Commercial Contracts

GUIDANCE NOTES

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Introduction

If you're running a business, big or small, you will inevitably get involved in commercial contracts.

Not everyone is aware of the law of contract, however familiar they may be with the sort of terms and conditions (T&Cs) to expect to see in their own business field.

A supplier of pet food will not have the same T&Cs as a chiropodist but, the basic law relating to how their contracts are formed and whether they can enforce them, are broadly the same whatever the trade or industry.

This Help Desk offers general guidance on English contract law, and on some its familiar terminology and idiosyncrasies. It also debunks some of the myths surrounding commercial contracting. Whenever in doubt, we recommend getting legal advice from a specialist lawyer.

Plus, there is a wide range of business and commercial contract templates ready to download and use on our sister platform LawDocs4All.com, with explanations and guidance on how to use them.

Contact Law

A valid contract requires the presence of three essential requirements:

- An agreement created by an offer and an acceptance;
- An intention to create legal relations: this is an intention to form a legally binding relationship, and;
- Consideration: i.e. payment in money or in kind.

Contracts do not have to be in writing to be legally enforceable, with one important exception: a contract for the sale (or other disposition) of land or property must be in writing and contain all the terms agreed, otherwise it is not enforceable.

OFFER

Whether an offer is capable of being accepted as part of the formation process of a legal is not always clear.

Sometimes, a communication, like an advert, is nothing more than an inducement to look at or consider a product, service or some goods, prior to deciding on whether to buy. These types of communication amount to what is known in the legal trade as an '*invitation to treat*' and are not offers which, when taken up, result in a contract.

Offers in respect of business contracts (i.e. those between traders or service providers), to be capable of a resulting in binding and valid acceptance, need to be clear, state as clearly as possible what is being offered and on what terms.

If a communication about a 'deal' is succeeded by a negotiation on matters such as price, delivery, quantity, quality etc., then it is very unlikely a contract will come into being until all those matters have been finally hammered out.

ACCEPTANCE

An offer must be accepted by the person receiving it (offeree) for a contract to be made and for an acceptance to be valid it must:

- Be communicated to the person making the offer (offeror)- so it's no good if the acceptance is given or sent to a third party rather than the offeror or to an intermediary who is not authorised to receive the acceptance on behalf of the offeror;
- Must precisely match the terms of the offer- so if a new condition is added or a term that has been offered is removed or qualified by the offeror in the acceptance communication, that becomes a counter-offer and does not result in a contract. A counter-offer can be accepted by the original offeror or a new round of offers started;
- Be in respect of terms that are certain- so if any of the terms in the deal are unclear or ambiguous there is a significant risk that a contract will not be formed. For example, if the payment terms are not clearly spelled out or if the delivery conditions for goods are not included, a contract may well fail to be formed.

If there is no acceptance that meets these necessary criteria, then there will be no contract, leaving the parties unable to enforce their rights against one another. Whether a legal contract is actually formed can ultimately be determined by the courts looking at the all the relevant facts.

An offer can be withdrawn by the offeror at any time before it is accepted and a contract then cannot be formed. The withdrawal notice does need to reach the other party for it to be effective.

INTENTION

In commercial contracts, there is what is known as a 'rebuttable presumption' that there is legal intent between traders and businesses. The presumption can be overturned if it can be shown from their inter-actions that the traders actually had no such intention.

A party claiming that there is no legally binding contract must to prove this and the required standard of proof is "a balance of probabilities".

In a dispute over whether there was legal intent, the court will need to look at the objective conduct of the parties along with the relevant circumstances. It can also consider the parties' behaviour after it is alleged that a legally binding contract was created to decide whether or not it is legally binding.

'BINDING'

Contracts and their terms are frequently referred as being, or not being, 'binding'.

We enter into legally binding contracts every day. Buying food in a supermarket shop is a legally binding contract between the consumer and supermarket. Purchasing a piece of software or hardware for a business creates a binding agreement with the supplier.

What does 'binding' mean?

It means that a valid contract has been created or entered into between two or more parties- see this page on how contracts are formed- and that they are 'bound' by its terms to perform their respective obligations under it.

Perversely, it is possible for some terms of a contract to be binding and others not so. This can happen if a term is shown to be excessively onerous or illegal, for example requiring a party to perform an illegal act.

Just because a particular term or clause is held not to be binding, it does not necessarily mean the whole agreement in which it appears then falls down, provided that the remainder is not so completely undermined by the non-binding elements that its rendered incapable of being performed.

Commercial contracts will often include a provision that if a clause becomes non-binding for any reason (i.e. because of a subsequent change in the law), the rest of the agreement will nevertheless continue to stand.

'CONSIDERATION'

As long as the other elements are present, for a contract to be formed there must be a 'consideration' paid by the offeree to the offeror.

Consideration usually takes the form of paying a price in exchange for goods or services. It can also be a promise to do (or not to do) something.

As long as it is treated as having value as between the parties, consideration can be almost anything.

In barter deals, consideration is the exchange of an item or commodity in return for the thing that has has been offered.

Consideration must be ‘sufficient’ and adequate; however, it does not have to be of market value. It cannot be illegal (i.e. stolen goods or the proceeds of crime) and it must be given by the offeree and cannot be given by a third party.

Terms and Conditions

The T&Cs, as they are often referred to, warrant an entire help desk of their own, but the basics are highlighted here.

Commercial contracts come in all shapes and sizes and cover a huge range of deals and situations, too numerous to cover. The purpose of this section is therefore to highlight their key components - what the average commercial manager would expect to find in the draft he is sent for his approval.

'**Contract**' and '**Agreement**' are synonymous and there's no practical distinction between them.

'**Heads of Terms**', '**Memorandum of Understanding** (MoU)' '**Term Sheet**' and other similar names are frequently used to mean documents that outline, sometimes in very sketchy and at other times in quite a lot of, detail the essentials of what the parties are trying to agree. Unless expressly stated to be binding, these types of document are essentially a pre-cursor to more detailed negotiations and do not give rise to legally binding commitments.

Express Terms

These are terms that are written down in the contract documents and form the largest part of any commercial deal.

Contracts usually have a main body containing the fundamental elements of the agreement i.e. Parties : Start Date or Commencement Date : Recitals (statements of fact leading to the agreement) : Definitions : Substantive Terms (contract subject matter, price, delivery, quantities, service levels, KPIs, payment terms, default provisions, termination, etc.).

Further information on express terms can be found on our LawDocs4All.com site which contains numerous individual business templates and template collections that are ready-made for business use.

Implied Terms

Implied terms are those that are not written into a contract but which have, in commercial contracts, become part of the agreement through fact, law or custom or a combination of these.

Sometimes, time being of the essence may be implied into a commercial agreement (see below).

It is best to try avoid having implied terms because they can catch out a party who was less aware of the term and finds itself being held to a term that is not in black and white.

For this reason, many commercial contracts expressly exclude any implied terms in order to create certainty and a level playing field.

It is usually not possible to exclude the operation of statute law from a contract.

Contract Schedules

When there are a number of things to be agreed about the performance of the contract and that would clutter up the main body, it is not unusual for agreements to include schedules which have the nitty gritty, such as details and specifications of products or services, customer lists, intellectual property, delivery and payment schedules etc.

It is vital that schedules are expressly stated to be included as forming part of the agreement, otherwise there could be a risk that one of the parties says they were merely illustrative and that it was not bound by them.

Pre-Contract Statements

Statements made in writing (and this includes entire documents**)** orally by one of more of the eventual parties to a contract, before it has been finalised, can become binding terms. Mere representations are not actionable as breaches of contract if it turns out they were untrue.

What distinguishes a representation from a contractual term is essentially the intention of the parties. If this is in dispute, the decision is likely to have to be made by a court or via some form of alternative dispute resolution process, such as mediation.

Actions, words and behaviour can imply an intention to make a statement a term of the contract, as opposed to mere thoughts which won't, so it is the former that will be tested.

If a reasonable bystander would honestly believe that the intention of the parties was to make a statement a term of the contract this will satisfy the test of intention.

The risk of unintentionally incorporating a pre-contract statement as a term can be eliminated by some careful drafting to ensure that the agreement reached is clear that only the words included in it are terms and binding and that any other statements are excluded.

