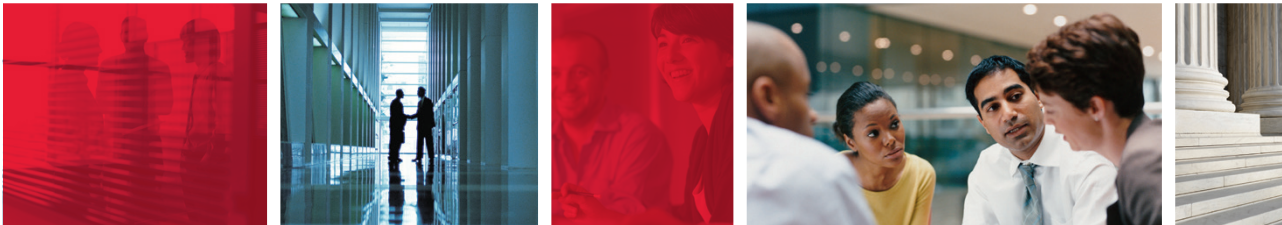


DISPUTE RESOLUTION BULLETIN



hfw Entire agreement clauses – are they effective?

The main purpose of an entire agreement clause is to make clear that all other statements, representations or warranties, particularly those made during pre-contractual negotiations, are excluded from the final contract, which alone forms the “entire agreement”.

This may seem relatively straightforward. However, disputes relating to entire agreement clauses are not uncommon and indeed in a recent LCIA arbitration in which HFW represented the claimants, the defendants argued that the entire agreement clause incorporated in the sale and purchase agreement did not exclude pre-contractual negotiations.

This begs the question as to whether entire agreement clauses can be relied upon and whether they will withstand the scrutiny of the Court, in particular with regard to implied terms and claims for misrepresentation.

Entire agreement clauses and implied terms

The law is clear that express words are required to exclude terms implied by common law or statute. The position is less clear-cut when considering terms implied by trade customs or the parties' previous dealings. For example, it is likely that an implied term as to business efficacy would not be excluded by an entire agreement clause, whilst terms implied by custom of the trade would.

Given this uncertainty, the wording of entire agreement clauses should be made as clear as possible so as to avoid any unintended effect. The safest approach for parties wishing to ensure that implied terms are excluded from an agreement is to include clear wording in the entire agreement clause to that effect, specifying which implied terms are excluded by it. However, parties should bear in mind the possible consequences of simply excluding all implied terms, in case this may exclude terms on which they later wish to rely.



Entire agreement clauses and misrepresentations

As with implied terms, the position regarding misrepresentation is not entirely clear. Each entire agreement clause will be assessed on its own wording. Case law does make clear that for misrepresentation to be excluded successfully, the entire agreement clause must incorporate express words to that effect.

This is because a misrepresentation involves one party having relied and acted upon a statement made by the other. This stands in contrast to ‘matters of agreement’ (where two or more parties agree on something). Consequently, an entire agreement clause will not exclude misrepresentation, unless express words to that effect have been incorporated. Using the term “representations” will not be sufficient to cover “misrepresentations”.

It should also be borne in mind that liability for fraudulent misrepresentation cannot be excluded.

Conclusions

It is possible for a party to rely upon an entire agreement clause to defend a claim arising from pre-contractual representations. However, this will depend on the wording of the clause: clear words must be used to exclude liability for misrepresentation and general language excluding pre-contractual agreements will not be sufficient for that purpose.

It is becoming more common to see parties using express wording to exclude misrepresentation. These clauses can be divided into three categories: (i) non-reliance clauses, (ii) exclusion of liability for misrepresentation regarding pre-contractual statements and (iii) exclusion of liability for misrepresentation regarding statements set out in the agreement.

Care should be taken when using these: there is no “standard wording” which will be effective in every circumstance. Finally, because they are exclusion clauses, entire agreement clauses will be subject to a reasonableness test under the Unfair Contract Terms Act 1977 (UCTA). Whether or not a clause will be considered as reasonable will be case specific.

The Courts will uphold entire agreement clauses where appropriate, but parties should beware of treating them as “boilerplate” language to be included in every agreement without careful thought.

