MODULE 7: COMMON PROVISIONS AND BOILERPLATE CLAUSES

Purpose of module

This module has the following objectives:

- To describe certain standard terms or clauses that appear in many contracts – often called "boilerplate" clauses;
- To identify some key clauses that should *not* be treated as boilerplate, but should intend be treated with caution and specifically addressed before signing ("danger" clauses);
- To increase understanding of the purpose and legal effect of common boilerplate clauses; and
- To emphasise the importance of not taking boilerplate clauses for granted.

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A. Introduction to boilerplate clauses

Most contracts contain a number of common, stock-standard clauses – often called "boilerplate" clauses, in reference to their standardized nature. For instance, clauses that identify which jurisdiction (e.g. South Australia, New South Wales, Singapore, California) will be treated as the jurisdiction whose laws will govern the agreement, or clauses that state that the written contract represents the "entire agreement" between the parties, excluding any previous verbal or written agreements on the subject.

When reading separate written contracts, there is often a danger of glossing over the details, seeing "legal jargon" and assuming it must be boilerplate – it must be standard and "unimportant". However, there are some common types of clauses that are hardly "standard". In the University context, two critical examples are clauses relating to intellectual property, and clauses relating to confidential information. Such clauses should always be closely scrutinized and never treated as "boilerplate".

Even when clauses are truly boilerplate, it is helpful for people who engage in a lot of contracting activity to understand what the "legal jargon" means, why it is there, and when it should be treated with caution. It is also useful to understand some of the common contracting terms, so that when instructing your legal advisor to draft a contract for you, you can turn your mind to such issues and provide clear instructions on them.

In this module, the following common clauses will be outlined:

- Acceptance clauses
- Access and assistance clauses
- Confidentiality clauses
- Dispute resolution procedures
- Duration of the contract
- Entire agreement clauses
- Exclusion clauses (liability caps)
- Exclusivity clauses
- Extensions and renewals
- Force majeure (unforeseeable events)
- Governing law or jurisdiction clauses
- Indemnity and insurance clauses
- Intellectual property rights
- Key personnel clauses
- Liquidated damages clauses
- Payment mechanisms and clauses
- Performance measures
- Termination rights
- Variation clauses
- Warranty clauses

This module is intended to provide background information to increase your understanding of the legal effect and purpose of some common contracting clauses. However, it is not intended to be a substitute for legal advice in the case of individual contracts. This set of common clauses should help you better identify potential issues in draft contracts that you are reading over – and once spotted, the issue should be discussed with your lawyer. It should help you better instruct the lawyer who is drafting your own contracts.

B. A – Z of common clauses

Acceptance process

Where the contract involves the supply of goods and services, there should be a clear acceptance procedure – that is, the contract should envision and explain what will count as "acceptance" of the goods or services, and accordingly what will count as satisfactory "delivery" of them. Acceptance terms will usually require the other party to provide the contract deliverables in the form specified by the contract. The University (if it is the receiving party) could then undertake testing in a specified timeframe and if the goods do not satisfy the test, the University may request the supplier to rectify the problems or resupply them without additional cost to the University.

Access and assistance to be provided by either party

Sometimes performance of the contract will require access by one party to premises, equipment, information or other resources of another party – and it is usual for the contract to contain a clause that addresses the provision of that access. In any contract, consider what access to premises and other assistance is to be provided by either party, without which the contract could not properly be performed. This is particularly important where the University is undertaking certain obligations under the contract and cannot perform those obligations without the assistance of the other party (e.g. provision of documentation; access to premises, equipment or personnel).

If the University is providing access to its premises, equipment or information, it is important to retain some right to terminate access in the event that a contractor starts abusing it – and it is useful to consider how that access will be cut off (through handing in of security access passes, deletion of IT access accounts etc) once the contract has been completed. When dealing with contractor access to premises, it is also important to address issues like occupational health and safety and security access, since the University will be held responsible for both the health and safety of the contractor while on our premises, and the health and safety of others arising from any actions or inactions of the contractor while onsite.

Confidentiality clauses

Legally, confidentiality has the same connotation as in everyday conversation; except that if you promise to keep something confidential through a contractual term (as opposed to just vowing to "keep a secret" for someone in a non-legal setting) then that promise, like any undertaking under the contract, is legally binding. Failure to comply with that promise could lead to legal action for breach of contract and breach of confidence – and if the information was commercially sensitive or valuable, then significant damages could result.

Whole contracts may be drafted exclusively to deal with the issue of confidentiality.