Representations

Before parties finalise a contract, it is very common for there to be discussions, sometimes lasting for days or even months. These can be conducted across the boardroom table, online by email, by phone and informally in the bar or a combination of all of them.

As noted above, care needs to be taken not to accidentally allow comments and statements made during negotiations to become contested on whether they form a term of the final contract.

Three concepts will be considered when a court is deciding whether a statement is a term of the contract or a mere representation.

- The importance of the statement
- The reliance on the statement by all parties involved, and
- The relative knowledge of the parties.

If it is clear that a particular statement is treated by the parties a definitive term of the contract then the courts will determine it as such. If a party can show that it has unquestionably and reasonably relied on the statement in entering into the contract, it is likely to be treated as a binding term. The statement is more likely to be treated as a term if the party who is in the best position to know its purpose considers it to be a term.

Other than drafting the agreement in a way that excludes all pre-contract discussions to ensure they do not become terms, it is always worth considering stating in writing at their outset that all negotiations are '**subject to contract**'.

'Subject to Contract'

Most often these three words appear in house sale deals, but they also have a significant role to play in commercial deal making as well.

What do they mean?

To mark a document or correspondence 'subject to contract' puts the parties to negotiations (and their advisers and other third parties) on notice that a binding contract has not been formed and that preliminaries are still being discussed.

When included, the phrase will prevent documents, letters, email etc on which it appears being accepted by a party as forming a binding agreement.

For example, it is possible (and this frequently happens in commercial negotiations) that a draft of an agreement or even a letter contains all the elements of the deal and could be accepted in its entirety by a party thereby creating a binding agreement. If the three words 'subject to contract' are included this cannot happen.

There are cases of businesses being caught out by the omission of the words.

'Without Prejudice'

This is a term much mentioned but seldom understood.

Where and how to use 'without prejudice' is perhaps more common when discussing dispute resolution, but it has a place in commercial negotiations as well.

The legal definition of “Without prejudice” is that it is without abandonment of a claim, privilege, or right, and without implying an admission of liability.

When it's used in a document or a letter, 'without prejudice' means that what follows (in the document etc):

- Cannot be used as evidence in a court case
- Cannot be taken as the signatory’s last word on the subject matter, and
- Cannot be used as a precedent.

It is therefore very useful to enable parties to talk freely and this usually helps when negotiating a settlement of a contentious or difficult commercial deal that may contain sensitive information, such as the terms of a settlement agreement.

It is important to realise that merely labelling a document “without prejudice” will not afford a document protection if the communication does not form part of a genuine attempt to settle an issue or dispute.

All communications that contain a sensitive concession or an admission must be clearly marked ‘without prejudice’, whether they are made in a letter, e-mail or document, and any discussions (including by telephone or online) or any meetings held on the subject matter requiring protection, must be formally agreed to be 'without prejudice' before they are held.

Breach of Contract- the practical stuff

The words 'you're in breach of contract' can strike fear into anyone.

What is a 'breach of contract'?

A validly binding contract will contain terms as to its performance by the parties. These are contractual obligations that are required to be performed.

Each contracting party has the legal right to expect and to demand that the other party or parties who have committed to perform those obligations in its favour do so correctly and in accordance with the provisions laid out in the agreement.

A number of conditions may be specified in the contract as to the actions required by a party to fulfil the performance of its obligations.

For example, in a building contract, the builder will have to to construct a building in accordance with the detailed specifications set out as to quantities, structural integrity, shape and finishes and within a set period of time. A breach of contract will occur if the builder fails to deliver the finished building on time or without a secure roof on it.

In simpler contracts, obligations may only amount to payment of a price of goods. It would be a breach of contract if the payment is made late or in the wrong amount.

In general, a breach of contract will give rise to remedies in favour of the party who is owed the obligation- the developer (in the case of the builder) and the seller (in the case of goods).

