

Word or phrase to avoid	Suggested replacement word or phrase
determination (or determine)	end the agreement
distress or execution is levied against any of [the consumer's] goods	the consumer's belongings are taken away
indemnify	will pay for
joint and several	that each consumer to the contract is liable for the whole amount due for payment by the consumers, and not just a proportionate part
jurisdiction	if you wish to take legal action you must do so within [specify country]
lien	business/trader can hold some or all of the goods until the consumer has paid the business/trader's charges (even if they do not relate to the goods)
liquidated damages	compensation
merchantable quality	satisfactory quality
risk	the consumer will be responsible for the goods on delivery
pro-rata	adjusted in proportion
time of the essence	specify a period of notice when something will happen or not happen and state what will occur
statutory reference (a mere reference to the statutory legislation)	explain briefly what the legislation does, provides, takes away etc
tender	offer to pay
title (property)	retain or have ownership

Chapter 8

Legal Terms and Lawyers' Jargon

8.1 Introduction

This chapter considers a selection of words and phrases which:

- are commonly used by contract drafters, including useful 'legal terms of art' and unnecessary legal jargon; or
- are defined by statute as having a particular meaning when used in contracts and other situations; or
- the courts have considered in cases involving the interpretation of contracts.

The material in this chapter focuses on practical issues which the drafter or negotiator might wish to consider in relation to the use of these 'legal' terms. As already mentioned, it is possible to divide legal terms into the following categories.

- *Liability and litigation terms.* For example: negligence; tort; Contracts (Rights of Third Parties) Act 1999; arbitration; proceedings; legal action; the parties submit to the jurisdiction of the [English] courts; exclusive jurisdiction; non-exclusive jurisdiction; expert. Terms of this kind are commonly found in the 'boilerplate' language towards the end of the contract.
- *Terms relating to the transfer or termination of obligations.* For example: assignment and novation; indemnity; hold harmless; breach; material breach; insolvency; liquidators; receivers. Again, these terms are commonly found in boilerplate clauses.
- *Obligations with a particular legal meaning.* For example: time shall be of the essence; condition/condition precedent/condition subsequent; warranties; representations; covenants; undertakings; guarantees; with full title guarantee; with limited title guarantee; beneficial owner; subject to contract; without prejudice; delivery. It is important for the drafter to be aware of the meaning of such terms and, where needed, to use them in an appropriate way.
- *Expression of time.* For example: year; month; week; day; from and including; until; from time to time; for the time being; forthwith; immediately; at the end of. These expressions are often to be found in the main commercial provisions of the contract, for example, in clauses which state when a party is required to perform obligations.

- *Other terms defined by statute.* For example: person; firm; subsidiary; United Kingdom; European Union; power of attorney; month; delivery. It is important to be aware of the statutory meaning of such words, particularly in those relatively few cases where the statute provides that the statutory definition applies when the word is used in a contract.
- *Other terms interpreted by the courts.* For example: best; all reasonable and reasonable endeavours; due diligence; set-off; consent not to be unreasonably withheld; material; consult; penalty; nominal sum; subject to. It is important to be aware of the case law on the meaning of some of these words, which are commonly used in contracts.
- *Unnecessary legal jargon.* Such as words which are commonly encountered in contracts but which add little if anything to the contract or which could be replaced by simpler or more modern language, for example, 'hereinafter'.

It is convenient to discuss terms defined by statute, and expressions of time separately before discussing various other terms in alphabetical order.

8.2 Terms defined by statute

In a few cases, statute law provides that certain words will have a particular meaning, when used in contracts and other instruments. In particular, the following:

- *Month, person, singular, masculine.* Section 61 of the Law of Property Act 1925¹ provides:
 'In all deeds, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act [ie 1 January 1926], unless the context otherwise requires:
 (a) "Month" means calendar month;
 ...
 (h) "Person" includes a corporation;
 ...
 (c) The singular includes the plural and vice versa;
 ...
 (d) The masculine includes the feminine and vice versa.'
- *Full title guarantee, limited title guarantee, beneficial owner.* Under the Law of Property (Miscellaneous Provisions) Act 1994, certain terms are implied into 'dispositions of property' which are expressed to be made 'with full title guarantee' or 'with limited title guarantee'².

¹ See also the equivalent provisions in ss 5 and 6 of, and Sch 1 to, the Interpretation Act 1978. Section 17(2)(a) of this Act is discussed at 8.4.3.

