

# UNDERSTANDING BOILERPLATE AND COMMERCIAL CLAUSES

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## Introduction

The term "boilerplate clauses" is used in a general sense to describe standard clauses usually found in written agreements irrespective of the subject matter of the agreements. However, in a simple agreement, they may not be necessary.

The expression 'boilerplate' is suspected to have originated in the nineteenth century in the United States as an expression used by journalists for standard texts slotted in a newspaper.<sup>1</sup> News items from locations outside a newspaper's office were usually sent to the newspaper's office on a metal drum known as 'boilerplate' with the news already typeset and ready for printing, such that once the local newspaper's office received the boilerplate (metal drum), it would use it to incorporate the news so sent in the already pre-set section of the newspaper. From this practice, standard texts slotted in a newspaper now became known as boilerplate texts. With time the term also became used by lawyers to describe standard clauses in contracts. Thus another name for boilerplate clauses is standard clauses.

Some practitioners and businessmen some time refer to such clauses as 'boring' and 'unimportant contract terms' and would rather focus on the commercial issues in a contract. Boilerplates sometimes deal with important operational issues such as the governing law of contract, how notices are served. On the other hand, they may deal with commercial issues like force majeure. This becomes significant if a party cannot perform a contract because of unforeseeable circumstances and events out of the party's control. Thus instead of focussing on the pure commercial terms only, the 'boring' ones can create problems, for example, 'entire agreement clause' which is usually buried at the end of the agreement. The dispute resolution clause and place (seat) of arbitration can also create problems.

Boilerplate and commercial clauses of 'lesser importance' are unglamorous. 'Lesser importance' means clauses which are often not the focus of a business person, that is, something other than what a party is to supply, what price will a party be charging for it, when a party will be supplying it and when the other party will be required to pay for it or when the services specified in the contract are to be rendered. In the heat of negotiating a commercial

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<sup>1</sup> Mark Anderson & Victor Warner, *A-Z Guide to Boilerplate and Commercial Clauses*, (3<sup>rd</sup> edn, Bloombury Professional Ltd, 2012) 9

deal, few business people are likely to spend much time or emotional capital arguing over the wording of a 'force majeure clause' or a 'waiver clause'. Instead, they leave the negotiation of such dry or 'boring' details to the persons responsible for preparing the agreements - the legal practitioners or draftsmen.

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

- ✓ Should a party be allowed to assign its rights or obligations to another?
- ✓ Should flooding, a failure in the electricity supply or a strike or a civil war entitle the other party to delay performance?
- ✓ Should the dispute be resolved by litigation or arbitration?
- ✓ Should representations made before the conclusion and execution of the contract by one party which the other has relied in the entering into the contract become part of the contract?<sup>2</sup>

In practice, it may be difficult to obtain detailed instructions on what the client requires on some of these issues. The challenge faced by legal practitioners is to predict whether any particular boilerplate provision will prove to be important in a particular agreement. However, it is unsafe to include any 'standard' set of boilerplate clauses in a contract without considering whether they are appropriate for the particular transaction.

There are two principal uses of boilerplate clauses in contracts. These are: to clarify rights and obligations. Examples in this regard will include *Force Majeure*, *Assignment* and *Waiver* clauses; and to specify how the agreement would operate as a legal document. Examples in this regard include clauses like *Law and Jurisdiction*, *Dispute Resolution*, *Definitions* and *Interpretations*, *Notices*, etc.

In this presentation, we will provide a guide on the purpose and effect of boilerplate clauses that are in common use. At the end of the presentation, we should be able to discuss boilerplate provisions in relation to:

- Purpose of the clause
- Drafting issues
- Location of such clauses
- Linkage and use

### **Which Boilerplate clauses are the most important?**

In the course of discussing or drafting a commercial transaction, I have often been asked this question: 'which boilerplate clauses are the most important?' My answer always is that 'it depends'. For instance in the drafting of the Share Purchase Agreements (SPA) in respect of the power sector in Nigeria, anybody purchasing the Distribution Companies (DISCOs) or

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<sup>2</sup> Mark Anderson & Victor Warner (n 1) 1-2

Generation Companies (GENCOs) in Adamawa, Yobe and Borno ought to be aware of the Boko Haram crises in that region. At the moment, anybody doing business in Nigeria especially in Zamfara, Niger, Katsina, Kaduna States in the north and some States in the south should be conscious of the effect of the herdsmen, bandits and kidnappers. Consequently, attention should be paid to the 'force majeure' clause in such agreements. Someone else purchasing in areas where there are no such crisis may be indifferent. However, even if the person is indifferent, the definition of 'force majeure' should be of interest to every drafter of a contract.

In a contract, we may find the following:

- No boilerplate - relatively simple contract
- Minimal/light boilerplate - eg Interpretation/Definition Clause
- Medium boilerplate eg Interpretation, Entire Agreement, Assignment, Agency, Force majeure, Confidentiality
- Full-scale boilerplate

If a decision is taken to include boilerplate clauses, there is generally no legal requirement regarding the structure of a contract or to follow a particular format or layout. However, in practice a contract follows a particular structure. A typical structure is as follows:

- ✓ The type of contract - concession, lease agreement, share sale agreement, etc
- ✓ Commencement/Execution Date
- ✓ Parties - Successors and assigns
- ✓ Recitals - Recitals
- ✓ Definitions - Interpretation, Completion, Affiliates, Intellectual property, sub-contracting, Commencement date
- ✓ Main Commercial Provisions - Acknowledgment, Best and reasonable endeavor, Commencement Date, Conditions Precedent or Subsequent, Consent, Currency, Commercial Obligations
- ✓ Secondary Commercial Provisions - Cumulative remedies, Disclaimers, Force majeure, Indemnities, Warranties, etc
- ✓ Boilerplate provisions - Agency and Partnership, Amendments, Announcements, Dispute Resolution, Assignment and Novation, Entire Agreement, Joint and Several liability, etc
- ✓ Schedules
- ✓ Execution

## **Boilerplate Clauses**

We will now examine a few of these clauses

### Acknowledgement

- a) **Purpose** - an acknowledgement is used to indicate the existence of a legal relationship or fact between the giver and recipient and upon which both parties intend the recipient to rely; that a person has not relied on statements (such warranties, representations or undertakings, etc) or a set of facts. Such acknowledgement may be in a stand-alone document or part of the contract.

Acknowledgements are generally used in non-commercial matters like probate matters where some right or possession of a document is acknowledged. In commercial transactions, it can be used in a conveyancing where one party may acknowledge that another party is the owner of specified property or that specified facts are true or that a particular sum is owed. In franchising the registered trade mark can be acknowledged.

- b) **Drafting Issues** - one major drafting issue is that an acknowledgement can be confused with warranties or representations or statements made in a recital or acknowledgment made for the purposes of the Statute of Limitation.

If a party warrants that a statement is true and turns out to be untrue, a cause of action can arise but where a party merely acknowledges a statement then he may not be liable for breach of a warranty if the statement is untrue. In the case of Statute of Limitation, a statute-barred debt is revived and reinstated.

- c) **Location** - in the main or secondary commercial provisions.

- d) **Linkage and Use** - This is different from 'Entire Agreement' clause

- e) **Precedent** -

*Precedent 1—Confirmation of a fact*

[PartyA] acknowledges that [PartyB] has assigned certain R&D Contracts with [PartyC] to [PartyA] ('R&D Contracts').

*Precedent 2—Confirmation of a state of affairs*

The Parties acknowledge that it is not possible for [PartyA] to negotiate a complying sub-licence as required by Clause [ ] because [ ], and [PartyA] will negotiate or enter into a sub-licence on the best terms and conditions (most closely complying with Clause [ ]) as [PartyA] is able to obtain.

*Precedent 3—Franchisee*

The Franchisee acknowledges:

- 1 that he has been advised by the Franchisor to discuss his intention to enter into this agreement with other franchisees of the Franchisor and to seek other appropriate independent advice, and
- 2 that his decision to enter into this agreement has been taken solely on the basis of the personal judgement and experience of the Franchisee having taken such independent advice.

## Force Majeure

- a) **Purpose** - where a contract becomes impossible to perform or is capable of performance only in a manner substantially different from how the parties originally envisaged because of some external event or situation beyond the control of either party or an event reasonably unforeseeable, then in the absence of express provision by the parties further performance is likely to be subject to the common law doctrine of frustration. Note however, that frustration is implied by law whilst force majeure is solely of a contractual nature as it is negotiated
- a. The purpose, therefore, is to define what constitutes 'force majeure' and avoid bringing the contract to an end under the law of frustration.
  - b. The challenge here is whether what amounts to 'force majeure'. For instance, is a labour dispute beyond the control of a party? Should the definition be closed ended or open ended? Should the force majeure events be listed exhaustively or inexhaustively? What happens where a party to the contract is responsible for the 'force majeure'?
  - c. What are the effects of 'force majeure'? - both parties released or further performance is suspended?
  - d. In frustration loss lies where it fails but in the case of force majeure parties can agree upfront on compensation payable e.g. for recouped fixed investments in infrastructure development contract
- b) **Drafting Issues** - effect of force majeure and consequences, procedure to be adopted, wording to be used, curing of the force majeure event, whether the force majeure events should be listed comprehensively or inexhaustively.
- c) **Location** - definition section or main or commercial obligations.
- d) **Linkage and Use** - performance and payment obligations.
- e) **Precedent**