The remedies that are open to the innocent party can vary and include the following:

- Voluntary correction by the party in breach of contract- the best solution and likely the most costs-effective too
- Exercise of specific rights set out in the contract by the wronged party- this might be applying interest to a ate payment until the full price is settled
- Claiming 'liquidated damages'- this can only happen where the contract contains a specific provision setting out how much the damages will be for a breach e.g. delays in completion or delivery
- Calling on a contract security- this could be under a guarantee or an on-demand bond (see above)
- Serving a notice of default on the party in breach terminating the contract with immediate effect or on a specific amount of notice- this might also include a demand for damages to be paid for the breach
- Alternative dispute resolution- this might include arbitration if that is expressly provided for or a mediation
- Court proceedings to recover the losses and damages suffered as a result of the breach- this is likely to be the last resort in view of the costs and administrative headaches that bringing legal proceedings involves.

Breach of contract- the legal stuff

This is where matters can become complicated because of the way English law has developed. It's beyond the scope of this Help Desk to go into all areas in great detail, so we include the basics here and direct you to places where more information and guidance can be found.

In the end, the best outcome may be to get legal advice via our portal to sort out the contractual issues.

A breach of contract has potential consequences- both for the innocent non-breaching party- and also (for the lack of a better expression) the guilty party who is in breach.

What those consequences might be depends broadly on the following factors:

- What the contract itself says happens if there is a breach (see above on the practical stuff), and
- What common law remedies are available (this is the developed law of the land)

Dealing with the what common law remedies are available is what this section covers.

If the breach is of a minor or less important provision (what is known as a '**warranty**') i.e. one that is not critical to the performance of the contract, then the innocent party can only claim damages that directly result from the breach and the contract as a whole remains in place.

The level of damages is assessed by the courts in the context of the claim as a whole, while having regard to other terms of the contract. The general rule is that the damages awarded are to place the innocent party in the same position had the contract been performed according to the its terms.

A claim for more than nominal damages will be subject to the rules of remoteness, mitigation and penalties. That means that damages that are found to be 'too remote' from the breach cannot be claimed. Remoteness is assessed on the facts of the case. See below on mitigation and penalties.

If the breach is of a major or more important provision (what is known as a '**condition**') the remedies are rather different.

The innocent party has the right to terminate the contract and claim damages from the guilty party. In that situation, the contract does not actually cease to exist. Instead, upon the innocent party electing to treat his own obligations as at an end because of the breach of condition, the primary obligation of the guilty party to perform his side of the contract is replaced by a secondary obligation to pay damages to the innocent party for the loss arising from the breach.

Deciding whether a term of a contract is a condition, warranty or some intermediate term, can be difficult.

The courts have regard to the express terms of a contract and if the parties have identified a term as a condition or warranty, the courts will generally treat it as such. Where things are less clear cut, the courts usually call them intermediate and take account of the surrounding circumstances to work out if the breach is sufficiently serious to justify termination.

A word of warning: treating a breach as one of a condition (as opposed to a warranty) and terminating the contract, can land the otherwise innocent party in trouble.

If it is found that the provision breached was not a condition, the innocent party can instead become the one in default, and liable for a wrongful termination. If in doubt seek legal advice before reaching for the pen and paper to claim termination and damages for breach of a condition.

Terminating Contracts Under English Law- Ashurst

Mitigation

This is a word that tends to get bandied about quite a bit nowadays: 'in mitigation, he felled the forward in the penalty box because he got pushed from behind'. We know the pundit is trying to excuse the defence player's action in giving away a needless penalty.

What does it mean in the context of a commercial contract?

An injured party cannot recover damages for any loss (whether caused by a breach of contract or breach of duty) which could have been avoided by taking reasonable steps. The claimant is said to have a "duty to mitigate".

However, this is not a duty enforceable by anyone, rather it is a recognition that if the claimant fails to do so its damages recovery will be affected by that failure.

The English common law imposes a duty on an innocent party to a contract who has suffered loss as a result of a breach to take reasonable steps to minimise that loss. What are reasonable steps is generally a question of fact.

The burden of proof is on the guilty party to prove that the innocent party has failed to mitigate the loss suffered.

In a commercial context, if a buyer defaults on payment for goods ordered, the seller cannot simply assume that he, she or it can sue for the value of the contract.

Generally, the seller will be expected to attempt to sell the goods to an alternative buyer for a reasonable price. If the seller recovers some, but all of the original price, then the buyer can be pursued for the balance.

Mitigation will have happened and the seller ought to succeed on the balance claim.

If in doubt seek legal advice.

