

Paris Energy Series No. 8: Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

May 2013

1. Introduction

When commercial agreements are negotiated, certain key terms are generally the subject of intense discussion. Once these terms have been agreed, there is a risk the ‘boilerplate’ provisions¹ at the back of the contracts can receive scant scrutiny in the race to get the deal done. Yet far greater scrutiny will fall on these provisions when a dispute arises. Properly drafted, they can protect a party from liability or allow it to assert its rights. If neglected, they can prove the other side’s ‘get out of jail free’ card.

The risks attaching to these provisions differ in common and civil law jurisdictions. In common law jurisdictions, the principal problem is that parties do not properly consider what risks they are trying to avoid, and unquestioningly use time-honoured wording. The result is that the boilerplate provisions may not be drafted broadly enough to cover off the risks in question. This article selects several of these neglected provisions (entire agreement, severability and no waiver provisions), and explains their purpose and potential pitfalls awaiting the unwary, primarily focusing on English law. It then provides practical tips for avoiding these pitfalls.

The pitfalls are different in civil law jurisdictions. International commercial contracts are often drafted on the basis of common law precedents including boilerplate provisions, even if the contract’s governing law is that of a civil law jurisdiction. Although the principle of freedom of contract – *i.e.*, parties being free to contract on their chosen terms and have their contracts enforced – is generally recognised in civil law jurisdictions², it is

recognised in very different ways, often owing to the heavy influence of duties of good faith/loyalty imposed by the civil codes in these jurisdictions.

As a result, boilerplate provisions can sometimes have a very different effect in civil law jurisdictions than a common law draftsman intended (and may even be considered invalid in some jurisdictions).³ Under Italian law, for example, clauses not specifically negotiated based on the effective will of the parties – a particular risk for boilerplate provisions – may be found to be purely ‘stylistic’ and therefore invalid.⁴

For the arbitrator, this can present a serious dilemma. Clearly, arbitration is a consensual system of dispute resolution and, as arbitrator, one seeks to give effect to, and abide by, the parties’ will. As a result, when considering boilerplate provisions in contracts between sophisticated international entities, there is a temptation to conclude that, to the extent the parties actually considered these provisions when negotiating, they may well have viewed them from an international perspective, rather than merely by reference to the governing law. It can seem restrictive to interpret provisions which are typically creatures of common law by reference to a legal system to which they are (often) foreign.

Nonetheless, the arbitrator is faced with the task of applying the parties’ choice of governing law as, at the very least, a major factor in coming to his or her decision.

For this reason, parties should get proper advice on the impact of these provisions under local law (and on the key potential risks) at the time of contracting, rather than waiting until a dispute arises.



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The writer would like to thank Luka Kristovic-Blazevic and Tom Cameron for their assistance in the preparation of this article.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

Considering the same sample of provisions examined from a common law perspective, this article considers some of the risks and factors to contemplate when employing these provisions in a number of civil law jurisdictions, with a particular focus on French law, where relevant. Finally, the article examines how apparently innocuous notice and time-related provisions can give rise to uncertainty if not considered carefully, whether in common or civil law jurisdictions.

2. Entire agreement (or merger/integration) clause⁵

2.1 Purpose

This clause seeks to exclude or limit a party's liability for any statements or representations (particularly pre-contractual ones) which are not included in the final agreement.⁶

2.2 Pitfalls: English law

When a dispute arises, the party for whom the wording of a contract is less favourable may often look to rely instead on statements or representations that were not included in the written contract. A loosely drafted entire agreement clause can allow this party to do so.

(a) Pitfalls 1 and 2

When looking to limit the scope of parties' agreement to the terms of the written contract, there are risks that (1) the written contract may not be defined narrowly enough, and (2) the exclusion of other statements and representations may not be drafted broadly enough.

These risks were illustrated in an English case concerning payments under a consultancy agreement. The clause in question provided that (1) the "Agreement" (undefined) constituted the entire agreement between the parties, and (2) it had effect to the exclusion of other agreements reached before the date of the Agreement.⁷ However, the agreement was accompanied by an unsigned side-letter which – the Court found – was meant to take effect from the same date.

Since the Agreement only had effect to the exclusion of agreements predating it, the Court found that the contemporary side-letter was part of the parties' agreement. In addition, the written agreement was not defined narrowly enough: the lack of any definition for "Agreement" meant its scope was not sufficiently limited and could be extended to cover the side-letter.

As a result, additional payments were triggered on the terms set out in the side letter, rather than being limited to those set out in the consultancy agreement.

(b) Practical tips 1 and 2

These risks can be mitigated by:-

- providing a comprehensive definition of the "Agreement" (including any relevant schedules and a list of any associated "Transaction Documents"); and
- removing references to "preceding" or "prior" representations and generally referring to "any" representations.

(c) Pitfall 3

Another pitfall is failing to specify precisely what types of representation are excluded from the scope of the contract. Under English law, a party can be liable for misrepresentation not only under a contract, but also in tort. The English courts have in recent years taken a hard line on boilerplate entire agreement clauses which failed expressly to exclude liability for all kinds of misrepresentation⁸ (except fraudulent misrepresentation, which cannot be excluded⁹).

The provisions in question stated that the contract between the parties superseded any previous agreements or representations between the parties relating to the subject matter of the agreement.¹⁰ In each case, the court found the boilerplate clause failed to exclude a claim for misrepresentations in tort, since clear language would have been required to limit liability in this way.