### *Precedent 1— Short form*

Neither party shall be liable for any failure or delay in performance of this agreement which is caused by circumstances beyond the reasonable control of a party [including without limitation any labour disputes between a party and its employees].

### *Precedent 2— Short form*

Neither party shall be liable for any default due to any act of God, war, strike, lockout, industrial action, fire, flood, drought, tempest or other event beyond the reasonable control of either party.

*Precedent 3— Short form - termination by either party*

If this Agreement cannot be performed or its obligations fulfilled for any reason beyond either party's reasonable control for a continuous period of 3 months then either party may, at its discretion, terminate this Agreement by notice in writing at the end of this period.

The Long Form sets out a long list of events which would be deemed to be beyond the parties control. This form is advisable in long term contracts. Care should be taking in drafting the list of events so that its interpretation is not limited by the maxim *expressio unius est exclusio alterius*.

Cumulative Remedy

- a) **Purpose** - to indicate that a specific remedy or remedies available in the contract are in addition to the other rights or remedies that a party may have.

Can be used to exclude the principle of construction under the Latin maxim *expressio unius est exclusio alterius*- the inclusion of one is the exclusion of the other.

- b) **Drafting Issues**- whether the word 'cumulative' should be used or 'in addition'. What remedies are to be included in the clause.

- c) **Location** - usually in the Boilerplate section.

- d) **Linkage and Use** - termination provisions, entire agreement.

- e) **Precedent**

*Precedent 1—General*

The remedies provided in this agreement are cumulative and not exclusive of any remedies provided by law.

*Precedent 2—General*

The remedies provided in this agreement are in addition to, and not exclusive of, any remedies provided by law.

*Precedent 3—One party only*

Any remedy or right conferred upon the Purchaser for breach of this agreement (including the right to rescission) shall be in addition to and without prejudice to all other rights and remedies available to it.



*Precedent 4— Both parties*

Any remedy or right conferred upon any party for breach of this agreement shall be in addition to and without prejudice to all other rights and remedies available to it.

*Precedent 5— Both parties*

Entire Agreement or Entire & Final Agreement

- a) **Purpose** - generally, a legal contract can be formed between two parties under the instrumentality of one written document or a number of documents (including letters, memos) taken together or oral statements or a mixture of oral and written documents.

It is important, therefore that where there has been a period of negotiation leading up to the contract and several exchanges have been made it is imperative to determine whether the contract represents all the terms of the contract or reference can be made to other documents/statements.

Sometimes, sales representatives made statements to induce the other party to contract or pre-contractual agreements are entered into or sales brochures or literature or letters are exchanged in the course of negotiations.

Parol evidence rule may be used to exclude such oral statements or documents from the contract.

Consequently, the purpose of this clause is to state that all the terms and conditions of a contract are contained within the written agreement.

- b) **Drafting Issues** - this include whether the agreement is to be limited only to its written terms or reliance can be based on previous course of dealings; which oral statements or prior documents should be included in the contract or whether the parties which to exclude all or some pre-contractual representations or documents? Are the Schedules of attachments of appendices included within the entire agreement?
- c) **Location** - usually located in the Boilerplate section.
- d) **Linkage and Use** - It is linked with representations and warranties and other pre-contractual documents. Its use is to exclude liability and non-reliance on statements made prior to entering into the contract.

Entire Agreement clauses cannot be considered in isolation as they may impact on other clauses limiting or excluding liability and indemnity clauses.

- e) **Precedent**

*Precedent 1— Short form*

This agreement contains the whole agreement between the Parties [in respect of (*subject matter of agreement*)] and supersedes any prior written or oral agreement between them [relating to that subject matter] and the parties confirm that they have not entered into this agreement on the basis of any representations that are not expressly incorporated in this agreement.