Penalties

Many commercial contracts include specified sums to be paid to the innocent if a provision is breached.

This type pf provision is generally enforceable by the innocent party, but only if it is a reasonable pre-estimate of the losses actually suffered for that particular breach.

The common law will not enforce what amounts to a penalty, it will only grant damages for breach that replaces that which has been lost as a direct result of it happening. A penalty is where the innocent party would be receiving more than is reasonable to compensate for the severity and actually quantifiable value of the losses shown to arise directly from the breach itself.

In other words, the innocent party is not going to be rewarded by extra compensation above and beyond what is regarded as provable losses. By the same token, the guilty party is not being penalised for the breach and is only required to make good the losses caused by the breach and no more.

The application of interest to the principal losses awarded to an innocent is not generally regarded as pushing the award of damages into the realms of a being a penalty.

Liquidated Damages

What are they?

Liquidated damages is a term used for a provision in a contract that specifies an amount to be paid by one party (defaulting party) to another party (innocent party) if there is a breach of a contractual term by the defaulting party.

The sum to be paid for the breach must be fixed in advance and written into the contract if it is to be enforceable.

The nature of the breach must also be clearly spelled out.

This remedy is not transferable. So, it is not possible, for example, to validly claim liquidated damages for the non-delivery of some goods, when they are expressed to be payable if there is a delay in the schedule of works.

Typically, construction contracts contain a clause that allow 'liquidated damages' to be charged to the contractor by the developer/owner if the contractor is late in completing the works.

The mechanism for making the liquidated damages charge may vary, depending on the type of contract and include:

- Claiming as a cash sum to be paid by the defaulting party
- Deducting them from other amounts due to be paid to the defaulting party
- Claiming them from a surety, such as guarantor
- Calling an on-demand bond

It should be noted that liquidated damages can become unenforceable if they are in effect a penalty, rather than a genuine pre-estimate of loss.

The courts usually apply four basic tests to decide if a contractual provision is a penalty:

1. If the sum provided for is "extravagant and unconscionable compared to the greatest level of loss that could conceivably be shown to result from the breach".
2. If the breach consists solely of the non-payment of money and the liquidate damages stipulate a larger sum be paid.
3. A clause will be presumed to be a penalty if the same sum is payable for a number of breaches of varying degrees of seriousness.
4. A clause will not be treated as a penalty solely because it is impossible to estimate in advance the true loss likely to be suffered.

For more information on liquidated damages this article by law firm Ashurst provides further insights.

Force Majeure

'Superior Force' is its literal translation, but what does this often used and misunderstood phrase mean when it comes to commercial contracts?

Under English common law, which is different from civil law (e.g. France, Germany, Netherlands, UAE), the expression is not defined anywhere by statute or for that matter by decided cases. Nor is Force Majeure to be implied into contracts.

To all intents and purposes, parties to a commercial contract can only rely on Force Majeure if there is a specific clause setting out what it means in the agreement between them.

What does a Force Majeure provision contain and what does it do?

There really is no typical Force Majeure clause and they come in many different forms. But, in order to illustrate what they can contain, this is an amalgam of the sort of events that they can cover:

"No Party to this Agreement shall be liable for any failure or delay in performing its obligations if such failure or delay results from any cause that is beyond the reasonable control of that Party. Such causes shall include, but shall not be limited to:

1. *Acts of God*
2. *Power failure*
3. *Internet Service Provider failure*
4. *Strikes, riots, rebellion and industrial action*
5. *Flood*
6. *Earthquakes*
7. *Acts of terrorism*
8. *Acts of war*
9. *Changes of law*
10. *Refusal of licenses"*

There are many other formulations and different events can be, and often are, included in commercial deals to cover specific risk events that the parties consider could affect their respective obligations to perform.

For example an air freight contract might include events that involve unscheduled air traffic control outages. A manufacturing supply contract might include factory fire or explosion.

What is the effect of a Force Majeure provision?

Contracts will normally provide that if a Force Majeure event occurs the parties can be released from performing their obligations to one another.

Often, there will be a requirement for the party wanting to trigger the release for Force Majeure to give a written notice that it in its opinion such an event has occurred and that it is relying on the provision to cease performance of the contract.

