contract (rather than that which the other party would wish to know—ie such as sufficient information to know precisely whom it is contracting with).

The information a party must provide about itself (and what it provides) is a requirement under various laws. The requirement to provide this information does not have to be in the contract itself in most cases, and the failure to provide the information will not normally provide the other party with any directly enforceable rights[97]. Only the government (or one of its various agencies such as the Registrar of Companies (if a party is formed or regulated by the Companies Act 2006), the Competitions and Markets Authority, a local authority trading standard department etc) can take action.

[97] For example, for a company formed or regulated by the Companies Act 2006, the only item of information that must appear in all forms of documentation relating to the company is its registered name: Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, SI 2015/17, reg 24. For other information (such as its registered number and address and the part of the UK in which it is incorporated), the type of documentation which contain such information is more limited and would not necessarily cover a commercial agreement, see reg 25.

Chapter 2

The structure and format of the contract

Key points

- ***Date of agreement***. Write (or type) the date on which the agreement is signed. If signed on different dates, write the date on which the last party signed.

  Where solicitors are involved, but the signing of the agreement takes place without them being present, conventionally the agreement is not dated until after signature. The date is inserted later by agreement between the parties' solicitors.

- ***Commencement date***. If the commencement date of the agreement is different to the date it is signed, the agreement should mention two dates: a commencement date (or effective date) as well as the date on which the agreement is signed. Do not confuse the two dates.

- ***Names and addresses***. State the full legal names, legal status and addresses of the parties at the head of the agreement. Place each party's details in a separate paragraph and number the parties (eg (1) Party A, (2) Party B).

  If there are more than two parties, and the parties 'share' any obligations, make it clear whether they are jointly or severally liable, or both jointly and severally liable, for performance of those obligations.

- ***Recitals***. Recitals ('whereas' clauses) can help in explaining the background to the agreement; they are not compulsory. When recitals are included, do not include any obligations on the parties; these belong in the operative provisions part of the agreement.

- ***Linking wording***. Appropriate wording should appear between the recitals and the operative provisions, for example, 'IT IS AGREED AS FOLLOWS', or 'THIS DEED WITNESSES AS FOLLOWS'.

- ***Operative provisions***. There is no fixed order for operative provisions. Conventionally these start with a definitions clause, then follow the main commercial provisions, followed by secondary commercial provisions and legal 'boilerplate'. It is better to group clauses together by subject matter, rather than have a long list of obligations on Party A followed by a long list of obligations on Party B. Headings can make the document easier to read.

- ***Schedules.*** It is possible to place these before or after the signatures. More importantly, make sure that the operative provisions of the agreement state whether the provisions of the schedules form part of the agreement.
- ***Signatures.*** Use the appropriate execution clauses and signature blocks, particularly where the agreement is executed as a deed. Where there is use of a traditional format, where a person places her or his signature may well need explaining (or make this clear in the wording).
- ***Alternative formats.*** Alternative formats for an agreement are acceptable, subject to the caveats stated in this chapter.

2.1 Introduction

This chapter considers a conventional format and structure for an English law contract used by commercial parties. There is no legal requirement to draft or lay out contracts in the way described in this chapter, or any other way. Commercial contracts are sometimes put together in a completely unstructured way but the courts still hold them legally binding. Nevertheless there are advantages in adopting a conventional format, including:

- ***To give a logical framework to the contract document.*** In practice most well-drafted agreements follow a similar format, although alternative formats may also be logical;
- ***To give a familiar framework.*** When negotiating the provisions of an agreement it can save time and effort (and expense) to work with a draft agreement structured in a way which is familiar to the parties and their legal advisers. If an agreement becomes the subject of litigation, it may be necessary to persuade a court of its meaning and legal effect; some courts are more conservative than others and may need persuading as to the meaning (more than usually) of a document which has a very unusual structure or format.

All of this begs the question, what is meant by a 'conventional format'? What is considered conventional at the beginning of the twenty-first century is very different from what was conventional at the end of the nineteenth century or earlier. What is conventional for a modern commercial contract in the UK is very different to the style of residential leases, many of which are still drafted

in a very traditional way[1], let alone the style used in both many commercial and non-commercial contracts originating from the US.

This chapter recommends techniques for structuring contracts in a clear, logical way, whilst remaining within the boundaries of current conventions. Similar techniques are now used by many of the leading commercial law firms in England.

2.2 Main elements of a typical contract document

The main elements of a typical contract document are as follows. See Appendix 1 for an example of a contract which follows the sequence of clauses described below.

- Status of the document (ie its date and version number, whether it is legally binding: eg 'draft' or 'subject to contract').
- Cover page (setting out the date of the agreement or draft, names of the parties and title of the agreement, and sometimes the firm of lawyers preparing the document)[2].
- Table of contents (setting out the main sections and headings and their page numbers)[3].
- Title of the agreement (eg 'patent and know-how licence' or 'asset sale and purchase agreement').
- Date of agreement.
- Names, legal status and addresses of the parties.
- Recitals (sometimes referred to as 'whereas' clauses).
- Main provisions of the agreement (the operative provisions), including:
  - definitions;
  - conditions precedent (if any);

[1] Over the last few decades much effort has gone into drafting legal documents in clearer and simpler English. Much of the effort arose from what were the Unfair Terms in Consumer Contracts Regulations 1999 (based on an EU directive), the provisions of which are now found in the Consumer Rights Act 2015. Also, there are many continuing government and non-government initiatives (such as the Plain English Campaign, and the Crystal Mark scheme and Golden Bull awards). For documents intended for use only by commercial parties, again documents are generally written in a clearer fashion, although in the authors' experience many agreements are not written in clear language.

[2] This, and a table of contents, will usually appear only in longer contracts.

[3] Where used, it is possible to generate a table of contents automatically using a modern word processor (subject to the use of styles with the right codes contained within them to be able to do so).

- main commercial obligations (for example supply of goods/services, price and payment, compliance with specifications, delivery);
- secondary commercial issues (for example risk, passing of property and retention of title, intellectual property, confidentiality, term (eg start and finish dates, length of contract) and termination (situations when termination is possible, eg for breach, insolvency etc), warranties, indemnities, liability).

- Miscellaneous 'boilerplate' clauses dealing with such matters as law and jurisdiction, notices, Contracts (Rights of Third Parties) Act 1999, entire agreement, interpretation, amendment, *force majeure*, no assignment, etc.
- Schedules and/or appendices (these sometimes appear after the signatures in English contracts).
- Signatures.

The following paragraphs discuss in detail some legal and drafting issues relating to the above points, and give examples of some typical wording. These formal elements are distinguished from the substantive provisions of a commercial contract which are discussed in Chapter 4.

2.3 Title

The title is to indicate the type of agreement that the parties are entering into. By convention this is normally brief and will not include the names of the parties or reference number etc.

However, if a party enters into many agreements of the same type, then in—or more usually underneath—the main title there could be some further wording briefly to distinguish the particular agreement from others. For example:

- an owner of a portfolio of patents who regularly enters into a standard form patent licence might include the patent number under the main title, eg:

Example

PATENT LICENCE AGREEMENT

(Patent Number [ ])

- the parties enter into a series of agreements, such as a series of confidentiality agreements (because discussions progress beyond any stated expiry date), or amending agreements all amending the same agreement.

Examples

(a) FIRST AMENDING AGREEMENT

(b) SECOND AMENDING AGREEMENT

(c) FIRST AMENDING AGREEMENT

to the Patent Licence Agreement dated 1 September 2016

(d) SECOND AMENDING AGREEMENT

to the Patent Licence Agreement dated 1 September 2016

(e) FIRST CONFIDENTIALITY AGREEMENT (expiring 30 June 2011)

(f) SECOND CONFIDENTIALITY AGREEMENT (expiry 31 December 2011)

- a party is granting a large number of leases to different property but all the leases are drafted in the same way, so each lease could be headed 'lease' and then a following line with the registered title and/or the postal address.

Example

LEASE

Registered Property Number: [ ]. Address: [ ]

Such an approach can speed going through a large number of documents to help identify a particular one. The alternative method is to record the distinctive information in a recital.

2.4 Date of agreement

Examples:

Example 1

THIS AGREEMENT is made on _____ 201[ ] between:

Example 2

THIS AGREEMENT is made the day of 201[ ] between:

Example 3

This Agreement dated _____ is between:

Example 4

This Agreement dated as of _____ is made by, between and among:

Example 5

THIS AGREEMENT is made on _____ and takes effect from _____ ('Commencement Date') BETWEEN:

Set out above are five examples of wording which typically appear in the first line of a commercial contract. If the contract is to be made as a deed, the word DEED normally replaces the word AGREEMENT. Example 1 and Example 2 are from contracts prepared by leading firms of English solicitors.

Example 3 is similar but in a simpler format. It is conventional to refer to the agreement throughout the document as 'this Agreement'.

Example 4 is from an agreement prepared by US lawyers. The main points to note in this example are the use of the phrases 'dated as of', and 'by, between and among'. 'As of' probably means 'with effect from'. It is recommended that 'as of' be avoided in English law contracts (see below). It is conventional in English agreements to use simply the word 'between' even where there are more than two parties, where grammatically the word 'among' would be more appropriate.

2.4.1 Which date should be inserted?

The date of the agreement is:

- the date on which it is signed (if signed by all of the parties on the same day);
- the date the last party signs (if the parties sign on different dates).

Conventionally, this date is not inserted until all the parties have signed the agreement and typically it is written by hand by the parties' lawyers (if lawyers are involved), who agree on the date to be inserted. There is nothing wrong with typing in the date before the parties sign, but if this approach is used there is an increased risk that the date might not be correct if the agreement is signed by one or more of the parties on another date.

If the agreement is signed in counterparts (see discussion of counterparts, below), it is dated when the counterparts are exchanged. If the anticipated date of signing is typed in prior to signature, there is a risk that the parties

may sign on a different date. It is bad drafting practice to misstate the date of execution, and it may amount to a forgery[4].

These points assume that signing the agreement takes place in the traditional way, with a real signature. If the agreement is signed electronically (such as typing the name of the person who is signing on behalf of a party in the signature), the same points as to dating the agreement after (electronic) signature still apply.

2.4.2 Reasons for dating an agreement

There are several reasons why contracts are dated.

One practical reason is to be able to refer to the agreement at a later date (as in 'the agreement between X and Y dated Z').

Another practical and evidential reason is that the date can be the date when the parties reached agreement to enter into a legally-binding contract.

Often an agreement will include provisions which take effect by reference to the date of the agreement, eg:

- where royalties are to be paid on each anniversary of the date of the agreement; or
- from when certain obligations are to commence or terminate; or
- to be used as for the basis for calculation as to when the parties are to perform obligations (eg a party needs to make a payment 30 days after the date of the agreement); or
- the date of termination of the agreement is calculated by reference to the date of the agreement (eg the agreement is to terminate 364 days after the date of the agreement).

Where there are several contracts concerned with the same subject matter (eg if an agreement is amended on several occasions) it may be essential to know the order in which the amendments were made. Particularly, where the agreement is signed in counterparts and the parties' solicitors agree to date the versions in their possession, dating also acts as a formal acknowledgement that the agreement has come into existence.

2.4.3 What format to use for the date

When the date is inserted (whether in writing or typed), best practice is to do so in full; this will mean that the month part of the date is written

[4] See the Forgery and Counterfeiting Act 1981, s 9 which specifically mentions the misdating of contracts.

as a word not as a numeral. The use of numerals can cause confusion or uncertainty given that some countries place the month first in dates written numerically (such as in the US and countries which follow US practice). For example, a date written numerically as 12.1.2012 will mean, in England and Wales, 12 January 2012, while in the United States it will mean December 1, 2012.

2.4.4 Not adding a date of agreement

From the authors' experience, parties to an agreement sometimes leave '**THIS AGREEMENT** is made on' at the top of the agreement without a date at all. Not adding the date could, in the event of a dispute, lead to (eg):

- doubts as to whether the parties entered into a contract at all (even if both have signed) in the worst case; or
- parties arguing as to when obligations were due to start or to be performed by; or
- disagreement about when it would be possible to terminate an agreement, etc.

For example, an agreement may:

- state that it renews on a date of the agreement; or
- contain a definition of 'commencement date' which is stated as being a particular number of days from the date of the agreement.

In the absence of a date being entered for the date of agreement, and where the parties cannot agree on that date, then there is scope for dispute, particular where a party wishes to get out of the agreement or not perform or be liable for an obligation under the agreement. It may 'recollect' a date which is favourable to its point of view.

2.4.5 Date of agreement and the effective date (or the commencement date)

Do not confuse the date of the agreement (the date the agreement is signed) with the date on which the agreement is stated to take effect (often called a commencement date, ie the date when the parties are due to start performing some or all of their obligations under the agreement). If they are different, then they may need distinguishing.

The usual way of distinguishing between the two is to include a definition of the commencement date and/or wording in the operative provisions of the agreement to state when the agreement comes into effect (ie when the parties start performing some or all of their obligations under the agreement).

It is best not to state the commencement date at the head of the agreement, to avoid confusion with the date of the agreement; if, however, the parties insist, it is possible to use wording as in the last of the above examples could be used. The alternative method is to include a specific definition for when performance of the contract will start and refer to that definition in the rest of the agreement as needed (see Appendix 1—Precedent 1—definition of 'Commencement Date' and Clause 3.1) for an example.

