

Understanding Contracts for Non-Legal Professionals

A large, faint, circular watermark logo is centered on the slide. It features the letters 'CMG' in a bold, sans-serif font in the center. Surrounding the letters are several concentric circles, and between these circles are segments of a circular path, creating a maze-like or target-like appearance.

CMG

Darren Isaacson

© Copyright Darren Isaacson 2026

Darren Isaacson



CMG Training
The Irish Institute of Professional Education

- Trained in Arthur Cox 2004-2007
- Qualified solicitor in 2007 and worked in Arthur Cox until 2013
- Seconded to Vodafone 2006-2007
- Arthur Cox Corporate Department 2007-2008
- Arthur Cox Construction Department 2008-2013
- ESB (on secondment) 2011-2013
- ESB Senior Commercial Solicitor 2013-2016
- Mercury Engineering Group Head of Legal 2016 – present
- darren_isaacson@yahoo.co.uk

Disclaimer



CMG Training
The Irish Institute of Professional Education

- This seminar has been written in general terms as a guide only and therefore cannot be relied on to cover specific situations. This seminar does not constitute, or purport to constitute, legal advice, nor do any slides or documents provided with it. Application of the principles set out will depend on particular circumstances involved and professional advice should be obtained before acting or refraining from acting or otherwise relying on any of the contents of this seminar.
- The presenter accepts no duty of care or liability for any loss occasioned to any person acting or refraining from acting as result of any material or statement in this seminar.

The logo features the letters 'CMG' in a bold, sans-serif font, centered within a circular area. This central area is surrounded by a series of concentric circles, which are further defined by a complex, maze-like pattern of lines that spiral outwards. The entire logo is rendered in a light teal color against a darker teal background.

CMG

Introduction

Why contracts are so difficult to read and write



CMG Training
The Irish Institute of Professional Education

Writing well is difficult

Writing contracts well is harder

Every profession has its own language and terminology

Legalese we need in a contract

Legalese we do not need in a contract (even though lawyers understand it)

The law is complex (but could be expressed simpler than it is)

Why contracts are so difficult to read and write



CMG Training
The Irish Institute of Professional Education

Lack of clarity (i.e. clause does not actually make sense)

Lack of clarity (i.e. clause makes sense but is unnecessarily convoluted) Poor formatting / lack of 'user-friendliness' / lack of appreciation of visual impact of lists / 'the small print' (literally!)

Massive unbroken paragraphs

Massive unbroken sentences

Some lawyers like to 'sound like lawyers' without caring about functionality

Why contracts are so difficult to read and write



CMG Training
The Irish Institute of Professional Education

Young lawyers learn from older lawyers

Lawyers have to read lots of old cases with old language and textbooks that use this old language and just 'get used to it'

Enforcing contracts - case law and judges' interpretation

Cynicism - make it difficult/unreadable for commercial purposes?

Why contracts?



CMG Training
The Irish Institute of Professional Education

- A contract is a promise to be legally bound
- Unlike a favour, it is enforceable
- Some transactions have to be in writing – e.g. land, employment
- Otherwise, contracts can be oral, but lacks certainty/clarity needed for enforceability
 - court will have to 'find' the contract
- If insufficient clarity on key points (not all points) contract might be void/'set aside' for uncertainty (3 Ps)

Why contracts?



CMG Training
The Irish Institute of Professional Education

- Express the commercial intention of the parties in clear unambiguous language in a manner that is legally binding upon them
- Certainty
- Guide administration of the contract

Why contracts?



CMG Training
The Irish Institute of Professional Education

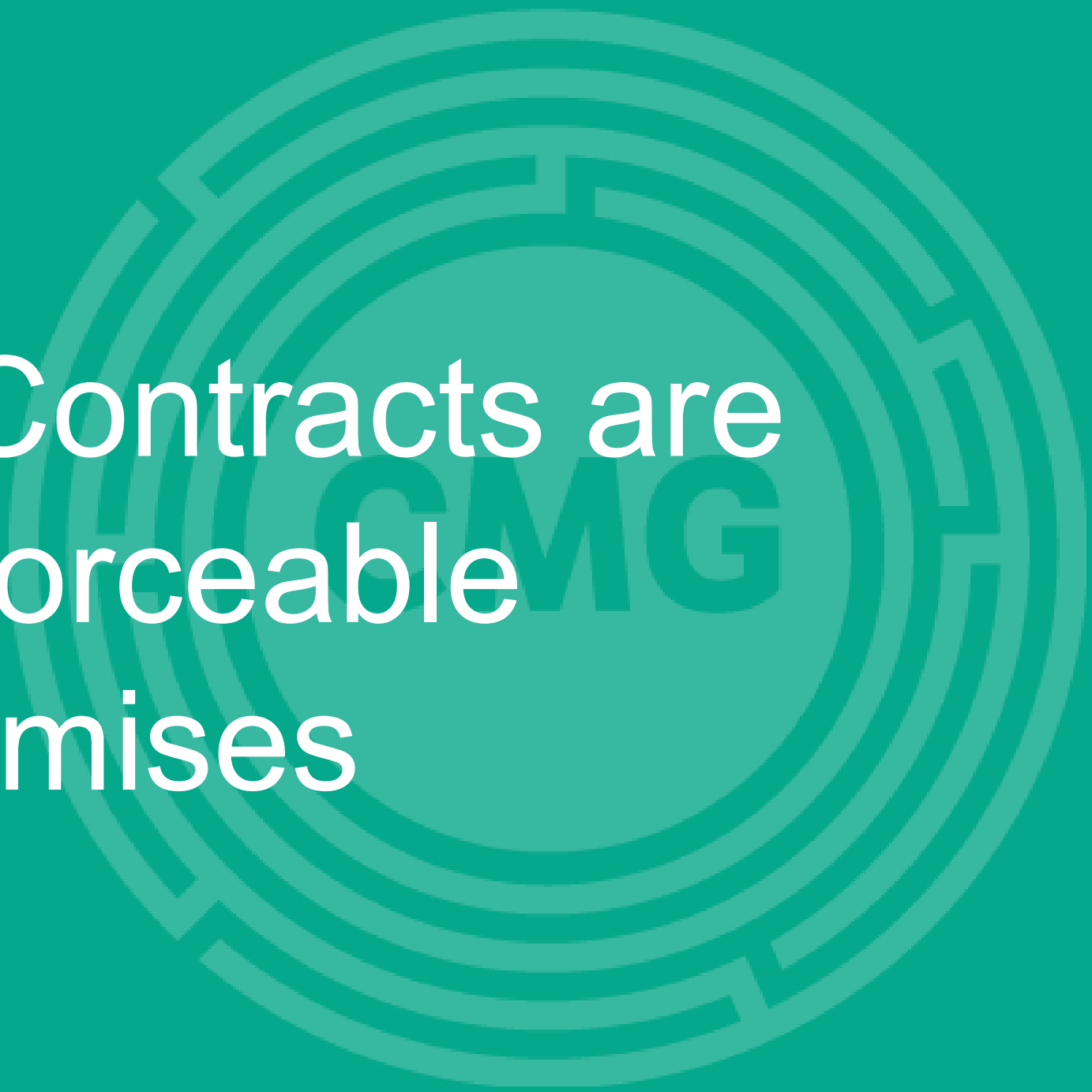
- Resolve disputes/negative situations that arise during performance of the contract, or at least express the means to resolve the dispute
 - **Foresight assists – figure out what can go wrong and resolve it before it happens!**
 - **This is why lawyers are often prophets of doom...**
- Clarity should prevent parties going to court
- But if dispute goes to court, judge will interpret what the contract actually says, not what it 'meant' to say

Why contracts?



CMG Training
The Irish Institute of Professional Education

- Include terms that the law would not otherwise provide for (e.g. how payment is made, caps on liability, contract procedures, standards of care or delivery of a product, indemnities etc)
- You can pick and choose which areas of legislation apply (apart from those that you can't contract out of!) – e.g. interest for late payment



1. Contracts are
enforceable
promises

Enforcing Contracts



CMG Training
The Irish Institute of Professional Education

- Ultimately involves going to court (ignoring alternative methods of dispute resolution)
- Judges read and interpret contracts according to the rules of interpretation
- Many drafting conventions arise because of these rules
- So some familiarity with them is important
- Judges also read and interpret based on precedent, i.e. previous case law

- 
1. Contracts are enforceable promises
 2. We go to court to enforce them
 3. Judges interpret contracts using the rules of interpretation and precedent

Lawyers and drafting



CMG Training
The Irish Institute of Professional Education

The lawyer's 'pure' function in contract negotiation is to draft the intention of the parties in legal text that is not open to interpretation.

Like a computer programmer/coder!

In 'pure' model, lawyer does not care what the commercial terms are
– the role is simply to ensure the contract 'works'

Lawyers and drafting



CMG Training
The Irish Institute of Professional Education

Because he/she is used to reading and drafting contracts, they are more familiar with the issues that arise (outside of price/quality/delivery etc). But in the 'pure' model, they still do not make the decisions, simply advise on the potential consequences of different routes

This is NEVER the reality. The lawyer also fights for the best commercial deal on the contract, so as to achieve the objective of her client or the organisation she is a part of

Lawyers and drafting



CMG Training
The Irish Institute of Professional Education

The law is complex and a certain amount of complexity is required

Lawyers also know the rules of interpretation and precedent

Lawyers draft on the basis of “what will happen if this goes to court” (sometimes forgetting that a contract’s audience are also the parties to the contract)

Lawyers and drafting



CMG Training
The Irish Institute of Professional Education

- Many clauses exist to deal with the consequences of previous decisions
- 'Boilerplate' clauses
- Other standard clauses in most contracts
- Standard expressions used in all types of clauses
- So lawyers are trying to capture the intention of the parties in a way that will be enforced in the courts

- 
1. Contracts are enforceable promises
 2. We go to court to enforce them
 3. Judges interpret contracts using the rules of interpretation and precedent
 4. Lawyers understand these rules...
 5. ...so are drafting to (i) capture the intention of the parties (ii) in a way that will be enforceable by judges

Drafting and Reading



CMG Training
The Irish Institute of Professional Education

- We are trying to draft our ideas / intentions / principles using words and expressions
- We need to know what these principles are first before we try to read/draft so that we have a yardstick to measure whether the clause achieves the certainty required...
- ...taking into account the rules of interpretation
- We also need to format the document and draft it, so as to be (i) enforceable and (ii) as user-friendly and simple as possible (though no more). This last goal has traditionally been neglected.
- But...

The Plain English Movement



CMG Training
The Irish Institute of Professional Education

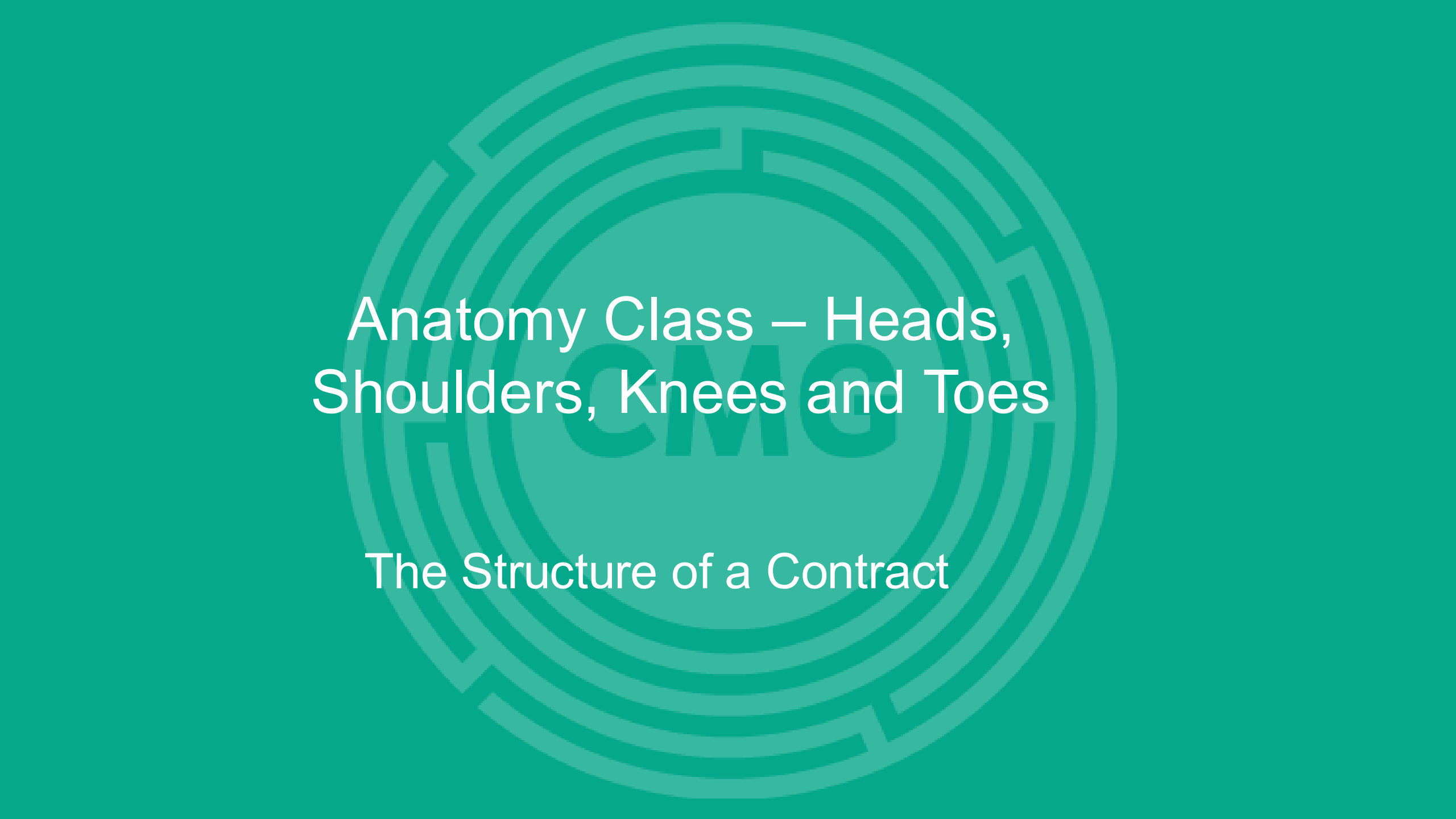
- Started in the 1970s and increasingly popular
- Rules and principles to combat antiquated and unnecessarily dense and unreadable drafting
- In particular for consumer contracts, but principles should be, and are increasingly being, used in other contracts
- We will look at some of these principles today

Contents



CMG Training
The Irish Institute of Professional Education

- Structure of Contracts
- Basic Principles of Interpretation
- The Main 'Types' of Clauses
- Presentation and Reading 'Tips'
- Drafting using plain English
- This will 'bypass' much of the theory that lawyers learn before they even start to look at contract and learn to draft



Anatomy Class – Heads, Shoulders, Knees and Toes

The Structure of a Contract

Basic Contract Structure



CMG Training
The Irish Institute of Professional Education

Front page

Table of Contents

Commencement Section

Parties

Recitals

Basic Contract Structure



CMG Training
The Irish Institute of Professional Education

Operative Provisions

- Definitions

- Interpretation

- Operative clauses (the deal)

- Standard non-boilerplate provisions

- Boilerplate

Schedules/Appendices/Annexes etc (also operative!)

Execution Block

Basic Contract Structure



CMG Training
The Irish Institute of Professional Education

With very few exceptions – form does not matter

But over time contracts take standard or 'traditional' form

Alternative Structures – short form, letters, emails, oral contracts

If key ingredients are present the courts, through the common law system of judge made law, will 'find' the other terms of the contract if the matter comes to dispute

Front Page



CMG Training
The Irish Institute of Professional Education

- Date of Contract
- Name of Parties
- Title of Contract
- Law firm/company details
- "Subject to contract/contract denied/draft"

Table of Contents

Automatic numbering and clauses

Cross-referencing

“Not used”

Drafting Tip! Easy as A B C – inserting new clauses



Commencement and Execution Block



CMG Training
The Irish Institute of Professional Education



Commencement and Execution Block



CMG Training
The Irish Institute of Professional Education

- Contract / Under hand or Deed?
 - Consideration
 - Liability Period
 - Form of execution block

Commencement and Execution Block



CMG Training
The Irish Institute of Professional Education

- Date [Admin Tip!]
 - Date last party executes!
 - (Crossing out mistakes/handwritten amendments – all signatories must initial / side letters / letter of amendment or variation)
 - Effective date/commencement/past/present/future

Commencement and Execution Block



CMG Training
The Irish Institute of Professional Education

- Date is evidential but not conclusive – legal ingredients of a contract may have been present beforehand, or may not be present at date stated
- DO NOT DATE CONTRACT BEFORE SIGNING – ONLY WHEN LAST PARTY SIGNS

Detour : Ingredients of a Contract



CMG Training
The Irish Institute of Professional Education

- Offer
 - Not a willingness to deal/negotiate
 - Definite promise to be bound if accepted.
 - Need to withdraw before acceptance if no longer wish to be bound
- Acceptance of offer
 - A different term is a counteroffer
 - unequivocal and communicated (i.e. not expressly rejecting an offer does not mean acceptance)
 - performance

Detour : Ingredients of a Contract



CMG Training
The Irish Institute of Professional Education

- Consideration
 - **Money**
 - **Delivery of Goods/Service**
 - **Exception is Deeds**
- Capacity / Authority (minors, mental incapacity, authority under company constitutional documents i.e. '*vires*')
 -

Detour : Ingredients of a Contract



CMG Training
The Irish Institute of Professional Education

- . Certainty of fundamental terms (e.g. 3 P's – parties, price, product)
- . But all terms need not be certain – if not the court will seek to 'find' the terms through rules of interpretation.

Detour : Ingredients of a Contract



CMG Training
The Irish Institute of Professional Education

- Intention to create legal relations (i.e. commitments that are enforceable by a court)
 - *Blue v Ashley [2017] EWHC 1928, 26 July 2017*
 - Investment banker and Sports Direct founder – night of drinking (8 pints each!)
 - Discussed remuneration if share price doubled – banker sued
 - *“an evening of drinking in a pub...is an unlikely setting in which to negotiate a contractual bonus arrangement”*

Detour : Ingredients of a Contract



CMG Training
The Irish Institute of Professional Education

- Purpose of meeting was introductions, and evidence showed conversation was jocular in nature and the suggestions re remuneration were "*banter*"
- Hence "Letter of Intent / Subject to Contract/ Contract Denied"

Parties



CMG Training
The Irish Institute of Professional Education



Parties



CMG Training
The Irish Institute of Professional Education

- **Formal company name**
 - **Correct company name**
 - **Same name as execution block!**
- **Registered Number**
 - **Only source of continuity – other details can change (think name change in recessions!)**
- **Registered Address**
- **Trading Name**
- **‘permitted successors and assigns’**
 - **If business bought, sold, merged, spun out**
 - **If contract is assigned to other party**

Parties



CMG Training
The Irish Institute of Professional Education

- **Equivalent information if partnership of sole trader/individual**
- **“of the first part” generally no longer used**
- **Defined term of each party (Exception to usual gathering of all definitions in “one source of truth”)**
- **(Each a “Party” and together the “Parties”)**

Recitals



Recitals



- Recitals, Background, Context, Preamble
- “Whereas” in older documents
- Useful to get an ‘English language’ version of intention of deal
BUT...
-not legally binding unless expressly stated to be so

Recitals



CMG Training
The Irish Institute of Professional Education

- **Therefore best practice not to put operative provisions (i.e. obligations) into the Recitals**
- **Sometimes provides for definitions – best practice is to still provide these in Definitions section of contract and refer back to the Recitals**
- **Absolutely no legal requirement for Recitals but they are customary (and often negotiated)**

Schedules

- **Used to ‘house’ blocks of information that might otherwise break the flow of the contract**
- **May be legal provisions/clauses, may be commercial, technical, descriptive, formulas**
- **Generally are operative provisions and are part of the contract BUT...**

Schedules



CMG Training
The Irish Institute of Professional Education

- ...parties may use them simply to display or exhibit something (e.g. another contract that a parties may be obliged to enter into like a bond/guarantee).
- Sometimes after execution block, sometimes before – irrelevant
- Many different labels – again irrelevant (schedules, appendix, annex, exhibit, addendum, 'Numbered Document' etc)
- Schedules may have different priority - parties should create rules (or else allow one party to determine). If not, a judge may end up deciding

Schedules



CMG Training
The Irish Institute of Professional Education

- **Watch out for inconsistent provisions**
- **Inconsistent terms – ideally full review of all documentation is done, in practice very difficult because of different competencies and inability of different sets of professionals to understand each others language and field of knowledge**
- **Ensure everyone knows who is responsible for what schedule**

Schedules



CMG Training
The Irish Institute of Professional Education

- **Also reality of time**
- **Oil and gas industry ‘contract engineers’**
- **‘Hidden’ legal type clauses in technical documents – if they are ‘additional’ provisions they are not necessary inconsistent with contract and constitute real obligations**

Operative Provisions



CMG Training
The Irish Institute of Professional Education

- These are all 'clauses' – they can be split into types/classification to assist with understanding but descriptions are arbitrary, not hard and fast
- Definitions
- Interpretation

Operative Provisions

- **Conditions Precedent**
- **Performance Clauses (what to be done, when to be done by, methods to be used)**
- **Payment clauses – think of Performance and Payment clauses as ‘the deal’**

Operative Provisions



CMG Training
The Irish Institute of Professional Education

- Standard, but non-boilerplate provisions (usually negotiated)
 - Limitations and Exclusions
 - Representations, warranties, undertakings
 - Termination clause
 - Insurances
 - Liquidated Damages/Service Credits
- Boilerplate provisions (rarely heavily negotiated, but important)
- Implied Terms (the ones not written in the contract!)

Operative Provisions : Express and Implied Terms



CMG Training
The Irish Institute of Professional Education

- **Express Terms – those written into a contract**
 - A 'representation' is not a statement which attracts liability for breach, it is rather a statement used/relied upon to induce a party to enter into a contract. There is a body of law surrounding representations, which can generally lead to the voiding of the contract.
 - A 'Warranty' is a statement of fact at a time that can be relied upon, and attracts damages if not true
 - An 'Undertaking' is a legal promise to do something in the future, again attracts damages

Operative Provisions : Express and Implied Terms



CMG Training
The Irish Institute of Professional Education

- Implied Terms – those terms that the law will imply into a contract
 - Usage or custom in an industry
 - Previous course of dealings between parties
 - Intention of the parties (i.e. “in fact”)
 - Business efficacy (i.e. necessary) and ‘officious bystander test’ (so obvious it goes without saying)
 - Must not contradict a clear term of the contract
 - Examples – co-operation, non-prevention, right to terminate an indefinite contract, discretion must not be exercised arbitrarily

Operative Provisions : Express and Implied Terms



CMG Training
The Irish Institute of Professional Education

- Common law – e.g. where necessary characteristic of a type of contract. Sometimes called “characteristic terms”
- Statute (e.g. fit for purpose, title in goods) (NB: Consumer law)
- Some statutory terms can be removed by express terms, some not (e.g. compliance with certain laws)

Operative Provisions : Express and Implied Terms



CMG Training
The Irish Institute of Professional Education

- Though often you see contractual obligation to comply with the law. This makes the breaking of a law not just an illegal act, but also a breach of contract, usually allowing a party to terminate. Often coupled with an indemnity to protect the innocent party of any consequences of the illegal act.
- One can remove fitness for purpose requirement in commercial negotiations (not consumer) but not e.g. Health and Safety / Construction Contracts Act 2013. Depends on legislation.
- Can often depend on whether contracting as a consumer or business to business

The background of the slide features a large, light teal circular maze. In the center of the maze, the letters "CMG" are displayed in a bold, sans-serif font, matching the background color. The maze consists of multiple concentric rings with various openings and dead ends, creating a complex geometric pattern.

Interpretation Clause and Principles of Interpretation

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- Main purpose – reduce repetition – shorter document and (supposedly!) easier to read
- Avoids ambiguity
- Two parts, (i) a 'glossary' and (ii) general interpretive provisions
- Like variables in a maths equation or a computer programme
- Can be a word or a phrase
- Usually in first clause, sometimes entire schedule at end

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- Almost always in uppercase – signals to reader that a defined term exists
- Best practice – put all defined terms in definitions clause – even if only a reference to a clause where the definition exists
- Words used should reflect subject matter. Sometimes a bad idea to give an ‘industry’ term a different meaning in a contract – although internally consistent, will confuse people who have to use a contract – e.g. “Client” in construction industry is usually the Contractor’s employer, so don’t refer to the Employer’s tenant

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- It matters if word is in upper case or not - sometimes the same word can be used in lower case to mean something different e.g.
 - “The contractor shall be obliged to carry out the instructions of the Contractor on Site”
 - “the Contractor shall be obliged to carry out the instructions of the contractor on Site”
- Hence the pedantry of lawyers!

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- Likewise important not to use different terms to describe the same thing, e.g. the “Contract” and the “Agreement”. Use one or the other (unless they mean different things, in which case, make sure to use them correctly)
- Alphabetical order for user friendliness
- Best practice is not to put operative provisions into the definitions, they should be concepts only – though often happens for the comfort of the parties

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- Some expressions are best left undefined – particularly if words have a particular meaning within a field of competence e.g. finance, technology, engineering – though if so, useful to state that as the definition if used upper case
- Don't use upper case terms if there is no definition – likewise acronyms (can be a particular issue for techies and engineers!)

Interpretation Clause - Definitions



CMG Training
The Irish Institute of Professional Education

- Definitions/use of upper case words should hold true for all documents making up the contract, e.g. specifications, programmes, etc. Rarely done...
- One idea is not to review all at once, but review definition and jump to relevant clause, where issue is generally confined to one or two clauses (e.g. “Confidential Information” and “Confidentiality” clause; Force Majeure etc (or look at such clauses first?))

Some Typical Definitions

- Affiliate, Group Company, subsidiary, holding company etc
 - Usually by reference to legislation and/or shareholding and/or control (often argument if 50% shareholding or less, because no control in that instance)
- Business/Working Day/Banking Day vs. 'day' ; week, month, year etc – important for periods of time in contract
 - Convention (for no reason!) – often put in lower cause
 - Banks open on Saturday now. Is this a banking day? Be careful!

Some Typical Definitions



CMG Training
The Irish Institute of Professional Education

- Business Hours – same point as above. Online too?
- Commencement/Effective Date – can be different from contract signing date. Used with commencement clause. Can also be used for others (e.g. Change in Law clause)

Some Typical Definitions

- Confidential Information
 - Long list of every imaginable form of media, plus a catch all
 - One issue is whether should be physically labelled/referenced as 'confidential' or not. But human error - safer to not have this as a condition of confidentiality
 - But better to not say *everything* is confidential when clearly not the case, courts have struck such a clause out as being too wide to be enforceable (*Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617). So include reference to 'by its nature is confidential', or 'confidential to a reasonable business person' – gives final discretion to court, therefore unlikely to be struck out in its entirety

Some Typical Definitions

- Force Majeure
 - Should be defined as is not an English word – otherwise can be void for uncertainty
 - *Electrical and Associated Industries (Cardiff) Ltd v Patley [1953]1 WLR 280*
 - Will deal with this in FM clause discussion later

Some Typical Definitions



CMG Training
The Irish Institute of Professional Education

- Intellectual Property Rights
 - Also “Foreground” and “Background” IP Rights
 - i.e. IP Rights owned prior to the contract and/or developed independently of the contract
 - Foreground might be jointly owned, owned by one party (the consultant, or the one with negotiating clout)
 - Moral Rights?

Interpretation



CMG Training
The Irish Institute of Professional Education

- Purpose of these clauses is to clarify the parties' intentions by assisting in the interpretation of the contract.
- Sometimes the clauses modify rules/principles that exist in the common law for interpreting contracts
- These 'rules', whether in common law or the modifications in the interpretation clause, are background assumptions for lawyers

Interpretation



CMG Training
The Irish Institute of Professional Education

- We will look at the common rules of interpretation to gain insight
- Lawyers/judgements often use the phrase 'construction' of the contract

Interpretation

- In general, only arises where there is confusion
- Judges only care about what the contract states!
 - General rule is inadmissibility of all other evidence, and 'entire agreement' contract boilerplate clause generally reinforces/strengthens this rule
 - Even if there are limited circumstances where what lawyers call 'extrinsic' evidence may be brought in, better practice is to draft with sufficient clarity that such evidence is not required

Interpretation



CMG Training
The Irish Institute of Professional Education

- Overarching principle of rules of interpretation is to try to determine the intent of the parties with respect to the provision at issue at the time the contract was made.
- Question One – is the contract ambiguous?
- Before answering – Question Two - what is ambiguity?
- A provision is not ambiguous just because the parties disagree on its meaning

Interpretation



CMG Training
The Irish Institute of Professional Education

- Principle - a contract or provision is ambiguous if it is reasonably susceptible to more than one interpretation
- In court – lawyers will try to argue something is or is not ambiguous – so unambiguous, precise drafting matters!
- Court won't adopt a meaning that produces an absurd result

Interpretation



CMG Training
The Irish Institute of Professional Education

- View of an objective person...
- ...with all the background knowledge of parties...
- ...in the particular industry/business/context they work in
- For example if a term is used that is known in an industry but not by a layperson

Interpretation



CMG Training
The Irish Institute of Professional Education

- Back to Q.1 – Is the provision ambiguous?
- If NO – court will ONLY look to the text of the contract (the “four corners rule”)
- Use ‘manifested intent’, not ‘actual intent’ – the intent as manifested in the words used.
- Equity and fairness irrelevant

Interpretation



CMG Training
The Irish Institute of Professional Education

- If YES
- Parol/extrinsic evidence can be used (i.e. emails/negotiations/prior drafts/heads of terms etc)
- But there are other rules which we will touch upon later (e.g. *contra preferentum*)

Interpretation



CMG Training
The Irish Institute of Professional Education

- Loyalty to the text
- Words used are the starting point, and usually the end point, of interpretation
- *“the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage”*

(Bank of Credit and Commerce International SA (in compulsory liquidated) v Ali [2001] UKHL 8, Lord Hoffman at para. 8)

Interpretation



CMG Training
The Irish Institute of Professional Education

- *“the clearer the natural meaning the more difficult it is to justify departing from it”* (even it departing from it leads to a more commercially common sense result)

(Arnold v Britton [2015] UKSC 36)

Interpretation

- Whole Contract Approach
- This means that the document will be construed as a whole, in its context. When interpreting one clause, all the other clauses of the same contract must be considered. A seemingly confusing clause, or phrase, may make sense in the context of the overall document (or even the rest of the clause)
- But better not to rely on this!
- