



Boilerplate Beware: Common clauses that can get you in hot water!

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What is Boilerplate?

"1. Ready-made or all-purpose language that will fit in a variety of documents. 2. Fixed or standardized contractual language that the proposing party views as relatively nonnegotiable." – Black's Law Dictionary

Why does it matter?

- Term "boilerplate" is a misnomer. There are many variations of boilerplate clauses.
- Boilerplate clauses may inadvertently amend the interpretation or meaning of substantive clauses, which can result in inconsistency or even an unenforceable agreement.
- Consider the meaning of the clauses and their purpose and suitability for the deal. Boilerplate clauses should be negotiated and tailored to each transaction.

Clauses to be Considered

- Governing Law
- Waiver
- Further Assurances
- Entire Agreement
- Notices
- Enurement
- Time of the Essence
- Amendment
- Assignment

Governing Law

*This Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein, and each of the Owners **submits** to the **[exclusive]** jurisdiction of the courts of the Province of Alberta for the interpretation and enforcement hereof.*

(Source: PJVA Unit Operating Agreement)

Governing Law – Case Law

- Courts will generally uphold choice of law regardless of connection, so long as it is *bona fide* and legal (*Hunter Engineering Co v Suncrude Canada Ltd.*, [1989] 1 SCR 426; *Vita Food Products Inc. v Unus Shipping Co.*, [1939] 1 WWR 433 (PC))
- Where no choice of law or forum clause, courts may infer the proper law that has the closest and most substantial connection and jurisdiction that a real and substantial connection (*Imperial Life Assurance Co v Colmenares*, [1967] SCR 743; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17)
- Choice of law does not presume jurisdiction (*Christmas v Fort McKay First Nation*, 2014 ONSC 373)
- Term "exclusive" is necessary to avoid granting concurrent jurisdiction (*Westcott v Also Products of Canada Ltd.*, [1960] N.J. No. 3)
- "Submit" has been interpreted as non-mandatory language (*Naccarato v. Brio Beverages Inc.*, [1998] AJ No 47 (QB))

Governing Law – Practice Points

- Clearly state both choice of law and choice of forum
- Use term "exclusive" and mandatory language (attorn versus submit)
- Alberta courts have experience and large body of binding precedents in oil and gas disputes

Waiver

No waiver by any Owner of any breach (whether actual or anticipated) of any of the covenants, provisions or conditions herein contained shall take effect or be binding upon that Owner unless the same is expressed in writing under the authority of that Owner. Any waiver so given shall extend only to the particular breach so waived and shall not limit or affect any rights with respect to any other or future breach.

(Source: PJVA Unit Operating Agreement)

Waiver – Case Law

- To establish waiver, it must be shown that person waiving his rights had full knowledge of their existence and nature (*British American Oil Co. v Ferguson*, [1951] 1 WWR (NS))
- A waiver in writing clause will prevail over an oral variation of the contract (*Hawrish v Bank of Montreal*, [1969] SCR 515)
- Conduct may constitute a waiver despite the inclusion of a waiver clause (*Delilah's Restaurants Ltd. v 8-788 Holdings Ltd.*, [1994] BCLR (2d) 342(CA))

Waiver – Practice Points

- Expressly state that waiver must be in writing (and if you've agreed to an amendment or waiver – get it in writing)
- Specifically address situations where conduct may amount to waiver (i.e. failure or delay in exercising a right)
- Be cautious of conduct that is inconsistent with written contract

Further Assurances

Each Owner shall from time to time and at all times, [at its own expense], do all such further acts and execute and deliver all further documents as may be reasonably required in order to [fully] perform and carry out the terms of this Agreement.

(Source: PJVA Unit Operating Agreement)

Further Assurances – Case Law

- Allows one party to make requests of the other party and compels them to comply with such requests (*Alberta (Attorney General) v Samuel Doz Professional Corp*, [1993] 6 WWR 260 (Alta QB))
- Can't be relied on to require a party to do something after the expiry of the relevant limitation period (see *Menary v Welsh*, (1973), 1 OR (2d) 393 (CA))
- The court won't use a further assurances clause to impose on a party an obligation inconsistent with the rest of the agreement (see *Apex Mountain Resort Ltd. v British Columbia*, [2000] BCJ No 1099)

Further Assurances – Practice Points

- Clearly define required actions and documents
- Clearly define time limits
- Ensure the FA clause survives termination of the agreement
- Lay out which party will be on the hook for costs and expenses arising from such assurances

Entire Agreement

The Parties have expressed herein their entire understanding and agreement concerning the subject matter of this Agreement. No implied covenant, condition, term or reservation shall be read into this Agreement [relating to or concerning such subject matter], nor shall any prior oral or written understanding entered into modify or compromise any of the terms and conditions herein.

(Source: 1999 Operating Procedure as incorporated into the PJVA Construction, Ownership and Operation Agreement)

Entire Agreement – Case Law

- Excludes liability for precontractual misrepresentations (in the absence of compelling equitable circumstances) (see *Hayward v Mellick* (1984), 5 DLR (4th) 740 (Ont CA); *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding* [1997] 3 SCR 1210 (SCC); *Horizon v Blaze*)
- Alberta tends to have a strict approach to the parol evidence rule – in *Gainers Inc. v Pocklington Holdings Inc.*, 2000 CarswellAlta 508 (Alta CA) the court reaffirmed the parol evidence rule and clearly states that the "entire agreement" clause can nullify earlier promises and representations and prevent "side oral contracts" and that "the power to imply terms is to be used cautiously, an no implied term can be inconsistent with or contrary to the express terms of the contract"

Entire Agreement – Practice Points

- Draft broadly
- Clearly state that any schedules and appendices are not rendered ineffective

Notices

All notices or other communications required to be given hereunder shall be in writing and delivered by hand or fax to a Party at the address or number set out in Exhibit "E". Any notice given by fax is deemed to have been received the following business day. Any notice delivered by hand will be deemed to be delivered upon receipt by the receiving Party. Any Party may change its contact information by notice as set forth herein.

