

# Terms and Conditions of Contract Boilerplate / Core Clauses



These clauses are of use as standard or what is known as “boiler plate” clauses in many forms of commercial contract such as distribution agreements and contracts for the supply of goods and/or services.



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### FOREWORD

These clauses are of use as standard or what is known as “boiler plate” clauses in many forms of commercial contract such as distribution agreements and contracts for the supply of goods and/or services. They are not the substantive clauses in a contract such as A sells good to B or the warranties and obligations of the parties. They are the additional provisions which usually appear at the end of an agreement. Users also need all the material principal provisions of an agreement too. Care should be taken in preparing a contract containing all or any of these clauses that they are compatible with the remainder of the contract and legal advice should be taken specific to individual circumstances. They are applicable to the law of England and Wales. For Scotland or other jurisdictions local law advice is needed. The clauses aim to be balanced between supplier and purchaser. If instead a party wants a set of clauses more to the disadvantage of the other party these should be modified so there is a negotiating position to move to rather than acceptance of the terms as they are.

A firm that resells to a third party goods that it has bought from another supplier could be left exposed to risk of legal challenge. Such a challenge might emanate from the original supplier if the reseller's core boilerplate clauses do not accurately reflect those of the original supplier. Such a position might also be the case with a firm that provides a service, say consultancy, which includes the intellectual property owned and provided to it by the original service provider

The clauses do not include provisions concerning quality of the goods or services, warranties and the obligations of the supplier and purchaser which will vary from contract to contract nor exclusion and limitation of liability which need particular care in drafting and not as such boilerplate or core clauses, although of equal importance.

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Revised March 2006 Susan Singleton, [www.singlelaw.com](http://www.singlelaw.com)

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## Clause 1

### Insolvency and Bankruptcy

If either party shall;

1. become insolvent or bankrupt or
2. have a receiving order or administration order made against it or compound with its creditors, or
3. being a corporation commences to be wound up (not being a member's voluntary winding up for the purposes of reconstruction or amalgamation), or
4. carries on its business under an administrator or administrative receiver for the benefit of its creditors or any of them, then the other party shall have the right forthwith by notice in writing to that party or to the administrator, administrative receiver or to the liquidator or to any person in whom the Contract shall have become vested to terminate the Contract.

Alternatively the party giving notice may at his sole option give such administrator, administrative receiver, liquidator or other person the option of carrying out the Contract subject to its providing a guarantee for the due and faithful performance of the Contract in such form and up to such amount as the party giving notice shall decide.

In the event of the Contract being terminated under this Clause the party giving notice shall have the right by prior notice to the other to enter that other's premises for the sole purpose of removing any item, equipment or materials which are its property and which are clearly marked and identified as such.

The exercise of either party of their rights under this Clause shall not prejudice any of their rights or obligations accrued prior to termination and the provisions referred to in the Clause relating to Termination for Breach as continuing obligations shall apply.

### Comments

The parties are not named as supplier and purchaser because it is not known which definitions are used in the remainder of the Contract but could easily be adapted.

The clause provides for:

1. The form and the amount of the security the administrator etc. is allowed to carry on the Contract as being at the discretion of the party giving notice and not to be left to agreement since this could be awkward. As it is the purchaser who it is to be hoped would be giving notice, this should be to the Purchaser's advantage.
2. The right of removing any item, equipment or materials is limited to that which is the property and marked as such and not just that which is marked as being the property of the other. One can always mark something as being your property even if it is not! Again, this should be to the Purchaser's advantage. The Clause is suitable only for English law. If the Contract is to be under any law other than English, even if Scottish, then the Clause would need amendment and legal advice should be taken accordingly.

The Enterprise Act 2002 made administrative receivership less attractive than "administration" but the procedure does still exist so remains in and is mentioned in the clause. If software is involved then it is wise to have a separate source code escrow agreement with a third party agent such as the NCC because the liquidator is permitted under English law set aside onerous clauses in contracts and indeed often will simply ignore and be legally entitled to do so, clauses

in contracts which specify certain events will happen on termination.