For example, if you had students or contractors working on a particularly sensitive project that was being funded by a defence company, then you may get those each of those working on the project to sign a specific "confidentiality agreement" or "deed of confidentiality" (your funding agreement may specifically require it). If you require such a document, the Legal Services Branch have standard form contracts that may be suitable.

However, in almost every significant contract there will normally be some kind of provision addressing confidentiality. There are several types of confidentiality clauses, which vary based on *what* is being kept confidential – information brought to the table in performing the contract, information created in the course of the contract's performance, or the terms of the contract themselves. For instance, a contract may include:

- A "standard" confidentiality clause requiring parties to keep "confidential information" confidential, and then define "confidential information" to include certain specific things or general categories of documents or information. This often is used just to cover everyone's bases in case the parties exchange certain sensitive information through the course of performing the contract.

- A more specific clause requiring the parties to keep certain outcomes of the contract confidential, or certain material supplied for the completion of the contract (such as information shared that would assist the performance of the contract, but that is otherwise to be kept confidential).
- A clause requiring the parties to keep the terms of the contract itself to be kept confidential. This final case requires special treatment, due to the University being an entity covered by the Freedom of Information Act. Where you require some or all of the actual terms of the contract to be kept confidential, a special clause referencing the Freedom of Information Act will need to be included, and the clause will need to be approved by the Vice-Chancellor. For more information, please refer to the Freedom of Information Policy (http://www.adelaide.edu.au/policies/3/) or speak with the Legal Services Branch.

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Dispute resolution procedures

Contracts will often include provisions that specify what process should be followed if a dispute arises during the performance of the contract. When dispute procedures are included, they should clearly specify the requirements and responsibilities of both parties in handling the dispute. Time frames and methods of escalation should be addressed. Alternative dispute resolution techniques should also be considered as a means of reducing the need for formal proceedings.

The kind of approaches that can be specified for managing disputes include:

- Setting effective, appropriate, stepped negotiation and resolution procedures that provide for the phased escalation of disputes;
- Being prepared to negotiate directly using alternative dispute resolution principles; and
- For more significant contracts, considering the costs and benefits of mediation, expert appraisal or determination as mechanisms to specify in the contract.

Duration of the contract

Early in this Handbook, we discussed the importance of clearly defining the point at which a consensus becomes legally binding – and the line is crossed from negotiations to legally binding contract. To avoid confusion in this regard, it is usual to include a clause that expressly states when the contract commences, and how long the contract will remain in force for (assuming no other events occur which would end it early).

Most commonly, a contract will be drafted to state that it commences on the date it is signed by the last party. However, in some cases, a specific commencement date may be preferred. Where the contract is for a term calculated by reference to the commencement date (e.g. 3 years from the Commencement Date), then it would be administratively more convenient to stipulate a specific commencement date.

The University's preference is not to have contracts continue for more than three years, unless there are clear advantages in doing so, or unless the contract allows for easy termination without fault (that is, a termination "for convenience").

Entire agreement clauses

These are clauses that state that the written contract represents the “entire agreement” between the parties, excluding any previous verbal or written agreements on the subject. In the United States, such clauses are sometimes called integration or merger clauses. The idea behind formalising a separate written contract is to integrate or draw together all aspects of the agreement into a single document, and a single set of terms. With an entire agreement clause, all previous discussions, representations or promises made by the parties during the negotiation – whether verbal or written – no longer have any legal effect.

This is desirable because it enhances certainty surrounding the contract terms. However, it means that you need to be careful to make sure that any representations or promises made during the negotiations that are important to the University are properly included in the written terms. Otherwise, once the agreement is signed and becomes the “entire agreement” between the parties, those earlier promises will not have any weight.

An important exception to these clauses occurs if a party makes false or misleading statements during the negotiation, which lead to the contract being agreed to, those statements can form a basis for legal recourse even when they are not included in the final written agreement.

Exclusion clauses – exclusion of liability or “liability caps”

An exclusion of liability clause is used where one party will not be liable to the other in relation to particular events, or that their liability will be capped at a fixed amount (or capped at an amount determined in accordance with an agreed formula). Exclusion clauses operate to exclude, restrict or qualify the rights (and risks) of the parties. For instance, the University might agree that in buying something from someone else (a “vendor”), it will not bring a claim against the vendor in relation to particular matters. In this way, the vendor is released from the risks associated with the matter specified and the University *assumes those risks* because it is giving up its rights to bring an action against the vendor in relation to those risks.