*Precedent 2—Longer form*

This agreement contains the whole agreement between the Parties [in respect of (*subject matter of agreement*)] and supersedes and replaces any prior written or oral agreements, representations or understandings between them [relating to such subject matter]. The parties confirm that they have not entered into this agreement on the basis of any representation that is not expressly incorporated into this agreement.

Without limiting the generality of the foregoing, neither party shall have any remedy in respect of any untrue statement made to him upon which he may have relied in entering into this agreement, and a party's only remedy is for breach of contract. However, nothing in this agreement purports to exclude liability for any fraudulent statement or act.

Further Assurance

- a) **Purpose** – After the completion of a transaction, one or both parties may need to take further action to ensure the consummation of the transaction. Such action may include obtaining requisite approvals, authorizations, permission, licence. For example, in a sale of a patent, there may be need to assign ownership from the seller to the buyer or a sale of land, there may be need to execute a power of attorney to transfer the title to the new owner. Such a power of attorney is usually irrevocable.

A Further Assurance clause is usually included to avoid argument or delay in respect of such matters. The clause will obligate one or more parties to execute any further documents that it may need to prepare, sign or otherwise deal with to give effect to the terms of the agreement. Such clauses are common with government contracts.

- b) **Drafting Issues** – Should it be a simple clause in the contract or a more detailed clause; who bears the cost; whether a power of attorney will be necessary.
- c) **Location** – usually in the Boilerplate section
- d) **Linkage and Use** – may be linked with formal assignments of the contract, novation agreements, formal licences and applications to governmental and regulatory bodies. This may also be provided for at 'completion'.

- e) **Precedent**

*Precedent 1—Simple further assurance clause*



Each party agrees to execute, acknowledge and deliver such further instruments, and do all further similar acts, as may be necessary or appropriate to carry out the purposes and intent of this agreement.

*Precedent 2—Further assurance*

The Mortgagor shall at its own expense from time to time execute all such deeds and documents and do all such acts and things as the Mortgagee may reasonably require for the purpose of protecting or perfecting the security intended to be created by this Mortgage.

*Precedent 3—Carrying on of activities or contracts after transaction completed*

The Purchaser shall after completion carry out and complete for its own account [the Contracts] to the extent that the same have not been performed prior to completion.

## Commencement Date

- a) **Purpose** - The date an agreement is signed may be different from the date it comes into effect or the obligations under the contract will commence. There may be conditions precedent to effectiveness.

Unless otherwise provided, an agreement commences on the date of signature or when executed as a deed, upon delivery as a deed.

Where the commencement date is different from the execution date or effective date, there should be clear wording in the agreement to make this very clear.

- b) **Drafting Issues** - different commencement date and different execution date or effective date. If so, there is the need to define 'Commencement Date' in the Definition Section or there is a clause or wording defining 'commencement date'.
- c) **Location** - where the 'commencement date' will be used in several parts of the agreement, it is preferable that it is defined in the Definition Section or Main Commercial Obligations.
- d) **Linkage and Use** - usually linked with Main Commercial Obligations or Secondary Commercial Obligations. It can be used to determine the length of the agreement or when the agreement is to terminate.

- e) **Precedent**

*Precedent 1—Definition*

Commencement Date shall mean [date]

*Precedent 2—Clause indicating date agreement will come into effect*

This agreement will come into effect on the Commencement Date.

*Precedent 3—Stating commencement date at head of the agreement*

This agreement is made on [date signed] and takes effect from [desired commencement date] (the 'Commencement Date').

*Precedent 4—Commencement date is before the date of the agreement (using a separate definition of commencement date)*

The agreement shall be deemed to have commenced upon the Commencement Date.

*Precedent 5—Commencement clause - fixed term*

This agreement shall commence on [date] (the 'Commencement Date') and continue for a period of [12] months unless terminated sooner by either party under Clause [ ].

### Other Boilerplate Clauses include:

#### Agency & Partnership

- ▶ This clause is usually found in long-term or collaborative contracts.
- ▶ Denial necessary to avoid the risk of the agreement being construed to create an agency or partnership relationship, since both relationships can be implied.
  - The authority of a person to act as an agent can either be express or implied.
  - The existence of the relationship is always a question of fact which does not depend entirely on documents executed but on statutory definition of partnership as "as relation which subsists between persons carrying on a business in common with a view for profit"
- ▶ Where parties do not intend an agency or partnership relationship, they should expressly deny the existence of such relations. However, because of the provisions of partnership laws, a clause denying the existence of partnership may not be conclusive but may assist the parties to argue their position. The clause should also state that neither party may bind the other

#### Assignment & Novation

- ▶ Assignment is the transfer of a party's right under a contract to a third party. Except the contract has a personal element (e.g. personal service contracts) or expressly prohibits assignment,
- ▶ **Rights** under a contract can be assigned without the consent of the other contracting party except where the contract has a personal element (e.g. personal service contracts) or expressly prohibits assignment.
- ▶ **Assignment** should not be confused with **Novation** and **sub-contracting**. These are three different concepts with difference legal elements and implications.