## Clause 2

### Force Majeure

1. For the purpose of the Contract the term Force Majeure shall mean:
  - a) war and other hostilities (whether war be declared or not) invasion, terrorist activity, act of foreign enemies, mobilisation, requisition or embargo
  - a) rebellion, revolution, insurrection, military or usurped power or civil war
  - b) riot, commotion or disorder except where solely restricted to employees of the
  - c) (Supplier) or its sub-Contractors or sub suppliers
  - d) earthquake, flood, fire or other natural physical disasters except to the extent that any such disaster is caused by, or its effects contributed to by, the party claiming force majeure
  - e) a general industrial dispute not limited to the employees of the (Supplier) or the employees of any of its sub-Contractors or sub suppliers.
2. If either party considers that any circumstance of Force Majeure has occurred which may affect materially the performance of its obligations then he shall forthwith notify the other in writing to that effect giving full details of the circumstances giving rise to the Force Majeure event.
3. Neither party shall be considered to be in default of its obligations under the Contract to the extent that it can establish that the performance of such obligations is prevented by any circumstance of Force Majeure which arises after the date of the Contract and which was not foreseeable at the date of the Contract.
4. If the performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period less than 30 days then during that period the Contract shall be considered as suspended. Upon the ending of the Force Majeure event the Contractual obligations of the parties shall be reinstated with such reasonable modifications to take account of the consequences of the Force Majeure event as may be agreed between the parties or, in default of such agreement, as may be determined by an Expert under Clause... Notwithstanding such suspension the Supplier shall use his best endeavours to assist the Purchaser in the performance of the Contract.
5. If performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period in excess of 30 days then the Contract shall be terminated by mutual consent and, subject to Clause 6 below neither party shall be liable to the other as a result of such termination.
6. If the Contract is so terminated then subject to the transfer to the (Purchaser) of the benefit referred to in sub-Clause 7 below the Purchaser shall pay to the (Supplier) such reasonable sum as may be agreed between the parties or in default of agreement as may be determined by Expert Determination in accordance with Clause... in respect of costs incurred and commitments already entered into by the Contractor/Supplier at the date of the Force Majeure notice, less the amount of any payments already made to the (Supplier) at the date of the Force Majeure notice. If the amount of such advance payments made to the (Supplier) exceeds the sum due to the (Supplier) under this sub-Clause then the (Supplier) shall repay the balance to the (Purchaser).



7. The (Supplier) shall transfer to the Purchaser the benefit of all work done by him or his sub-Contractors and sub-suppliers in the performance of the Contract up to the date of the Force Majeure notice, and if applicable it shall include the rights in any licensed and developed software and licensed firmware so far as the rights in the same have accrued to the Purchaser prior to the Force Majeure notice or will do so on the payment under sub-Clause 6 above.

### Comment

It is wise to define Force Majeure, to state what is to happen if an event of Force Majeure occurs and how the rights and obligations of the parties are to be affected. Force Majeure can affect buyer or seller. Some buyers will not want a force Majeure clause as it benefits usually the supplier so consider whether it is needed. Conversely many suppliers will want all circumstances beyond their control included which this clause does not include as a general provision.

Force Majeure is defined restrictively and it is for the supplier to establish that the event prevents him from performing the Contract. If necessary other events could be included but it is strongly suggested that “beyond the Supplier’s control” should never be used it is too broad a term where a buyer is concerned. Suppliers of course will want that provision included.

There is provided an initial period of suspension; the period could be lengthened if considered appropriate. If the force Majeure event is then past the parties rights are adjusted. It should not be left to agreement of the parties without a third party reference as otherwise the obligation is unenforceable.

If the event continues then the Contract is terminated by mutual consent; the supplier is then paid for the work he has done provided that the purchaser is given the benefit of this.

## Clause 3

### Confidentiality, Intellectual Property and Data Protection

1. Each party shall treat the Contract and any information it may have obtained or received in relation thereto or arising out of or in connection with the performance of the Contract or its negotiation or relating to the business or affairs of the other as private and confidential and neither party shall publish or disclose the same or any particulars thereof without the prior written consent of the other or as may be permitted under the later provision of this Clause.
2. The obligations expressed in sub-Clause 1 above shall not apply to any information which:
  - 2.1 is or subsequently comes into the public domain otherwise than by breach of this Clause
  - 2.2 is already in the possession of the receiving party without an accompanying obligation of confidentiality
  - 2.3 is obtained from a third party who is free to divulge the same
  - 2.4 is independently and lawfully developed by the recipient or its sub-Contractor outside the scope of the Contract.