(d) Practical tip 3

Tightly drafted entire agreement clauses often look not just to limit liability for misrepresentation, but also to deny that liability could have arisen in the first place. This also has the effect of sidestepping statutory controls on attempts to limit the remedies available for misrepresentation.¹¹ For example, the following clauses have been accepted as effective by the courts:-

- a clause by which each party acknowledges no representations have been made;¹² and/or
- a clause by which each party acknowledges it was not relying on any representations.¹³

Other clauses accepted by the English courts as limiting liability for misrepresentation include:-

- a general waiver of rights relating to warranties and representations not expressly set out in a contract;¹⁴
- an express exclusion of liability for misrepresentation.¹⁵

(e) Conclusion (common law jurisdictions)

A well drafted merger clause can achieve most of what it sets out to achieve in common law systems. The courts of most US states have traditionally given effect to merger clauses as

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

showing the parties' intention that the written contract should be regarded as a complete record of their agreement (though some courts have denied such clauses they have conclusive effect).¹⁶ Provided the clause is conspicuous and tightly drafted, it is thought to be sufficient to bar evidence of prior negotiations (including warranties and innocent representations), unless there has been fraud.¹⁷ Indeed, such clauses are so commonly used that their absence may give rise to a contrary inference.¹⁸ Under English law too, a properly drafted merger clause creates a strong presumption that the contract documents should be considered the complete agreement between the parties,¹⁹ and should be effective to exclude reliance, unless there has been fraud.²⁰

2.3 Pitfalls: civil law jurisdictions

In civil law jurisdictions, there is often less certainty as to the likely effect of merger clauses. The first reason is that they are generally not a part of traditional contractual practice in these jurisdictions and, as a result, have seldom or never been considered by their courts.

Second – and more importantly – various provisions of the civil codes in these jurisdictions require a judge (or arbitrator) interpreting a contract to search for the common intent of the parties, considering their behaviour before and after execution of the contract. An entire agreement clause is unlikely to be able to prevent this.

Under Italian law, for example, a merger clause does not appear to prevent a court (or an arbitrator) interpreting a contract in this way.²¹ Article 1362 of the Italian Civil Code requires a judge interpreting a contract to consider “the common intent of the parties, not limited to the literal meaning of the words”, which encompasses “the general course of their behaviour, including that subsequent to the conclusion of the contract”. Italian scholars therefore consider a merger clause will not be effective to the extent it tries to exclude behaviour before or after execution from being considered in interpreting a contract.²²

Under French law too, a merger clause may not always prevent circumstances indicating the parties' common intent from being considered. Although a merger clause is likely to be effective in providing that the “present” agreement replaces “prior” agreements, it cannot make the agreement the sole source of rights and obligations between the parties.²³ Again, a key reason for this can be found in the country's Civil Code, which requires that agreements between parties “must be performed in good faith”.²⁴ One consequence of this is that a French judge can go beyond the letter of the contract in looking to establish the actual intention of the parties.²⁵

However, properly drafted, a merger clause will be enforced by French courts. Thus, while absent such a clause a French judge would take account of other documents to determine the parties' common intent,²⁶ French courts have applied merger clauses with a clear wording. For example, the courts have applied clauses stating that (1) only the contract, together with the documents to which it referred, defined the rights and obligations of the parties, and it replaced any earlier documents regarding the same subject,²⁷ or (2) the contract “annulled and replaced all prior agreements, whether written or oral” and “none of the parties could be bound by any other obligations than those which have been expressly agreed in the present contract.”²⁸

Nevertheless, in France as well as in other jurisdictions, a court may consider surrounding circumstances where a contract is unclear (regardless of whether there is a merger clause).²⁹ Where the literal meaning of contractual terms is unclear, the Russian Civil Code allows a court to take all surrounding circumstances into account to ascertain the common will of the parties.³⁰ Under Hungarian law too, courts can fill any gaps in the agreement by considering each party's prior statements and representations and their likely effect on the understanding of the other party.³¹

Finally, a merger clause is unlikely to be effective under German law to the extent it tries to exclude other evidence from a court's consideration. The German Civil Code provides that any standard term disfavoured another party to an unreasonable extent and offending the principle of good faith should be invalid, owing to the principle of good faith.³² Yet the clause is likely to raise a rebuttable presumption that the contract is correct and complete.³³

A second issue which may impact upon the effect of a merger clause is the extent to which it is a standard clause, rather than being individually negotiated. Under Italian law, for example, a merger clause could be considered invalid on the basis it is purely ‘stylistic’.³⁴ Similarly, under Swedish law, a merger clause in standard form may only establish a presumption the parties did not intend their pre-contractual statements to form part of the contract, whereas an individually negotiated clause should actually exclude such statements from forming part of the contract.³⁵ Local advice in these jurisdictions should therefore be sought as to the degree of evidence required to establish that a term of a contract is individually negotiated.

Finally, specific obligations attaching to contracts of a particular type can affect the interpretation of merger clauses under national law. French law automatically imposes various obligations on parties to certain types of agreement, out of which it is impossible to contract. For example, it is impossible to exclude obligations of ‘safety’ and of information and advice from contracts with

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

professionals.³⁶ Again, local law advice should be taken to determine the extent to which peculiarities of a particular contract type may impact upon interpretation.

2.4 Conclusion

A well drafted entire agreement (or merger) clause is likely to exclude evidence of negotiations or representations (except fraudulent ones) from the consideration of courts (or arbitrators) considering contracts governed by a common law system.