The other party may or more may not accept the notice as being valid and try to maintain the contractual obligations between them remain in force.

This can lead to disputes that have to be resolved through discussion or possibly via legal process.

A party who wrongly claims Force Majeure can find itself in breach of the contract and liable to the other party for damages, so there can be significant downside to misusing the provision.

This helpful blog Force Majeure Events in Agreements and Disruption in Contract Works (with examples) by Leigh Ellis of Hall Ellis, Solicitors sets out more details on how Force Majeure works under English law.

The potential consequences to a Force Majeure event that may be included in commercial contracts include:

- suspension of contractual obligations;
- non-liability;
- extensions of time to fulfil obligations;
- renegotiation of terms;
- obligation to mitigate losses; and
- the right to terminate the contract.

But to benefit from those effects, recent case law suggests that the party looking to be excused from its contractual obligations must have been ready and willing to perform the contract, if it had not been for the *force majeure* event.

There may now be a question, which would have to be answered by the Courts if there was a dispute over it being claimed as Force Majeure, as to whether Coronavirus, as a viral pandemic that has the potential to cause significant disruption, amounts to an Act of God that could release parties from performing their contract.

It is clear that each case will fall to be decided on its own very particular circumstances.

Having said that, Acts of God are generally taken to mean events that occur through natural causes, could not have been prevented through planning or intervention and are not possible in general to guard against.

This article "Coronavirus: impact on commercial contracts" by Ashurst, explains how this highly significant worldwide event may have an impact on commercial contracts, as it says:

" Notwithstanding that a court or tribunal may have sympathy for circumstances which have arisen and may cause disruption to the contractual relationship, the task required in common law jurisdictions is an analysis of which risks it was agreed would be borne by which commercial party. This requires careful consideration of the precise wording in the particular agreement.

Since the virus is a relatively new phenomenon, it is unlikely that any force majeure clauses would explicitly refer to the event of a Coronavirus outbreak. Accordingly, in order to rely on the clause, parties will need to consider the other events included, such as epidemics, actions by government agencies, or work stoppages.

In addition, force majeure clauses that are widely worded will not necessarily capture events such as the Coronavirus outbreak. The party relying on the clause will still likely need to prove that the force majeure event was not "reasonably contemplated" by the parties when making the contract, and that the event is "beyond the reasonable control" of the party seeking relief."

Time of the Essence

It is not uncommon to say in an email to a supplier (probably marked URGENT) that '**time is of the essence**' in order to give them the hurry-up.

What does the phrase mean in legal terms?

Saying it just in an email does not do much more than tell your supplier that you need the order expedited, but with no legal consequences.

In order for it to have some legal 'bite' on the supplier, the phrase needs to be written into a contract.

It then means that the timing or deadline for delivery or performance by the supplier in that contract becomes a condition (see above), which entitles you to terminate it, even if the deadline is missed by the supplier by a small margin.

If the phrase is not specifically used in the contract, it is probable that time is not going to be of the essence as a condition (unless it's implied- see below) and therefore you may not be entitled to terminate if the date for delivery/performance is missed.

Using phrases such as *'as soon as possible'* and *'within a reasonable time'* are not going to make time of the essence on their own.

An intention of the parties to make time of the essence may be implied into commercial contracts, when it is not written into the documentation.

Whether or not there is an implication, depends on the nature of the deal, the circumstances and the contract wording. The key question to be decided is; *"must the parties have intended that even a slight default or delay should give rise to a right to terminate the contract?"*

Examples of where a 'time of the essence' condition may be implied, include:

- A buyer transferring completion monies late for a property may entitle the seller to terminate the sale contract and keep the deposit.
- Contracts for the delivery of perishable vegetables, fruit, meat and fish because their late delivery may render them unsaleable.
- Completion of the sale of a business as a going concern, where it's vital the buyer takes ownership by a certain date and time in order to continue trading.

Time is not likely to be implied as being of the essence when:

- There's no fixed date for performance.
- There's mechanism to extend time built into the contract, perhaps also with liquidated damages (see above) applying to delays.
- Interest is charged on late payments which might tend to indicate that time was not of the essence for payment.

For your business legal documents please go to **LawDocs4All.com** where you will find templates for a wide range of contracts and related documents, with guide notes to help you use them.