3. So far as it may be necessary for the performance of the Contract or for the operation and maintenance of the subject matter of the Contract each party may divulge any information to be kept confidential under sub-Clause 1 of this Clause to their employees, agents and sub-Contractors on a “need to know” basis but undertake that they will take all steps necessary to ensure compliance by such employees, agents, and sub-Contractors with the obligations as to confidentiality expressed in this Clause, including without limitation incorporating such clauses into their own contracts with such persons, and will be responsible to the other party for any failure by any employee, agent or sub-Contractor to comply with such obligations whether such employee, agent or sub-Contractor was aware of them or not.

### Comments

This is an important Clause if confidential information is to be disclosed during the course of negotiations then a separate agreement covering this should be made and signed prior to the information being released known as a confidentiality or Non-Disclosure Agreement (NDA). Some companies will not want subcontractors or agents to have access to confidential information at all so changes would need be made to that effect.

Where one party is in the public sector it sensible to say by a provision in the Agreement that before disclosing information in response to a Freedom of Information Act 2000 request the other party will first notify the other. Also it may be necessary to specify exactly which parts of the Contract are confidential when dealing with some public bodies subject to FOIA.

4. All intellectual property rights in all works or supplies provided under this Contract which are written or produced on a bespoke or customised basis, including, without limitation, all future such rights when the said works are created, shall be owned by the Purchaser and the Supplier shall ensure that it executes all documents necessary to effect such ownership. Where the Supplier provides existing intellectual property right protected material to the Purchaser under this Agreement it shall disclose this to Purchaser, warrants it has the right to do so and shall fully indemnify and hold Purchaser harmless against all loss or liability arising from any third party intellectual property rights claims arising both from such existing material and in relation to any such bespoke work. Except as provided above both parties retain ownership of their pre-existing intellectual property rights protected material.

### Comment

Often a Supplier will want to own copyright, patents, design rights and trade marks in works even those customised or produced solely for a Purchaser. However as a buyer it is better that the default position in the core clauses is that the rights are owned by the buyer. If nothing is said then for copyright works under the Copyright, Designs and Patents Act 1988 such as designs for websites or computer software, the rights remain with the original author/supplier and all the buyer receives is the licence or right to use, leaving the supplier free to use the rights for other clients. Some suppliers however wish to retain IPR in customised work and many buyers are content for that to be the case as long as they have the rights to which they require.

5. Both parties shall ensure that they, their employees, agents and sub-Contractors shall observe the requirements of the Data Protection Act 1998 and any amendments or revisions thereto in the provision and use of the subject matter of the Contract and persona data processed under it and shall comply with any request made or direction given to the other which is directly due to the requirements of such Act.
6. On the conclusion or termination of the Contract both parties shall cease to use all copies of

confidential information obtained from the other except in so far as the law requires the information be retained in which event it shall be kept until such period is over and in any event kept strictly confidential under the provisions of this clause..

7. The obligations relating to confidentiality shall continue notwithstanding termination of this Agreement until such time as the information is no longer confidential in nature.

### Comment

Some clauses limit the period of confidentiality but in general wording such as this where the agreement might relate to confidential information potentially secret for years or decades the provision that it is kept secret for so long as it maintains its confidential nature is the best protection for all parties.

On termination some information may need to be retained rather than destroyed, hence the wording above. It may for example be incorporated within briefing papers for company boards which must be retained as a matter of record. For PPP (private and public partnership) contracts one party often insists that data records are maintained for their access for many years and even longer where documents are signed as deeds. Documents signed as a deed have a legal statutory limitation period of 12 years, rather than the 6 year period for other contracts so obviously such documents must be kept for at least a 12 year period.



## Clause 4

### Publicity

Neither party shall without the written consent of the other (the giving of which consent shall be at the sole discretion of that party) advertise, publicly announce or provide to any other person information relating to the existence or details of the Contract or use the other party's name in any format for any promotion, publicity, marketing or advertising purpose.