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Changes to litigation in the English Courts – a good thing for the parties?

The stated aims of the much publicised Jackson reforms introduced in April 2013 were to control costs and promote access to justice. This sounds appealing for parties conducting litigation in the English Courts. A key element of the reforms was in the approach to case management. Now that they have been in place for a period of time, this article considers the practical effect of some of the case management reforms and their potential significance for parties.

Since April 2013, the emphasis has shifted away from the need to do justice in the particular case and towards the notion of doing justice through the consistent application of the Civil Procedure Rules (CPR) in all cases. The overriding objective in the CPR has been amended to make clear that dealing with cases justly and at proportionate cost includes enforcing compliance with rules, practice directions and orders.

This has meant a requirement for strict compliance with procedural rules and deadlines and, in some cases, severe penalties for non-compliance.

CPR 3.9 sets out a new provision on relief from sanctions, which is intended to be a stricter test. When considering whether to grant relief from sanctions for failure to comply with a rule, order or practice direction, the court must now consider the need for litigation to be conducted efficiently and at a proportionate cost, as well as the importance of enforcing compliance.

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The impact on parties has been that Courts are now more likely to strike a case out as a sanction for non-compliance. There have already been examples of this. In one case, where the trial bundle was filed two days late, the case was struck out. This sanction was upheld on appeal.



The well-publicised case of *Mitchell v News Group Newspapers*, which relates to Andrew Mitchell MP’s libel claim against The Sun regarding a story published in relation to the “Plebgate” affair, highlights this. Mr Mitchell’s solicitors did not file his costs budget within the relevant deadline. The Court ruled that his budget was therefore restricted to Court costs only, with the effect that even if he succeeded in his claim, he would not be able to recover costs from his opponents. On 27 November 2013, the Court of Appeal upheld this ruling, indicating that relief from sanctions will normally only be ordered if:

- the breach is trivial;
- the party has otherwise fully complied with their obligations; and
- the application for relief is made promptly.

If the breach is not trivial, the burden of persuading the Court to grant relief will be on the defaulting party. Relief will only be granted if there is a good reason for the failure to comply. Overlooking a deadline is unlikely to constitute a good reason.

The decision in *Mitchell* is being seen as an indicator that the Courts will endorse Lord Jackson’s approach and take a tough line – and we understand that there are no plans to appeal this decision to the Supreme Court.

There will no doubt be a settling down process following *Mitchell*; and it may be that the courts will ultimately adopt a more relaxed approach. In a

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recent decision allowing a claimant a further short period of time in which to comply with an order for security for costs, failing which its claim would be struck out, a Commercial Court judge commented that he was making an order that was not “*unduly tough or unduly forgiving*”. He referred to the tension between the need to do justice between the individual parties and imposing a proportionate sanction for the breach, as compared with the interests of other litigants and the requirement that Court orders should be seen to be enforced.

Is this new approach a good or bad thing for parties to litigation? The increased focus on strict compliance with orders and deadlines should have benefits, in that opponents will find it harder to delay the progress of a case for tactical reasons. Furthermore, there should be an earlier focus on the key issues, strengths and weaknesses of each party’s case, which may encourage early settlement. This is reinforced where the likely costs involved in pursuing a claim to trial are clear early on as a result of costs budgeting, which is now in operation in many Courts.¹

On the other hand, the demand for conformity with court rules and deadlines and the amount of work required to comply with case management procedures inevitably means that the parties must invest a considerable amount of time and money at the early stages of a case.

Managing and conducting litigation entails a huge amount of work by the parties and their lawyers. It remains to be seen whether the new strict approach adopted following the Jackson reforms will be consistently enforced and whether it will lead to a more efficient litigation process and earlier settlement of claims. If so, parties will no doubt welcome it despite the front loading of costs and work involved.

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¹ It is not currently operating in the Admiralty and Commercial Court, unless the judge orders otherwise, but this is under review.



hfw Part 36 offers in English arbitration proceedings

We are aware of cases in which tribunals have refused to give effect to Part 36 offers in English arbitration. A recent London arbitration decision indicates that some tribunals may be prepared to give effect to such offers, subject to the agreement of all the parties. The decision also highlights the risks involved in deploying a Part 36 offer and subsequently failing to ensure it has been validly withdrawn.