Similarly, the parties could agree that the liability of one of them in relation to a specified event is capped at a particular amount. This allows “worst case scenarios” identified during the preparation and negotiation phase to be catered for in some way through the contract – by deciding who will be responsible, and to what extent. Such clauses give comfort to the party unable to control the potential event, and provide some certainty to the person who is liable, as they know the maximum potential liability they may face in relation to a particular risk.

It is common to see liability capped to a dollar value that matches the total value of goods or services being provided under the agreement, or to the value of assets being transferred from a seller to a buyer. However, the dollar value being paid for the goods or services usually bears no logical relationship to the magnitude of the risk being assumed by the party acquiring them. While such a cap on liability makes sense to the seller to prevent them suffering a loss greater than the sale price they receive, if the University accepts such terms, it could be exposed to substantial risk and this should be avoided at all possible and wherever appropriate.

Before agreeing to a liability cap relating to a specific event, always think carefully through the *real* costs that would flow if the event in question happened – and if the liability cap is an overall cap for the whole contract, think carefully about the ways in which the University could lose under the contract, and ask whether the cap would cover those potential losses.

Exclusivity clauses

Sometimes clauses are included that make the relationship between the parties “exclusive” in some way – having the effect that one or more parties may be limited as to who or how they can deal with third parties in the future. For the University, with so many outside partners and collaborators, exclusivity clauses should only be agreed to in special circumstances – and consultation should be undertaken internally, to ensure that the exclusive relationship will not adversely affect any other areas of the University. Remember, your local agreement on behalf of the University binds *everyone* in the University, not just your area.

Extensions and renewals

Where it is likely that the University will wish to continue with the contract past the expiry of the initial term, you should consider whether you would like clauses included that provide either:

- An option to renew – this will enable the University to renew the agreement by providing notice by a certain date; or
- A provision for negotiation prior to the end of the term, with a view to agreeing to an extension.

It is possible for a contract to specify that it will *automatically* be renewed unless early notice is given by one party that it wishes not to renew, or unless some event has already ended the contract before its natural end. Be sure to check any contracts drafted externally to make sure there is no automatic renewal under a contract for the other party – or if it is to be included, make sure that it is designed in so that the University's consent is required at the time of renewal, or in some other way that leaves the University with some room to move (rather than locking us in to renewing in several years, by which point the situation may have changed dramatically).

Force majeure (uncontrollable events)

This is a common boilerplate clause that is used to excuse the parties from blame in the event that some act of nature or unforeseeable external disaster disrupts the contract. Such provisions usually operate to suspend an obligation under an agreement and to remove rights of a party to bring an action against another for failure to perform an obligation where an unanticipated external event affects performance.

A force majeure clause may be defined narrowly to include extreme environmental matters (such as flood, fire, cyclone) or more broadly to encompass a wider range of matters such as industrial relations issues and even economic downturns (which are assessed according to objective criteria set out in the relevant agreement).

Governing law or jurisdiction clauses

This is a clause through which the parties specify which law – that is, the law of which state in which country – will govern the agreement for the purposes of resolving any disputes. Laws vary from place to place, so when the parties are engaging in the contract across state or country lines, it is important that the contracting parties agree at the outset which laws will be applied if things end up going wrong. Sometimes, contracts may go so far as to specify a forum (or specific court) in which cases would need to be brought. If a contract that is presented to the University has the law of any place other than South Australia proposed as its governing law, you should consult with your legal advisor on that issue before proceeding.

Indemnity and insurance clauses

Agreeing to obtain insurance against specified risks and agreeing to indemnify another party are very different things, but are often confused.

To "indemnify" someone is to secure them against a particular loss, so an indemnity clause is a contractual commitment by one party to compensate for the other party for certain potential losses under a contract. In other words, an indemnity clause is a commitment by one party to cover the liability of the other party – effectively shifting the consequences of a contract risk to a designated party.

Every contract or agreement entered into requiring a party to provide a service or product to the University should have an indemnity clause that requires that party to indemnify the University in the event of an adverse impact upon the University arising from that party's actions or lack of action.

An indemnity is only worthwhile if the other party has the money to fulfill it or is sufficiently insured for it. Consequently, an obligation to obtain insurance against specified risks for specified amounts often follows from an allocation of risk through an indemnity clause. If one party agrees to bear the loss but has no assets to compensate for it, then the indemnity will be useless. Likewise, it makes no sense to have one party agreeing to indemnify the other against losses for some event but having the other party take out the insurance – the requirement to insure should line up with any allocations of risk that relate to that insurance. Both allocation of risk and obligations relating to insurance should therefore be clearly and separately addressed in the contract.