## Clause 5

### Waiver

Any failure by the (Purchaser) to insist at any time upon the performance of any of the terms, provisions or undertakings of the (Supplier) contained in the Contract or to exercise any rights thereunder shall not constitute or be construed as a waiver thereof or a relinquishment of the (Purchaser's) rights to require the future performance of any such term, provision or undertaking but the obligation of the (Supplier) with regard to the same shall continue in full force and effect.

## Clause 6

### Termination for Breach

1. 1. Either party may terminate this Contract forthwith by written notice to the other effective from the date of service of such notice if:
  - a) There is a breach by the other party of any provision of the Contract which expressly entitles the party not in breach to terminate the Contract.
  - b) There is a material or persistent breach by the other party of any other term of the Contract, which is not remediable, or if it is remediable has not been remedied within 30 days of the service of written notice to the defaulting party specifying the breach and requiring it to be remedied.
2. On termination other than for the default of the (Supplier) the Purchaser shall pay to the (Supplier) the proportion of the Contract Price payable in respect of the materials supplied and/or services performed by the Supplier up to the date of termination together with the costs of the commitments already entered into by the (Supplier) at the date of termination of the Contract less the amount of any payments already made to the (Supplier) up to the date of termination. If the amount of payments already made to the (Supplier) at the date of termination exceeds the sum due to the (Supplier) under this sub-Clause then the (Supplier) shall repay the balance due to the (Purchaser). Any such payment shall be in full satisfaction of the Supplier's rights to payment, compensation or damages in respect of the termination or the breach of Contract giving rise to the right of termination.
3. On payment of the sum due under sub-Clause 2 above the (Supplier) shall transfer to the (Purchaser) the benefit of all work done and the property in all materials supplied by the (Supplier) or his sub-Contractors or sub suppliers in the performance of the Contract up to the date of termination which benefit shall include any rights in any licensed or developed software and licensed firmware so far as the rights in the same have already accrued to the Purchaser under the Contract or will do so on the payment under sub- Clause 2 above. Where the Contract specifies that intellectual property rights in commissioned works will vest in the Purchaser on payment no such rights shall vest unless and until full payment has been made.

4. If the Contract is terminated by reason of the default of the (Supplier) the (Purchaser) shall be entitled to the like benefits and ownership of materials as are stated in sub-Clause 3 above without prejudice to any specific provision relating to ownership of intellectual property rights. The Purchaser shall only pay to the (Supplier) the proportion of the Contract Price payable in respect of the work done and /or services performed by the (Supplier) up to the date of termination after deduction of payments already made to the (Supplier), the costs reasonably incurred by the (Purchaser) in obtaining the completion of the work to be performed under the Contract by others and any damages which may be payable by the (Supplier) in respect of the termination or the breach of the Contract giving rise to the right to termination. If the amount due to the (Supplier) is less than the amount which the (Purchaser) is entitled to deduct then the (Supplier) shall pay the balance to the (Purchaser).
5. Following the termination of the Contract neither party shall have any further rights or obligations in relation to the other party other than those stated in this Clause and in the Clauses listed in sub-Clause 6 below which shall continue in full effect. Subject to sub-Clause 2 above termination shall not however affect the rights of action and remedy of the parties which shall have accrued at the date of termination or shall thereafter accrue.
6. Clauses which continue:
  - Confidentiality
  - Publicity
  - Waiver
  - Infringement Indemnity
  - Governing Law and Jurisdiction
  - Intellectual property rights
  - Property in materials
  - Conditions and warranties relating to the goods supplied and/or services provided under the Contract.

### Comments

This Clause sets out the rights and obligations of the parties if termination is due to the default of the Purchaser or to the default of the Supplier. For an IT Contract it might need to be supplemented by reference to source codes etc. The list of continuing obligations is only a guide; there may be others depending upon the terms of the particular Contract. There is no Infringement Indemnity as a Core Clause but it is assumed that for an IT Contract or intellectual property licence agreement one will be included.