(Source: PJVA Tie-In Agreement)

Notices – Case Law

- If the clause is drafted to be permissive (allowing methods of delivery other than those expressed), courts will generally take a practical approach, finding notice valid if it was actually received and the method was not less than advantageous (*Ross v T Eaton Co.*, (1992) 96 DLR (4th) 631 (Ont CA))
- Sending by ordinary mail is no less advantageous than be registered post (*Yates Building Co. v RJ Pulleyn & Sons*, [1976] 237 E.G. 183 (CA))

Notices – Practice Points

- Use permissive language to allow for methods of delivery other than those expressed
- Notice given under statutes will be interpreted more strictly, despite the notice provision in the contract
- Include essential components: when, how, time period to be deemed sent and received, to whom it should be addressed, whether the notice clause applies to all notices contemplated or only specific types

Enurement

*This Agreement shall enure to the benefit of and be binding upon, **[the Parties and]** the respective heirs executors, administrators, successors and assigns of the Parties.*

(Source: PJVA Common Stream Operating Agreement)

Enurement – Case Law

- If drafted broadly, will substitute parties under original contract (rather than novate) (*Montreal Trust Co. v Birmingham Lodge Ltd.*, (1995 24 OR (3d) 97 (CA); *Gill Estate v MacQuade*, [1989] NBJ No 817 (NBQB))
- Reference to "assigns" is not evidence that the contract is assignable (*Silver Butte Resources Ltd. v. Esso Resources Canada Ltd.*, (1994) 19 BLR (2d) 299). Courts will look to agreement as a whole

Enurement – Practice Points

- Consider whether there are any classifications of persons that should be included or excluded
- Include a broad scope of classes of parties to avoid terminating contract and creating a new contract
- Classification of parties (ex- heir, executor, successor, assign, etc.) may have unintended consequences
- Ensure consistency with restrictions on assignment (permitted assigns)

Time of the Essence

Time is of the essence in this Agreement.

(Source: PJVA Unit Operating Agreement)

Time of the Essence – Case Law

- To rely on clause, the innocent party must be ready, willing and able to perform at the stipulated time (*King v Urban & Country Transport Ltd*, (1973) 40 DLR 757 (ONCA))
- Timeliness will not be implied, unless the nature of the subject matter or surrounding circumstances would make it inequitable not to (*United Scientific Holdings Ltd. v Burnley Borough Council* (1978), AC 904 (HL))
- May be waived by conduct (*Richards v Law Development Group*, [1994] O.J. No. 2914 (Gen. Div). Conflicting case law on whether an extension of time constitutes waiver (*Hanson v Cameron*, [1949] SCR 101) or substitutes a new date for performance (*Landbank Minerals Ltd. v. Wesego Enterprises Ltd*, [1981] 5 WWR 524 (ABQB))

Time of the Essence – Practice Points

- Clearly state that time is of the essence to ensure that time obligations amount to conditions (as opposed to warranties)
- If there are good reasons to make certain time obligations not of the essence, except them from the essence clause to avoid the right to terminate on a breach
- If an extension is granted, make it clear that time continues to be of the essence
- If contracting in civil jurisdictions (e.g. QB), preferable to specify the actions to be taken and dates

Amendment

No amendment or variation of the provisions of this Head Document shall be binding upon any Owner unless and until it is evidenced in writing and executed by each of the Owners.

(Source: 1999 Operating Procedure as incorporated into the PJVA Construction, Ownership and Operation Agreement)

Amendment – Case Law

- Absence of an amendment clause may be taken into account by the court when considering whether the agreement can be altered or amended (*RoyNat v Altberg*, (1992), 7 BLR (2d) 261 (Ont Gen Div))
- Courts have typically been accepting of boilerplate amendment clauses (*Shell Canada Ltd. v Vector Energy Inc.*, (1989), 46 BLR 126 (Alta QB); *West Edmonton Mall Ltd. v Clock Gallery Ltd.*, (1993), 7 Alta LR (3d) 327 (Master))

Amendment – Practice Points

- Consideration must be given for any new term
- When drafting, consider:
 - Who is authorized to amend?
 - What form is acceptable for the amendment (verbal or written)?
- Ratify the agreement otherwise in the amending agreement

Assignment

Neither party shall assign this Agreement [or any benefits, interests, rights, obligations, etc.] without the prior written consent of the other Party which consent shall not be unreasonably withheld.

(Source: PJVA Well Effluent Processing and Water Disposal Agreement)

Assignment – Case Law

- The general rule is that obligations cannot be assigned without consent, but benefits can (*Rodaro v Royal Bank*, (2002), 59 OR (3d) 74 CA)
- If a refusal to approve an assignment by the non-assigning party is found to be unreasonable, then the assignor would be able to assign its rights (*McCallum, Hill & Co. v Imperial Bank*, (1914), 7 Sask LR 33 (SC))
- An amalgamation does not equal an assignment (*Rossi v McDonald's Restaurants of Canada Ltd.*, ((1991), 1 BLR (2d) 175 BC SC) and *Zurich Canadian Holdings Ltd. v Questar Explorations Inc.*, [1998] AJ No 609, 1998 CarswellAlta 495 (QB) aff'd (1999), 232 AR 160 (CA))

Assignment – Practice Points

- Interpretations vary wildly
- Clearly define permitted assignments and those not permitted
- Consider whether certain assignments should be an exception to the no assignment clause

Questions?



"These are tough times to be a contract law attorney.
Everything's written in stone."