- ▶ Where both rights and obligations are transferred with the consent of the other party, there will be, in effect, a novation of the contract.
- ▶ Novations normally require the agreement of all three parties: the transferor, the transferee and the other contracting party.
- ▶ It is possible to novate a part of an agreement.
- ▶ **Subcontracting** - where a party to a Contract (the contractor) arranges for another person (the sub-contractor) to perform some or all of the contractor's obligations under the contract.
- ▶ The contractor will remain contractually bound to the other party to the contract (the customer/client).
- ▶ If the sub-contractor does not carry out the obligation properly, the customer will be entitled to sue the contractor.

### Completion

- ▶ Completion ("Closing" in US) is a standard stage at which the process of sale and purchase (of shares or realty) is completed and the transaction is sealed. E.g. in sale of shares, completion events may include the execution and delivery of the instruments of share transfer, board meetings, etc.
- ▶ The term should only be used in a transaction where it is a well understood stage to avoid confusing execution or performance of the contract.

### Severance and Invalidity

- ▶ This clause is often included in an agreement to provide for the eventuality of a provision being held to be unenforceable, unlawful or void. The clause removes the offending words or provisions and leaves the remaining part of the contract in operation, as far as it is possible to do so.
- ▶ Its effectiveness depends on the consequence of removing the words or provision from the contract.
- ▶ **PLEASE NOTE** The court will:
- ▶ Only sever a provision where it is possible to strike it out without further modification or re-writing of the contract;
- ▶ Not sever a provision if severance would completely alter the scope and intention of the agreement;
- ▶ Not remove one of the essential components of a contract, e.g. the consideration.
- ▶ Note the 'blue pencil' test/rule. In certain circumstances this provides that if the offending words (i.e. those containing the unlawful provision) are struck out from the clause and the remaining words of the clause make sense as a contractual provision, the remaining words will be allowed.

- ▶ Otherwise, the entire clause containing the unlawful provision will be struck out of the contract.
- ▶ If the unlawful provision forms a major part of the purpose of the contract, the whole contract may, in extreme cases, be held to be invalid.

### Stamp Duty

- ▶ This is a transaction tax on certain instruments and agreements.
- ▶ Chargeable instruments and rate payable are determined from the Notice issued from time-to-time by tax authorities like the FRS
- ▶ The relevant law on stamp duty is the *Stamp Duties Act, 2004* (the Act) - payment of stamp duties on instruments are specified in the schedule to the Act and at the rates specified therein. No document can be charged with stamp duty not stipulated by the Act.
- ▶ **Who pays?**
- ▶ The Act does not stipulate the party with the responsibility to pay stamp duty whether the instrument is chargeable *ad valorem* or flat rate.
- ▶ It generally, provides for the stamping of instruments (payment of duties) within 30 days from the day of first execution in case of instruments chargeable *ad valorem* and forty days for other instruments. Failure to pay within the time stipulated will attract penalties.
- ▶ For instruments chargeable *ad valorem*, the Act provides for the party that will suffer penalty for default in stamping within the stipulated time. This includes obligee, vendee, transferee or mortgagee, in any agreement except for settlement or conveyances or transfers operating as voluntary dispositions *inter vivos*, where the settler or grantor or transferor is stipulated to be liable
- ▶ The Act also prohibits the use of unstamped chargeable document in evidence or for any purpose whatsoever
- ▶ Therefore it is the party which seeks to rely on the provisions of the document in judicial proceedings that would pay.
- ▶ All instruments on which the duty is payable by government is exempted from stamping.
- ▶ In drafting always seek advice on whether the contract to be drafted will attract stamp duty
- ▶ If the document is chargeable then parties should agree on the party to pay the stamp duty otherwise the convention of leaving it to the obligee or transferee would apply

