

Corporate Department

Check the Plating – the importance of Boiler Plate provisions

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In commercial agreements, there is very often a series of clauses usually at the end of the agreement which may not seem as important as the provisions dealing with the essence of the contract but it is important to make sure that each of them is carefully considered. It can be costly at a future time if what is sometimes referred to as the “boiler plate language at the back” has not been focussed upon. These clauses will usually deal with choice of law, dispute resolution, and assignability among other matters.

Choice of law and forum for dispute resolution often go hand in hand. In other words, if a contract is going to be entered into under the laws of England and Wales, it will often provide that dispute resolution is to be in England.

While it might seem better to concede such a choice of law while chasing a prize in some more fundamental aspect of the agreement (for example commission), this should not be done too quickly.

It is a truism that while all goes well parties don't really need to look back at what the contract provides. However if a dispute does arise and the governing law of the contract is not Irish, then most likely foreign legal advice will need to be taken at that time. Furthermore if the dispute resolution is to be undertaken outside of Ireland, considerable direct cost in terms of legal fees and related expenses can arise. In addition management will require to instruct foreign lawyers, making sure that they have fully conveyed to the foreign lawyers all of the issues that have arisen and the context in which these need to be considered; there may be a need to attend meetings abroad in advance of the actual dispute resolution abroad. Significant direct and indirect costs can mount very quickly.

Other Boiler Plate provisions can include provisions facilitating in very broad terms or in restricted terms, the assignment of the contract within a corporate group of which one of the parties to the contract is a member. If dealing with a company within some large group, it is important to consider what reliance you are placing on your perception of the strength of the group as a whole as distinct from your perception of the strength and contractual ability of the nominated party in your contract - are all of the other members of the group as strong?

Provisions as to giving notices can be particularly important. In today's world, when people are receiving email at all times of the day and night and on all days of the week, it is easy for a document to be overlooked in a deluge of email received. For that reason, it is not uncommon nowadays to provide that notices can be served by hand, by registered post or by fax but not by email. Whether it is appropriate for you to have notices served by email or not is a question that needs to be considered in each case but it could be costly to wait until the latest possible moment to serve a notice assuming it can be served by email only to discover then or worse still, having served it (and with the deadline for service having now passed) that the contract in fact precludes service by email.

A whole agreement clause will provide that the written text is the entire of the agreement as to the subject matter. It may seem obvious but is very important to make sure that it does – this is particularly so where the written contract may be an updating or a committing to writing of an existing trading relationship. For example if the contract provides that the counterparty will “deliver to company's premises at A, B and D...” it would be unwise to assume that because the counterparty always does also deliver to C en-route from B to D that there is no need to provide for this in the contract

Within the substance of the contract and particularly where any form of financial or monetary calculation has been made, it may be wise to set out as an annexe to the contract a number of worked examples of how the formula would be applied. This should help to avoid misunderstanding between the parties as to how the formula is to work.

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