Background

In recent years, legislators have developed a regime set out in Part 36 of the Civil Procedure Rules (CPR) aimed at incentivising parties to litigation to resolve disputes before they reach Court if possible. An offer made in accordance with Part 36 carries with it costs consequences designed to encourage a party to Court proceedings to consider seriously accepting another party's "Part 36 offer".

CPR Part 36 prescribes that, should a defendant fail to accept a claimant's Part 36 offer which the claimant then betters at the outcome of the case, he faces being ordered to pay interest on the sum awarded at up to ten per cent, costs on an indemnity basis, interest on the costs awarded, and (in respect of offers made on or after 1 April 2013)

an additional amount, which shall not exceed £75,000. A claimant who fails to improve on a defendant's Part 36 offer risks paying the defendant's costs on a standard basis, together with interest on those costs.

Part 36 offers have become widely used to place a party in court proceedings under pressure to consider settlement to avoid the costs consequences that may follow, albeit the regime has faced criticism. Further reforms are expected in 2014.

Part 36 in arbitration

Given the potential costs implications and tactical significance, parties to arbitration proceedings also seek to invoke the Part 36 regime by making offers purporting to be or analogous to Part 36 offers.

These offers are made without any certainty that the Part 36 costs consequences will be taken into account by the tribunal, or whether they fall within the tribunal's general discretion to award costs under Section 61 of the Arbitration Act 1996 (Section 61).

The decision in *London Arbitration 17/13*

In *London Arbitration 17/13* the Tribunal decided that the Part 36 regime may apply to arbitration proceedings where the parties agree that it should do so by including appropriate wording in the offer. In this case the defendant, who had made an offer to settle, had specified an expiry

date of 21 days from the date of the offer.

The offer was described as "analogous so far as possible, to a Part 36 offer under the CPR". The offer stated:

"The Charterer [Defendant] draws the Owner's attention to the consequences of non-acceptance of a Part 36 offer, including the possibility that if the Owner [Claimant] obtains a detrimental result with respect to its Claim in the Arbitration, the Charterer will be entitled to seek interest on any sum found to be due to it at 10% above the base rate, together with indemnity costs from the Expiry Date and interest at 10% above the base rate on those costs."

In reply, the claimants denied that the offer was an effective Part 36 offer since it was expressed to be open for a limited period (which is not permitted under the Part 36 regime), and made their own offer expressed "to have the equivalent effect of an offer made under Part 36 of the Civil Procedure Rules". Over six months later the defendants sought to accept the claimants' offer.

The tribunal held that there had been an implicit agreement to apply the rules governing withdrawal of Part 36 offers, such that the acceptance by the defendants settled the case.

Lessons learned

The decision in *London Arbitration 17/13* – that parties may either expressly or by implication agree to the application of the Part 36 regime in arbitration – is not binding on other arbitral tribunals considering the status of a Part 36 offer. However, it may be persuasive.

...it is arguable that the cost consequences of Part 36 offers in appropriate cases fall within the tribunal's inherent jurisdiction to award costs at its discretion under Section 61.



In any event, it is arguable that the cost consequences of Part 36 offers in appropriate cases fall within the tribunal's inherent jurisdiction to award costs at its discretion under Section 61. If so, a tribunal may in some circumstances choose to give effect to a Part 36 offer even if the parties have not reached agreement to do so.

Parties should be careful to comply fully with the requirements of Part 36 to ensure the benefits of enhanced recovery remain available. When faced with a Part 36 offer, a party should consider carefully whether to make a Part 36 offer in reply in light of the possible cost consequences. All parties should remember that any offer made under the regime will remain open until it is withdrawn.

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hfw Conferences and events

Shipping Disputes in West Africa

HFW London

5 February 2014

Presenting: Stanislas Lequette and Xavier McDonald

2nd Annual Dubai – International Arbitration Summit

Dubai

25 February 2014

Presenting: Damian Honey
Attending: Hugh Brown

APRAG

Melbourne, Australia

26–28 March 2014

Presenting: Nick Longley
Attending: Damian Honey and Chris Lockwood

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