However, the obligation of courts and arbitrators interpreting a civil law contract to consider parties' common intention by reference to the general course of their behaviour may well prevent an entire agreement clause having the same effect. In addition, parties should be wary of the possibility that such a clause could be considered purely 'stylistic' in certain jurisdictions.

Subject to local advice, it is nonetheless worth looking to include a merger clause in contracts in these jurisdictions, to take advantage of its protection to the extent possible under the law in question.

Finally, at a crossroads between common and civil law positions, it is worth noting, the UNIDROIT Principles of International Commercial Contracts 2010,³⁷ which include the following merger clause (Article 2.1.17):

"A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."

3. Severability (or divisibility) clause³⁸

3.1 Purpose

A severability clause aims to regulate what happens if any contract provision is found to be, or becomes, illegal or otherwise invalid. In particular, this clause often looks to prevent an entire contract becoming void as a result of one provision's invalidity.

3.2 Pitfalls: English law

When a contract provision becomes invalid or unenforceable, the English courts will often consider applying the so-called 'blue pencil' test. This test allows an invalid provision to be severed if it is possible simply to run a blue pencil through the offending part without affecting the meaning of the remaining parts.³⁹

However, this test is limited by the principle that the English courts will not make a new contract for the parties.⁴⁰ The idea of including a severability provision, then, is to suggest to the courts that they would merely be applying the contract by severing a void provision, rather than making it anew.

(a) Pitfall 1

The first point of which parties should be aware is that, under English law, a provision will not be severed by applying the 'blue pencil' test if to do so would defeat the parties' intention. The courts have stated that they will not sever words of a contract if this would "alter entirely the scope and intention of the agreement."⁴¹

Though the English courts are generally commercially astute, there is at least some risk that the judge may not accept one party's views as to which are in fact key provisions of the agreement removal of which would alter entirely the scope and intention of the agreement. Strict application of a severability provision could therefore cause the balance of the contract to be disrupted by removing a term which particularly benefits one party.

(b) Practical tip 1

This risk can be mitigated by including an express provision that the severability provision should not apply if specified key terms (e.g., terms particularly favouring one party) are found to be invalid.

(c) Pitfall 2

Sometimes, boilerplate severability clauses provide for the renegotiation by the parties of a term which is found to be invalid. Although this precise point does not appear to have been the subject of litigation, there is a risk that it could fall foul of the general English law principle that an agreement to negotiate will not have contractual force,⁴² particularly if the clause is an essential one.

(d) Practical tip 2

It is inadvisable to include such a clause, since there is a significant risk that it would be found to be unenforceable. It would be preferable to provide for certain criteria by which particular terms could be determined⁴³ or particular machinery by which a matter might be resolved (e.g., in the event of a price provision becoming invalid, third party valuation through a clearly specified procedure,⁴⁴ or, otherwise, a clearly specified dispute resolution procedure⁴⁵). Although the precise criteria or machinery will depend on the kind of contract, the key principle is that they should be clear and certain, and therefore capable of enforcement by an English court.

3.3 Pitfalls: civil law jurisdictions

Even under English law, the effect of severability clauses has not been much considered by the courts. In civil law jurisdictions too, there appears to be little case law,⁴⁶ which itself leaves some risk that such a clause will not take effect as anticipated.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

Under French law, this risk appears to be particularly pronounced. Where a provision which is the determining and fundamental cause of the contract in question becomes invalid or void, a severability clause cannot generally prevent the entire contract becoming void.⁴⁷ Though this approach is reminiscent of the English courts' reluctance to defeat the parties' intention by severing a contract provision, under French law it is not necessarily possible to contract out by specifying the provisions which will cause the contract to be annulled and those which can be severed without this effect. It is impossible to contract out of the requirement of a "cause" for a contract under Article 1131 of the French Civil Code, and the French courts appear to undertake an independent analysis of what constitutes the cause of the contract.

The French courts have extended this principle to consider the economic balance of the contract. For example, the Supreme Court has annulled a severability clause on the basis that its literal application would have been contrary to the economic balance of the contract.⁴⁸ Similarly, in cases in which parties have entered into several connected contracts and provided that the contracts are to be considered independent, French courts have nonetheless considered the economic balance of the undertaking as a whole. As a result, where one contract is found void, the courts have found that the connected contracts too must become void (if that is what their assessment of the economic balance dictates).⁴⁹

The issue of the balance of the contract also appears likely to trouble a court (or an arbitrator) applying other national laws. Under Finnish law, for example, it seems that, where this balance would be affected by literal application of a severability clause, the court could actually amend other parts of the contract to restore the balance, or could terminate the contract, in each case in spite of the severability clause.⁵⁰

Under Danish law too, it seems possible severability clauses could fall foul of the general clause of Denmark's Contracts Act, which allows courts discretion to disregard an agreement if it would be "unreasonable or contrary to the principles of fair conduct" to uphold it.⁵¹ Finally, under Norwegian law, a severability clause apparently cannot limit a court's discretion to apply principles of Norwegian contract law to regulate the consequences of a provision becoming void or invalid.⁵²

3.4 Conclusion

A well drafted severability clause is likely to have the desired effect under English law. Similarly, the divisibility clause is so well established as a part of contractual practice under New York law that its absence may be considered a factor indicating that the parties intended all terms of a contract to be viewed as interdependent.⁵³

Yet it seems that the clause would only be applied in many civil law systems to the extent it does not disturb the balance of the contract (as determined by the courts or arbitrator(s)). French law, for example, allows the court or arbitrator some latitude in determining this balance, while one respected Finnish commentator has suggested that Finnish courts could amend other parts of a contract to restore the contractual balance if that balance is upset by the application of a severability clause. So, it appears there is a risk of unexpected side-effects in adopting a severability clause in some jurisdictions. As ever, early local advice should mitigate the risk of being caught unawares.

4. No waiver

4.1 Purpose

This clause is intended to protect the rights of a party who fails to exercise them immediately, by making clear that such a failure should not be considered a waiver (of the breach of contract itself and/or the rights and remedies to which that breach gives rise).

4.2 Pitfalls: English law

(a) Pitfall

Under English law, a party can generally only waive its rights under a contract by making a clear and unequivocal representation that this is his intention.⁵⁴ This means mere failure to exercise rights under a contract is usually not a clear enough representation to constitute a waiver of those rights. In certain business scenarios, an unreasonable delay in exercising a right to terminate can lead to an inference that a contract has been affirmed.⁵⁵ A 'no waiver' clause can be an effective way of preventing such an inference from being drawn.⁵⁶ Properly drafted, it can ensure the party looking to exercise its rights preserves those rights in spite of a technical delay.

Yet a 'no waiver' clause cannot be relied upon to preserve a claimant's rights in all circumstances. A party which has made a clear and unequivocal representation that it wants to affirm a contract or otherwise waive its rights is unlikely to be allowed to rely on a 'no waiver' clause and exercise its rights. In one key case, the English court refused to allow a party to rely on a 'no waiver' clause after it had delayed for one year in seeking to exercise a right to terminate a contract and continued to perform its obligations throughout that period. The court found that this party had already elected not to terminate the contract.⁵⁷

(b) Practical tip

Particularly if they are the likely claimant in any action (*e.g.*, a lender or a purchaser), parties should look to include this clause to protect against a 'technical' waiver and to allow reasonable time to take advice on the rights available to them under the relevant contract.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

However, a party should not sit on its hands and rely on the protection of this clause. Once a party has taken advice on its rights under a contract, it should look to exercise these rights promptly, since otherwise it may well be deemed to have chosen not to do so.

4.3 Pitfalls: civil law jurisdictions

The position under French law is not dissimilar from the position under English law, though its legal underpinning (the principle of good faith) is different. The waiver of a right can result only from actions unequivocally manifesting a will to waive one's rights.⁵⁸

The French courts have prevented a party enforcing its rights where its behaviour has indicated an intention not to do so, since this would contravene the principle of good faith.⁵⁹ In fact, the French courts have even gone so far as to sanction parties who act in this way.⁶⁰ However, French courts will take into account the circumstances of the case and may enforce a party's right despite that party having delayed exercising this right.⁶¹

Similar principles in the Nordic legal systems limit the effectiveness of a 'no waiver' clause. Under Finnish law, the principle of loyalty in contractual relationships is likely to prevent a party relying on a 'no waiver clause' if its behaviour was 'disloyal' and had indicated an intention to waive its rights.⁶² The position appears to be similar under Danish law,⁶³ and the Norwegian law duty of loyalty and good faith too seems likely to prevent a party relying on a 'no waiver' clause when its conduct has indicated a willingness to waive these rights.⁶⁴ In fact, under Danish and Norwegian law, the impact of a 'no waiver' clause is further limited by the requirement that a party must give notice of a breach of contract within a reasonable time⁶⁵ (though arguably this is not so different from the position under English law).

Yet, in some jurisdictions, the clause may be applied more strictly or at least have uncertain effect. For example, a delay in exercising a right does not usually cause that right to be relinquished under Russian law, and it appears a 'no waiver' provision could be interpreted literally.⁶⁶ The position under Hungarian law is uncertain: the clause could perhaps be applied strictly, but a party may be prevented from breaching implied duties of good faith and fair dealing.⁶⁷

4.4 Conclusion

The position in civil law jurisdictions does not seem that dissimilar to the position under English law (in terms of practical effect, rather than legal underpinnings, which remain distinct).

Again, it seems likely to be worth including a 'no waiver' clause to preserve one's rights to the maximum extent possible under national law. Again, however, a party takes a risk by relying on this clause instead of acting promptly to enforce its rights.

That said, it appears there is a converse risk – in some jurisdictions (e.g., Russia and Hungary) – that the 'no waiver' provision could be interpreted more literally, with the result that a party could look to rely on it even where its conduct had suggested it would not exercise its rights. As ever, it is better to be properly advised on this risk sooner (*i.e.*, at the time of drafting) rather than when a dispute has arisen.

5. Notice

5.1 Purpose

A notice clause explains how parties should communicate formally with one another about matters relating to the contract.

Giving notice can be necessary simply for the purpose of providing information relating to a contract, but it can also be a condition precedent for bringing a claim. In the latter situation, in particular, the notice provision can impact upon a party's ability effectively to exercise its rights under a contract. It is therefore important to make sure the provision leaves little room for doubt (as set out below).

5.2 Pitfalls (Common and civil law jurisdictions)

(a) Pitfall 1: drafting notice provisions

Whether the governing law is that of a common or a civil law jurisdiction, notice provisions need to provide sufficiently specific details about how notices are to be given to be effective. Thus, if a clause is not specific enough and, for example, simply provides an address, without details as to the form of notice, the timing, *etc.*, it can cause problems for the parties in determining whether a notice was properly issued.

Further, a party issuing a notice should ensure that it complies exactly with the requirements of the notice provision. While this might seem overly formalistic, notices have sometimes been deemed invalid for failing to comply strictly with the form prescribed in the notice clause, even where the purpose of the notice was clear.⁶⁸

A final problem to address is that notices can sometimes sit in an absent person's in-tray for some time, which can be particularly problematic if prompt action is required.

(b) Practical Tip 1: drafting notice provisions

First, the general notice provision should be drafted broadly enough that it covers all relevant communications under the contract.

Second, the clause should specify the form of the notice, whether it is to be made in writing, by what means (letter, e-mail, fax, *etc.*) it is to be issued, to what address(es) it should be sent, and when it is to be deemed effective, *i.e.*, to have been received.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

This last point is particularly important where several different methods of delivery are envisaged: to avoid confusion, the clause should specify when delivery by each method becomes effective. Delivery should also be evidenced in a manner capable of proof.

Third, the recipient of the notice should be considered. A notice provision should specify a position at a company (*e.g.*, the Chief Executive Officer) rather than a named individual. This avoids problems arising if the named individual leaves the company or moves to a different position (an almost inevitable occurrence in the type of long-term agreements we often find in the energy industry). It is also advisable to provide for more than one position, to cover the situation where the addressee is away (which can be an issue in respect of notices requiring prompt attention).

Fourth, a provision dealing with change of address should be included in the clause, *i.e.*, requiring a party to inform the other party in writing and in good time in advance if one of the addresses in the notice clause changes in the course of the contract.

Finally, the time for the sending or receipt of the notice should be specific and clear (in this connection, see **Section 6**, which considers “Time-related provisions”).

(c) Pitfall 2: issuing notices

In limited circumstances, even if a notice has been given in accordance with applicable notice provisions, it may be deemed ineffective.

For example, in one case the Swedish Supreme Court found a Swedish defendant had not been properly notified of arbitration proceedings (and therefore refused to enforce an arbitral award), even though:

- (i) notifications had been sent to the defendant’s former address (where an unidentifiable party had even confirmed receipt on one occasion) and the defendant had failed to notify the opposing party of its change of address as required under their contract; and
- (ii) the applicable arbitration rules essentially provided that notifications should be deemed received if they were sent by specified means to the last known address of the addressee (which had occurred in this case).⁶⁹

(d) Practical Tip 2: issuing notices

When sending a notification, one should always check whether it has in fact been received (and retain confirmation of receipt). Since public policy requirements under domestic laws can affect whether notices have been properly issued under contractual provisions, parties should also consult local counsel when issuing an important notification in another jurisdiction.

5.3 Conclusion

One should thus seek to include enough detailed requirements in a notice clause to ensure certainty as to when a notice will be deemed proper and effective. As well as complying with all the requirements in a notice provision, one should always seek to verify and/or confirm whether notice was actually received in order to avoid any further issues which might arise as a result of local public policy considerations. In cases of doubt, assistance from local counsel should be sought.

6. Time-related provisions

6.1 Purpose

Contractual clauses often include various time limits or periods for the performance of obligations. Time-related clauses can be specifically included to clarify what precisely is meant by these time provisions (*e.g.*, by providing as to what happens if a time period elapses on a non-working day).

6.2 Pitfall and practical tip (common and civil law jurisdictions)

When dealing with relevant time periods, expressions of time in contracts can create uncertainty. For example, where a provision provides for a particular time period, it may be unclear whether the first or final days of the time period are included in the calculation.

The best way to avoid problems is to be specific and exhaustive. Thus, instead of providing for *e.g.*, a three-year or 25-day time period, one could seek to give examples by way of specific dates. The relevant provision should also specify whether the period starts after or includes the start date, and whether it includes or excludes the end date.

One should also consider specifying, where relevant, whether a deadline expires at midnight on a specified day or at a specific hour. Attention should be paid to different time zones as well if the contract involves parties in different countries or in countries with several time zones. One can even have different times of day in the same contract, such as gas supply agreements which for operational matters, for example, can consider a day to commence at 8 a.m.

One can also specify whether weekends and holidays are counted in time periods, which they generally are, and also what occurs when a period expires on a weekend or a holiday, taking into account that weekends may be on different days and holidays on different dates in other countries. Thus, for example, Saudi Arabia, Oman, Afghanistan and Yemen have weekends on Thursday and Friday, and Algeria, Egypt, Qatar and the United Arab Emirates have weekends on Fridays and Saturdays.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

6.3 Conclusion

In lieu of a conclusion, some useful language regarding periods of time is set out below:

- (i) All references to time shall unless otherwise specified be to Official Local Time (which is defined as [DEFINE]).
- (ii) In the computation of a period of time from a specified day to a specified day, the word “from” means “from but excluding,” the words “on and from” mean “from and including” and the words “until” and “to” mean “to and including.”
- (iii) Any provision or stipulation that an action may or shall be taken within a specified number of days means that the action may or shall be taken within the number of so specified starting at 00:00 hours on the day on which the right or obligation to take the action arises.
- (iv) Official holidays and non-business days are included in the calculation of a period of time. If the last day of the relevant period of time is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

7. Conclusion

The differing interpretations of this sample of boilerplate provisions in common and civil law jurisdictions emphasise the need to assess this risk early (particularly if one is the likely claimant, *e.g.*, a lender or a purchaser).

Even though there are sometimes strong similarities in the approach of courts in common and civil law jurisdictions (see, in particular, **Section 4** above on ‘no waiver’ clauses, which can only be relied upon to a limited extent in any jurisdiction), the differences can be significant. Properly drafted entire agreement clauses are generally effective in the common law systems considered (other than to exclude fraud), but are subject to further qualifications in civil law systems (see **Section 2** above). Similarly, the decision of whether to apply severability clauses in contracts governed by a civil law system can be the cue for a court or an arbitrator to undertake an analysis of the economic balance of the contract, whereas an English judge may well simply apply his blue pencil to the contract (**Section 3**).

Although an arbitrator is likely to be sympathetic to, and versed in, the different legal assumptions which parties to an arbitration may make about boilerplate provisions, clear evidence on how such provisions are actually interpreted under the governing law is hard to ignore. For this reason, local advice on these provisions at the time of contracting is indispensable.

Notice (**Section 5** above) and time-related (**Section 6** above) provisions too can give rise to a range of problems and should thus include sufficient detail to provide clear guidance as to how they should be applied.

To conclude, treating these provisions with insufficient care can be costly. In all cases, an ounce of prevention is worth many pounds of cure.

Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions

Endnotes

- 1 The US term ‘boilerplate’ appears to derive from the metal plates on which ready-to-print copy was supplied to newspapers for printing. The wording on these plates could not be changed before printing, an idea later absorbed into the legal lexicon (see ‘The common law tradition: application of boilerplate clauses under English law’, by E. Peel, in Cordero-Moss, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, G. Cordero-Moss (ed.) (2011), p. 131). The present article aims to illustrate the reasons metal-plated wording of this kind can be ill-suited for use in international commercial contracts.
- 2 See footnote 16 of the Société de Legislation Comparée’s ‘Guiding Principles of European Contract Law’, which identifies, for 11 EU member states, the provision of the constitution or civil code setting out this principle.
- 3 For a full survey of the interpretation of certain common provisions in a number of jurisdictions, please see the excellent collection of essays in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, G. Cordero-Moss (ed.) (2011).
- 4 See ‘The Romanistic tradition: application of boilerplate clauses under Italian law’ by G. de Nova, in Cordero-Moss, *op. cit.*, p. 228.
- 5 This clause is named differently in UK (“entire agreement” clause) and US English (“merger” or “integration” clause).
- 6 On exclusions of liability generally, see ‘Paris Energy Series No. 6: Exclusion Clauses – Navigating the Minefield’, by M. Polkinghorne (December 2012), <http://www.whitecase.com/parisenergyseriesno6/>.
- 7 *Chevorny Consulting Ltd v. Whitehead Mann Ltd* [2006] EWCA Civ 1303, in which the full clause read as follows ([5]):

“This Agreement constitutes the entire agreement between the parties to it with respect to its subject matter and shall have effect to the exclusion of any other memorandum agreement or understanding of any kind between the parties preceding the date of this Agreement and touching and concerning its subject matter.”
- 8 *Axa Sun Life Services plc v Campbell Martin Ltd and others* [2011] EWCA Civ 133, *BSkyB v. HP Enterprise Services UK Ltd.* [2010] EWHC 86 (TCC), and *McCain Foods GB Limited v. Eco-Tec (Europe) Limited* [2011] All ER (D) 225.
- 9 See, e.g., *S Pearson & Son Ltd v. Dublin Corp* [1907] A.C. 351.
- 10 In *Axa Sun* (fn. 8 *supra*) the clause stated that the contract would “supersede”

“any prior promises, agreements, representations, undertakings or implications, whether made orally or in writing...relating to the subject matter of [the] agreement” ([2011] EWCA Civ 133 at [13]). In *BSkyB v. HP Enterprise Services UK Ltd.*, the clause stated that the agreement and its schedules “constitute the whole agreement between the parties in relation to its subject matter and supersede any previous discussions, correspondence, representations or agreement between the parties with respect thereto” ([2010] EWHC 86 (TCC) at [359]).
- 11 In particular, section 3 of the Misrepresentation Act 1967 provides that:-

“If a contract contains a term which would exclude or restrict –
(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.”
- 12 *Springwell Navigation Corp v. JP Morgan Chase Bank* [2010] CLC 705; *Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd.* [2006] 2 Lloyd’s Rep 511.
- 13 *Man Nutzfahrzeuge v. Freightliner* [2005] EWHC 2347.
- 14 *Bikam OOD, Central Investment Group SA v. Adria Cable S.a.r.l.* [2012] EWHC 621 (Comm), a clause stating that “[e]ach party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out in this Agreement.”
- 15 See, e.g., *Axa Sun Life Services plc v Campbell Martin Ltd and others* [2011] EWCA Civ 133 at [80].
- 16 *Farnsworth on Contracts*, E. Allan Farnsworth (3rd ed., 2004, as updated by 2013-1 Cumulative Supplement (L. Garvin)), Volume 2, pp. 233–234, § 7.3.
- 17 *Farnsworth, op. cit.*, Volume 2, pp. 263–265, § 7.6a, sets out various drafting tips (akin to those set out above) which can be followed to make the clause as effective as possible, e.g., adding a specific mention of “warranties” in any transaction where claims based on warranties are likely to arise.
- 18 *Farnsworth, op. cit.*, Volume 2, p. 263, § 7.6a.
- 19 The English courts have at least once suggested they would be prepared to prevent even an appropriately drafted entire agreement clause from being relied upon if the outcome would be unjust. In the second trial in the *Chevorny* case ([2007] EWHC 3130 (Ch), of which the first trial was discussed in Section 2.2(a) above), the judge found that, even if the entire agreement clause had deprived the side-letter of any contractual effect, the parties had acted consistently with an agreement under the side-letter, which gave rise to an “estoppel by convention”, preventing the defendant from denying it was bound by the side-letter (discussed further by E. Peel, ‘The common law tradition: application of boilerplate clauses under English law’ in Cordero-Moss, *op. cit.*, at p. 139, fn. 43). This decision undermines the solidity of the distinction between contractual interpretation in civil law jurisdictions, which is often said to be effected by reference to principles of good faith, and contractual interpretation in common law jurisdictions, which is often said to be effected strictly by reference to the letter of the contract. This does not devalue the distinction, however, which remains a useful generalisation.
- 20 See fn. 10 above.
- 21 See ‘The Romanistic tradition: application of boilerplate clauses under Italian law’ by G. de Nova, in Cordero-Moss, *op. cit.*
- 22 The Italian courts do not appear to have considered the validity of such clauses, probably because they are not part of traditional Italian contractual practice (de Nova, *op. cit.*, in Cordero-Moss, *op. cit.*, at p. 230, fn. 7, which cites as scholarly authority C. Grassetti, *L’interpretazione del negozio giuridico* (CEDAM, 1983), p. 258; and C. Scognamiglio, *L’interpretazione*, in E. Gabrielli (ed.), *I contratti in generale*, vol. II, 2nd edn (UTET, 2006), pp. 1035–1146, 1044).
- 23 ‘The Romanistic tradition: application of boilerplate clauses under French law’ by X. Lagarde, D. Méheut and J-M. Reversac, in Cordero-Moss, *op. cit.*, pp. 214–215.
- 24 Article 1134, §3 of the French Civil Code.
- 25 ‘The Romanistic tradition: application of boilerplate clauses under French law’ by X. Lagarde, D. Méheut and J-M. Reversac, in Cordero-Moss, *op. cit.*, p. 211.
- 26 See e.g. C. Cass, Ch. Com., 19 May 1998, in which the judge relied on wording in a simple letter sent by one of the parties.
- 27 C. Cass., 3e Civ., 3 April 2002.
- 28 CA Paris, 5 Ch. A, SA Thomson Télévision Angers v. SAS française de restauration Sodexho, RTD civ. 2006, p. 111, confirmed by C. Cass., Ch. Com., 13 February 2007.
- 29 See e.g. C. Cass., 2e Civ., 21 April 2005. This is in fact little different from the law in some US states (see Farnsworth, *op. cit.*, p. 265, § 7.6a, and fn. 12).
- 30 Article 431, cited in ‘The East European tradition: application of boilerplate clauses under Russian law’ by I. Zykin, in Cordero-Moss, *op. cit.*, p. 334.
- 31 ‘The East European tradition: application of boilerplate clauses under Hungarian law’, by A. Menyhárd, in Cordero-Moss, *op. cit.*, p. 306.
- 32 § 307(1) of the German Civil Code, cited in ‘The Germanic tradition: application of boilerplate clauses under German law’, by U. Magnus, in Cordero-Moss, *op. cit.*, pp. 193–194.
- 33 U. Magnus, *op. cit.*, in Cordero-Moss, *op. cit.*, pp. 193–194.
- 34 See fn. 4 above.
- 35 See Article II – 4:104 of the Draft Common Frame of Reference, cited in ‘The Nordic tradition: application of boilerplate clauses under Swedish law’, by L. Gorton, in Cordero-Moss, *op. cit.*, p. 289.