2.5 Names and addresses of the parties

Examples:

Example 1

(1) **ABC LIMITED**, a company incorporated in England and Wales [under company registration number 123456789, and] whose registered office [and principal place of business] is at ABC House, ABC Street, ABC City, AB12 C99 (the 'Company'); and

(2) **ABC PLC**, a company incorporated in England and Wales [under company number registration 987654321, and] whose registered office [and principal place of business is at ABC House], ABC Street, ABC City, AB12 C99 (the 'Guarantor');

(the Company and the Guarantor being referred to collectively below as the 'Group'); and

(3) **DEF, INC.**, a Delaware corporation, whose principal place of business is at 99th floor, Business Towers, 15th 2nd Avenue, New York, NY12345, United States of America (the 'Consultant').

Example 2

This Agreement dated [ ] is made by and between **DEF, Inc.** ('DEF' which expression shall include its successors and assigns) a US corporation incorporated in the State of Delaware and having a place of business at 1234 San Antonio Boulevard, La Jolla, California, and **GHI Services Limited** a company incorporated in England and Wales whose registered office is at Twenty-First Century Business Park, Greentown, Loamshire G1 2AG, United Kingdom, a wholly owned subsidiary of **GHI Plc** having the same registered office as GHI Services Limited ('GHI' which expression shall include its successors and assigns).

Example 1 is drafted in a conventional English style, whereas Example 2 includes some undesirable wording and formatting (although the layout is fairly conventional in US agreements), which will be discussed further below. In particular, note the following:

- *Numbering.* Numbering is useful to distinguish the parties from one another. In the second example, it is not entirely clear whether GHI Plc:

(a) is an entirely separate contracting party from GHI Services Limited; or

(b) is to be treated as the same party as GHI Limited (perhaps it is intended that they should be jointly and severally liable for the obligations of 'GHI'); or

(c) is not to be a party at all, and is named simply as part of a description of who GHI Limited is.

Use of numbering and paragraphing makes these points clear. If it is intended that GHI Plc and GHI Services Limited should be treated as one, it is possible to make this clear in the drafting of this section of the agreement by including them both under (2) in Example 1 above and adding words such as 'GHI Plc and GHI Services Limited being collectively referred to in this Agreement as GHI'. The question of their joint and/or several liability should be addressed elsewhere in the agreement (see discussion of this topic below).

Before numbering became conventional, phrases such as 'on the one part' and 'on the other part' or 'of the first part', 'of the second part', etc were placed after the parties' names, to distinguish them; it is recommended that this antiquated practice be avoided.

- ***Names.*** The full (legal) names of the parties should be used, including any part of the name which describes its status, such as 'Limited', 'Plc', 'llp', etc. 'Legal' will usually mean the name shown in an official registry (such as, for the UK, that maintained by the Registrar of Companies). Sometimes, to avoid any uncertainty, the number with which a company or limited liability partnership is registered is also stated; whilst the name of the company or limited liability partnership may change (and even be swapped with that of another company), the number remains constant and therefore identifies with certainty the contracting party.

  If it is not clear from the name of the party or the use of the words such as 'Limited' etc, it is sometimes also helpful to indicate the status of the parties, for example, to state that a party is a company limited by guarantee[5] or is incorporated by Royal Charter.

  In international contracts, the country or state of incorporation should also be stated. The purpose of including all this information is to be clear as to the identity (and status) of the entity which is entering into the contract.

- ***Addresses.***
  - *Companies.* In the case of a UK company (ie a 'limited', 'Plc', or 'limited by guarantee') or a limited liability partnership ('llp'), the registered office is normally stated. For other bodies corporate (ie not formed or regulated by the Companies Act 2006, such as those formed by Royal Charter), a principal or main address can be used.

[5] Some charitable organisations are established as companies limited by guarantee. They can apply not to use the word 'limited' in their name.

  - *Overseas companies.* With overseas companies, the principal place of business is more often stated.
  - *Individuals.* Where an individual is a party, the person's home address is normally stated.
  - *Unincorporated partnership.* For a partnership the home address of each of the partners is normally used.

  One of the reasons for stating the parties' addresses is that it is clear where to send notices under the agreement.

  Although the addresses are stated in the Parties Clause, there should normally also be a notices clause included in the agreement (see Chapter 4) and this may cross-refer to the addresses set out at the head of the agreement. Technically, it is not necessary to state the parties' addresses at the head of the agreement, and in the contracts of some other countries the addresses are sometimes stated in the notices clause (such as in many US agreements).

- ***Successors and assigns.*** It is not conventional in modern English contracts to include a reference to 'successors and assigns' in the names and addresses section of the contract, although this practice is occasionally encountered (see Example 2 above, which includes such wording). Such wording is typically included to indicate that the party named in the party clause will include a third party who takes the place of that party, in situations where there is an assignment of the rights and obligations of the party or where there is a novation.

  Relatively few published English precedents for commercial contracts include such wording (although there may an 'interpretation' clause in the main body of the agreement that has a similar effect). This practice is more commonly encountered in contracts drafted by overseas lawyers. Assignment of contracts is discussed in more detail in Chapter 6.

- ***Requirement to include name and address of a party.*** In most commercial contracts in England and Wales there is no legal requirement to include any details about a party, with one important exception. For companies formed or regulated by the Companies Act 2006, the registered name of the company must appear in all 'documentation' that the company produces[6], which would cover contracts. The registered office, the part of the UK in which it is registered and its registered number need to appear

[6] Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, SI 2015/17, reg 24. Companies must disclose their registered name in a range of documentation, which in addition to specific types of document (orders, letters), includes 'all other forms of its business correspondence and documentation'. This latter phrase appears to be a catch-all and therefore would appear to include a contractual document. The failure to disclose this is a criminal offence, reg 28 (ie not something which a party to a contract can do anything about).

Chapter 6

Interpretation of contracts by the courts—implications for the drafter/negotiator[1]

6.1 Introduction

This chapter considers the methods the English courts use for interpreting contracts. It focuses particularly on how the drafter of a contract should take account of such methods. The courts have developed these methods over decades (in some cases over centuries). The reported cases indicate that the courts take these principles very seriously, and seek to apply them when interpreting contracts.

Many people (whether non-lawyers or lawyers) find it difficult to predict how a court will apply the principles or what the practical result will be. It can seem sometimes that the courts pay lip service to the principles, whilst deciding cases on the 'merits' of the situation before them. On some issues there are so many principles that it seems the court can choose which principle to apply[2].