## Clause 7

### Terms of Payment

1. The (Supplier) shall be entitled to invoice the (Purchaser) at the times and in the manner specified in the Contract.
2. Provided that the invoice was one which under the Contract the (Supplier) was entitled to submit the (Purchaser) shall pay (the Supplier) within the period of days specified in the Contract from the date of receipt of the invoice subject to any right of deduction which the Purchaser may have by way of setoff or abatement. If the (Purchaser) does make any such deduction then he shall notify the (Supplier) accordingly in writing with reasons.
3. If the (Purchaser) shall fail to make any payment to the (Supplier) to which the (Supplier) is entitled under this Clause after deduction of any amount which the Purchaser is entitled to deduct, then the (Purchaser) shall pay to the (Supplier), where so demanded by the Supplier, in addition to the amount not properly paid simple interest for the period in days until such payment is made. The rate of interest shall be... .. per annum over the Base Rate of the Bank of England ruling at the date when the payment became overdue.

### Comments

The details of the percentages to be paid and the events against which payment is to be made must be specified elsewhere in the Contract since they will clearly vary. This Clause allows the Purchaser to deduct amounts for defects, work not properly performed etc, otherwise payment is to be made within 30 days.

No specific rate of interest has been specified. It is possible that the purchaser could, even if the Contract is subject to the Late Payment of Commercial Debts (Interest) Act 1998, replace the statutory rate currently of 12.25% with a lower figure provided that the Contract gives the supplier a substantial remedy or deters late payment, and is fair and reasonable.

The previous CIPS clause relating to “undue delay” in payment has been omitted. If it is considered appropriate to give the unpaid seller an additional remedy then there should be a definite period stated after which the seller could exercise the right to suspend – say another 30 days. In any event breach by the Purchaser of the payment would probably be considered a material breach, giving the right to terminate if payment was not made within another 30 days. Note it is a “material breach” which is referred to in the termination Clause and not a “breach of a material term” which could be construed as a condition of the Contract and time of payment is not a condition unless expressly made so.

## Clause 8

### Time of the Essence

The time for delivery and/or completion of the work to be performed under the Contract shall be of the essence of the Contract.

### Comments

The purpose of a “time of the essence” Clause is to give the innocent party the right to reject the goods and terminate the Contract for a breach of a condition if there is not strict compliance with the time stipulated for the performance of the obligation.

Thus a delay of only one day would be sufficient in practice if there is a delay the clause will not always be invoked and the parties will escalate the matter and discuss a resolution to the delay rather than the draconian step of termination, although in some situations delay means the buyer has no use of the goods and the termination for breach of contract option is necessary. Good management of the contract and relationship between the contracting parties can help ensure disputes over timing are resolved.

It is an extremely critical clause where time is important. Although the right to reject and terminate may be useful if goods are wanted for a seasonal trade or for showing at a particular exhibition, the more common reason for the buyer rejecting is that he no longer wants the goods because the market for their re-sale has fallen and he would make a loss if he accepted them or late delivery might put him in breach of his contract with his own customer

This does not apply to a normal commercial

Contract for the supply of hardware and software or other similar Contracts where the equipment/software is for the Purchaser's own use. The Purchaser's remedy will normally be to recover damages for delay. Often the Clause will not therefore be required. If, exceptionally, there is some particular reason for requiring delivery or completion by a specific date, and if late there would be no value to the Purchaser in taking delivery/accepting completion, then the Clause could usefully be included.

Often the contract will also provide for liquidated damages for delay instead or allow liquidated damages plus a right to terminate when a certain period has passed.

Liquidated damages are a fixed sum per period of delay or a percentage of the price for each week of delay or whatever is agreed and can be simpler to enforce than bringing a court action for damages for breach of contract. They must under common law be a genuine pre-estimate of the loss suffered by such a delay. Thus the parties must calculate carefully the sum included. If that is not the case then the clause risks being held to be void as it is then what the courts call a 'penalty clause'. For that reason never had such a clause "penalty clause" but instead use the phrase "liquidated damages". They are also sometimes known as LDs.

## Clause 9

### Notices

1. Any notice or other communication which either party is required by the Contract to serve on the other party shall be sufficiently served if sent to the other party at its address as specified in the Contract either (a) by hand; (b) by registered or first class post or special or recorded delivery or (c) by facsimile or electronic mail transmission confirmed by registered, first class post or recorded delivery within 24 hours of transmission.
2. Notices are deemed to have been served as follows: delivered by hand; on the day when they are actually received, sent by post, special or recorded delivery; two working days after posting, sent by facsimile or electronic mail; on the day of transmission if transmitted before 16.00 hours on the working day, but otherwise 09.00 hours on the following working day, provided in each case that the required confirmation is sent.