- 36 'The Romanistic tradition: application of boilerplate clauses under French law' by X. Lagarde, D. Méheut and J-M. Reversac, in Cordero-Moss, *op. cit.*, pp. 212 and 214. See also Article 1135 of the French Civil Code, which requires an agreement to be interpreted by reference to "all the consequences that equity, usage or law confer to an obligation in accordance with its nature."
- 37 A document drawn up by UNIDROIT (the International Institute for the Unification of Private Law) intended to help harmonize international commercial contracts law.
- 38 Again, this clause is known by different names in UK English ("severability") and US English ("divisibility").
- 39 *Goldsoll v. Goldman* [1915] 1 Ch 292. Much of the case law on this test has arisen as a consequence of the English courts finding particular non-compete provisions to be in restraint of trade and therefore (at least partially) invalid.
- 40 See, e.g., *Beckett Investment Management Group Ltd. v. Hall* [2007] I.C.R. 1539 at [35]–[36], and *Chitty on Contracts*, H. Beale (ed.) (31st ed., 2012), paragraph 16-199. Although the courts of the United States historically applied the 'blue pencil' rule as a limit to the doctrine of divisibility (*Farnsworth*, *op. cit.*, Volume 2, p. 91, § 5.8), in modern times they have endorsed a "rule of reasonableness" instead, and reduced the scope of non-compete covenants even where application of the 'blue pencil' rule would not be possible (*Central Adjustment Bureau v. Ingram*, 678 S.W. 2d 28, 37 (Tenn. 1984)), though this liberal approach has not been applied to other kinds of clauses (*Farnsworth*, *op. cit.*, Volume 2, pp. 93–94, § 5.9).
- 41 *Atwood v. Lamont* [1920] 3 K.B. 571 at 580.
- 42 *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*, [1975] 1 W.L.R. 297 at 301. See *Chitty on Contracts*, H. Beale (ed.) (31st ed., 2012), paragraph 2–137.
- 43 *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503.
- 44 *Halpern v. Halpern* [2007] 3 All E.R. 478 at [50].
- 45 *Cable & Wireless Plc v. IBM UK Ltd* [2002] EWHC 2059 (Comm).
- 46 See 'Conclusion: the self-sufficient contract, uniformly interpreted on the basis of its own terms: an illusion, but not fully useless', by G. Cordero-Moss, in Cordero-Moss, *op. cit.*, p. 358.
- 47 Under French law, if the cause of a contract becomes invalid, the entire contract will become void, unless a judge decides that other public policy considerations require the contract to be upheld. For example, in C. Cass., 3e Civ., 31 January 2001, despite a clause expressly designated as essential by the parties becoming void, the court preserved the contract on the basis that a tenant's right to renewal of a commercial lease – recognised as a matter of public policy – should be upheld (see also C. Cass., 3e Civ., 14 June 1983).
- 48 See 'The Romanistic tradition: application of boilerplate clauses under French law' by X. Lagarde, D. Méheut and J-M. Reversac, in Cordero-Moss, *op. cit.*, p. 217, which cites C. Cass., Ch. Com., 15 February 2000, No. 97–19.793, Bull. Civ. IV, No. 29, RLDA 2000/27, No. 1703.
- 49 See e.g. C. Cass., Ch. Com., 24 April 2007 and CA Versailles, 12e Ch., 6 May 2010.
- 50 Under § 36 of the Finnish Contracts Act, cited in 'The Nordic tradition: application of boilerplate clauses under Finnish Law', by G. Möller, in Cordero-Moss, *op. cit.*, p. 258.
- 51 § 36 of the Danish Contracts Act, cited in 'The Nordic tradition: application of boilerplate clauses under Danish law', by P. Møgelvang-Hansen, in Cordero-Moss, *op. cit.*, p. 233.
- 52 'The Nordic tradition: application of boilerplate clauses under Norwegian Law', by V. Hagstrøm, in Cordero-Moss, *op. cit.*, p. 269.
- 53 *F&K Supply, Inc. v. Willowbrook Development Co.*, 732 N.Y.S.2d 734 (N.Y. App. Div. 2001).
- 54 For the purposes of this article, the differences between the various doctrines of waiver are not considered.
- 55 *The Scaptrade* [1981] 2 Lloyd's Rep. 425 at 430; and *The Laconia* [1977] AC 850 at 872.
- 56 For example, in *State Securities Plc v. Initial Industry* [2004] All ER (D) 317 (Jan), a no waiver clause prevented affirmation being implied from the acceptance of payments due under the contract.
- 57 *Tele2 International Card Co. v. Post Office Ltd.* [2009] EWCA Civ 9.
- 58 See e.g. C. Cass., Ch. Mixte, 26 April 1974, C. Cass., 3e Ch. Civ., 5 November 1976 and, more recently, C. Cass., 3e Civ., 19 March 2008.
- 59 X. Lagarde, D. Méheut and J-M. Reversac, *op. cit.*, in Cordero-Moss, *op. cit.*, p. 215.
- 60 X. Lagarde, D. Méheut and J-M. Reversac, *op. cit.*, in Cordero-Moss, *op. cit.*, p. 215. The Supreme Court has regularly sanctioned banks who have repeatedly tolerated debtors' non-payment, before suddenly claiming full payment (e.g., Cass., Ch. Com., 8 March 2005, P. No. 02–15783, Bull. IV No. 44).
- 61 C. Cass., Ch. Com., 28 September 2004, in which one party granted the other several months more to make contractual payments, but then sought to exercise the contractual remedies for non-payment.
- 62 G. Møller, *op. cit.* in Cordero-Moss, *op. cit.*, p. 257. That said, the clause could cause the threshold for considering a party's behaviour 'disloyal' to be raised.
- 63 P. Møgelvang-Hansen, *op. cit.*, in Cordero-Moss, *op. cit.*, p. 238.
- 64 V. Hagstrøm, *op. cit.*, in Cordero-Moss, *op. cit.*, p. 269.
- 65 P. Møgelvang-Hansen and V. Hagstrøm, *op. cit.*, in Cordero-Moss, *op. cit.*, pp. 238 and 269.
- 66 I. Zykin, *op. cit.*, in Cordero-Moss, *op. cit.*, p. 335.
- 67 A. Menyhard, *op. cit.* in Cordero-Moss, *op. cit.*, pp. 307–308.
- 68 See e.g. C. Cass., Ch. Com., 3 October 2006, Bull. Civ. IV, n°204, or C. Cass., Ch. Com., 12 July 2005, Bull. Civ. IV, n°161.
- 69 The Supreme Court considered that it would be unacceptable that an arbitral award be recognized and enforced against a party that was completely unaware of the arbitration. It concluded that where it is not clear that the request for arbitration has reached the respondent, or the respondent provides evidence giving rise to reasonable doubt that it did, a ground for refusing enforcement "should generally be deemed to exist." See *Lenmorniiproekt OAO v. Arne Larsson & Partner Leasing Aktiebolag, Högsta Domstolen* [Supreme Court], Ö 13-09, 16 April 2010, in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2010 – Volume XXXV, Volume XXXV (Kluwer Law International 2010), pp. 456-457. See also Paris CA, Ch. 1, *Société Oktrytoye Aktsioneroye Obshestvo "Tomskneft" Vostochnoi Neftyanoi Kompanii v. Société Yukos Capital*, 15 January 2013.

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