What is the structure of a commercial contract?

The essential parts to a commercial contract include the following:

PARTIES

The names, addresses (registered address in the case of companies) are set out at the start of the contract. The parties also are named at the end as well where they sign it.

Each party will be given a short name for the purposes of the entire contract, such as 'Seller', 'Buyer', 'Client', 'Contractor', or each may be identified by their initials e.g. Stefan Lithgow ('SL").

It's vital that the correct parties are named in the contract. This means making sure that within a group of businesses, the one that is to be responsible for undertaking the contract obligations.

An example of how the parties may be described:

"THIS AGREEMENT is made the [xx] day of [month] 2020

BETWEEN:

*(1) [Name] a company registered in the United Kingdom under number [xxxxxxxxxx] whose registered office is at [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (the **"Company**") and*

*(2) [Name] a company registered in the United Kingdom under number [xxxxxxxxxx] whose registered office is at [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (the "**Client**")"*

PREAMBLE OR RECITALS

This is the part of the contract that appears immediately after the names and addresses of the parties and before the Interpretation or Definitions clause.

The recitals set the scene, so to speak, and 'recite' in a fairly summary form how and why the parties have got to where they are, what the subject matter of their deal is and that they and have decided to make an agreement.

Sometimes, but not always, the recitals will form part of the agreed text of the contract. Usually, this is to ensure that any pre-contract representations that may have been made between the parties are expressly agreed to form part of their agreement.

An example of how recitals may be worded:

"WHEREAS:

(1) The Manufacturer manufactures the Products, as described in Schedule 1 and now wishes to sell the Products to the Client, together with certain services to maintain the Products.

(2) The Client wishes to purchase the Products from the Manufacturer and to distribute the Products in the Territory under its own brand names.

(3) The Manufacturer has agreed to fabricate and deliver the Products to the Client and provide the Services to the Client in accordance with the terms and conditions of this Contract.

IT IS AGREED as follows:"

INTERPRETATION OR DEFINITIONS

These come immediately after the recitals and are usually numbered Clause 1 in commercial contracts.

They are a key part of the mechanics of the agreement and must always be carefully crafted to ensure accuracy throughout the document.

All the words and phrases that are going to be used frequently in the contract are given a specific meaning to enable the document to flow when it is read and interpreted.

Some fairly typical examples of defined terms are to illustrate what they can look like are:

“Business”	The business of the Company shall be the undertaking of [insert description of business of Company] and such other business as may be determined from time to time by the Board in accordance with this Agreement;
“Shareholder”	means, the Existing Shareholders, the Subscribers, the Principal Investor and any person to whom they may transfer their respective Shares pursuant to the Articles and this Agreement and “Shareholder” shall mean any one of them;
“Confidential Information”	means all business, technical, financial or other information created or exchanged between the Parties in the course of fulfilling their obligations under this Agreement;
“Term”	means the term of this Agreement, as defined in Clause [ ] of this Agreement.

Each contract will need to have its own unique set of defined terms to make it work properly and to avoid misunderstandings and disputes.

EXPRESS TERMS

These are the real guts of a commercial contract and are to be distinguished from the 'boiler plate' clauses (see next).

The parties will have set about coming to a broad understanding of what they are agreeing to through meetings and other communications, and the main body of the contract will set out the details.

Very often, the parties will find that these clauses contain more than they expected to see, based on their own, often shorthand pre-contract exchanges.

This is because contracts usually aim to protect parties' interests and to cover more eventualities than the parties themselves have had either the time, inclination or ability to properly consider.

A not untypical list of clause topics (e.g. for a services agreement) will contain the details of what is being agreed might look something like the following:

- Scope of Services
- Provision of the Services
- Key-personnel
- Home Office Support
- Service Levels & KPIs
- Fees and Payment
- Term
- Resources
- Training
- Reporting
- Intellectual Property
- Liability and Indemnity
- Schedules:
  1. Systems
  2. Training Materials
  3. Telephone Numbers
  4. Resources
  5. Reporting procedures

'BOILER PLATE' CLAUSES

This expression is often used when a contract is being drafted or referred to and it simply means provisions in a contract that are generally accepted as being a common feature in most forms of commercial contract.