The most common forms of insurance required under a contract are Public and Product Liability Insurance (covering liability for loss or damage to property or injury caused to persons) and Professional Indemnity Insurance (covering liability arising from negligence in providing professional advice).

Imposing an obligation on a party to obtain insurance in relation to a particular allocated risk should provide some comfort to all the parties involved that there will be funds available to compensate for a loss suffered, provided that the loss suffered falls within the scope of the insurance policy and that the insurer (sometimes referred to as an underwriter) will accept the claim.

It is always important to consider whose name insurance should be taken out in and who is to be noted on the policy as an interested party. If both parties to an agreement are named as interested parties on the insurance policy, then a loss suffered by *either* party may be covered under the insurance policy. Sometimes, it is in a party's interest to have a "cross liability" clause in an insurance policy. This means that if one insured party sues another insured party, the party sued can make a claim under the insurance policy in relation to this liability.

Insurance is a highly technical area and should be assessed and dealt with only be qualified professionals. In the first instance, any request by the University to accept or offer risk or insurance should be referred to the Risk and Insurance Branch.

Intellectual property rights

Intellectual property rights are legal rights over certain intellectual creations. Such rights may be protected by legislation (e.g. copyright, patents, registered designs, trademarks), or may be protected under case law or common law (e.g. trade secrets, unregistered trademarks, confidential information).

Where it is likely that the activities under the contract will give rise to the development of intellectual property by either the University or the other party to the contract, you must consider the position of ownership and access to those intellectual property rights – as well as future use.

Under common law (which is case made law, or the outcomes of court decisions) intellectual property rights belong to the person (or their employer) who creates the intellectual property. Therefore, any desired variation to this position needs to be clearly stated in the contract.

Where the University is paying full commercial rates for a contractor to create intellectual property, the University may need to own the intellectual property seek ownership of such the intellectual property rights – therefore, a clause would be needed to specifically assign the intellectual property rights created by the contractor under the agreement to the University. Where it is not possible to negotiate ownership rights, you should think about what access or usage rights the University needs. Where it is not necessary or essential that the University own the rights, special consideration should be given to access or uses the University needs for the future, and the contract should address those specifically.

Where the University may create intellectual property that is of commercial value, the University's preferred position is to retain ownership of that intellectual property, or at least have provision for royalties should the other party commercialise the intellectual property.

Any contracts involving the commercialisation of intellectual property should be developed in consultation with Innovation & Commercialisation Services.

Key personnel clauses

In many contracts, especially those dealing with the provision of consultancy services, the unique skills, qualifications or experience of particular personnel may have influenced your decision to engage a particular party. In such cases, those "key personnel" that you want to be engaged throughout the performance of the contract should be named expressly in the contract, and the contract should include a specified process to replace them in the event of unavailability.

If an outside party seeks to have University "key personnel" named (such as in a specific research project) then you should ensure that the person(s) named have the approval, workload capacity and support required to fulfill their role under the contract, **before** committing to the contract.

Liquidated damages clauses

Liquidated damages are fixed damages agreed to by parties to a contract which apply if a specified event occurs. This is similar to an exclusion of liability clause, but instead of limiting potential liability, they "fix a price" for compensation if a certain event occurs. The fixed damages agreed to must be a genuine pre-estimate of the loss likely to be suffered as a consequence of that event occurring, or a lesser sum – in other words, they cannot be used as an "inflation" mechanism.

If a liquidated damages clause applies in relation to a breach by a party of a provision of an agreement, the compensation to be paid to the "victim" of that breach is a fixed sum or a sum determined in accordance with a fixed formula, rather than a sum determined in accordance with the normal rules of contract. This provides some certainty – the party who is responsible for performing a particular obligation knows exactly what amount will be payable as damages if it fails to meet its obligations; the recipient of the liquidated damages knows exactly how much it will recover if the specified event occurs. However, there is a risk that if the amount of liquidated damages is substantially less than the amount of the loss actually suffered by a party as a consequence of a specified event occurring, that party will suffer a net loss, which it will then be prevented from taking any further action to recover.

Payment mechanisms and clauses

The contract must specify the amount (or a method for calculating an amount) and timing of payments.

Clauses relating to payment may involve incentives for a party to comply with its obligations in the form of increased rates or agreed one-off payments, rights to withhold payment where obligations have not been fully complied with, or provisions that payments be made in segments subject to specified conditions being met. This way a party can match its obligations to pay for goods or services with the actual provision of those goods or services so that it does not bear the risk of having paid, or being required to pay, for goods and services which are not provided, or which do not meet standards or specifications agreed between the parties. Payment mechanisms will often be expressed to coincide with a milestone date or a milestone event.

Some common types of payment arrangements are (and these are not mutually exclusive):

- **Fixed price**: A fixed amount for the entire contract. This is typically used for straightforward contracts for goods or services.

- **Variable price**: The price is calculated on the basis of a formula. This is suitable for use in longer-term contracts or where the contract costs are likely to vary due to factors beyond the contractor's control. The most common example is for a first year price to be stated in the contract, which will then be increased by a fixed rate (such as a consumer price index or other indicator) for future years.
- **Variable quantity**: Allows for a maximum contract price to be agreed with such factors as labour rates, overheads and quantities also being agreed by the parties (e.g. $120 per hour, up to $10,000). This payment regime is generally used where the level of labour effort required under the contract cannot be estimated with certainty.
- **Incentive payments**: These are extra payments which are generally tied to achievement of performance measures. These can be useful to encourage the contractor to achieve desired outcomes within a nominated time.

Common timing arrangements for payments are:

- **Full payment upon completion:** Payment upon successful delivery of all contract deliverables. This is suitable for straightforward contracts for goods or services.
- **Progress payments:** These are periodic payments, usually tied to time (e.g. monthly).
- **Milestone payments:** These are progress payments based on certain events or deliverables being achieved. This is a useful mechanism for ensuring that contracts are planned, progressed and delivered or performed on track.

Performance measures

Performance measures or key result areas (KRAs) are sometimes mistakenly treated as boilerplate or common clauses – but as discussed in Module 2 (see section 2.5 and 2.6), performance measures should be carefully customized for each agreement. What the performance measures look like will depend entirely on the nature of the deliverables under the contract – since the performance measures should be designed to measure the successful completion of those deliverables.

If you notice performance measures in a draft contract that are masquerading as part of the "standard terms and conditions", be sure to check them very carefully, considering the factors raised in Module 2.

Termination rights

These can be included in a commercial agreement to provide a "way out" where a project does not go according to plan. The University might request that an agreement include rights to terminate if the other party to the agreement is in breach or if performance falls below specified levels. This means that the University can limit its further losses if the project is a failure or if another party is not complying with its obligations.

Depending on the circumstances, there may be a wish to retain the right to terminate the agreement simply for convenience (rather than any failure by the other party). Such a right could be included in a termination clauses, but would ordinarily require various steps to be taken and notice to be given, to prevent either party from losing out unfairly due to the choice to terminate.

Variation clauses

Contracts normally contain a standard clause requiring all variations to be in writing. This is perfectly adequate for minor variations that may need to occur through the life of the contract.

However, if the nature of the contract is such that more significant variations may be needed – such as variations to the scope of work (e.g. in a contract for the development of systems) – then you may wish to consider implementing a set of procedures to enable variations to be proposed and agreed to. These variation procedures could be included as a more comprehensive “variation clause” in the original contract.

Warranty clauses

Warranty clauses govern the rights and obligations of the contractor and the acquiring entity in relation to defective goods and services. They serve to promote a minimum standard of performance. A warranty clause allows one party to vouch or promise to the other that a certain thing or fact will remain true (for instance, that some item will remain in working order). Warranties are usually accompanied by a requirement for the person giving the warranty to compensate the party relying on the warranty, if the warranted “fact” turns out to be incorrect.

Warranty clauses are usually drafted so that the party that is best placed to verify a piece of information warrants the veracity of that information to a party who must rely on it, where the party relying on the information may not be able to effectively or efficiently verify the information by itself. In this way, the “risks” associated with a piece of information being found to be incorrect (such as losses suffered by someone who relied on the information) are allocated to the person who provides the warranty. “Warranty” may also be defined more broadly as a contractual promise. In this sense, a party may warrant that it will or will not do something, in which case other parties to an agreement may have a right to sue if this contractual promise is not complied with. This means that the party making the warranty bears the risk of not being able to satisfy the obligations set out in the warranty.

From a University perspective, there are two key things to keep in mind about warranty clauses:

1. If the University is being asked to provide a warranty, be sure that you are able to verify that information and exercise control over it – for instance, it would be problematic to warrant that we will maintain the working order of an item that is not in the University’s possession or control.
2. If there is some crucial fact or circumstance that needs to remain true in order for the contract to succeed from the University’s perspective, then it may be appropriate to seek a warranty from whichever party has control over that circumstance. Your lawyer can help draft such a clause.

