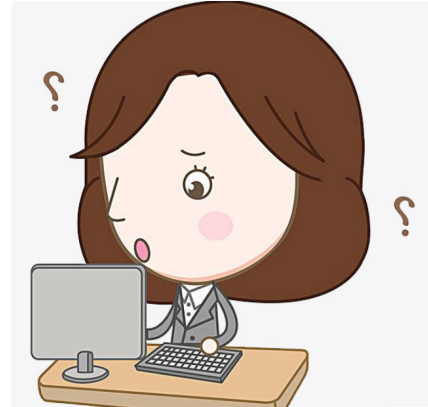


The Importance of BOILERPLATES in commercial contracts



INTRODUCTION

Boilerplates clauses are usually found towards the end of any contracts to define the operational matters of a particular contracts. Nevertheless, reasonable emphasis should be placed on boilerplate clauses as they do play a significant role in ensuring the smooth execution and implementation of the crust of an agreement.

In this article, we set to expound a selection of boilerplates and its legal effects which shall be given sufficient consideration by the contracting parties.

○ TIME IS OF ESSENCE

In determining whether time is of essence of a commercial contract, it is pertinent that the parties expressly stipulate their intention in the contract that it shall be so. Whenever parties expressly stipulate their intention in the contract that time is to be of essence, the contracting parties shall perform and carry out their obligations in accordance to the time and period expressly agreed upon between the parties in an agreement. Any failure to act or perform within the timeline can tantamount to breach of contract whereby the non-defaulting party is entitled for damages under the breach of contract.

However, it is trite law that in the absence of an express clause in a given contract, whether or not time had been intended to be of essence would depend primarily on the conduct, dealings, intention of the parties and surrounding circumstances.

○ COUNTERPARTS

This clause allows the contracting parties to sign on duplicate copies of a same agreement, all of which shall constitute as one valid and binding instrument. The clause is pertinent to ease the signing logistics between the contracting parties, particularly when it involves contracting parties from different jurisdictions. In essence, the parties are allowed to execute an agreement separately instead of having each and every person to be in one place at one time to sign on the same agreement.

Given the advancement of technology, certain counterparts clause may also include references to execute an agreement by way of an electronic or digital signatures. Electronic signatures carry a wider meaning under the Electronic Commerce Act, 2006 meaning any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature whilst digital signatures is considered as the most secure type of electronic signature as it leverages on digital certificate under the public key infrastructure that guarantees the integrity and authentication of the authors and signers. Digital signatures are governed by the Digital Signature Act, 1997 under the purview of Malaysian Communications and Multimedia Commission.

Whilst execution of agreements electronically may appear to be hassle free and convenient, parties should exercise reasonable care and diligence in opting for such execution method as the Electronic Commerce Act, 2006 clearly excludes its applicability to documents such as power of attorney, the creation of wills and codicils, creation of trusts and negotiable instruments.

○ ASSIGNMENT

Special attention would need to be given to this clause as it determines the contracting parties' rights whether all the contractual rights, obligations and interest are transferrable or delegable to a third party. The assignor may impose conditions or mechanism in order to effect the assignment to the other party.

On the other hand, assignee should ensure that the assignment clause has been drafted clearly and unambiguously to warrant there to be absolute assignment in the later stage. In short, there should always be clear intention on the part of the assignor to convey or assign his rights and the interest as claimed by the parties is transferred to the assignee unconditionally and placed completely under the control of the assignee.

○ SEVERABILITY

The idea behind this clause is that the invalidity, unenforceability or otherwise illegality of one or any part of the provisions in an agreement shall not affect the validity and enforceability other provisions in the same agreement. The remaining provisions shall remain in full force and continue to be binding upon the contracting parties. Severability clause serves an important role to preserve the parties' rights and obligations remain intact even if the court made a declaration to one of the provisions in an agreement to be void and unenforceable.

○ CONFIDENTIALITY

In the usual context, confidentiality clause is drafted widely to prohibit the contracting parties from disclosing any confidential information communicated, disseminated or circulated between the parties during the contracting period. Nevertheless, attention should be given when it comes to crafting the definition of confidential information depending on the nature of a transaction which determines the level of protection to be applied onto this clause.

○ ENTIRE AGREEMENT

This is a clause included into an agreement to attain certainty between the contracting parties having the effect of supersedes any previous agreements (whether in verbal or writing) between the parties relating to the transactions in question. The parties therefore will have to be cautious in ensuring that the parties' intention including all undertakings, representations and warranties are sufficiently captured in the agreement.

○ GOVERNING LAW

The purpose of this clause is to state the laws of country governing the parties' contractual relationship and to which jurisdictions should the parties resort to when dispute arises. In any cross-broader transactions involving multiple jurisdictions, it is thus essential for parties to discuss and to agree on the most appropriate rules and laws to govern the contractual relationship between the parties.

CONCLUSION

Whilst the boilerplates are often regarded as trivial, it ought to be given sufficient attention as more often than not, these binding provisions could be one of the main subjects of dispute between the contracting parties in the court of law. In essence, each of the boilerplates shall be thoroughly reviewed, carefully crafted and its inclusion shall at all times, reflect the intention of the contracting parties with purpose.

All information in this Newsletter is correct as at **October 2018** unless otherwise stated.

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