The exact wording of 'boiler plate' clauses will likely vary from contract to contract, but whatever their exact formulation, they will essentially cover the same ground.

Boiler plate usually finds its place towards the end of a contract and rounds it off as a document. Often, the last two boiler plate clauses deal with the contract's governing law, the jurisdiction and the method of resolving disputes.

WHY DOES A CONTRACT NEED BOILER PLATE CLAUSES?

The selection of Boiler Plate clauses depends on several matters including the type and subject matter of the contract and the parties' respective interests.

BOILERPLATE EXAMPLES

The following are some common provisions that you might expect to find in a commercial contract, with some example wordings:

Confidentiality: imposes confidentiality obligations on the parties and can vary a great deal depending on the information and be protected and for how long, e.g.:

"Each Party undertakes that it shall, at all times during the continuance of this Agreement [and for 2 years after its termination] keep confidential all Confidential Information and not disclose any Confidential Information to any other party."

Costs: establishes who pays for the preparation of the contract and can be varied depending on what is agreed, e.g.:

"The costs and expenses (including professional, legal and accountancy expenses) of the preparation, negotiation and execution of this Agreement and associated documentation shall be borne by the [Company] [by the parties in equal proportions]."

Duration: states the length of time the contract is to be in force for, e.g.:

"This Agreement shall continue in full force and shall bind each of the Parties for so long as he or she shall be the beneficial owner and/or registered member in respect of any Shares in the Company until the date of commencement of the Company's winding up."

Force Majeure: provides that if circumstances arise that are outside the control of the parties then their rights and obligations can be suspended for an agreed period, e.g.:

"No Party to this Agreement shall be considered to be in breach of or liable for any failure or delay in performing their obligations where such failure or delay is due to Force Majeure [which term will be defined in the Definitions clause]"

Governing Law: establishes the system of law to be used to interpret the contract and any disputes arising under it, e.g.:

"This Agreement shall be governed by and construed in accordance with the laws of England and Wales."

Jurisdiction: establishes the court system that will be used to determine a dispute under the contract, e.g.:

"All disputes or differences between the Parties arising under or in relation to this Contact shall be referred to and finally decided by the Courts of England and Wales."

Non-Assignment: prohibits assignment of a contract or part of a contract to another legal entity, e.g.:

"This Agreement is personal to the parties and neither party may assign any of its rights hereunder, or sub-contract or otherwise delegate any of its obligations hereunder, except with the prior written consent of the other party."

***Notices**:* provides the methods by which the parties must give a contractual notice to one another and the clause can take many different forms, e.g.:

"All notices under this Contract shall be in writing and be deemed duly given if signed by, or on behalf of, a duly authorised officer of the Party giving the notice."

A boilerplate notice clause may also include a deemed notice provision, such as:

"Notices shall be deemed to have been duly given under this Contract:

a. when delivered, if delivered by courier or other messenger (including registered mail) during normal business hours of the recipient; or

b. when sent, if transmitted by facsimile or e-mail and a successful transmission report or return receipt is generated; or

c. on the third Business Day following mailing, if mailed by national ordinary mail, postage prepaid; or

d. on the fifth Business Day following mailing, if mailed by airmail, postage prepaid.

In each case notices shall be addressed to the most recent address, e-mail address, or facsimile number notified to the other Party."

No Waiver: preserves the parties' rights if they have failed to exercise them or waived them for an earlier breach by the other party who then commits a later one, e.g.:

"No failure or delay by either Party in exercising any of its rights under this Contract shall be deemed to be a waiver of that right, and no waiver by either Party of a breach of any provision of this Agreement shall be deemed to be a waiver of any subsequent breach of the same or any other provision."

Relationship of the Parties: establishes that the parties are only in a contractual relationship and no other type, e.g.:

"Nothing in this Agreement shall constitute or be deemed to constitute a partnership, joint venture, agency, or other fiduciary relationship between the Parties other than the contractual relationship expressly provided for in this Agreement."

Severance: permits survival of the contract even if some of its provisions are held by a court to be invalid or unenforceable, e.g.:
"If any provision of this Contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this Contract shall continue to be valid as to its other provisions and the remainder of the affected provision."

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