² These provisions replace the former law, under s 76 of the Law of Property Act 1925, by which certain terms are implied into a 'conveyance' of property if the seller expressly conveys the property 'as beneficial owner'. As to the implied terms, see the extracts from the 1994 Act set out in Appendix 2. As to the effect of the 1994 Act on assignment of intellectual property see Anderson, *Technology Transfer* 2010 Bloomsbury Professional, at 8.1.

- *Infants and minors.* Under the Family Law Reform Act 1969³, the age of majority was reduced from 21 years to 18 years, and 'infant', 'infancy', 'minor', 'minority' and similar expressions are to be understood as meaning someone of less than 18 years. This applies to contracts as well as other 'instruments', unless the context requires otherwise.

8.3 Expressions of time

8.3.1 Actions to be taken within a specified time period

Consider the following example of a clause in a commercial contract:

X shall within 3 months of 11th May 2011 pay to Y the sum of Z.

The last date on which X can pay this sum without being in breach of contract would normally be 11 August 1998. (The counting of the three-month period would start from and include 12 May 2011, and X can usually make payment up to midnight at the end of 11 August.)

This seems simple enough. In reaching this conclusion it is necessary to consider an extensive amount of confusing case law, which is briefly summarised as follows:

- *Statutory meaning.* Section 61 of the Law of Property Act 1925 (quoted above) provides that month means 'calendar month' in agreements governed by English law. Section 61 does not limit such a meaning to agreements concerned with property. At common (non-statute) law, 'month' meant calendar month only in bills of exchange and other commercial documents. Otherwise it meant 'lunar month'⁴.
- *What is a calendar month?* In the leading case the court held the following points as being well established under English law⁵:
 - In calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurred is excluded from the reckoning.

³ Section 1(2).

⁴ *Hart v Middleton* (1845) 2 Car & Kir 9 at 10.

⁵ *Dodds v Walker* [1981] 2 All ER 689, HL. *Register of Companies v Radio-Tech Engineering Ltd* [2004] BCC 277 is a recent illustration of the application of the principles set out in *Dodds v Walker*. In this case, a company had to file accounts within ten months of the end of its accounting period (30 September) in accordance with Companies Act 1985, s 244(1)(a). The company filed its accounts on 31 July. The Registrar of Companies applied the corresponding date rule, so that the last day for the company to file its accounts was 30 July 2006. The court agreed with the Registrar of Companies. See also *Migotti v Colvill* (1879) 4 CPD 233: 'A "calendar month" is a legal and technical term; and in computing time by calendar months the time must be reckoned by looking at the calendar and not by counting days.'

- When the relevant period is a month or a specified number of months after the giving of a notice, the general rule is that the period ends on the corresponding date in the appropriate subsequent month (ie the day of that month that bears the same number as the day of the earlier month on which the notice was given). Except in a small minority of cases (see next point), all that a person has to do is to mark in his or her diary the corresponding date in the appropriate subsequent month.
- The corresponding date rule does not apply where the period is calculated by using weeks as the calculating factor, as the period it covers (ie seven days) is certain⁶.
- *Ends of months* In the few instances when there is no corresponding date in the subsequent month, the corresponding day will be the last day of the subsequent month. This is illustrated by the example from the case: a party gave four months' notice on 30 October 2011. Time would begin to run at midnight on 30/31 October and the notice would expire at midnight on 28 February/1 March (or 29 February/1 March on a leap year).
- *At what time does the period expire?* Normally, the period expires at midnight at the end of the last day of the period in question. Fractions of a day are usually excluded⁷. A person under an obligation to do a particular act on or before a particular date has the whole of that date to perform it⁸. But there is nothing to stop the parties to an agreement specifying the particular time for when an obligation has to be completed (eg the 'Supplier shall deliver the Goods on the Date but no later than 5pm').
- *Dates calculated 'from' and 'until', etc.* The same principles apply to time periods calculated 'from' or 'after' a date or event. Normally that date is excluded⁹. 'Beginning from' is treated in the same way as 'from'¹⁰. To reduce doubt as when the period starts, consider using special words such as 'commencing on' or 'beginning with'.

If the period is 'X months from the date of this Agreement', it seems that the date set out at the head of the agreement will be used as the reference point, even if the parties have misstated the date of execution of the agreement¹¹. Words such as 'by', 'from', 'until' and 'between' may

⁶ *Okolo v Secretary of State for the Environment* [1997] 4 All ER 242.

⁷ *Re Figgis, Roberts v MacLaren* [1969] 1 Ch 123.

