is to provide for the intervention of a third party expert or arbitrators (but not a judge sitting in a court of law) should the parties fail to reach agreement themselves.

The advantage of a hardship clause is that it is designed to enable the relationship between the parties to continue, albeit on different terms. Given that the courts at common law have no power to adjust the terms of a contract to meet changed circumstances (see 21.6), this can be a useful clause to incorporate should the parties wish to make provision for the adjustment (rather than the suspension or termination) of the contract.

12.3.10 Entire Agreement Clauses

Entire agreement clauses are frequently relied upon in an attempt to prevent one party from asserting that the written contract is not the sole repository of the terms of the contract and that there is in fact another term of the contract which has been broken by the other party. The aim is thus to prevent liability arising for breach of contract outside of the terms of the written agreement. Entire agreement clauses can also be utilized for another purpose, namely to attempt to eliminate any possible liability for misrepresentation. Not all entire agreement clauses attempt to fulfil this second function. For example, in *Deepak Fertilisers and Petrochemicals Corporation* v. *ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387 the entire agreement clause consisted of the following:

> This contract comprises the entire agreement between the parties, as detailed in the various Articles and Annexures and there are not any agreements, understandings, promises or conditions, oral or written, expressed or implied, concerning the subject matter which are not merged into this contract and superseded hereby. This contract may be amended in the future only in writing executed by the parties.

It was held that this clause was effective to exclude liability in respect of a collateral warranty. But it does not attempt to exclude liability for misrepresentation. A slightly more elaborate entire agreement clause is illustrated by *Watford Electronics Ltd* v. *Sanderson CFL Ltd* [2001] All ER (Comm) 696, where the entire agreement clause was drafted in the following terms:

> The parties agree that these terms and conditions (together with any other terms and conditions expressly incorporated in the Contract) represent the entire agreement between the parties relating to the sale and purchase of the Equipment and that no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract.

The addition of the words 'and that no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract' were inserted in order to exclude liability for misrepresentation. Clear words are required in order to exclude liability for misrepresentation (*Axa Sun Life Services plc* v. *Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1), although whether the words are
p. 408 effective so ↵ to exclude liability depends upon an evaluation of the words which have been used in the particular clause (see 17.6) and any such attempt to exclude liability for misrepresentation is likely to be caught by section 3 of the Misrepresentation Act 1967 and subject to a test of reasonableness (*First Tower Trustees Ltd*

v. *CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, see 17.6). The modern practice of inserting entire agreement clauses into contracts is in many ways a reaction to the relaxation of the parol evidence rule (on which see 8.4).

12.3.11 No Oral Modification Clauses

No oral modification clauses are sometimes combined with entire agreement clauses (an example being the final sentence of the entire agreement clause in *Deepak Fertilisers and Petrochemicals Corporation* v. *ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387, see 12.3.10). The difference between the two is that an entire agreement clause seeks to deny effect to promises or statements made prior to entry into the contract and which are not to be found in the written terms of the contract, whereas a no oral modification clause looks to the future and to the way in which the contract which the parties have concluded can be amended or varied. The leading authority on the validity and effect of a no oral modification clause is the decision of the Supreme Court in *Rock Advertising Ltd* v. *MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, where the clause which was the focus of dispute was in the following terms:

> All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.

It can be seen that the aim of a clause of this nature is to provide the parties with certainty as to the future shape or scope of their contract so that they always have a written record of its content. The Supreme Court held that the effect of the clause was to deprive an oral variation agreed between the parties of legal effect because it had not complied with the formality prescribed by the clause. The decision has the merit of giving effect to the clause as agreed by the parties. The criticism which has been levelled against the decision is that it does not give effect to the last agreement made by the parties and it will create practical difficulties in the case where the parties have acted in reliance on the validity of the non-compliant variation. The latter difficulty may, however, be mitigated by the operation of the doctrine of estoppel, at least in the case where the parties have entered into the oral variation after one party has represented to the other that no reliance will be placed on the no oral modification clause. Otherwise, contracting parties who include a no oral modification clause in their contract should have confidence that the courts will give effect to the clause and deny validity to a non-compliant variation or amendment.

12.3.12 Termination Clauses

Contracting parties frequently produce standard form termination clauses which they insert into their contracts. Termination tends to be seen as an important right (or, if one prefers, remedy) in English contract
p. 409 law. The drafting of termination clauses can be a difficult ↵ matter (for an example see *Rice (t/a Garden Guardian)* v. *Great Yarmouth Borough Council* [2003] TCLR 1 CA, at 22.3.5). We shall examine termination clauses in more detail in a subsequent chapter (see 22.3.5).

12.3.13 Assignment

The law allows parties, within prescribed limits, to assign their rights under the contract to another party. Standard terms of contract frequently regulate the entitlement of contracting parties to assign their rights. For example, clause 17(1) of the contract between the parties in *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 provided:

> The Employer shall not without the written consent of the Contractor assign this Contract.

This clause is, in fact, drafted rather loosely in that it is the rights under the contract that are assigned and not the contract itself (see further 25.3.3.3). But the House of Lords nevertheless gave effect to the clause and held that an attempted assignment of contractual rights in breach of the prohibition contained in clause 17 was ineffective to transfer any such contractual rights to the assignee (although a clause prohibiting assignment may not necessarily prohibit a declaration of trust in favour of a third party: *Don King Productions Inc* v. *Warren* [2000] Ch 291).

12.3.14 Exclusion and Limitation Clauses

Exclusion and limitation clauses are both extremely important boilerplate clauses and they constitute the subject matter of the next chapter.

Further Reading

CHRISTOU, R, *Boilerplate: Practical Clauses* (8th edn, Sweet & Maxwell, 2020).

MCKENDRICK, E, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in A BURROWS AND E PEEL (eds), *Contract Terms* (Oxford University Press, 2007), p. 233.

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