### Comments

It is wise to have a notices clause of this kind.

## Clause 10

### Entire Agreement

This Contract constitutes the entire agreement between the parties concerning its subject matter, and supersedes any previous accord, understanding or agreement, express or implied. Each party confirms that it has not relied upon any representation not recorded in this Contract inducing it to enter into this Contract. No variation of this Contract shall be valid unless it is in writing, refers specifically to this Contract and is duly executed by the authorised representatives of both parties on or after the date of this Agreement.

## Clause 11

### Dispute Resolution

1. If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract the parties shall first seek to resolve the matter between themselves within a period of 14 days. The Managing Director or equivalent Person of both parties shall be the nominated officer responsible for seeking resolution to the dispute.  
If agreement is not reached either party may give the other 7 days' notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Effective Dispute Resolution (CEDR). If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be referred to Arbitration in accordance with sub-Clause 2.
2. Subject to sub-Clause 3 below if any dispute or difference which may arise between the parties in connection with or arising out of the Contract is referred to ADR mediation, but is not so settled as specified in sub-Clause 1, then either party shall give notice to the other and such dispute or difference shall be referred to Arbitration. The parties shall agree on the appointment of a single arbitrator within 14 days after the date of such notice or in default of agreement the arbitrator shall be nominated on the application of either party by the President for the time being of the Chartered Institute of Arbitrators. The Arbitration shall be conducted in accordance with the then current Arbitration Rules as published by the Chartered Institute of Arbitrator.
3. There are excluded from Arbitration any proceedings brought by one party against the other which arise out of the failure by that other party to comply with the provisions of any binding agreement setting out the terms upon which the dispute or difference was settled as a result of or following from the ADR mediation procedure referred to in sub- Clause 1 above.

### Comments

This Clause provides for a three-stage process of dispute resolution. First the parties try to resolve it themselves. The second stage is ADR mediation under the auspices of the CEDR. If in a defined time this is not successful then the dispute is referred to court. Most big British companies however have found arbitration to be more expensive than litigation, although it does have the advantage of confidentiality. Both involve solicitors, barristers and long complex hearings but in the case of arbitration the arbitrator too has to be paid and the rooms hired where it is held, unlike in court and in addition can be appealed to court in any event. Thus few big companies specify arbitration and instead give the court's jurisdiction. The third stage is court action.

Immediate reference to either the courts or arbitration is contrary to modern purchasing

practice so the first step should be to ADR although if an emergency court order to restrain infringement of intellectual property rights and similar matters is not precluded as the courts would retain jurisdiction.

As an alternative to going to court formal arbitration can be used and an alternative in place of the latter part of this clause. Arbitration is confidential and preferred in some industry sectors. Some sectors have their own arbitration schemes to which reference should be made. It is important to distinguish between mediation/ADR and arbitration. Mediation can be used before going to court or arbitration and is usually, but not always, not binding unless the parties reach agreement to settle. By contrast an arbitrator or a judge if the case goes to court decides who wins the dispute. Where arbitration is chosen alternative sub-paragraph 3 is included to deal with the problem that if the Contract contains an arbitration Clause then all disputes must go to arbitration which would prevent one party from using the summary judgement procedure in the High Court to enforce a binding agreement arrived at after mediation proceedings.

## Clause 12

### Assignment and Sub-Contracting

4. Neither party shall assign the Contract or any of its rights or obligations there under without first having received the written approval of the other party
5. The (Supplier) shall not sub-Contract the Contract or any part thereof without having first obtained the written permission of the (Purchaser) provided that this restriction shall not apply to sub-Contracts for materials or minor details or any part of the work to be performed or materials or equipment to be supplied for which the sub-Contractor is named in the Contract.
6. The (Supplier) shall be responsible for the acts, defaults and omissions of its sub- Contractors, whether approval has been given to their appointment under this Clause or not, as if they were his own and any consent given under this Clause shall not relieve the (Supplier) of any of his obligations under the Contract.

### Comments

This Clause is straightforward. Some Purchasers may be content that consent must not be unreasonably withheld.