⁸ *Alfivos Shipping Co SA v Pagnan and Lli, The Afovos* [1983] 1 All ER 449, HL.

⁹ *Hammond v Haigh Castle & Co Ltd* [1973] 2 All ER 289 and *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 All ER 990, CA, considered in *RJB Mining (UK) Ltd v NUM* [1995] IRLR 556, CA.

¹⁰ See *Hammond v Haigh Castle & Co Ltd* [1973] 2 All ER 289 and *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 All ER 900, CA.

¹¹ *Styles v Wardle* (1825) 4 B & C 908.

be ambiguous and lead to uncertainty as to which dates are included. It may be better to use phrases such as 'on or before', 'from and excluding', 'from and including', 'to and including', etc, which specify which dates are to apply¹².

- *Days.* To avoid any uncertainty over the duration of months (including whether calendar or lunar months are intended), it may be better to state the time periods in days rather than months (eg instead of an agreement stating 'Party A shall perform the Services within 3 months of the date of this Agreement', rather 'Party A shall perform the Services within 90 days of the date of this Agreement'). Generally, to avoid arguments over whether the start or end date of a period is taken into account¹³, it may be better to give a couple of extra days' notice. The word 'day' may mean either a calendar day (midnight to midnight) or a period of 24 consecutive hours, depending on the context¹⁴. A 'working day' is normally understood as a (complete) calendar day which is not a holiday, and not just the working hours of a day, whilst a 'conventional day' begins at a defined time and ends 24 hours later¹⁵.
- *Years.* Similar problems may arise with expressions such as 'year of this Agreement'—is this a year from a specified date or the period 1 January to 31 December? To avoid any uncertainty, the expression 'year of this Agreement' is sometimes defined in the contract.
- *Quarters.* Sometimes contracts refer to quarters of a year, for example, if royalty payments are to be paid quarterly. The contract should state which quarterly periods are to be applied (eg 1 January to 31 March, 1 April to 30 June, etc, as required). If the periods are not stated, the court may construe the contract as referring to the traditional quarterly periods used in landlord and tenant law, which ended on a 'quarter day' or some other period¹⁶. The usual quarter days are 25 March (Lady Day), 24 June (Midsummer), 29 September (Michaelmas) and 25 December (Christmas).

¹² In some agreements drafted by US lawyers, the interpretation clause defines what is meant by expressions such as 'until'. Americans also use the term 'through' as in 'through March 1st', which means 'up to and including March 1st'.

¹³ For example, see *Re Hector Whaling Ltd* [1936] Ch 208.

¹⁴ See, eg, *Cornfoot v Royal Exchange Assurance Corp'n* [1904] 1 KB 40, CA, distinguished in *Cartwright v MacCormack* [1963] 1 WLR 18, CA.

¹⁵ *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, HL. Where an agreement is with a financial institution (such as a bank), a 'day' (unless otherwise defined) will run until to the end of working hours (*Momm (t/a Delbrueck & Co) v Barclays Bank International Ltd* [1977] QB 790).

¹⁶ For example, 'two quarters of a year' was construed in one case as meaning six calendar months, see *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, CA; *Samuel Properties (Developments) Ltd v Hayek* [1972] 1 WLR 1296, CA.

8.3.2 *Actions to be taken 'forthwith' or 'immediately' or 'as soon as possible'*

In one leading case¹⁷, the court made the following comment on the meaning of the term 'forthwith', in the context of an obligation to file court documents 'forthwith':

'In many cases it may well be that unless the notice is filed the same day it cannot be said to be filed "forthwith", but it may be filed forthwith even though not filed the same day. Their Lordships do not propose to attempt to define "forthwith". The use of that word clearly connotes that the notice must be filed as soon as practicable, but what is practicable must depend on the circumstances of each case.'

Normally, forthwith means immediately¹⁸, without any delay. Sometimes the courts are prepared to interpret forthwith less strictly, as meaning 'within a reasonable time' if no harm can result from this interpretation¹⁹ or 'as soon as reasonably possible'²⁰.

The courts have also interpreted similar words such as 'immediately'²¹, 'as soon as possible'²², 'directly'²³ and 'promptly'²⁴. However, not all of these cases were concerned with the interpretation of contracts.

In a case²⁵ which was concerned with the interpretation of a contract, the court was asked to rule on the meaning of an obligation to manufacture part of a gun 'as soon as possible'. The manufacturer delayed making the gun because he did not have a suitably qualified member of staff to make the part.

¹⁷ *Sameen v Abeyewickrema* [1963] AC 597, PC.

¹⁸ It appears that 'forthwith' will usually have the same meaning as 'immediately': 'There appears to be no material difference between the terms "immediately" and "forthwith". A provision to the effect that a thing must be done forthwith or immediately means that it must be done as soon as possible in the circumstances, the nature of the act to be done taken into account' 45 *Halsbury's Laws of England* (4th Edn Reissue) Vol 45, para 251.

¹⁹ *Hillingdon London Borough Council v Cutler* [1968] 1 QB 124, CA.

²⁰ *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540, CA.

²¹ As meaning 'with all reasonable speed' considering the circumstances of the case, see *R v Inspector of Taxes, ex p Clarke* [1974] QB 220, CA; and *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40.

²² As being stricter than 'as soon as reasonably practicable'—see *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1986] 2 All ER 651 at 662, CA.

²³ As meaning speedily or at least as soon as practicable, and not just within a reasonable time. But directly does not mean 'instantaneously'. See *Duncan v Topham* (1849) 8 CB 225.

²⁴ See *R v Stratford-on-Avon District Council, ex p Jackson* [1986] 1 WLR 1319, CA; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233, HL; and see the comments of Lord Wilberforce in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 113, HL; and the words of Lord Hope in *R (Burket) v Hammersmith LBC* [2002] 3 All ER 97, HL, where 'promptly' meant the 'avoidance of undue delay' in the bringing an application for judicial review.

²⁵ *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 QBD 670 at 3, per Bramwell LJ, CA.

This was held to be a breach of the obligation. One of the Court of Appeal judges in that case stated in his judgment:

'... to do a thing "as soon as possible" means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time ... I quite agree that a manufacturer or tradesman is not bound to discard all other work for the occasion, in order to take in hand a thing which he promises to do "as soon as possible".'

However, another judge in that case stated that the manufacturers had undertaken:

'[to] make the gun as quickly as it could be made within the largest establishment with the best appliances.'

Thus (with all of these expressions) it comes down to a matter of construction of the contract. To avoid uncertainty it is usually preferable to state any required time for performance specifically, rather than hope that the party under the obligation and then a court will interpret an obligation to perform the obligation 'forthwith' in the way that one intended.

8.3.3 *'From time to time'; 'for the time being'*

Contracts sometimes include these expressions, as in the following examples:

Example 1

The Project Director shall be such person as Party A nominates from time to time.

Example 2

If the parties are unable to agree upon an arbitrator, the arbitrator shall be appointed by the President for the time being of the Law Society of England and Wales.

In Example 1, the phrase 'from time to time' is intended to clarify that party A can nominate a person to be Project Director more than once during the life of the contract. In other words, there is an ongoing right to nominate. In Example 2, the phrase 'for the time being' means, in effect, 'at the relevant time', so that if the parties are unable to agree on an arbitrator in five years' time, they will refer to the President of the Law Society at that time, not the person who was President when the agreement was signed.

8.3.4 *Other 'time' expressions sometimes encountered*

The following expressions are sometimes encountered in commercial agreements. They may not be defined and sometimes their meaning may not be clear without further investigation:

- *Bank holiday*. In England and Wales the following are defined as bank holidays: Easter Monday, the last Monday in May, the last Monday in

August, 26 December (if it is not a Sunday) and 27 December (in a year where 25 or 26 December are on a Sunday)²⁶. Note (at least for England and Wales), Christmas Day, Good Friday and New Year's Day are not bank holidays. A definition which only uses the words 'Bank Holiday' would not capture other dates which are commonly not worked.

- *Business day*. This is likely to mean Mondays to Fridays (but excluding bank holidays at least) are business days²⁷.
- *Business hours*. The times different organisations are open will obviously vary. If under an agreement, a task needs completing by the end of a business day then the agreement should clearly spell out what the business hours are for the purposes of the agreement. For example, a computer supplier is installing a computer system into a retailer's shops. The shops are open until 8pm but the head office of the retailer business hours are open until 5pm. Unless specified clearly there can be doubt as to what are the business hours of the retailer. Completion of the work at 8pm might be outside the retailer's 'business hours'²⁸.
- *Public holiday*. These words, although often appearing in statutes and contracts, appear not to have a defined meaning. One common meaning appears to be days which are holidays (such as Christmas Day and Good Friday) including bank holidays²⁹.

8.4 Other legal terms used in contracts

8.4.1 'Agreement' and 'contract'

The words 'agreement' and 'contract' are often used interchangeably. The word 'agreement' can have three meanings relevant in a commercial context:

²⁶ Bank and Financial Dealings Act 1971, s 1(1) and Sch 1. Note that New Year's Eve in England and Wales is not a bank holiday. The bank holidays for Scotland and Northern Ireland are different. In Scotland the following are bank holidays: New Year's Day (if not a Sunday, but if it falls on a Sunday then 3 January), 2 January (if not a Sunday, but if it falls on a Sunday then 3 January), Good Friday, first Monday in May, first Monday in August and Christmas Day (if it is not a Sunday, but if it falls on a Sunday, then 26 December will be the bank holiday).

²⁷ For the purposes of the National Debt (Stockholders Relief) Act 1892 a business day is any day other than Saturday, Sunday, Good Friday, Christmas Day and any day which is a bank holiday in the United Kingdom under the Banking and Financial Dealings Act 1971 (plus any other days that may be specified under the 1892 Act). A normal working week from and including Monday to Friday is the conventional view, but will not apply to certain businesses which normally operate on the other days of the week (eg the retail sector where many shops are open seven days a week). Also many services now operate on the internet. Some or all of the services may be available on every day of the week (eg an insurance company may be open for people making a claim seven days a week, but not be open in relation to some 'back office operations'). Also the start of a conventional working week in England may be Monday, but in other countries, it may be a Sunday or Saturday.

²⁸ See *Re Kent Coalfields Syndicate* (1898) 67 LJQB 503.

²⁹ See Arbitration Act 1996, s 78, one of the few statutes to give a meaning to the words.

- the name of a document;
- the fact that parties have reached an understanding, which may or not be a legally binding;
- the fact that parties have entered into a legally binding contract.

Where the word is used to refer to a type of document or arrangement between two or more parties, the meaning of the word 'agreement' normally means 'contract'³⁰.

Where the parties are involved in a transaction, event or situation which needs to be referred to or is subject to a legislative provision, the exact meaning should be checked³¹.

Similarly with EU competition law, an agreement can have a meaning where the parties have reached an understanding of a non-binding nature³².

8.4.2 'and/or'

An agreement may require a party to fulfil an obligation in one of several ways or a party to come within one or more situations. For example, a party providing a service may have to produce a report at the end of the agreement and the agreement specifies various ways the party can provide the report to the other party, ie:

The Consultant shall supply a final Report within 30 days of the termination of this agreement to the Client by post and/or email and/or facsimile and/or in person.

In this example, the Consultant can provide the report either:

- by post or email or facsimile or in person; or
- by post and email and facsimile and person.

That is, to fulfil the obligation, it is possible for the consultant to provide the report either conjunctively or disjunctively³³.

Having 'and/or' in a clause may have unintended consequences, particularly where a party is to do or provide something, as the 'and' part of 'and/or' may

³⁰ *Re Symon, Public Trustees v Symon* [1944] SASR 102, 110; *Goldsack v Shore* [1950] 1 KB 708 at 713, CA, per Evershed MR.

³¹ Eg, Enterprise Act 2002, s 129, where agreement 'means any agreement or arrangement, in whatever way and whatever form it is made, and whether it is, or is intended to be, legally enforceable or not'.

³² See *Electrical and Mechanical Carbon & Graphite Products* (Comp/E-2/38 . 359).

³³ This appears to be the default meaning as held by courts, see *Stanton v Richardson* 45 LJCP 82; *Gurney v Grimmer* (1932) 38 Com Cas 7.

entitle that party to fulfil the obligation in multiple instances or in ways that the other party does not wish to occur.

8.4.3 'As amended'

If the contract includes any references to legislation, it may be appropriate to refer to the legislation 'as amended from time to time', to take account of changes to the legislation during the life of the contract. Alternatively the parties may want to avoid having their contract changed as a result of changes in legislation (eg if they use a definition of 'subsidiary' set out in the Companies Act 2006)³⁴.

Under s 17(2)(a) of the Interpretation Act 1978, a reference to an enactment in a contract is to be understood as referring to an enactment which repeals and re-enacts the earlier enactment. Rather than rely on this section (which may be too narrow in some cases, and unacceptable in others), it is common to include wording along the following lines:

1. In this Agreement, subject to clause 2 below, any reference to any enactment includes a reference to it as amended (whether before or after the date of this Agreement) and to any other enactment which may, after the date of this Agreement, directly or indirectly replace it, with or without amendment.
2. The reference to section 1159 of the Companies Act 2006 in clause 3 of this Agreement shall be interpreted as meaning section 1159 in the form in which it is enacted as at the date of this Agreement, and without any subsequent amendments or re-enactment.

8.4.4 'Assignment' and 'novation'

The term 'assignment' is used in several senses, including:

- the transfer of title in property (ie ownership), for example, of intellectual property or land;
- the transfer of rights, for example, rights under an agreement (such as a right to be paid the price stated in the agreement).

The term 'assignment' should not refer to the transfer of obligations under an agreement, although in practice this is sometimes done. (A clause dealing

³⁴ However, there are dangers in not referring to statute where a defined word or clause is based on the statute, particularly if the statute is amended (perhaps adding further or different categories of some situation or event). An example of this would be where an agreement allows a party to terminate if another party becomes insolvent, and the wording in the clause uses the meanings of insolvency as defined in a statute (but makes no reference to the statute). If the statute changes and includes newer forms of insolvency, but the agreement is not explicitly amended, then if the other party becomes insolvent in one of the newer ways the first party will not be able to terminate for that new form of insolvency. See *William Hare Ltd and Another v Shepherd Construction Ltd* [2010] EWCA Civ 283, [2010] All ER (D) 168 (Mar) for an illustration of this point.

with the assignment of rights, the transfer of obligations and other matters is commonly called just the 'assignment clause'.) It is bad practice to refer to 'assigning an agreement' since this phrase does not make clear whether obligations, as well as rights, are to be transferred³⁵.

Generally, it is possible for one party to assign rights under a contract³⁶ unless the contract is one involving a personal relationship (eg agent or employee), or there is an express or implied term preventing assignment. Transferring obligations under an agreement requires the consent of the other contracting party. If the rights and obligations are transferred there is in effect a 'novation' of the contract, whereby the contract is, in effect, cancelled (with the agreement of the original parties) and replaced by a new one with different parties³⁷. It is possible to 'novate' only some of the rights and obligations of an agreement³⁸. For example, in an agreement where a supplier provides a range of services to a customer, the parties may decide that a third party will provide one of the services, and also that the third party will receive any payments for that service from the customer. In this situation, it is possible to novate just that one service.

8.4.5 'Best endeavours', all reasonable endeavours, and 'reasonable endeavours' (as well as absolute obligations)

These phrases indicate the level of obligation (whether absolute or qualified) and the amount of effort that a party is required to put into fulfilling a specified obligation. See the discussion on these points at 5.5.

8.4.6 'Boilerplate'

'Boilerplate clauses' are a set of clauses which are often found in commercial agreements almost irrespective of the subject matter of the agreements. They are often placed at the end of an agreement. Some 'boilerplate' is concerned with the operation of the agreement itself (such as notices, law and jurisdiction and interpretation clauses), whilst some deal with the rights and obligations of the parties (clauses such as assignment and subcontracting, entire agreement, waiver, *force majeure*, etc). There is no fixed list of what constitutes 'boilerplate',

³⁵ See [Clause 8.3 in Precedent 1 in Appendix 1] for example wording. Although the heading of the clause is called 'Assignment', the actual wording of the clause, among other things, deals with assignment *and* transfer.

³⁶ Unless there is express or implied prohibition, an assignment can be without the consent of the other party, *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2000] Lloyd's Rep IR 249.

³⁷ See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103, per Lord Browne-Wilkinson.

³⁸ *Telewest Communications Plc v Customs and Excise Commissioners* [2005] EWCA Civ 102, [2005] All ER (D) 143 (Feb).

and the classification of certain clauses as 'boilerplate' does not really turn on their importance³⁹. As a general proposition, the longer the agreement the greater the amount of boilerplate is found—there are more clauses covering a greater amount of detail.

The authors classify boilerplate as the following—depending the complexity or importance of the agreement:

- *very simple/very unimportant agreement*. Clauses dealing with notices, law and jurisdiction and Contracts (Rights of Third Parties) Act 1999.
- *simple and short*. Clauses dealing with notices, law and jurisdiction and Contracts (Rights of Third Parties) Act 1999, (brief) interpretation provisions, (separate) definitions.
- *medium length/medium importance*. Clauses dealing with notices, law and jurisdiction and Contracts (Rights of Third Parties) Act 1999, (more extensive) interpretation provisions, (separate) definitions; entire agreement, amendment, assignment, waiver, (no) agency or partnership (particularly where the parties are working together on a project), further assurance (if there is a transfer of property), severance (if any provisions are thought to be problematic and not pass judicial scrutiny) and announcements.
- *Full-scale boilerplate: medium length/medium importance*. Clauses dealing with notices, law and jurisdiction and Contracts (Rights of Third Parties) Act 1999, (more extensive) interpretation provisions, (separate) definitions, entire agreement, amendment, assignment, waiver, (no) agency or partnership (particularly where the parties are working together on a project), further assurance (if there is a transfer of property), severance (if any provisions are thought to be problematic and not pass judicial scrutiny), announcements, costs and expenses (of negotiating and entering to the agreement), counterparts and duplicates, joint and several liability, priority of terms, retention of title (if not dealt with in a payments clause), set-off (if not dealt with in a payments clause), cumulative remedies, capacity (to enter into the contract), arbitration and mediation/ADR (if not in law and jurisdiction clause).

8.4.7 'Breach' and 'non-performance'

The word 'breach' could be considered as a technical term, not used in everyday speech. A few contracts use the more modern word 'break', as in 'if X breaks this contract', but this has not become a common practice.

³⁹ For example, the boilerplate section of an agreement usually contains an 'entire agreement' clause (see 6.5.5 and 6.5.22.10). Such clauses have received considerable scrutiny by the courts in recent years.

Technically, there is (or some lawyers consider there to be) a difference between breach of a contract's terms and failure to perform obligations under the contract. However, it seems unlikely that a court would interpret a clause dealing with breach of contract as not covering non-performance, unless the contract refers elsewhere to non-performance and breach as being two separate things.

8.4.8 'Cash'

It is unlikely that many commercial agreements will require payment in actual notes or coins. 'Notes' and 'coins' is perhaps a common understanding of the meaning of 'cash'. If immediate payment is required (ie that the payor has immediately available funds to make payment), then the use of clear wording as to the type of funds available should be used, rather the use a term such as 'cash'⁴⁰ (eg that a supplier will consider that payment is made when it has received cleared funds in a specific bank account).

8.4.9 'Change of control'

A 'change of control' clause concerns what is to happen where there is a change in:

- the ownership of shareholding of a party; or
- in the directors (or others) who manage a party.

A change of control clause will specify what is to happen in the event of these situations occurring. For example, the party affected by such a change may have to notify the other party. The clause may then provide that certain actions can or will occur in consequence, such as the second party being able to terminate an agreement.

A change of control clause is commonly used where the issue of who owns and/or manages one party is of particular interest or importance to the other party. For example, a party (the licensor) might develop specialised software for accountancy work in a particular industry. It licenses the software to another party (the licensee). The licensee may not wish one of its competitors to own or control the licensor. This could, for a number of reasons, include the competitor acquiring access to confidential information of the licensee,

⁴⁰ For example, in *Re Stonham, Lloyds Bank Ltd v Maynard* [1963] 1 WLR 238 the phrase 'cash ... in bank' was held to mean, in the circumstances of the case, to mean money both in deposit and current accounts. Also under the meaning of cash in various statutes varies (eg in s 289(6) of the Proceeds of Crime Act 2002, including bearer bonds and bearer shares).

refusing to license the software (or new or improved versions) to the licensee, and so on.

Such a clause is often used in addition to an assignment clause⁴¹. The latter is concerned with the transfer of rights and obligations (including assets), but does not deal with the situation where there is no transfer of rights or obligations but the nature of the other party (whether through ownership or management) has fundamentally changed (such as a sale of large part or all of the shareholding in the party).

8.4.10 *Competition and anti-trust*

The main competition laws affecting English law agreements are domestic UK competition laws, including the Competition Act 1998, other UK statutes and the common law on restraint of trade, and EC competition laws, particularly Articles 101 and 102 of the EU Treaty.

In the United States, competition laws are known as anti-trust laws. This name derives from the late nineteenth century, when laws were introduced to deal with the anti-competitive activities of major commercial trusts in the steel industry. At that time, prior to the development (or widespread use) of limited liability companies, the trust was a common vehicle for commercial activities.

8.4.11 *Comfort letter*

A letter which contains statements by a party (or someone connected with a party). The statements are intended to re-assure another party, but they are usually not intended to be legally binding. See the discussion of comfort letters and letters of intent at 1.12.

For example, a supplier of goods to a buyer might require, if the buyer is a subsidiary of another company (ie a holding company), the holding company to provide a comfort letter which indicates that the holding company normally meets the liabilities of its subsidiaries (even though not legally liable to do so). If the supplier's concerns are strong there are other ways of tackling them, such as requiring a guarantee from the holding company or making the holding company be a party to the contract.

8.4.12 *'Completion' and 'closing'*

'Completion' is a stage in a contract when the main purpose of the contract takes effect, for example, in a house sale, it will include the formal conveyance

⁴¹ See 8.4.4.

of property⁴². The term is also often used in sale of business agreements. The term 'closing' is an equivalent expression used in the United States.

With some contracts it may not be clear what is the exact meaning of completion, ie the extent to which the contract obligations are fulfilled (by one or both parties), where the contract does not involve a house sale. For example, for some types of building contract, there can be completion of the building work although there may still be some minor items needing doing or attention ('snagging')⁴³. In appropriate cases not involving specialist areas such as conveyancing or building contracts, what constitutes 'completion' may need specifying in detail to avoid (as far as possible) any disputes⁴⁴.

8.4.13 *Consent*

A party is sometimes required to obtain the consent of the other party or from a third party before carrying out an obligation under an agreement. For example, a software development agreement may require the developer to obtain consent before carrying a 'live' test on the data of the customer (so that the customer can make appropriate back-ups and take safety measures). A person will not normally give consent by remaining silent or being silently acquiescent⁴⁵.

Clear wording should always be used in such circumstances so that it is clear what is to happen at each stage in a contract and what is to happen if the party does not undertake an obligation or respond to a notice from the other party. In the above example, in some software development agreements where the software is being tested on live data, the customer is given a set number of days to respond and if they do not, then either the test is deemed accepted and the developer moves on to the next stage or the developer has the right to terminate the agreement or charge extra for any delay.

8.4.14 *Consideration*

See the discussion in Chapter 1.

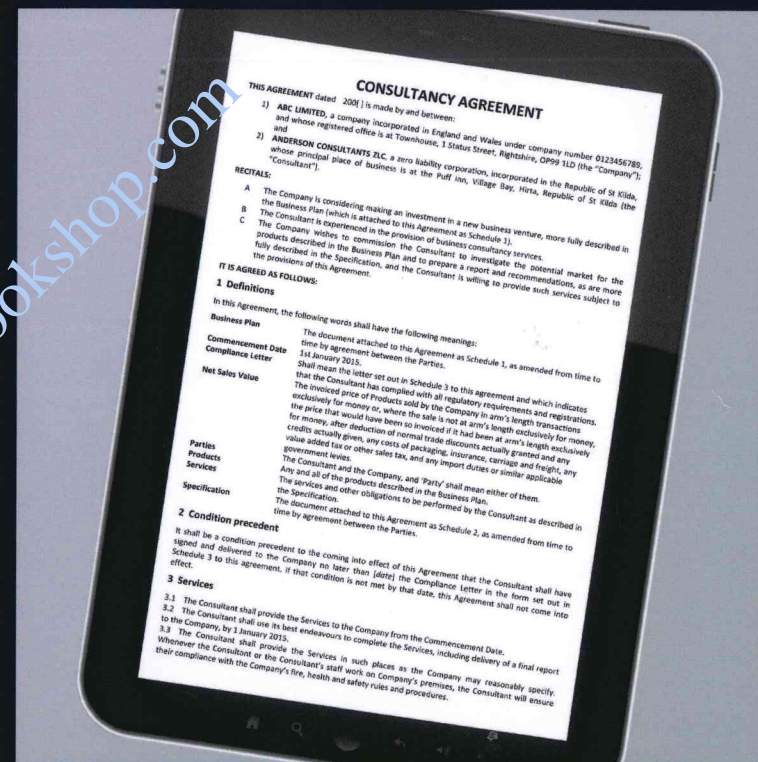
⁴² If the word is specifically defined in an agreement, then it will mean the actual completion and not the date named for completion, *Richards v Pryse* [1927] 2 KB 76.

⁴³ *Emson Eastern Ltd (in receivership) v E M E Developments* (1991) 55 BLR 114.

⁴⁴ For example, a contract may provide that an agreement terminates automatically on 'completion of the Project'. The supplier of the goods or services may consider it has completed the project when it has delivered the goods and installed them, and considers the agreement terminated. However the customer/client may not because it considers completion to mean a period to allow the goods to operate after installation. If 'completion' is not defined as meaning a set of steps, then there is greater scope for a dispute between the parties.

⁴⁵ *Macher v Foundling Hospital* (1813) 1 Ves & B 188.

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