The above still holds good, even with the near dominance of the modern approach to interpreting contracts (the principles outlined in *Investors Compensation Scheme v West Bromwich Building Society*[3]). This is often now the starting point to the interpretation of a contract by a court. Its aim is to take an objective approach to the meaning of the words used in a contract clause in the context of the contract and taking into account the admissible background (giving the words their ordinary and natural meaning), but ignoring what the parties think and discussed prior to the contract. This approach has a marked preference for not departing from the words used in the contract as the basis for interpreting their meaning.

Whilst this approach simplifies matters with regard to how a court will begin to interpret a contract, it still leaves plenty of room for a judge to come to his or her own view of what the 'objective' meaning of a contractual provision is,

[1] This chapter considers contracts other than those with a consumer. For consumer contracts, see Chapter 7.

[2] For example, when considering whether to admit evidence of terms not set out in the main contract document, the courts may apply the parol evidence rule (and exceptions to that rule), or treat the terms as part of a collateral contract or prior representation. This is discussed later in this chapter. Also, which 'principle' applies may depend upon what law and case law is presented to the judge in any particular case; this is a point which is usually overlooked.

[3] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, HL.

and does not provide an answer to all problems raised in the event of a dispute between parties[4]. The other principles are still needed in particular cases.

This chapter commences with considering the new approach; some of the other principles (which are now likely to apply in particular cases) will be considered in more detail later in this chapter.

6.2 Establishing the terms of the contract and their meaning

- ***General approach of the courts.*** How to determine the intentions of the contracting parties; relevance of past decisions.
- ***Which terms comprise the contract.*** Express terms; terms of other documents; parol evidence rule; representations and collateral contracts.
- ***The meaning of words used in contracts.*** The 'golden rule'; ordinary words; technical terms; legal terms (in outline)[5]; special meanings given by the parties.

6.3 Interpreting a given set of contract terms

The general starting point for the interpretation of a contract is as follows:

(1) use the words that the parties have chosen (given their ordinary and natural meaning);

(2) determine the meaning by taking an objective approach, ie what a reasonable person would have understood the parties to mean;

(3) examine the contractual provision in its context (against other provisions, the purpose of the contract, the facts known or assumed by the parties, other admissible background knowledge);

(4) if the contractual provision uses clear unambiguous language, then it must be applied;

(5) ignore subjective intentions of the parties and their pre-contract negotiations;

(6) if a contractual provision can have more than one meaning, the one which is more consistent with business common sense should be preferred.

[4] For example, the meaning of two contractual terms may be each clear, however in the context of the contract they may simply directly conflict with each other, and the other provisions of the contract do not help in determining which has precedence.

[5] Legal terms – words whose meaning have been decided by the courts or by statute – and lawyers' jargon, are considered together in Chapter 8.

If the above general starting point for the interpretation of a contract approach does not provide all the answers, other principles may assist in interpreting a contract or contractual provision, such as:

- ***Consider the contract.*** (1) Interpret the contract as a whole; (2) give effect to all parts of the document; (3) but special conditions override standard (usually printed) conditions.

- ***Express terms.*** (1) If some items are mentioned, and similar items are not mentioned, it may be assumed that the omission was deliberate; (2) if the contract includes express terms on a topic, it is unlikely that the court will imply terms on that topic; (3) the ejusdem generis ('of the same kind') rule—where the contract includes a list of items followed by words such as 'or other [items]', the 'others' will be interpreted as being limited to items which are similar to those specifically listed.

- ***Who has the benefit of the doubt?*** (1) Unclear contract wording will be interpreted against the interests of the party seeking to rely on it, or the party which drafted the wording; (2) the court is unlikely to interpret contract wording so as to allow a party to take advantage of his own wrongdoing (and only the clearest and most explicit words will allow a party to can take such an advantage, where it is possible to do so); (3) if there are two possible interpretations, one of which is lawful and the other unlawful, the court will apply the lawful one; (4) if by one interpretation the contract is valid, and by the other the contract is invalid, the valid interpretation will be applied; (5) an interpretation which leads to a reasonable result may be preferred over one which leads to an unreasonable result; (6) an interpretation which requires a party to do something which is possible will be preferred over a requirement to do something which is impossible.

- ***Implied terms.*** Terms implied by statute or common law or implied into the particular contract, for example, under the business efficacy rule.

- ***Special rules for exemption clauses.*** How the courts interpret such clauses, and restrictions on exemption clauses under the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967.

Some of these other principles are concerned simply with interpreting obscure or ambiguous wording and the message for the drafter is simple—draft the contract as clearly as possible. General techniques for clear drafting are discussed in Chapter 3. In some cases, there may be very little the drafter can do: the court may apply the *general starting point for the interpretation of a contract* (see **6.3** above) approach, which can override even the most careful drafting. In other cases there are specific techniques which can be used to try to ensure that the court interprets the contract in the way the drafter intended. This chapter will focus mainly on this last category—principles of interpretation which can be addressed by particular contract drafting—whilst

giving an overview of the main principles of interpretation which are followed by the courts[6].

Some of these principles may contradict one another, or could apply to a particular contract or contract term. Some principles may also only apply depending on the arguments put forward by a party's lawyers in the materials that they submit to the court or state during the case.

These points gives a court some scope for selecting which principles they wish to apply to a particular case[7]:

> 'The cynical truth about interpretation in England seems to be that the Bench has been provided with some dozens of "principles" from which a judicious selection has been made to achieve substantial justice in each individual case. From time to time, all the relevant principles point in the same direction and leave the court no choice, but in most of the cases susceptible of any real dispute, the function of counsel is merely to provide sufficient material for the court to perform its task of selection.'

In fairness to the courts, they are required to be consistent with previous court decisions whilst doing justice in the individual case. Strict adherence to so-called rules or principles of interpretation does not always enable this to be achieved.

Faced with comments like these, the reader may wonder whether it is worthwhile spending much time considering the many principles of interpretation which have been developed by the English courts. Nonetheless, it is suggested that it is very important to do so because:

- in many situations the principles lead to a consistent, predictable interpretation. In such situations, the drafter must take account of the principles in order to achieve the interpretation he intends;

- even where the courts have been accused of manipulating the principles to suit the 'merits' of the case, they have generally proceeded within the general framework of those principles. Although the drafter may not be able to ensure a particular interpretation by the courts, s/he can at least try to make sure the drafting is as watertight as possible, so that the court is not obliged to stretch the principles to achieve the intended purpose.

These comments may sound cynical. The problem is that contractual interpretation is not an exact science, no matter how many principles of interpretation are developed. The best that can be said for such principles is that they provide a broad framework for interpreting individual contracts, and are a guide to the drafter (and to the courts). Past cases can only provide

[6] For a fuller understanding of how the courts interpret contracts, the reader is referred to the leading contract law texts, particularly Lewison *The Interpretation of Contracts* (6th edn, 2015, Sweet and Maxwell). This book is recommended for all serious drafters of contracts.

[7] Review (1945) 61 LQR 102.

a general guide to how a court will interpret particular wording, not least because the facts of contract disputes will rarely coincide exactly with the facts of previous, reported cases. Applying the same legal principle may lead to a different result if the facts in each case differ.

Despite these limitations, it is important for the drafter to be aware of and understand the main principles of interpretation which the courts apply when deciding contract disputes. It is recommended that contracts are drafted in the expectation that the court will interpret the words used strictly, particularly if the drafter is legally trained or the contracting parties take legal advice. Some of the principles described in this chapter may provide a 'safety valve' where drafting is unclear, ambiguous or otherwise defective. But the court's view of how those mistakes should be corrected may differ from what one or both of the parties intended; the best course is to make the drafting as clear and unambiguous as possible.

6.4 General approach of the courts to interpreting contracts

The methods used by the courts to interpret contracts can conveniently be thought of in two stages:

- stage 1 is to determine which terms form the contract, the meaning of the words used in those terms, and generally how the courts establish what the parties have agreed. This stage can be thought of as identifying the contract terms and their meaning;
- stage 2 is where the court applies detailed principles of interpretation (the 'canons of construction') to the contract terms which have been identified in stage 1.

The following sections consider stage 1.

6.4.1 *Reformulation of general principle to the interpretation of contracts*

The starting point for interpreting contracts by the courts is nowadays based on a set of five principles. These were set out in a case decided by the most senior court in the UK[8] soon after the first edition of this book was published in 1997. The five principles are set out at **6.4.1.3** below.

In the subsequent years nothing has lessened their impact or their application, and they have been re-affirmed on each occasion that a case has come before

[8] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, HL.

the most senior court which required their use[9], and they are almost always quoted (or at least the first of the five principles) as the starting point for the way that a contract term is considered by a court.

What has changed over the subsequent years is that:

- there has been perhaps a slight change in emphasis over time: for a period the courts appeared to focus on commercial common sense[10] when interpreting a contract, but now there appears to be a shift in focus and the courts are likely to take a more literal view, with more emphasis on the words actually used by the parties[11]; and
- there has been some elucidation of points which are not immediately obvious in the principles as stated, eg if a court is faced with clear words then the court has to apply those words, or that all five principles apply (ie it is not possible to use one as the basis for interpreting a contractual provision whilst the others are ignored).

However, in many ways the principles are no more than a restatement of existing case law (but in more modern language)[12].

The interpretation of contractual provisions based on the five principles (together with subsequent developments) might be stated as follows:

(1) ***The starting point is always the words used in the contract, with a reluctance to depart from them, and the assumption is that they mean what they say.*** Before determining the meaning of the words used, the courts will start with the words actually used. There is a strong reluctance to depart from them, on the basis that in a written agreement there is a presumption that the parties 'have chosen their words with care [and] one does not readily accept that they have used the wrong words'[13]. The focus on the words used will also be based on an 'assumption that the words at issue mean what they naturally say'[14], ie they should be given their 'natural and ordinary meaning'.

[9] Most recently in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and in *Arnold v Britton* [2015] UKSC 36.

[10] Following the decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

[11] Following the decision in *Arnold v Britton* [2015] UKSC 36.

[12] As something acknowledged in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 and in, for example, *Arnold v Britton* [2015] UKSC 36. In the earlier case: 'I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240–242, [1971] 1 WLR 1381 at 1384-1386 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life.'

[13] *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251.

[14] *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429.

Comment:

(i) although the words need to be given their 'natural and ordinary meaning', the meaning will be determined in the context of the clause in which they appear and then in the context of the contract, and finally against the admissible background to the contract[15];

(ii) the reluctance to depart from the words used is likely to be on the basis that:

(a) the parties have control over the language of their contract; and

(b) the parties will have been focusing on the matter dealt with by a provision when they reached agreement on the wording of that provision[16].

(2) ***The aim in interpreting a provision in a contract.*** '... The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used...'[17].

(3) ***The meaning is found through the use of an objective standard (the reasonable person).*** '... Which involves ascertaining what a reasonable person would have understood the parties to have meant'[18].

Comment: the meaning is not what the parties consider their words to mean, but what the notional reasonable person would understand the words to mean.

(4) ***How the objective standard of the reasonable person is determined.*** '... A reasonable person having all the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'[19].

[15] *Cosmos Holidays plc v Dhanjal Investments Ltd* [2009] EWCA Civ 316. In *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50: 'one may proceed on the prima facie assumption that the words at issue mean what they naturally say, they cannot be interpreted in a vacuum. The words must be interpreted by reference to what a reasonable person (who is informed with business common sense, the knowledge of the parties, including of course of the other provisions of the contract, and the experience and expertise enjoyed by the parties, at the time of the contract) would have understood by the provision. So construed, the words of a provision may have a meaning which is not that which they may appear to have if read out of context, or the meaning which they may appear to have had at first sight. Indeed, it is clear that there will be circumstances where the words in question are attributed a meaning which they simply cannot have as a matter of ordinary linguistic analysis, because the notional reasonable person would be satisfied that something had gone wrong in the drafting'.

[16] *Arnold v Britton* [2015] UKSC 36 at [17].

[17] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

[18] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

[19] From the first principle in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98.

Comment:

(i) 'background knowledge'[20] will include, for example, factual background[21], the state of the law[22], market practice[23], expert evidence (if the ordinary principles of construction cannot provide an answer to which meaning is correct)[24];

(ii) pre-contract negotiations will be excluded[25], but it is possible to admit evidence of pre-contract negotiations if the purpose is to establish objective background facts (including if one party communicated them to another), but not anything which goes to interpreting the meaning of the words used[26];

(iii) the only background knowledge admissible will be that which was available up to the point at which the contract was entered into.

(5) ***Language having more than one meaning.*** As part of the unitary exercise of interpretation which involves taking all above factors into account and also taking account of the relevant surrounding circumstances, then 'if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other'[27].

(6) ***Clear wording to be applied.*** 'Where the parties have used unambiguous language, the court must apply it'[28].

[20] For example, in *Arnold v Britton* [2015] UKSC 36, which concerned the interpretation of a provision in a set of leases, the available background was limited to information about inflation rates at the time the leases were entered into (given that most leases had been executed between 1971 and 1999). If any correspondence remained in existence, it is unlikely to have been relevant as to the meaning of the provision under consideration by the court and 'would have merely have shown what one party thought'.

[21] *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251.

[22] *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251.

[23] *Galaxy Energy International v Assuranceforeningen Skuld* [1999] 1 Lloyd's Rep 249.

[24] *Zeus Tradition Marine v Bell* [1999] All ER (D) 525.

[25] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. Although the exact boundaries of what exactly in the pre-contract negotiations is admissible are blurred, the general point is that in almost all circumstances pre-contract negotiations will not be admissible. Principally, it seems it is very hard to determine what is objective: see *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 where it was said that '... judges should exercise considerable caution before treating as admissible communications in the course of pre-contractual negotiations relied on as evidencing the parties' objective aim in completing the transaction'.

[26] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *Q-Park v HX Investments Ltd* [2012] EWCA Civ 708.

[27] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

[28] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

Comment: This will mean that:

(i) if there is an improbable commercial outcome resulting from the meaning of the words but 'where the result, though improbable, flowed from the unambiguous language of the clause, then the court would give the clause that meaning';

(ii) the courts will not rewrite the parties' wording to make the contract conform to business common sense, ie the court will not change the parties' bargain for them.

(7) ***An iterative process.*** To interpret the wording requires an iterative process, involving 'checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'[29], which 'is not confined to textual analysis and comparison. It extends also to placing the rival interpretations within their commercial setting and investigating (or at any rate evaluating) their commercial *consequences*. That is not to say that in a case like this the commercial setting should be derived from considerations outside the four corners of the contractual documents'[30].

6.4.1.1 Most recent development

As briefly noted above, the emphasis appears to have changed as regards the interpretation of a contractual provision. The current leading case[31] favours perhaps a more literal approach to the interpretation of contracts. That is one that, although following the approach of the five principles, places particular emphasis on the words used by the parties in their contract and lessens emphasis on making a contractual provision accord with commercial common sense. Accordingly, it is worth considering the leading judgment in a little detail:

(1) The court started with the statement of the first principle, which the court held meant 'focusing on the meaning of the relevant words [of the clause under consideration in its] documentary, factual and commercial context'.

(2) The meaning is assessed in the light of:

'(i) the natural and ordinary meaning of the clause,

(ii) any other relevant provisions of the [contract],

(iii) the overall purpose of the clause and the [contract],

[29] *In Re Sigma Finance Corpn* [2009] UKSC 2.

[30] *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV* [2014] EWCA Civ 984.

[31] *Arnold v Britton* [2015] UKSC 36.

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

(v) commercial common sense, but

(vi) disregarding subjective evidence of any party's intentions.'

(3) Some points were particularly emphasised:

- *cases which have relied on commercial common sense and the surrounding circumstances*: These two points are not to be used to undermine the words used in the provision which needs interpreting, as the parties have control over the wording they used in the contract and the parties will have focused on the issues covered by the clause when agreeing its wording;
- *the quality of the drafting*: Concerning the wording that needs to be interpreted, the worse the drafting the more readily a court can depart from their natural meaning. But bad drafting will not justify a court embarking 'on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning'. Additionally, the fact that there is an error in the drafting does not mean that it is relevant to the issue of interpretation that a court must undertake;
- *commercial common sense and 20:20 hindsight*: Applying commercial common sense to a provision is only relevant as to how the parties could have or would have perceived matters at the time the contract was entered into (ie commercial common sense cannot be invoked retrospectively). That a contractual arrangement 'interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language'. A judge should not rewrite a provision to help a party who is unwise or to penalise a party who has been astute;
- *limits of commercial common sense*: Commercial common sense is an important factor in interpreting a contract. But a court should be slow to reject the natural meaning of a provision simply because it is imprudent for the parties to have agreed to it. To do so would be to turn the purpose of interpretation the wrong way round, rather 'the purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed';
- *the facts at the time of entering into the contract*: A court can only take account of facts or circumstances that:
  - existed at the time the contract was entered into; and

* were known by or reasonably available to both parties[32];

in interpreting the contract;

- *subsequent events:* If subsequent to the parties entering into the contract an event occurs which it is clear that the parties did not intend or contemplate, based on the wording they have used in the contract *and* it is clear what their intention was, then a court will give effect to that intention.

6.4.1.2 What are the implications for the contract drafter?

The message from the five principles (and subsequent developments) is that the contract drafter has to:

- clearly understand what the commercial purpose of a contract is and what each provision is intended to convey;
- draft each clause in the clearest way possible (Chapter 3 provides suggestions);
- test each clause for different meanings or unintended meanings, and redraft it until the clause only produces a result that a party does want;
- make sure that each clause fits within the context of the rest of the agreement;
- make sure the contract is consistent throughout; and
- obtain agreement from all the parties, if there are any facts etc which bear on the meaning of a contractual provision, but which are not included in the contract itself, so that they can be part of the admissible background.

6.4.1.3 The five principles[33]

'(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next,

[32] As 'a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties'.

[33] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115.

it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man[34].

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

6.4.2 Intentions of the parties

When interpreting contractual obligations, the courts try to ascertain the parties' intentions as expressed in the words they have used. In other words they look objectively at the words used in the contract, and do not generally consider what one or other party privately intended or said when it agreed to

[34] In *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251 this principle was qualified: 'I said that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "... we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage.'

those words[35]. This is the general principle, although there are exceptions, as will be discussed later. This may mean that the courts consider what reasonable people would have understood the terms to mean. If the words used are clear, they may be applied even if this contradicts the commercial purpose of the contract.

Consequently[36]:

(1) there is in general no law against people making unreasonable contracts if they wish;

(2) whether they have done so is to be decided by ascertaining their intention (which of course has to be found in the language they used, read in the light of the surrounding circumstances); and

(3) it is a matter of degree in two respects. The more unreasonable the result, the clearer the language needed. Therefore it would seem that if one intends to achieve a particularly illogical result, one must draft the wording of the contract so clearly that one is left in no doubt that the result was indeed intended.

6.4.2.1 *Drafting and negotiating issues*

The objective, rather than subjective, approach which the courts take has a number of implications for the drafter and negotiator, for example:

- ***Consider how the court might interpret the parties' intentions from the words used.*** It is necessary to think beyond what you intend by particular words, or what your client or commercial colleagues intend, or even what both parties to the contract intend, and consider what the court would regard as the likely intention of the parties using those words. If the words can be interpreted in several ways, consider which way the court is likely to interpret them. 'Clever' interpretations of the contract may be unlikely to succeed; if an unusual meaning is intended, it is better to spell it out in clear terms in the contract, so that the court will not misinterpret it. Even if both parties are in agreement as to their intentions, if these intentions are not clear from the wording of the contract, the court may reach a different conclusion (basing their view on what the notional 'reasonable person' would understand the intention to be);
- ***Make it intelligible to the non-businessperson.*** Increasingly, the courts are prepared to consider the underlying commercial purpose of contractual obligations. However, this should not be assumed. Make the contract intelligible to the outsider, not just to people who are familiar with industry practice.

[35] Consider *Reardon-Smith Line v Hansen-Tangen* [1976] 1 WLR 989: 'When one speaks of the intention of the parties to the contract one speaks objectively—the parties cannot themselves give direct evidence of what their intention was—and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.' See also above, the first principle in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.

[36] *Charter Reinsurance Co Ltd (in liq) v Fagan* [1996] 1 All ER 406, CA.

6.4.3 *Relevance of past court decisions*

The English courts have considered some types of contract on many occasions so that a body of case law has built up as to how contracts of the same type are to be interpreted. This is particularly true in the case of contracts concerned with real property (such as leases) or construction. In other areas there is relatively little case law, for example, in relation to some types of intellectual property agreement (such as the licensing of patents). Where a large body of case law has built up, the courts may be inclined to follow the general approach taken in past decisions, unless they are persuaded that the parties to the contract before them intended something different. The implications for the drafter are as follows.

6.4.3.1 *Drafting and negotiating issues*

- Ideally, the drafter will be aware of how similar contracts have been interpreted in reported cases. Alternatively, take specialist advice. The general ways in which the courts interpret contracts are discussed in this book, but there may be specific interpretations for particular types of contract (eg rent review clauses in leases[37]) which are beyond the scope of this book. If particular words have acquired a particular meaning, and this is not the meaning you intend, use different words or specifically state the meaning intended.
- If in doubt, state obligations specifically.

6.5 Which terms comprise the contract

6.5.1 *The terms set out in the contractual documents*

Before considering how the courts will interpret particular provisions of a contract, it is first necessary to be clear as to which of them the courts will consider. Where the parties have signed a written agreement, the terms set out in that agreement may be the main, or only, terms that the court will consider[38]. Almost certainly, those written terms will be binding on the parties who sign the agreement, even if they have not read the agreement[39].

[37] See further, 22(3)A *Forms and Precedents* (5th edn, LNUK).

[38] Whether the court will consider other terms, not set out in the written agreement, is considered in later sections of this chapter.

[39] *L'Estrange v Graucob* [1934] 2 KB 395; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430: 'It seems to me that when a party assents to a document forming the whole or a part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract; and it is unnecessary, and possibly misleading, to say that he is bound by them because he represents to the other party that he has made himself acquainted with them.' The proposition here will apply in the absence of fraud or misrepresentation. See further *Chitty on Contracts* (31st edn, 2015, Sweet and Maxwell), Ch 5.

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' as well as unnecessary legal jargon; or
- are defined by statute as having a particular meaning when they are 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 will 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, intellectual property, exclusive licence. 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 types of documents (usually called 'instruments'). These include, in particular, the following:

- ***Month, person, singular, masculine.*** Section 61 of the Law of Property Act 1925[1] 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; ...
  >
  > (b) "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 the Interpretation Act 1978, ss 5 and 6, and Sch 1. Section 17(2)(a) of this Act is discussed at **8.4.3**.

[2] These provisions replace the former law, under the Law of Property Act 1925, s 76, by which certain terms are implied into a 'conveyance' of property if the seller expressly conveys the property 'as beneficial owner'. They are likely now to be seen in pre-1994 documents relating to property transactions. As to the effect of the Law of Property (Miscellaneous Provisions) Act 1994 on assignment of intellectual property, see Anderson *Technology Transfer* (2010, Bloomsbury Professional), at 8.1.

- ***Infants and minors.*** Under the Family Law Reform Act 1969[3], 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 of age. 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 23 September 2016 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 23 December 2016. The date of 23 December 2016 is arrived at by counting the start of the three-month period from and including 24 September 2016 (not from and including 23 September 2016). Also X can usually make payment up to midnight of 23 December 2016.

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.*** The Law of Property Act 1925, s 61 (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 real property (ie land and buildings)[4].
- ***What is a calendar month?*** In the leading case the court held the following points as being well established under English law[5]:
  - 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] At common (non-statute) law, 'month' meant calendar month only in bills of exchange and other commercial documents. Otherwise it meant 'lunar month', see *Hart v Middleton* (1845) 2 Car & Kir 9 at 10.

[5] *Dodds v Walker* [1981] 2 All ER 609, 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 (now repealed) Companies Act 1985, s 244(1)(a) (see now Companies Act 2006, s 442(2)). 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 certain[6].

- ***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 2016. 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 excluded[7]. A person under an obligation to do a particular act on or before a particular date has the whole of that date to perform it[8]. 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 excluded[9]. 'Beginning from' is treated in the same way as 'from'[10].

  If the intention is that a period of time starts on the date rather than the day after and to reduce doubt as to when the period starts, consider using special words such as 'commencing on' or 'beginning with', or beginning with and including'. The example given at the beginning of this section would need rewording as:

  > X shall within 3 months of and beginning with and including 23 September 2016 pay to Y the sum of Z

[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] *Alfovos 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.

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 agreement[11]. Words such as 'by', 'from', 'until' and 'between' may be ambiguous and lead to uncertainty as to which dates are included[12]. 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 apply[13].

- ***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.

  Instead of an agreement stating

  > 'Party A shall perform the Services within 3 months of the date of this Agreement'

  the following could be used instead:

  > '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 account[14], 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 context[15].

  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, while a 'conventional day' begins at a defined time and ends 24 hours later[16].

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

[12] In *Ladybird v Wirral Estates* [1968] 2 All ER 197, a lease which was to run from a particular date was interpreted as meaning as including that particular date, as in the context of the lease, the parties had that intention because that was the date when the first rent payment would be paid.

[13] 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'.

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

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

[16] *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 the end of working hours (*Momm (t/a Delbrueck & Co) v Barclays Bank International Ltd* [1977] QB 790).

- ***Years.*** Similar problems may arise with expressions such as 'year of this Agreement'—is this a year from a specified date (eg 24 September 2016 to 23 September 2017) or the period 1 January to 31 December in any year (ie a calendar year)? To avoid any uncertainty, the expression 'year of this Agreement' is sometimes defined in the contract. A year may not even mean a period of 12 months but some lesser period, depending on the circumstances[17].
- ***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 period[18]. The usual quarter days are 25 March (Lady Day), 24 June (Midsummer), 29 September (Michaelmas) and 25 December (Christmas).

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

'Forthwith' does not have a precise meaning. An obligation to do something forthwith does not usually mean it must be done instantly, without any delay. The word usually denotes an obligation to do something 'as soon as practicable'[19], or 'as soon as possible'[20], depending on the circumstances of the case or the surrounding provisions of the contract.

Sometimes the courts are prepared to interpret forthwith less strictly, as meaning 'within a reasonable time' if no harm can result from this interpretation[21] or 'as soon as reasonably possible'[22].

[17] *Boufoy-Bastick v The University of the West Indies* [2015] UKPC. A year in the case was interpreted as an academic year, which ran from September in one year to June in the next.

[18] 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.

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

[20] Halsbury's Laws of England (4th Edn Reissue) Vol 45, para 251 considers 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'.

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

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

The courts have also interpreted similar words such as 'immediately'[23], 'as soon as possible'[24], 'directly'[25], 'promptly'[26], or 'with all possible speed'[27]. However, not all of these cases were concerned with the interpretation of contracts.

To provide some illustrations

- a party had an obligation to make part of a gun 'as soon as possible'. The party delayed because it did not have a suitably qualified member of staff to make the part. The court held the party was in breach of the obligation. The meaning of '"as soon as possible" meant do it within a reasonable time, with an undertaking to do it in the shortest practicable time', but did not mean that the party had to put aside an order on which it was already working[28];
- a party was an under obligation to deliver cable bars 'forthwith', with the payment of them within 14 days, and 'forthwith' was interpreted as meaning that the delivery was to be no later than the date payment was due[29].

Thus (with all of these expressions) it comes down to a matter of interpretation of the contract and the circumstances. To avoid uncertainty, it is preferable to state the 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', 'immediately' or 'as soon as possible' in the way that one intended[30].

[23] 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.

[24] 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.

[25] 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.

[26] 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-Izegum PVBA* [1978] 2 Lloyd's Rep 109 at 113, HL; and the words of Lord Hope in *R (on the application of Burket) v Hammersmith London Borough Council* [2002] 3 All ER 97, HL, where 'promptly' meant the 'avoidance of undue delay' in the bringing an application for judicial review.

[27] *Re Coleman's Depositories* [1907] 2 KB 798. Followed in *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm).

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

[29] *Staunton v Woods* (1851) 16 QB 638.

[30] In *Tarkin AG v Thames Steel UK Ltd* [2010] EWHC 207 (Comm) it was held that the use of the word 'immediately' in a clause in a contract to deliver steel scrap made time of the essence. The clause read: 'The schedule for arrival of material in the port to be as required by the Buyer. Material is to be delivered in the port immediately upon the Buyer's request. The Seller will guarantee to deliver the material in the port at a minimum rate of 800MT per day'.

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)[31]. Note (at least for England and Wales): Christmas Day, Good Friday and New Year's Day are not bank holidays, they are usually treated as (bank) holidays, even though they are included as bank holidays in statute. A definition which only uses the words 'Bank Holiday' would not capture other dates which are commonly not worked.

[31] 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).

- ***Business day***. This is likely to mean Mondays to Fridays (but excluding bank holidays at least) are business days[32].
- ***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 for customers to buy and pay for computer equipment until 8pm but the head office of the retailer business hours closes at 5pm. Is the end of the business day at 5pm or 8pm?;
  - where parties are based in different time zones, an obligation on a party to do something within business hours or by the end of a business day may need to be defined to indicate whether it has to be done within the business hours of the party who has the obligation or within those of the other party.

  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'[33].
- ***Public holiday***. These words, although often appearing in statutes and contracts, do not have a consistent meaning. One common meaning is the days which are holidays (such as Christmas Day and Good Friday), including bank holidays[34].

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:

- the name of a document;

[32] 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.

[33] See *Re Kent Coalfields Syndicate* (1898) 67 LJQB 503.

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

- the fact that parties have reached an understanding, which may or not be 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'[35].

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 checked[36].

Similarly with EU competition law, an agreement can have a meaning where the parties have reached an understanding of a non-binding nature[37].

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 e-mail and/or facsimile and/or in person.

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

- by post or e-mail or facsimile or in person; or
- by post and e-mail and facsimile and in person.

That is, to fulfil the obligation, it is possible for the consultant to provide the report either conjunctively or disjunctively[38].

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 entitle that party to fulfil the obligation in multiple instances or in ways that

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

[36] 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'.

[37] See Electrical and Mechanical Carbon & Graphite Products (Comp/E-2/38. 359).

[38] 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.

the other party does not wish to occur. Generally, a contract drafter should avoid the use of and/or as:

> '... the use of the expression "and/or" in any legal document is in any case open to numerous [...] fundamental objections of inaccuracy, obscurity, uncertainty or even as being just plain meaningless ...'[39].

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)[40].

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:

[39] *Situ Ventures Ltd v Bonham-Carter* [2013] EWCA Civ 47, para 26, where the court held that as evidence of a poorly drafted clause which included the use of 'and/or', and in the circumstances, the use of 'and/or' was unnecessary and confusing . The court had to interpret its use, in order to make sense of the clause in which it was found, as meaning 'or'.

[40] 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 v Shepherd Construction Ltd* [2010] EWCA Civ 283, [2010] All ER (D) 168 (Mar) for an illustration of this point.

- 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 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 transferred[41].

Generally, it is possible for one party to assign rights under a contract with the consent of the other party[42] unless the contract is one involving a personal relationship (eg agent or employee), or where there is an express or implied term preventing assignment.

Transferring obligations under an agreement requires the consent of the other contracting party.

If there is a transfer of rights and obligations 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 parties[43]. It is possible to 'novate' only some of the rights and obligations of an agreement[44]. 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.

Contracts generally include a provision which does not permit the assignment of rights or the transfer of obligations (often called 'assignment' clauses). However, if a party does try to assign its rights and/or transfer its obligations despite clear wording in a contract, such action may still be effective[45].

[41] 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.

[42] 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.

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

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

[45] See eg *Don King Productions v Warren* [1999] 2 All ER 218; *Swift v Diarywise Forms Ltd* [2001] EWCA Civ 145, [2003] 2 All ER 304n. Such an assignment may take effect as an equitable assignment. However, the principles of law permitting this are complex and specialist advice should always be sought.

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' clauses are concerned with the operation of the agreement itself (such as notices, law and jurisdiction and interpretation clauses), while some deal with the rights and obligations of the parties (clauses such as assignment and sub-contracting, entire agreement, waiver, force majeure, etc).

There is no fixed list of what constitutes 'boilerplate', and the classification of certain clauses as 'boilerplate' does not turn on their importance[46]. 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 on 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,
  - Contracts (Rights of Third Parties) Act 1999,
  - (brief) interpretation provisions, and
  - (separate) definitions.

[46] For example, the boilerplate section of an agreement usually contains an 'entire agreement' clause (see **6.5.5** and **6.5.23.9**). Such clauses have received considerable scrutiny by the courts in recent years as it is one of the clauses which attempts to restrict or limit liability. A law and jurisdiction clause can assume importance if the parties are based in different countries and the cost of litigation or the difficulty in litigating in a foreign jurisdiction is of concern to one party, although the interpretation of such clauses does not normally cause the same difficulty as an entire agreement clause.

- ***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), and
  - 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,