## Clause 13

### Statutory Regulations

1. Both parties shall in all matters relating to the performance of the Contract comply with all Acts of Parliament and with all orders, regulations and bye-laws made with statutory authority by Government Departments or by local or other authorities. The cost to each party of meeting the requirements of this Clause shall be borne by that party.
2. If the cost to the (Supplier) of the performance of the Contract shall be increased or reduced by reason of the making after the date of the Contract of any new law or order or regulation having the force of law as referred to in sub-Clause 1 above or of the making of any change to any such law, order or regulation in force at the date of Contract that shall be applicable to the Contract (other than any tax on profits), the amount of such increase or reduction shall be paid to or repaid by the (Supplier) as appropriate.



## Clause 14

### Health & Safety

1. The (Supplier) undertakes that he and his employees, agents and sub-Contractors will at all times comply with all health and safety requirements relating to the carrying out of the work under the Contract. Such requirements include in addition to statutory laws and regulations any codes of practice and British Standards or their equivalent relating to Health or Safety which may be applicable to the performance of the Contract.
2. When the (Supplier) his employees, agents or sub-Contractors are required to carry out work on the (Purchaser's ) premises then the (Supplier) undertakes that in carrying out the work they shall additionally comply with all the (Purchaser's ) rules and practices relating to safety and the conduct of persons working on the (Purchaser's ) premises.

### Comments

This Clause is a useful addition. It may be appropriate to strengthen the provision on environmental protection but care needs to be taken not to try to be too specific and run the risk of omitting some important element.

## Clause 15

### Law

The construction, performance and validity of the Contract shall in all respects be governed by the laws of England and Wales.

## CLAUSE 16

### No Third Party Rights

Subject to clause, a person who is not a party to this Agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999 ("the Act"). Where any clause of this Agreement entitles any person to enforce any term of this Agreement under the Act, the parties reserve the right to vary that term or any other term of this Agreement without the consent of that person.

### Comment

The Contracts (Rights of Third Parties) Act 1999 enables third parties named under a contract or beneficiaries under it to sue for breach of contract (although not to recover more than the original contracting parties). This can be excluded by an express contract term as here. Most parties wish to exclude the act. Sometimes those taking a licence of software or buying a business for example would like third parties such as other group companies to have rights to sue and either specifically set out such third party rights or ensure the Act is not excluded at all.

## Clause 17

### Severance

No clause, sub-clause or their relevant parts in this Contract may be held to be unenforceable or void except for the judgement of a court of competent jurisdiction. Should any clause, sub-clause or part thereof be so held to be unenforceable or void the remaining clauses, sub-clauses and their relevant parts shall remain in full force and effect to the extent that they are capable of remaining operative having taken account of the said court's judgement.

### Comment

Unfair Contract Terms Act 1977 and the Competition Act 1998 and article 81(1) and other statutes have the effect of rendering void and unenforceable contract clauses in particular cases.

Often it is helpful to include a provision saying the rest of the Agreement will then stand. However, sometimes in a document with exclusivity restrictions or non-competition obligations for example the parties would prefer termination in such case so always consider whether a different result in such a case should be expressed.

## Clause 18

### Agency

Except as expressly permitted by this Contract, neither party shall in any circumstances hold itself out as being:-

- (a) the servant or agent of the other party; or
- (b) authorised to enter into any contract on behalf of the other party or in any way to bind the other party to the performance, variation, release or discharge of any obligations.

### Comment

This clause is appropriate to ensure no party is held the agent of the other. However if the agreement is indeed an agency agreement or employment contract or one party can bind the other the clause is clearly completely inappropriate and should not be used.

## Clause 19

### Environment

Supplier warrants that prices for alternative products, where such products exist, which are free from harmful toxins, chemicals or gases, or which are manufactured from recycled material, and which are in any case proven to be less detrimental to the environment. Supplier agrees to provide goods/services which accord with the Purchaser's policy on the environment. The Supplier shall, when working at the Purchaser's premises, perform the Contract in accordance with the Purchaser's environmental policy, which is to conserve energy, water, wood, paper and other resources, reduce waste and phase out the use of ozone depleting substances and minimise the release of greenhouse gases, volatile organic compounds and other substances damaging to health and the environment.

### Comment

Whilst not legally necessary buyers with a concern for the environment or where required by other contracts to which they are party which affect the agreement or which require them as supplier or purchaser to impose on other parties in the contract chain may wish to impose environmental clauses such as those appearing above.

## Clause 20

### Conflicts of Interest, fraud and Competition Law

- (i) The Supplier shall take all appropriate steps to ensure that neither it nor any employee, servant, agent, supplier or sub-contractor is placed in a position where there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Supplier or such persons and the duties owed to the Purchaser under the provisions of the Contract. The Supplier shall disclose to the Purchaser full particulars of any such conflict of interest which may arise.
- (ii) The Supplier shall safeguard the Purchaser's funding of the Contract against fraud generally and, in particular, fraud on the part of the staff, or the Suppliers' directors. The Supplier shall notify the Purchaser immediately if it has reason to suspect that any fraud has occurred or is occurring or is likely to occur.
- (iii) The Supplier warrants that it has engaged in no price fixing, bid rigging, illegal price information exchange agreement or other arrangement in breach of UK, EU or other competition laws relevant to the Contract or arrangements between the parties.

### Comments

Buyers in the public sector are more likely than others to want these clauses, although all buyers particularly for bigger tenders may benefit from such provisions. At the least the provisions may seek to ensure the Supplier enquires of its staff whether any such arrangements are in place. Given the Extradition Act 2002 makes it easier for UK buyers and suppliers to be extradited to the US and jailed for up to 10 years for breach of US law and the UK Enterprise Act 2002 makes UK price fixing and bid rigging a criminal offence it is sensible to take every precaution against this occurring. Some buyers purchase software to help them track patterns of pricing to see if they are victims of price fixing arrangements in contracting.

## Clause 21

### Discrimination

The Supplier shall not unlawfully discriminate within the meaning and scope of any law or regulation relating to discrimination (whether in race, gender, religion, disability, age, sexual orientation or otherwise) in employment. The Supplier shall take all reasonable steps to secure the observance of this provision by all servants, employees or agents of the Supplier and all suppliers and sub-contractors employed in the execution of the Contract.

### Comment

Whilst such a clause as this on discrimination is legally unnecessary many businesses see it as part of their corporate and social responsibility to highlight such issues and particularly public sector bodies where they are purchasing often have clauses similar to this.

## Clause 22

### TUPE

Where the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply in respect of the award of the Contract the undertaking concerned (or any relevant part of the undertaking) shall transfer to the Contractor on the commencement of the Contract. For 6 months before the Contract expires the Supplier shall give to the Purchaser all employee information necessary for TUPE. The Supplier shall allow the Purchaser to use the information for the purposes of TUPE and of re-tendering. The Supplier will co-operate with the re-tendering of the Contract by allowing the body to whom the new contract is awarded ("the Transferee") to communicate with and meet the affected employees and/or their representatives.

The Supplier agrees to indemnify the Purchaser fully and to hold it harmless at all times from and against all actions, proceedings, claims, expenses, awards, costs and all other liabilities whatsoever in any way connected with or arising from or relating to the provision of information above.

The Supplier agrees to indemnify the Purchaser from and against all actions, proceedings, claims, expenses, awards, costs and all other liabilities (including legal fees) in connection with or as a result of any claim or demand by any employee or other employee or person claiming to be an employee on any date upon which the Contract is terminated and/or transferred to any third party ("Relevant Transfer Date") arising out of their employment or its termination whether such claim or claims arise before or after the Relevant Transfer Date.

### Comments

In 2006 new regulations protecting employees on transfers of businesses/undertakings (TUPE) came into effect. DTI guidance notes on the 2006 TUPE regulations are at

<http://www.dti.gov.uk/er/individual/tupeguide2006regs.pdf>. The Regulations are The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246). They implement Council Directive 2001/23/EC on the approximation of the law relating to business transfers. They revoke the Transfer of Undertakings (Protection of Employment) Regulations 1981.

Many new contracts have no employee transfer issues at all and a TUPE clause is not needed. However some particularly outsourcing arrangements do and this clause should provide some protection for the Purchaser. TUPE issues are complicated and specific legal advice should be sought and a tailored clause drawn up at the time. The 2006 regulations extend protection further.

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