Preface

For some people the word 'boilerplate' refers to 'boring' or worse still 'unimportant' contract terms.

Nothing we can write can cure the first impression. But the contents of this book are witness to the fact that the second impression is wrong.

Boilerplate clauses sometimes deal with important operational issues, such as the law of the contract or how notices may be sent. On other occasions, the clause deals with commercial issues that may not seem important, until a problem arises. Thus, a *force majeure* clause only becomes significant if a party cannot perform his obligations due to circumstances beyond his control; those circumstances may arise only rarely.

Whatever category a boilerplate clause is put in, many busy business people would prefer not to think about them. Instead, they prefer to focus on the core commercial terms, such as what someone will get, when they will get it, and for how much. But a failure to consider (or understand) all the provisions of a commercial agreement (even the 'boring' ones) can have serious consequences. These consequences may come when it is too late to do anything about the contract terms - after the agreement is signed.

A perfect illustration of this is an 'entire agreement' clause, usually buried at the end of the agreement. It is classic 'legal' wording dealing with what is in fact often a key issue: whether what a party says or writes about their product or service, outside the strict terms of their written agreement, is intended to be binding. Ideally, the parties should address such a matter explicitly and *also* understand how an 'entire agreement' clause deals with such oral or written statements. Unfortunately, the traditional wording of an entire agreement clause does not help the uninitiated understand it, let alone take account of the changing views of the court on the reach of an 'entire agreement' clause.

This book is now in its third edition and contains over 80 separate sections. There is a limit to what it is possible to *usefully* add. Our aim for this third edition remains the same as for the first edition:

- to provide a practical guide to key issues in a range common 'boilerplate' and commercial clauses likely to occur in mainstream commercial agreements;
- to provide a selection of boilerplate clauses.

To fulfill these aims for this third edition we set ourselves the following goals:

1. to provide more explanatory commentary on the legal principles underlying a boilerplate clause (to help the user of this book better understand the purpose for including or not including a particular boilerplate provision as well the factors needing consideration as to its content and its effect);
2. to add some new sections (for this edition on data protection, freedom of information and good faith);
3. to include further relevant case reports (to illustrate how the courts interpret boilerplate provisions in commercial agreements).

This book is not intended as a legal textbook, nor to rehearse in detail the law on a particular point or to provide a (traditional) casebook. As stated above this book is a 'practical guide' and should address the needs of drafters and users of commercial agreements who are not lawyers as well. To meet these needs, just providing a short explanation of the purpose of a boilerplate provision and a selection of examples is no longer tenable. What is necessary is to put boilerplates and commercial clauses in a legal and interpretative context. The difficulty, of course, is to find the right balance in giving enough explanation but not going on at too great a length. Some types of clauses (such as exemption clause) are repeatedly picked apart and reinterpreted by the courts, making such an aim difficult. We hope we have found the right balance.

Nor is this book a general guide to negotiating or drafting contracts. For that please read our book, *Drafting and Negotiating Commercial Contracts*, the third edition of which appeared earlier in 2012.

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How to negotiate boilerplate clauses

Driftwood: Oh that's the usual clause. That's in every contract. That just says, uh, it says, uh, If any of the parties participating in this contract is shown not to be in their right mind, the entire agreement is automatically nullified … That's what they call a 'sanity clause'.

Fiorello: Ha, Ha, Ha, Ha, Ha. You can't fool me. There ain't no Sanity Clause!

'A Night at the Opera', Marx Bros. (MGM Studios, 1935)

Introduction

Boilerplate and commercial clauses of 'lesser importance' are unglamorous.[1] In the heat of negotiating a commercial deal, few business people are likely to spend much time or emotional capital arguing over the wording of a force majeure clause or a waiver clause. Instead, they leave the negotiation of such dry details to the persons responsible for preparing the agreement (or their lawyers).

Good lawyers will have a clear idea of which boilerplate clauses are important, and how they should be worded. Although there is a strong 'legal' element to many boilerplate clauses, they also raise commercial issues (often critical commercial issues). For example:

- should a party be allowed to assign its rights or obligations to another?
- should flooding, a failure in the electricity supply or a strike at the supplier's premises entitle the supplier to delay delivery of contract goods?
- should the parties take a dispute be taken to arbitration or to a court?
- should any statements made prior to the contract by one party which the other has relied on in entering into the contract become part of the contract?

It may be difficult to get detailed instructions on what the client requires on some of these issues. In many cases, it will be necessary to 'take a view'. Commercially, it may be easier to justify including extensive boilerplate provisions in a 50-page agreement than in a two page agreement. From a legal perspective such a distinction may be less easy to justify.

The problem, of course, is that it is very difficult to predict whether any particular boilerplate provision will prove to be important in a particular agreement. A dispute might arise unexpectedly over whether a party may assign its rights under the agreement, or whether a reference to a 'year' in an agreement means a year starting on 1 January or a year starting on an anniversary of the date of the agreement. The contract drafters will often have to weigh up potentially conflicting objectives: legal certainty, a commercial desire to 'keep it simple but effective', efficient use of an expensive lawyer's time, the likelihood of a dispute arising, and so on.

1 'Lesser importance' means clauses which are often not the focus of a business person: ie something other than what a party is to supply, what price will a party be charging for it, when a party will be supplying it and when the other party will be required to pay for it.

What the contract drafter should not do is just include a 'standard' set of boilerplate clauses in the agreement without considering whether they are appropriate for the particular transaction. When preparing a suitable set of clauses, the contract drafter needs to understand why each boilerplate clause is useful, when it is important to include it and the potential legal consequences of including or not including it. A related point is that the wording of some 'standard' clauses needs modification from time to time in light of detailed and continuing judicial scrutiny and interpretation. Entire agreement and assignment clauses are just two of the more recent examples. Other clauses are sometimes added because of changes in the law (such as following the passing of the Contracts (Rights of Third Parties) Act 1999).

This book aims to provide guidance on the purpose and effect of boilerplate clauses that are in common use. It also covers a selection of other contract clauses that might not be regarded as 'boilerplate', but are nevertheless frequently encountered in many types of commercial agreement (for example, confidentiality clauses). The main purpose of this book is to discuss why such clauses are used, discuss drafting issues that arise, and provide practical samples of commonly used precedents. Also included are extracts from judgments where particular clauses have been defined, analysed or interpreted.

The main part of this book consists of approximately 80 topics arranged in alphabetical order, starting with 'Acknowledgements' and ending with 'Warranties'. Also included is a set of typical boilerplate terms in a form in which they might be found in a lengthy commercial agreement (see the 'Boilerplate Agreement' in Appendix 1). An accompanying CD contains the precedent clauses found in this book.

What is 'boilerplate'?

In this book, the term 'boilerplate' is used broadly to mean contract terms that are often found in commercial agreements, almost irrespective of the subject matter of the agreement. Usually these terms are found towards the end of the agreement, after the 'interesting' commercial terms that are concerned with the main purpose of the transaction. Sometimes, boilerplate terms are concerned with the operation of the agreement as a legal document (eg law and jurisdiction, notice and interpretation clauses). In other cases, they clarify the rights and obligations of the parties (eg force majeure, assignment and waiver clauses). In all cases, it is important to be aware of their purpose and legal effect.

Which boilerplate clauses are the most important?

The safe answer is 'it all depends'. For example, a force majeure clause may be thought essential in a contract involving a country where a civil war is likely to take place, but irrelevant to most contracts for the purchase of stock items

from a shop. Nevertheless, it is possible to make a few generalisations as to the boilerplate provisions that are frequently encountered in different types of agreement. It should be stressed that many contracts will not conform to these generalisations.

No boilerplate. Sometimes, no boilerplate clauses are included in a contract. It may be felt that any kind of 'legal' language is commercially unacceptable or off-putting. This is a decision for the commercial client to take, rather than a contract drafter. In practice, written contracts containing no boilerplate clauses tend to be short documents, often drafted without legal advice.

Minimal boilerplate. Sometimes the instructions are to keep the boilerplate to an absolute minimum, eg when drafting a short letter agreement. The contract drafter will often wish to include the following boilerplate clauses in this situation:

- A *Notices* clause.
- A *Law and Jurisdiction* clause (unless there is absolutely no foreign element).
- A Contracts (Rights of Third Parties) Act 1999 clause.

Light boilerplate. Where the contract is to be kept short and simple, the contract drafter may wish to include the following provisions in addition to those already mentioned:

- some brief *Interpretation* provisions; and
- perhaps set out any definitions in a separate *Definitions* clause.

Medium boilerplate. Where the agreement can accommodate more detailed boilerplate provisions, but it is felt to be inappropriate to 'go the whole hog', the contract drafter may wish to include some or all of the following provisions, in addition to those already mentioned. The following list concentrates on 'pure' boilerplate clauses, such as those to be found in the final clause of the specimen Boilerplate Agreement (see Appendix A). The contract drafter may include other common clauses, eg warranties, exemption clauses, termination provisions, payment terms and confidentiality provisions, but it is more difficult to generalise about which clauses will be included.

- More extensive *Interpretation* provisions.
- Entire Agreement and Amendment clauses.
- Assignment clause.
- *Waiver* clause.
- In contracts involving a programme of work or co-operation between the parties, an *Agency* clause and a *Force Majeure* clause.
- In contracts involving the provision of business, technical or other information from one party to another, a *Confidentiality* clause, a *Data Protection* clause and, if a party is a public authority, a *Freedom of Information* clause.

- In contracts involving a transfer of property or the grant of rights in property, a *Further Assurances* clause.
- If there is doubt over whether provisions would be upheld by a court, a *Severance* clause.
- Perhaps a clause dealing with how *Announcements* about the contract can be made.

Full-scale boilerplate. In some situations, the requirement is to make the contract as watertight and unambiguous as it can possibly be, and the business person is happy to include lengthy boilerplate provisions if these will protect their interests. In effect there is no commercial pressure to limit the number or extent of such provisions. For example, commercial bank guarantees are sometimes very detailed. In this situation, the contract may include some or all of the provisions mentioned above, as well as a large number of further boilerplate provisions.

Location of clauses in an agreement

There is generally no requirement for a contract under English law to follow a particular format or layout. Most modern commercial contracts prepared by lawyers follow a similar structure. There are advantages to having a structured and standard layout, including giving a logical and clear framework.

The aim is to draft an agreement so that it can be read, understood and used quickly and efficiently (whether by the parties to the contract, the contract drafter or anyone else who needs to).

In this book, for each clause we have suggested (in the Location section) where, in a typical commercial agreement, the clause might go, using the classification shown in the first column of the table, below. Grouping particular clauses in this way can be of assistance to users of commercial agreements, to:

- ensure that all the relevant provisions on a particular theme are considered or included;
- consider whether any further provisions should be added.

The following table indicates in the first column the different sections of a typical commercial agreement, and in the second column, those provisions that might typically be included in each such section.

Section of an agreement	*Clauses that might appear in that section*
Top of the agreement **Date of the agreement**	*Subject to contract* *Date of the agreement* *Commencement date* *Deeds* (to state document is a deed)
Parties	*Parties* *Successors and assigns*

Section of an agreement	*Clauses that might appear in that section*
Recitals	*Recitals* *Definitions*
Definitions	*Affiliates etc* *Charges* *Commencement date* *Completion* *Definitions* *Exclusive, non-exclusive and sole* (where these words have particular meanings) *Force majeure* *Intellectual property* *Interpretation* *Months* (and other expressions of time) *Net sales value* *Parties* *Price* (which refers to payment terms and Interest clause) *Sub-contracting* (such as the meaning of a particular sub-contractor) *Territory*
Main Commercial Provisions	*Acknowledgements* (usually within another clause) *Appointment* (usually within another clause such as X appoints Y to do Z) *Audit and records* (usually with a Payments clause) Best and reasonable endeavours (usually within other clauses—X to use the best endeavours to provide service Z to Y) *Breach* (usually within another clause—eg stating what the consequence of failure to perform a key commercial obligation) *Commencement date* (usually within another clause—eg within a main commercial provision to indicate when performance is to start) Completion (usually within another clause—eg within a main commercial provision to indicate when certain defined activities to take place) *Conditions precedent and subsequent* (usually within another clause) *Consent* (usually within another clause) *Consultation* *Currency* (usually with a Payment clause)

Section of an agreement	*Clauses that might appear in that section*
Secondary Commercial Provisions—*contd*	*Completion* (usually within another clause—eg within Termination clause to indicate when certain defined activities are take place) *Conditions precedent and subsequent* (usually within another clause) *Confidentiality* *Consent* (usually within another clause) *Consequences of termination* (usually with a Termination clause) *Consultation* (usually within another clause) *Covenants* (usually with Warranties or Exemptions clauses) *Cumulative remedies* (usually within another clause—such as Payment and Termination clauses) *Data Protection* *Disclaimers* (usually party of a Warranties clause) *Exemption clauses* (usually grouped with clauses such as Warranties and Indemnities) *Freedom of Information* *Expiry and termination at will* (usually included with a Termination clause) *Force majeure* (sometimes included with a termination or similar provision to indicate the consequences of a force majeure event occurring) *Indemnities* (usually grouped with Exemption and Warranties clauses) *Insolvency* (usually with a Termination clause) *Insurance* (usually grouped with Exemption, Warranties and Indemnities clauses) *Intellectual property* (usually within other clauses—eg in such clauses in Warranties (what warranties are given in relation to the intellectual property), Termination (what is to happen to any licences of intellectual property when the agreement terminates) *Termination for breach* *Warranties* (usually grouped with Exemption, Indemnity and Insurance clauses)
Boilerplate	*Agency and partnership* (denials of) *Agents for services* *Amendment or variation* *Announcements*

Section of an agreement	*Clauses that might appear in that section*
Boilerplate—*contd*	*Arbitration and ADR* (sometimes with Law and jurisdiction) *Assignment and novation* *Capacity* *Charges* (sometimes included within an Assignment clause) *Certificate of value* *Contracts (Rights of Third Parties)* *Costs and expenses* *Counterparts (or duplicates)* *Cumulative remedies* *Entire agreement/final agreement* *Exclusive, non-exclusive and sole* (usually within an Interpretation clause where this clause is located in this section) *Force majeure* (usually where a short provision) *Further assurance* *Interpretation* *Joint and several liability* *Language* *Law and jurisdiction* *Months* (and other expressions of time) (sometimes within an Interpretation clause) *Notices* *Partnership (denial of)* (sometimes within an Agency and partnership (denials of) clause) *Priority of terms* *Retention of title* (if not included with a Payments clause) *Set-off and retention* (if not included with a Payments clause) *Severance and invalidity* *Stamp duty* *Sub-contracting* (usually with an Assignment and novation clause to indicate that sub-contracting is permitted, or a separate clause to indicate sub-contracting is permitted) *Successors and assigns* *Time of the essence* (usually within another clause—such as in a Notices clause) *Waivers and releases*

Section of an agreement	*Clauses that might appear in that section*
Signing section	*Capacity* (usually as a statement with execution and signature block clauses) *Execution and signature block clauses* *Deeds* (to state document is a deed or executed as a deed)
Schedules	*Schedules*

Origin of the meaning of 'boilerplate'

Some readers may be curious as to the origins of the term 'boilerplate' and its meaning. The term seems to have been in common use in the United States for many years, used both in a legal and non-legal context (in the latter case, used principally by journalists). It seems that the expression originated in nineteenth century newspaper production in the United States. Local newspapers used to incorporate sections of national news that were sent to the local newspaper office by train, already typeset and ready for printing on metal drums. The metal drums were known as boilerplate. Boilerplate text became a name for standard text that was slotted into the newspaper along with more tailored, local news.

Affiliates, group companies and subsidiaries

Purpose of clause

The term 'affiliate' is sometimes used to refer to individuals or companies that are connected or associated with a party to an agreement.

The purpose of referring to a party's affiliates is usually to enable them to:

- receive a specific benefit (eg if a party is permitted to assign its rights under the agreement to its affiliate); or
- impose on them obligations under an agreement.

Drafting issues

- General points:
  - in the UK there is no standard definition of what an affiliate is;
  - accordingly, the parties should define the meaning of affiliates in their agreement;
  - UK companies legislation contains no definition of 'affiliate';
  - often (although not always) other companies in the same group of companies as a contracting party are defined as its affiliates.
- Use of statutory definitions:
  - many definitions of 'affiliate' in agreements use the meanings of certain words found in the Companies Act 2006 (the text of these is found at the end of this section):
    - *s 1159.* 'subsidiary', 'holding company' and 'wholly owned subsidiary' are defined in the Companies Act 2006; and
    - *ss 1161, 1173.* 'parent undertaking', 'subsidiary undertaking', 'parent company', 'undertaking' and 'group undertaking' are also defined . These sections appear in a section dealing with various accounts matters and provide a wider definition than under ss 1159 etc. They were originally introduced following the introduction of EC Seventh Directive on Group Accounts. They

originally appeared in the sections of the Companies Act 1985 dealing with accounts matters (ss 5, 21, 22 of and Sch 9 to that Act).

- Where the term 'affiliate' is used to mean, in effect, another company in the same group as a party to the contract, wording based on section 1159 is sometimes used (see Precedent 1);
- to make the definition broader, the definition of 'group undertaking' in the Companies Act 2006 can be used (see Precedent 2);
- sometimes parties will wish to make the definition of group companies broader still, to include joint ventures which are not majority-owned subsidiaries;
- where overseas parties are involved in an agreement, a more general definition, which does not refer to UK companies legislation, can be used. The reference in Precedent 3 to less than 50% ownership of shares, etc, takes account of the fact that in some countries, foreign investment in a company may not exceed a specified percentage of the share capital. For practical purposes, such a company may still be regarded as a member of the same group as the foreign parent, even though the percentage shareholding is less than 50%.
- if wording is used in the affiliates definition which refers to specific wording used in provisions of the Companies Act 2006 then it is likely that the courts, in the event of a dispute, will interpret the wording used as having the meaning used in the 2006 Act. In *Farstad Supply A/S Enviroco Ltd* [2011] UKSC 16, a decision on what is now Companies Act 2006, s 1159, the court held that the word 'member' used in that section of the Act as to whether a holding company of the subsidiary must be a member of the subsidiary must have a meaning consistent with that found in another section of the Companies Act 2006, s 112 (that a member is a person who agrees to become a member of the company ***and*** whose name is entered into the register of members).
- if the parties to an agreement wish a definition of an affiliate where a holding company or subsidiary does not need to be a member of one or the other then either the Companies Act 2006, s 1162 may be used or there should be use of alternative wording which does not make reference to the Act and which clearly explains the intentions of the parties.

- *Points to note:* When using a definition of 'affiliates' or 'group companies', references to affiliates or group companies are often included in a contract to enable them to receive a benefit under the contract. Unless careful consideration is given to the drafting of such a provision, it may not be clear who is or who is not a party to the contract. In general, if a person is to be a party to the contract, then the person or the person's agent (or, in the case of a company, an authorised signatory) must sign the contract. Therefore, unless a company signs the agreement as agent of its affiliates or group companies, or they sign the agreement, they will

not be bound by it and will not have enforceable contractual rights under it. When drafting a clause referring to affiliates or group companies, it is useful to consider the following points:

- if a party is referred to as a part of a group, and the contract states that references to the party include references to the group, are the group and all its members intended to be parties to the agreement?;
- is the term 'affiliate', 'group' (or whichever term is used) defined in the contract? Will the definition make use of the terms 'subsidiary' and 'holding company'? If so, are the statutory definitions set out in ss 1162 (wider definition) and 1159 (narrower definition) of the Companies Act 2006 to be used (see below)? If the wider definition is used, ie, s 1162, then persons who, although not incorporated, can claim a dominant influence over a party to the agreement may be able to claim a benefit under the contract;
- are the affiliates/group companies named as parties and will they sign the contract?
- will the named party to the contract be empowered (and stated in the contract to act) as the agent of the group of companies to sign the contract on behalf of each of the affiliates/members of the group?
- if group companies are to be parties to an agreement either by reference or by explicitly stating their names, it is important to be clear which of the parties has rights or obligations under particular clauses of the contract. If more than one party has such obligations, do the obligations give rise to joint, several or joint and several liabilities on the parties concerned (see Joint and Several Liability)?;
- the above issues will need addressing on a case-by-case basis.

Location in an agreement

An *Affiliates, etc* clause will usually appear in the Definitions section of an agreement.

Linkage and use

In addition to the situations described above, the following are some of the more common situations when the parties to an agreement might make use of a definition of 'affiliate':

- in a *confidentiality* clause, where confidential information is disclosed by one party to another party, the disclosure of the confidential information can also be disclosed to an affiliate of the other party;
- that the affiliates of one party can (also) enforce an obligation imposed on another party;

- that under some types of licence agreements where royalty payments are involved, the receipts generated by a party will include that of its affiliates;
- that warranties and/or indemnities provided by one party to another party will also extend to the affiliates of the other party (and the clause will sometimes extend to the affiliate having the right to bring an action against the party in breach of the indemnity etc);
- that a party is permitted to assign its rights and/or obligations to an affiliate (without the consent of the other party in an *assignment* clause);
- that an affiliate is included as a person who has the right to enforce some or all of the provisions of an agreement under a *Contracts (Rights of Third Parties) Act 1999* clause.

Other phrases/words are sometimes used instead of, or in addition to, 'affiliates', such as 'associated companies'.

Sample precedent material

Precedent 1—Using the Companies Act 2006, s 1159
In relation to a person, 'Affiliate' means any subsidiary or holding company of that person, and any other subsidiary of that holding company, where 'subsidiary' and 'holding company' have the meanings given in the Companies Act 20062006, s 1159 (as amended).

Precedent 2—Using the Companies Act 2006, s 1162(5)
'Affiliate' in relation to a Party shall mean any group undertaking of that Party, where 'group undertaking' has the meaning given in the Companies Act 2006, s 1161(5) (as amended).

Precedent 3—Where 'control' may be less than that found in the Companies Act 2006, s 1159
An 'Affiliate' of a Party shall mean any person controlling (directly or indirectly), controlled by or under common control with that Party. For the purposes of this definition, 'control' shall mean direct or indirect beneficial ownership of [more than 50%] [50%] [(or, outside a Party's home territory, such lesser percentage as is the maximum permitted level of foreign investment)] [or more] of the share capital, stock or other participating interest carrying the right to vote or to distribution of profits of that entity or person, as the case may be.

Precedent 4—Using the Companies Act 2006, s 1162
A company or other person is affiliated to another company or person if one is a subsidiary undertaking of the other or both are subsidiary undertakings of the same third company or other person, where 'subsidiary undertaking' has the meaning given in the (UK) Companies Act 2006, s 1162.

Precedent 5—Definition of 'group company'
'Group Company' means a company within the group of companies of which [the Company] is from time to time a member.

Precedent 6—Definition of 'group company'
'Group Company' means the Company and (as the context requires) the Subsidiaries and each or any of them.

Precedent 7—Definition of 'group company' by ownership
'Group Company' means any company which either owns more than 50% of the issued share capital of A or in which either A or any subsidiary of A owns more than 50% of the issued ordinary share capital.

Precedent 8—Definition of 'group company' with reference to the Companies Act 2006, s 1159
'Group Company' means any of the Company or its subsidiaries or holding companies or any subsidiary of the Company's holding company and 'subsidiary' and 'holding company' shall bear the meanings given to them by the Companies Act 2006, s 1159.

Precedent 9—Definition of 'subsidiary'
'Subsidiary' has the meaning given to that expression in the Companies Act 2006, s 1159.

Precedent 10—Definition of 'subsidiary' and 'holding company'
'Subsidiary' and 'holding company' shall bear the same respective meanings as in the Companies Act 2006, s 1159.

Precedent 11—Definition of 'subsidiary'
'Subsidiary' means either:

1 a subsidiary within the meaning of s 1159 of the Companies Act 2006, or

2 unless the context requires otherwise, a subsidiary undertaking within the meaning of s 1162 of the Companies Act 2006.

Precedent 12—Definition of 'subsidiary' by control
'Subsidiary' means an entity from time to time of which A or B:

1 has direct or indirect control, or

2 owns directly or indirectly more than 50% of the share capital or similar right of ownership,

'control' for this purpose meaning the power to direct the management and the policies of the entity, whether through the ownership of voting capital, by contract or otherwise.

Precedent 13—Definition of 'subsidiary' by control – longer form
A 'subsidiary' of a company, corporation or entity shall be construed as a reference to any company, corporation or entity:

1 that is controlled, directly or indirectly, by the first-mentioned company, corporation or entity;

2 more than half the voting rights of which are held directly or indirectly, by the first-mentioned company, corporation or entity; or

3 that is a subsidiary of a subsidiary of the first-mentioned company, corporation or entity,

and for these purposes a company, corporation or entity shall be treated as being controlled by another if that other company, corporation or entity is able to direct its affairs or control the composition of its board of directors or equivalent body.

Precedent 14—No subsidiaries
The Company has no subsidiaries except (name of subsidiary) which at Completion will be wholly owned.

References to the 'Company' in this agreement shall be construed as including every Affiliate of the Company [for the time being during the continuation of this agreement] [which is an Affiliate at the date of this agreement].

Extracts from legislation

Sections from the Companies Act 2006

1159 Meaning of 'subsidiary' etc

(1) A company is a 'subsidiary' of another company, its 'holding company', if that other company:

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,

or if it is a subsidiary of a company that is itself a subsidiary of that other company.

(2) A company is a 'wholly-owned subsidiary' of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

(3) Schedule 6 contains provisions explaining expressions used in this section and otherwise supplementing this section.

(5) In the Companies Acts 'group undertaking', in relation to an undertaking, means an undertaking which is–

(a) a parent undertaking or subsidiary undertaking of that undertaking, or

(b) a subsidiary undertaking of any parent undertaking of that undertaking.

1162 Parent and subsidiary undertakings

(1) This section (together with Schedule 7) defines 'parent undertaking' and 'subsidiary undertaking' for the purposes of the Companies Acts.

(2) An undertaking is a parent undertaking in relation to another undertaking, a subsidiary undertaking, if–

(a) it holds a majority of the voting rights in the undertaking, or

(b) it is a member of the undertaking and has the right to appoint or remove a majority of its board of directors, or

(c) it has the right to exercise a dominant influence over the undertaking–

(i) by virtue of provisions contained in the undertaking's articles, or

(ii) by virtue of a control contract, or

(d) it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking.

(3) For the purposes of subsection (2) an undertaking shall be treated as a member of another undertaking–

(a) if any of its subsidiary undertakings is a member of that undertaking, or

(b) if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings.

(4) An undertaking is also a parent undertaking in relation to another undertaking, a subsidiary undertaking, if–

(a) it has the power to exercise, or actually exercises, dominant influence or control over it, or

(b) it and the subsidiary undertaking are managed on a unified basis.

(5) A parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings shall be construed accordingly.

(6) Schedule 7 contains provisions explaining expressions used in this section and otherwise supplementing this section.

(2) A 'control contract' means a contract in writing conferring such a right which–

(a) is of a kind authorised by the articles of the undertaking in relation to which the right is exercisable, and

(b) is permitted by the law under which that undertaking is established.

(3) This paragraph shall not be read as affecting the construction of section 1162(4)(a).

5 Rights exercisable only in certain circumstances or temporarily incapable of exercise

(1) Rights which are exercisable only in certain circumstances shall be taken into account only–

(a) when the circumstances have arisen, and for so long as they continue to obtain, or

(b) when the circumstances are within the control of the person having the rights.

(2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

6 Rights held by one person on behalf of another

7 Rights held by a person in a fiduciary capacity shall be treated as not held by him.

(1) Rights held by a person as nominee for another shall be treated as held by the other.

(2) Rights shall be regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence.

8 Rights attached to shares held by way of security

Rights attached to shares held by way of security shall be treated as held by the person providing the security–

(a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions, and

(b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.

9 Rights attributed to parent undertaking

(1) Rights shall be treated as held by a parent undertaking if they are held by any of its subsidiary undertakings.

(2) Nothing in paragraph 7 or 8 shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.

(3) For the purposes of paragraph 8 rights shall be treated as being exercisable in accordance with the instructions or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.

10 Disregard of certain rights

The voting rights in an undertaking shall be reduced by any rights held by the undertaking itself.

11 Supplementary

References in any provision of paragraphs 6 to 10 to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those paragraphs but not rights which by virtue of any such provision are to be treated as not held by him.

Agency and partnership (denials of)

Purpose of clause

Commercial agreements sometimes include provisions stating that one party cannot bind or act on the behalf of another party except as specifically provided in the agreement. This issue is particularly relevant where the agreement provides for a long-term or collaborative relationship between the parties, particularly where they are working closely together on a project. For example, a long term supply agreement where a supplier of goods sell goods against orders from the buyer is unlikely to come within this category. But a long-term advertising campaign involving an advertising agency, a graphic designer and a photographer might.

If the wording is not clear or the provisions of the agreement are complex and/or there are many parties, it may not be clear whether an agency or partnership is intended.

Existence of agency, etc

Agency is the relationship which arises whenever one person (the agent) has authority, express or implied, to act on behalf on another (the principal) and consents so to act. An agent primarily means a person employed to place the principal in contractual or other relations with a third party. Some agents have authority to sign contracts on their principal's behalf. However, the term 'agent' is also used in a broader sense: certain types of commercial agent merely introduce customers to the principal rather than making specific contractual commitments (the terms of specialist agency agreements, including consideration of commercial agents and the Commercial Agents (Council Directive) Regulation 1993, are beyond the scope of this book).

In most cases, parties will wish to deny the existence of an agent/principal relationship or to specify exactly where such a relationship might lie.

Existence of a partnership

Whether or not a partnership exists between two persons is always a question of fact which does not depend solely on the documents which they have executed or even the express statements which they have made.

Where a relationship has all the properties of a partnership, an express written provision by the parties denying the existence of a partnership may be insufficient to prevent one being held to exist. The definition to be applied is that set out in the Partnership Act 1890: 'the relation which subsists between persons carrying on a business in common with a view of profit'.

There is no requirement for formality in order to establish a partnership (ie, under the Partnership Act 1890, unlike a limited liability partnership which requires registration under the Limited Liability Partnership Act 2002), and there will sometimes be a risk of creating a partnership under a commercial agreement, particularly in agreements concerned with unincorporated joint ventures.

Where a business arrangement is not intended to be a partnership and lies outside the scope of the Partnership Act 1890, it is nevertheless wise for the parties to state that they are not partners and that their agreement is not a partnership agreement. Except where the parties have consciously chosen to enter into a partnership, they will generally wish to avoid the risk of their relationship being treated as a partnership, in view of the liability that a partner has for the acts and omissions (and losses) of the other fellow partners. A clause denying partnership will not be conclusive, but may assist the parties to argue their position, eg with HMRC. Often, such a clause will also state that neither party may bind the other.

Drafting issues

- *Default points.* In commercial agreements, there should be a clear statement that:
  - a party *is* acting as agent for another (eg if a parent company signs an agreement on behalf of itself and its subsidiaries); or
  - the relationship between the contracting parties is *not* one of agent and principal or one of partnership. Sometimes parties will go further and include obligations on the parties not to represent to any other person that they have any authority to make commitments on each other's behalf.
- *Where a form of agency exists exclude partnerships and other agency relationships.* Where there is a form of agency in an agreement (ie a traditional agency arrangement or where some provisions in an agreement are intended to be that of an agent and a principal), there should be a denial that:
  - the parties wish to form a partnership; or
  - any agency arises apart from that expressly conferred by the agreement.
- Agency also plays a part when an agreement is signed, typically where a company is involved. The company has to act through human beings, who act as agents for, or authorised representatives of, the company. Such

issues are not normally addressed in this type of boilerplate provision (but are considered further in *Capacity*).

Location in the agreement

The Boilerplate section of an agreement is normally the location of an *Agency* clause.

Linkage and use

This boilerplate provision is not normally specifically linked or referred to in an agreement. However, for many types of agreements one party may specifically be given an 'agency' type of role for another party, eg in a manufacturing contract, the manufacturing party may need to buy materials, but it is stipulated that the party is doing it as an agent for the other party.

Sample precedent material

Precedent 1—No partnership
Nothing in this agreement shall be deemed to constitute a partnership between the parties.

Precedent 2—No partnership or agency or other relationship other than contractual relationship
This agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this agreement. Neither Party shall have, nor represent that it has, any authority to make any commitments on the other Party's behalf.

Precedent 3—No partnership or joint venture-limited agency only
The Parties are not partners or joint venturers nor is [*PartyB*] able to act as an agent of [*PartyA*] save as authorised by this agreement.

Precedent 4—No partnership
The Parties to this agreement are not partners.

Precedent 5—No partnership
Nothing in this agreement shall be deemed to constitute a partnership between the Parties.

Agents for service

Purpose of the clause

In some cases a party may require that any documents which are issued by a court in relation to legal proceedings are not sent to that party but to someone else. Court rules permit this in certain circumstances.

However, it may be necessary to obtain the permission of the court to do so if a party to a contract is resident or has its registered office (or equivalent) outside the United Kingdom.

An agents for service clause aims to allow service of documents in legal proceedings within the United Kingdom (and where possible without the permission of the courts) on the agent of a party, whether or not they are based in the United Kingdom.

Drafting issues

- *Legal issues*
  - The Civil Procedure Rules (CPR) (SI 1998/3132) (see CPR 6) governs the service of documents in legal proceedings;
  - if a contract contains a provision providing that if a claim is made concerning the contract, any claim form issued in relation to that claim may be served as specified in that contract, then the claim form is deemed to be served if it is served by the method specified in the contract: CPR 6.11(1);
  - if a claim form needs serving outside the United Kingdom then it may be necessary to obtain the permission of the court (under CPR 6.36) unless it falls into a category where permission is not required (under CPR 6.32 or CPR 6.33): CPR 6.11(2);
  - the rules for determining whether a party needs to obtain the permission of the court is found in CPR 6.36 and CPR 6.37. In addition, also a Practice Direction to this CRR, needs consideration (PD 6B) (the detailed provisions of which are beyond the scope of this book); Readers should obtain specialist advice and/or consult standard legal books such as the Civil Court Practice);

- if an agreement does not contain a provision concerning the serving of documents in legal proceedings then a party may still serve an agent of the foreign party subject to:
  - the party applying to the courts; and
  - the contract to which the claim relates was entered into within the jurisdiction with or through the foreign party's agent; and
  - the agent's authority had not been terminated or the agent still has business relations with the foreign party: CPR 6.12.
- it is also possible to apply for permission to serve a claim form by an alternative method or alternative place if there is a good reason (CPR 6.15, such as a saving of time by serving on the London solicitors of a claimant rather than the place where the defendant is resident (*JSC BTA Bank Ablyazov* [2011] EWHC 2506 (Comm) or dispensing with the service of a claim form altogether in exceptional circumstances) (CPR 6.16)

- *Appointment of an agent*
  - where a party to an agreement is based outside the United Kingdom, there should be provision for appointment of an agent within the United Kingdom (see Precedent 1);
  - and the provision should deal with the extent of the appointment of the agent, such as should it be:
    - irrevocable;
    - limited to the term of the agreement;
    - terminated on notice?
    - notified to the other party on termination?
- *Failure by agent to perform duties*
  - If the agent fails to notify the party who appointed the agent that proceedings are served, then there should be wording that such failure does not affect the validity of the service (see Precedent 2);
  - if the agent takes an excessive amount of time to notify the party that appointed the agent, then there should be wording specifying a time limit when service is deemed effective (See Precedent 3).
- Although an *Agents for Service* clause aims to deal with the situation where a party (which is not based in the United Kingdom) agrees a method of service out of the jurisdiction by means of an agent, it may still be regarded as invalid under a foreign law, and therefore the ability to proceed in other ways should be retained (see Precedent 4).

Location in the agreement

The Boilerplate section of an agreement is normally the location for an *Agents for Service* clause.

Linkage and use

This type of clause is not normally linked to or used by other clauses except:

- where a party is based outside England and Wales (or the United Kingdom), the other party to the agreement should check that the address given in the *Parties* clause is the address to be used for notices (including for the service of proceedings);
- the *Notices* clause may include provisions of an *Agents for Service* clause or will need to be amended to reflect that particular types of notices (such as the service of proceedings caused by an *Agents for Service* clause) are dealt with elsewhere by their own clause.

Sample precedent material

Precedent 1—Appointment of an agent
[*PartyA*] irrevocably appoints [*name*] at present of [*address*] to receive on its behalf service of proceedings issued out of the English courts in any action or proceedings arising out of or in connection with this agreement.

Precedent 2—Failure on the part of the agent to carry out instructions
Failure by such agent to notify [*PartyA*] of such service shall not adversely affect the validity of such service or any judgment based on it.

Precedent 3—Setting a time limit when service is deemed effective
Such service shall become effective 30 days after despatch.

Precedent 4—Permitting other methods of service
Nothing contained in this agreement shall affect the right to serve process in any other manner permitted by law.

Precedent 5—Effective service on agent
All proceedings, notices of proceedings and other notices in connection with or to give effect to this agreement shall be served upon [*agent in England for the foreign party*] at his address in [London] on behalf of [*foreign party*] and [*foreign party*] shall be bound by such service as if he had himself been personally served within the jurisdiction.

Precedent 6—Effective service on agent

[*PartyA*] irrevocably appoints [*name*] at present of [*address*] to receive on its behalf service of proceedings issued out of the English courts in any action or proceedings arising out of or in connection with this agreement and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based on it.

Precedent 7—Effective service on agent

[*PartyA*] irrevocably appoints [*name*] at present of [*address*] as its agent to receive on its behalf service of proceedings issued out of the English courts in any action or proceedings arising out of or in connection with this agreement. [*PartyA*] warrants that [*name*] has agreed to act as its agent as aforesaid. Failure by such agent to notify [*PartyA*] of such service shall not adversely affect the validity of such service or any judgment based on it. Such service shall become effective 30 days after despatch. Nothing contained in this agreement shall affect the right to serve process in any other manner permitted by law.

Precedent 8—Effective address for service

1 Any notice of proceedings or other notices in connection with or which would give effect to any such proceedings may without prejudice to any other method of service be served on any party in accordance with clause [ ].

2 In the event that [*name*] is resident outside [England] its address for service in [England] shall be the address for such service nominated at the head of this agreement and any time limits in any proceedings shall not be extended by virtue only of the foreign residence of [*name*].

Precedent 9—Appointment of process agent

1 [*PartyA*] irrevocably appoints [*name*] of [*address*] in England as its process agent to receive on its behalf service of process in any Proceedings in England. Such service shall be deemed completed on delivery to such process agent (whether or not it is forwarded to and received by [*name*]). If for any reason such process agent ceases to be able to act as process agent or no longer has an address in England [*name*] irrevocably agrees to appoint a substitute process agent acceptable to the other party to this agreement and to deliver to such other party a copy of the new process agent's acceptance of that appointment within 30 days.

2 [*PartyA*] irrevocably consents to any process in any Proceedings anywhere being served in accordance with the provisions of this agreement relating to the service of notices. Such service shall become effective 30 days after despatch. Nothing contained in this agreement shall affect the right to serve process in any other manner permitted by law.

- to indicate their consent to the provisions of the agreement; and
- to indicate that the agreement is coming into operation (immediately or at some later date).

Parties do not always sign the agreement themselves, and may appoint others to sign on their behalf, for example:

- agents,
- directors or authorised officers for a company,
- employees, or
- the solicitors or other advisors of a party.

It is possible to sign agreements 'under hand' or as a deed. The legal requirements for deeds are discussed in *Deeds*.

Drafting issues

- *Commencing the execution clause*
  - *Traditional*:
    - agreement (stating 'As witness' and then immediately following with the signature block);
    - deed (stating 'In witness' and then immediately following with the signature block);
  - *Modern*: Particularly in a commercial agreement:
    - for an agreement: 'Agreed by the parties through their authorised signatories' and then immediately following with the signature block;
    - for a deed: 'Executed as a deed' and then immediately following with the signature block.

    For some formal types of document executed as a deed (eg a power of attorney) or transactions involving the sale/purchasing or leasing of property, trusts, guarantees, etc), it is often best to use traditional language; to avoid any risk that a court (or other parties or any governmental or regulatory board) will misinterpret the document . The relatively relaxed attitude of the courts to the format and language of commercial contracts may not apply to other types of legal matter.
- *The placement of the signature block*. It is up to the parties which spot in the agreement they choose to sign. However,
  - the placing of the signature(s) otherwise than at the end of the document; and/or
  - having the signature block clause drafted in other than one of the conventional ways

  may not be acceptable to some parties.

- *Does an agreement need to be signed (at all)? Except in a few instances there is no legal requirement for the parties to a contract to sign it.* But a real signature indicates (among other things) that the party signing is signifying their consent to the provisions of the agreement;

  Although a party need not sign a contract, it must be named (or otherwise identified) as a party to the contract to be able to enforce it or use it as a defence. Eg, a bank does not usually sign a guarantee that it receives.

  There are, however, exceptions to this principle. Eg:

- a contract for the sale or other disposition of an interest in land needs to be in writing, but also has to be signed by or on behalf of each party (Law of Property (Miscellaneous Provisions) Act 1989, s 2);

- an assignment or mortgage of a patent must be in writing and signed by or on behalf of the assignor or mortgager (Patents Act 1977, s 30(6)).

- *Witnessing a signature*

- A contract does not need to have the signatures of the parties witnessed. However, signatures are sometimes witnessed:

  Eg, a bank taking a personal guarantee will require a solicitor to witness the signature of the guarantor together with a statement on the guarantee to indicate that the solicitor has explained its effect to the guarantor before the guarantor signed: *Cornish v Midland Bank plc* [1985] 3 All ER 513;

  - signature blocks in some civil law countries are drafted in a way so that two persons are signing for each party, and sometimes one person is said to be witnessing the signature of another party (rather than two people signing the agreement);

  - in the United States, some commercial agreements have execution clauses, and then there is wording where the lawyer for that party is indicating (by the lawyers's signature or initials) that the agreement is approved as to form.

- *One person signing for more than one party.* When a person signs in two or more capacities (eg as principal and as agent of another, or as an officer or authorised signatory of two parties (ie a party entering a contract and the party's parent acting as a guarantor)) then the person:

  - should sign for each party (ie if signing for two parties then the person should sign twice, and accordingly there should be two signature blocks); or

  - should sign once and the signature block should reflect that the signature covers more than one party;

Breach

Purpose of the clause

A breach of contract is the breaking of an obligation which a contract imposes or the breaking of a term or condition in a contract.

The word 'breach' could be considered a technical, legal term, not used in everyday speech. A few contracts use the more modern word 'break', as in:

> 'if X breaks this contract, Y may terminate it'.

However, this has not become common practice.

Technically, there is, or some lawyers consider there is, a difference between breach of a contract's terms and conditions and a failure to perform those terms and conditions. For this reason, some precedents for termination clauses refer to both breach and failure to perform. In the authors' personal view, it is unlikely that a court would normally interpret a reference to breach as excluding non-performance, unless a distinction is made elsewhere in the contract between these two terms.

Meaning of 'material' or 'substantial' breach

In some agreements a party is entitled to give notice to terminate (or to terminate) if the other party is in 'material' or 'substantial' breach of its obligations, eg:

> 'if the other party shall commit any [substantial][material] breach of any of its obligations under this agreement and shall fail to remedy such breach (if capable of remedy) within 30 days after being given notice by the first party so to do or'

The aim of such a clause is to not allow a party to terminate an agreement where the other party has only committed a minor or trivial breach of the agreement (see *DB Rare Books Ltd v Antiqbooks (a limited partnership)* [1995] 2 BCLC 306, CA, and *Superior Overseas Development Corpn and Phillips Petroleum (UK) Co v British Gas Corpn* [1982] 1 Lloyd's Rep 262 for discussion of these terms). In many cases it is likely that there will be no difference in the meaning between 'material' and 'substantial', subject to the context (see *Fitzroy House Epworth Street (No 1) Ltd and another v Financial Times Ltd* [2006] EWCA Civ 329, [2006] 2 All ER (D) 463 (Mar)).

The use of terms 'substantial' or 'material;' does not precisely define exactly what in a particular breach will be sufficient to amount to substantial or mate-

rial. What is substantial or material for one party may not be for the other party. For example, a party may have an obligation to make payments on certain dates but makes one payment one day late. For the party making the payment, this may amount to a small breach but to the other it may have serious consequences. The other party may need to pay its suppliers or to repay loans on terms which are draconian. If it does not have sufficient reserves then any delay in receiving payment even by a small amount of time could be serious or very expensive. One solution is to make any breach of an obligation sufficient to terminate (through the use of clear wording). This may not always be commercially attractive or always possible (if the parties are not of equal bargaining strength).

Other solutions could involve (before the contract is entered into) arranging for staged payment terms or making each stage of the performance of the contract conditional on the other party paying for the previous stage, together with good internal administration so that these provisions are strictly adhered to.

However, the advantage of using such words as 'substantial' and 'material' does permit the parties to set a (rough) standard as to the level of breach which entitles a party to terminate. However, in the event of dispute, a court will need to interpret the precise meaning against the circumstances of the case (see *Dalkia Utilities Services plc v Celtech International Ltd [2006]* EWHC 63 (Comm) and case analysis below). The courts will judge whether a breach is material objectively by reference to the facts (ie not the subjective views of the parties) (see *Fitzroy House Epworth Street (No 1) Ltd and another v Financial Times Ltd* [2006] EWCA Civ 329, [2006] 2 All ER (D) 463 (Mar); *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB). When considering what involves 'materiality' the following facts will be taken into account: '…the actual breaches, the consequence of the breaches to [the innocent party]; [the guilty party's] explanation for the breaches; the breaches in the context of [the a]greement; the consequences of holding [the a]greement determined and the consequences of holding [the a]greement continues' (from *Phoenix Media Ltd v Cobweb Information*, unreported, 16 May 2000; 2004 WL 147 6680, quoted in the *Compass Group* etc case).

The word 'substantial' has come in for consideration by the courts on many occasions (in cases involving payment of rent under a lease), and amounts for non-payment of less than 15% are generally not substantial. However, it is not clear the extent to which such decisions are applicable to commercial agreements.

Drafting issues

Some preliminary questions need consideration as to the effect of a breach:

- which obligations or terms or conditions are considered sufficiently important that breach of them would be:

- sufficient to terminate an agreement;
- not sufficient to terminate but the breaching party should be allowed to 'perform' again;

  eg a termination provision allowing for notice to be given to the party in breach specifying that the breach can be remedied within a set number of days.
- not sufficient to terminate but the party in breach will face a sanction so it will, eg:
  - be liable to pay liquidated damages;
  - be set a time limit which will be made of the essence (ie a failure to meet the time limit will entitle the party not in breach to terminate the contract);
  - be liable (in the case of non-payment) to pay interest;
  - have to allow a third party to perform some or all of its obligations and to pay the third party.

- which failures to perform obligations or the terms and conditions will amount to breach?
  - will any of the obligations or terms or conditions, which are not performed or not performed 'properly', be a breach?
  - will the party obliged to perform an obligation or term or condition only be in breach if it does not meet a standard, eg:
    - where services are involved, the party does not use reasonable care and skill (the standard set by the Supply of Goods and Services 1982);
    - where goods are involved, the goods made or supplied are not of satisfactory quality (the standard set by the Sale of Goods Act 1979)
    - does not use reasonable or best efforts or endeavours;
    - does not meet some specified specification; or
    - the failure to meet the standard is 'material' or 'substantial'?
  - will the party be in breach but excused from any liability because there are limitations and exclusions of liability in the agreement to cover the breach?

Location in the agreement

There is not usually a stand-alone clause stating or setting out the circumstances when there is a breach. Provisions dealing with breach are usually found in:

- the Main Commercial Provisions, such as the core operative provisions which may state (either directly or by reference) the standard that a party needs to achieve and the importance of a failure to perform or performance of them below a required or expected standard; and/or
- in the Secondary Commercial Provisions, such as:
  - the *Termination* clause, which will set out either in:
    - general terms what constitutes a breach (eg a material breach of the agreement); or
    - specific instances what constitutes a breach (eg a failure by a party to meet a standard set in a specification or failure to obtain regulatory approval);
  - the *Warranty* clauses, which will specify, in some cases, the standard that a party is stating that they are meeting, and the consequences of failing to meet them.

Linkage and use

The subject of breach typically arises in termination clauses and liquidated damages clauses. Precedents to allow termination of the contract in the event of a breach of its terms appear in *Termination for breach*.

Case analysis

Dalkia Utilities Services plc v Celtech International Ltd [2006] EWHC 63 (Comm)

1 The parties entered into a contract for the claimant to build and maintain a power plant for the defendant.

2 The defendant failed to pay 3 instalments. The defendant claimed that it had no money to pay and that unless the agreement between the parties was renegotiated it would be become insolvent. The claimant refused to do so.

3 The claimant sued for sums it claimed were payable on termination of the agreement.

4 The agreement included a variety of clauses concerning termination including:

'14.2. In the event of one of the parties (the "DEFAULTING PARTY") being in material breach of any of its obligations hereunder or under the LEASE being a breach which is capable of being remedied, and failing to remedy such breach within one hundred and twenty calendar days after receiving written notice of the failure from the other

Scope

- *UCTA 1977*: Only covers some provisions of a contract (other than tort), mainly those concerning limitation and exclusion of liability (and indemnity clauses in consumer contracts).
- *1999 Regulations*: Covers all 'unfair' provisions of a contract, save those which deal with the definition of the main subject matter of the contract or the price (if those are drafted in plain intelligible English).

Manner of dealing with a consumer

- *UCTA 1977*: UCTA 1977 does not impose any 'standard' or method of dealing on a business when contracting with a consumer; it makes certain clauses ineffective and others subject to a requirement of reasonableness *in* a contract.
- *1999 Regulations*: The 1999 Regulations impose a requirement on a business to use good faith to avoid a significant imbalance in the right parties' rights and obligations (see *Harrison and others v Shepherd Homes Ltd and others* [2011] EWHC 1811 (TCC) for an explanation of the meaning of good faith in relation to a building contract as well containing a summary of the principles that are to be derived from the application of the 1999 Regulations in court cases, and Case analysis below).

Goods and services

UCTA 1977 and 1999 Regulations both cover goods and services.

Type of provisions caught

- *UCTA 1977*: applies to standard form contracts and those which are individually negotiated (in the most part) plus making some contractual terms of no effect at all where consumers are concerned.
- *1999 Regulations*: Only applies to provisions in standard form contracts (ie provisions which are not individually negotiated). Where a provision is drafted in plain, intelligible language, then
  - the definition of the main subject matter of the contract, or
  - the adequacy of the price or remuneration,

  is not assessed for fairness (accordingly if these matters are contained in clauses which are not drafted in plain intelligible English then they it is possible to assess whether they are fair).

  If the provisions of the contract are provided to the consumer (ie drafted in advance) and the consumer has not been able to influence the substance of the contract then those conditions will not be considered as being individually negotiated (1999 Regulations, reg 5(2)). Although if one provision is individually negotiated, the 1999 Regulations will apply

to the rest of the contract (1999 Regulations, reg 5(3)) and it is for the supplier of the goods and/or services to show that a provision of the contract is individually negotiated (1999 Regulations, reg 5(4)). The fact that a consumer

- has had a lawyer look over a term or the terms; or
- has had the ability to influence the substance of a term or the terms (ie been able to but in fact did not influence the substance of the term or terms);

is not enough to make the term or terms individually negotiated (*UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] 3 All ER 519; and see also *Harrison and others v Shepherd Homes Ltd and others* [2011] EWHC 1811 (TCC)).

(Another key issue is likely to be establishing what is the main subject matter(s) of the contract and determining the price(s) or remuneration(s) paid in exchange for the goods and/or services supplied. The current leading case is *Office of Fair Trading v Abbey National plc and Others* [2009] UKSC 6, [2010] 2 All ER (Comm) 945. See also the wording of 1999 Regulations, reg 6(2). For further consideration and examples of what constitutes the 'price' or 'remuneration' see the authors' *Drafting and Negotiating Commercial Contracts* (3rd Edn), 7.53.

Language

- *UCTA 1977*: There are no requirements regarding the use of a particular drafting style where a consumer is a party to the contract;
- *1999 Regulations*: There is a requirement to use plain, intelligible language (see below for further consideration of this) (1999 Regulations, reg 7(1)).

  The meaning of plain intelligible language is not defined by the 1999 Regulations but is likely to mean more than just the choice of words used or the drafting style. In essence, in addition to taking the style of expression, choice of words, and presentation of the text into account, the key issue is whether the consumer can understand what the particular clause means *and also* understand how it affects the rights and obligations they and the supplier have in the contract.

  Where there is doubt as to the meaning of a clause, the meaning most favourable to the consumer will be used (1999 Regulations, reg 7(2)).

Burden

- *UCTA 1977*: The burden is on the party relying on a clause to show it is reasonable.
- *1999 Regulations*: The burden is on the consumer to show that a clause is unfair.

Effect

- *UCTA 1977*: Makes some contractual provisions:
  - ineffective (eg liability for breach of ss 13, 14, 15 of the Sale of Goods Act 1979 cannot be excluded or restricted by reference to a contract term); and
  - subject to a requirement of reasonableness (eg where a business is in breach and seeks to render a contractual performance different from that reasonably expected of the business or for it to render no performance at all).
  - *1999 Regulations*: All provisions will survive as long as they are fair. If a provision is unfair then it shall not bind to a consumer (1999 Regulations, reg 8(1)) although the contract may continue to operate if it can do so without the unfair term (1999 Regulations, reg 8(2)).
  - Some provisions are not subject to any test as to their fairness (ie concerning as the definition of the main subject matter of the contract, or the adequacy of the price or remuneration, as long as they are in plain intelligible language).
  - ('Unfair' means that 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' (1999 Regulations, reg 5(1)).

Drafting issues

- *Do not attempt to exclude or limit liability for specific provisions where it is not possible to exclude or limit liability.* Although this might be an obvious statement, what is clear, particularly following the implementation of the 1999 Regulations, is that traditional methods of limiting or excluding of liability are unlikely to work.

  Eg, adding wording to limit the liability of a business for its breach of the implied term of satisfactory quality would be counterproductive. I.e. stating that the goods are of satisfactory quality but then limiting the business's liability for a breach or limiting liability to a sum of money, or excluding any warranties.

  However, there is nothing to stop a supplier defining what 'satisfactory quality' means in relation to the particular goods that are being sold.

- *Use the wording of the statutory provisions to indicate matters clearly affecting the goods (or services) being provided.* Eg, the Sale of Goods Act 1979, s 14(2A) and (2B) state the factors determining (satisfactory) quality:
  - description;
  - price;

- fitness for all the purposes of which goods of the kind in question are commonly supplied;
- freedom from minor defects;
- safety;
- durability;
- public statements on the specific characteristics of the goods made about the goods by the seller, producer or his representative (particularly in advertising or on labelling).

- *State clearly the 'strengths', 'weaknesses', 'limitations' and the requirements on a customer of a product or service.* Providing a more descriptive meaning of the product or service can help to reduce or avoid liability. That is instead of attempting to exclude or limit liability, the seller or supplier can prevent liability arising at all, although in some cases it may difficult to draw a clear distinction between avoiding liability arising in the first place and excluding or limiting liability. Eg, if a business sells LCD monitors products (which are manufactured or supplied by third parties) to consumers, instead:
  - of simply stating that goods that are ordered by a consumer will be supplied, perhaps state the meaning of satisfactory quality
  - provide wordings as follows:

    'We shall supply to you the goods that you have ordered. You should note that certain types of monitors occasionally suffer from minor errors in the manufacturing process. In particular, LCD monitors have one or two pixels which appear incorrectly ("pixel errors"). Such pixel errors are in accordance with industry standards for the manufacture of LCD monitors.

    Monitors must be set up correctly using the instructions provided with the monitors. In particular setting up a monitor with the wrong display resolution is likely to damage a monitor. Monitors must be cleaned only as described in the instructions provided with a monitor. A monitor, because it contains electric and electronic parts, should never be cleaned with water or other liquids. In addition, the use of abrasive cleaners or rough cloths is likely to damage the casing or display of a monitor.

    In addition, our website contains further information concerning the monitors which you should read (www.xxxxyyyy.co.uk).

    We will not take responsibility for damage to the goods you have ordered where you do not set up or use the goods in accordance with the instruction manuals provided or statements or information which is provided with the monitor.'

    Although this wording is perhaps excessive, it suggests a way of defining the meaning of satisfactory quality.

- *Is the agreement drafted in plain, intelligible language?* The contract drafter should draft an agreement on the basis that an ordinary consumer can use and understand the agreement without the benefit of legal advice

when a provider of services supplies the goods as part of providing the services (eg a plumber fitting a new boiler);

- the guarantor should use plain intelligible language;
- the guarantee needs to contain the essential particulars for making a claim under the guarantee together with the length of the guarantee, its territorial scope, the contact details of the guarantor and a statement that the statutory rights in relation to the goods which are sold or supplied are not affected;
- the guarantee must be written in English if the goods are offered in United Kingdom.
- the guarantee takes effect from the date of delivery.

This is in addition to the provisions of UCTA concerning guarantees.

- *Delivery.* Delivery of goods to a carrier is not delivery to a consumer, where the seller is authorised or required to send the goods to the consumer (Sale of Goods Act 1979, s 32(4)).
- *Acceptance.* A consumer is to have a reasonable opportunity to examine goods which are delivered to the consumer (for the purpose of checking whether the goods are in conformity with the contract) (Sale of Goods Act 1979, s 35).

- *Have the specific exclusions and limitations available in the statutes been considered?* Each statute provides a series of exclusions or limitation which can reduce the impact somewhat for particular types of contracts. Eg:
  - *Sale of Goods Act 1979*: There is no implied term of satisfactory quality:
    - where any matter making goods of unsatisfactory quality is drawn to the attention of the consumer before the contract is made; or
    - where the consumer has examined the goods before the contract is made (1979 Act, s 14(2C);
  - *UCTA 1977*: UCTA 1977, ss 2–4 do not apply to, eg:
    - contracts of insurance;
    - contracts to the extent that they relate to the creation, transfer or termination of an interest in intellectual property;
    - contracts relating to the formation or dissolution of a company etc;
    - any contract relating to the creation or transfer of securities or of any right or interest in securities; contracts relating to the creation, transfer or termination of an interest in land (UCTA 1977, s 1(2), Sch 1);
  - *1999 Regulations*: the 1999 Regulations do not apply:

- to specially negotiated terms which are not drafted in advance (but the 1999 Regulations will apply to the rest of the contract, if it is a pre-formulated standard contract);
- to provisions which define the main subject matter of the contract or relate to the adequacy of the price or remuneration, as against the goods or services supplied (unless they are not in plain, intelligible language).

- *Consumer Protection (Distance Selling) Regulations 2000*: These Regulations in total do not apply to contracts:
  - for the sale or other disposition of land (except for rental agreements);
  - for the construction of a building where the contract also provides for a sale or other disposition of land on which the building is constructed (except for rental agreements);
  - relating to financial services;
  - concluded by means of an automated vending machine or automated commercial premises;
  - concluded with a telecommunications operator through the use of a public pay-phone;
  - concluded at an auction.

  The provisions relating to cancellation rights etc do not apply to the following contracts:
  - timeshare agreements;
  - supply of foods, beverages or other goods intended for everyday consumption supplied to the consumer's residence or the consumer's workplace by regular roundsmen;
  - supply of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide those services on a specific date or within a specific period.

  Cancellation rights do not apply for example to:
  - goods made to the consumer's specification;
  - goods which are clearly personalised;
  - goods which by their nature cannot be returned;
  - goods which are liable to deteriorate or expire rapidly;
  - audio or video recordings or computer software, if they are unsealed by the consumer;
  - newspapers, periodicals or magazines;

  - services where the performance of the contract has started prior to the end of the cancellation period with the agreement of the consumer.

- *What if it is not possible to prepare terms and conditions only for use by a consumer?* Some businesses do not trade only with consumers or may only sell a small amount of what they offer to consumers. It may not be simply worth the time or effort for a new set of terms being prepared. At a minimum there should be wording that the terms implied by the Sale of Goods Act 1979 are not limited or excluded (see Precedent 1).

Sample precedent material

Precedent 1—Minimum wording where not possible to redraft an agreement for consumer use only

1 Any provision in this Agreement which seeks to or does exclude liability of the Supplier for breach of the terms implied by the [Sale of Goods Act 1979][Supply of Goods and Services Act 1982] shall apply where the Customer is a consumer.

2 Any provision in this Agreement where delivery is stated to be made by delivery to a courier shall not apply to a Customer who is a consumer.

Precedent 2–Sample set of boilerplate provisions

The terms and conditions of this contract

We intend that the terms and conditions of our contract with you is set entirely in this agreement. Please read through it carefully before you [sign this agreement][*other method for consumer to enter into agreement*]. If you have any questions about these terms and conditions or wish to change them please contact us. You can contact us in the following ways [*specify*].

Amending or varying this contract

If you or us wishes to change any of the terms and conditions of this contract you and us will need to both agree to the change. We would prefer that any changes which are agreed are put in writing.

Waiver

If you do not comply with or follow any of the terms and conditions of this contract but we choose not to do anything about this, we can still do so (that is using any of the rights or remedies available to us) whether in relation to the specific failure to comply or following any future failure.

Communications

You may contact us by telephone, email or in writing. The details for each of these methods of communication are found at [*specify*]. If you contact us by email then you are authorising us to send you any notices, documents or other communications we need to send you under this contract by email to the email address you used in your email. If you do not wish us to use email please let us know.

Law and jurisdiction

These terms and conditions and the contract between you and us are subject to and governed by the law of England and Wales. We hope that you will discuss with us any problems you are having with us or [our goods] [our services] but if we or you can not resolve any problem or dispute between you and us, we or you will use only the courts of England and Wales to do so.

Third parties

For the purpose of the Contracts (Rights of Third Parties) Act 1999, only you and us can enforce any of the terms and conditions of this contract. Any person who is not a party to this contract cannot enforce any of the terms and conditions.

Precedent 3—Sample wording for a guarantee

We wish you to be happy with the [goods][name of product, model number etc] you have bought from [us (if the seller is also providing the guarantee)][name of supplier, if supplier and guarantor are different]. We would like to offer you the following guarantee:

For a period [12][24] months starting from the date of your purchase, if the [goods][name of product, model number etc] breaks down, fails to operate or is defective we will either repair the [goods][name of product, model number etc] or replace it at our option.

This guarantee will not cover the following situations:

1 if you deliberatively or accidentally damage the [goods][name of product, model number etc];

2 if you do not follow the instructions and guidance in the (user) manual or similar documents for the operation or use of the [goods][name of product, model number etc];

3 if you use the [goods][name of product, model number etc] other than for any normal domestic purpose;

4 if

(a) there is cosmetic damage; and/or

(b) parts of the [goods][name of product, model number etc] are damaged, defective or break down but which do not affect the normal operation of the [goods][name of product, model number etc]

To claim under this guarantee:

1 Please do not return [goods][name of product, model number etc] with out please notifying first that you wish to make claim under the guarantee;

2 If we ask you to return the [goods][name of product, model number etc] please send or take it to the address below;

3 We will refund any of your reasonable costs in returning the goods (such as the cost of postage) unless we arrange to pick up the [goods] [name of product, model number etc] from you.

This guarantee does not affect your statutory rights in relation to [goods] [name of product, model number etc].

[name of company providing guarantee and their address, if different to the seller].

Case analysis

Harrison and others v Shepherd Homes Ltd and others [2011] EWHC 1811 (TCC)
(Case appealed and not on the issue set out below (appealed on the proper amount of damages payable). The appeal was dismissed: [2012] EWCA Civ 904.)

1 The defendant built a number of houses. The claimants purchased them.

2 There were a number of issues which the claimants sued, including clause 7.1 of the sale agreement between the each claimant and the defendant which stated:

> "The Works shall be completed by the Seller in a good and workmanlike manner and shall be so completed and made ready for occupation with all reasonable despatch after the Agreement Date . . . ."

and

Works being defined as 'The house of the House Type and any ancillary works constructed or to be constructed by the Seller on the Site in accordance with the Specification'

and the Specification being defined as 'the drawings and specifications relating to the Works previously approved by the relevant authorities and any amendment of them from time to time'.

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2 Scope of paragraphs 1(g), (j) and (l)

(a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Paragraphs 1(g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

agreeing to pay specified sums in specified circumstances. Alternatively, there may be no unfairness if they have the right to cancel it without penalty before becoming subject to the additional burden.

Requiring the consumer to bear inappropriate risks

> For example, the customer indemnifies the company against all third party claims.
>
> The customer will pay for damage caused to the company's equipment by adverse weather conditions.

Consumers should not be forced to bear liability for the supplier's negligence, or risks that the supplier is better able to insure against. 'Indemnity' clauses are open to particular objection, and may be unenforceable under other legislation.[8] They use legal jargon, and imply that the supplier can simply pass on to the consumer any costs incurred whether reasonable or not.

Requiring the consumer to make disadvantageous declarations

> For example, I have read and understood the conditions of sale overleaf.
>
> No oral representation was made to me as to the vehicle's condition or mileage.

If a declaration is written into the contract, in practice consumers are forced to make it, whether it is true or not. They may think it is just a formality, but it means they can in future be told they have 'signed away their right' to argue that the facts were not as the declaration indicates.

Excluding non-contractual rights

> For example, this contract is deemed to have been signed on the company's business premises.
>
> The customer agrees to allow any personal data to be communicated to third parties.

Consumers have various legal rights outside of contract law, for instance, to a cooling-off period in doorstep sales, and to the confidentiality of personal information. A contract term which makes them waive such rights is open to objection as unfair, whether or not it is legally effective.

Unreasonable obligations and restrictions

> For example, the tenant shall not keep any inflammable materials on the property.

8 Section 18 of the Unfair Contract Terms Act 1977 says they are void if not fair and reasonable.

Failure to comply with a contract term gives rise to a risk of incurring contractual penalties. Where the term is wholly unreasonable, any penalty must be unfair, whatever its extent or nature. The problem in such a case is not in the penalty, but the term itself, and the solution is to remove the term, or limit its scope so that it goes no further than is necessary to achieve a legitimate purpose.