### Sovereign Immunity

- ▶ In international law, sovereign states (countries) are immune from foreign municipal courts. They cannot be sued in such foreign courts without their consent.
- ▶ This is founded on the principle of equality of states (*Par in parem non habet imperium*).
- ▶ In applying the principle of immunity the courts attempt a distinction between purely government functions (*actus jure imperii*) and commercial acts of governments (*actus jure gestionis*).
- ▶ The principle is applied to purely government functions (*actus jure imperii*) and excludes commercial acts (*actus jure gestionis*).
- ▶ But it is not always easy to draw a line between government sovereign activities and commercial activities. In actual fact most *actus jure gestionis* are made in furtherance of sovereign acts.
- ▶ In *Trendtex v. Central Bank of Nigeria* (1977) QB 529 where an English Court held that the purchase of cement for the construction of army Barracks in Nigeria is a commercial act and assumed jurisdiction over the case but in another case the contract for purchase of cigarettes for a foreign army was held to be a sovereign act.
- ▶ To avoid this confusion and controversy it is better to have a clause in a commercial contract describing the government's activity in that contract as a commercial activity and waiving the government's sovereign immunity. Note the Chinese contracts!!

And yet other boilerplate clauses include the following

- Conditions Precedent, Inherent and Subsequent
- Contra Proferentem
- Counterpart
- Definition
- Notices
- Confidentiality
- Law & Jurisdiction
- Dispute Resolution
- Schedules
- Successors and Assigns
- Waivers and Releases

### Other Terms in Commercial Contracts

In this section we shall be discussing briefly the following terms:

- Affiliates
- "Best Endeavours" and "Reasonable Endeavours"
- Terms that express time like 'forthwith,' "immediately," "as soon as possible," "from time to time" and "for the time being".

## Affiliates

- ▶ The term is sometimes used to refer to entities that are connected or associated with a party to a contract usually for the purpose of enabling the entities to receive benefits or for the purpose of imposing an obligation on those entities under the contract.
- ▶ It is often intended to cover entities within the same group as the contracting party. (See the P&ID Gas Purchase Agreement)
- ▶ The term is not defined in CAMA. Therefore, it should be generally defined. Care should be taken not to limit the definition to holding company and subsidiaries as this could exclude other associated companies that are subsidiaries under a common control (parent) with the contracting party.

## Best Endeavours and Reasonable Endeavours

- ▶ These terms are commonly used in agreements to qualify a party's contractual obligations. ("Best Effort" & "Reasonable Effort" in US)
- ▶ The level of commitment under a best-endeavours-obligation is believed to be more onerous than under a reasonable-endeavours-obligation.
- ▶ Because of this commercial lawyers devised the use of the phrase "all reasonable endeavours" or "reasonable endeavours"
- ▶ But it is difficult in practice to describe the actions that would be regarded as meeting "reasonable endeavours" and those that would meet "best endeavours."
- ▶ In order to avoid uncertainty it is better to avoid using any of these terms
- ▶ Lawyers should state specifically what the parties are expected to do under the contract. If it is not possible to do so then the obligation should be benchmarked against some recognized or third party standard

## Expression of Time

- ▶ **Forthwith** ordinarily means "immediately", "without any delay." But sometimes it is interpreted less strictly, as meaning "within a reasonable time" or "as soon as reasonably possible"
- ▶ **Inmediately** has been interpreted to mean "as soon as possible" "promptly" and "directly"
- ▶ **As soon as Possible** has also been interpreted to mean "within a reasonable time" or "in the shortest possible time"
- ▶ It is clear that these expressions are matters of construction by the courts. To avoid uncertainty it is advisable to specifically state any required time to do a thing, rather than hoping that the court would interpret the expression the way one intended.
- ▶ **From time to time** This phrase is better illustrated by an example
- ▶ *"The Financial Controller shall be such person as the Investor nominates from time to time"*
- ▶ In this example the phrase "from time to time" is intended to clarify that the Investor can nominate more than one person to the position of Financial Controller more than once during the duration of the contract.
- ▶ **For the time being** means "at the relevant time"



## **Concluding Remarks**

In the course of my negotiation of contracts, I have never accepted that there are standard clauses until I am convinced as to the purpose of such clauses in the contract, address the drafting issues and determine the location of the clause in the contract. For instance, a clause can have a short, medium and long form. It is important that all these are carefully negotiated.

In drafting contracts, lawyers should not copy a standard set of boilerplate clauses, hook, line and sinker. There is the need to consider the suitability of each clause to a particular situation and the potential consequences of including or not including the clause.

Thank you.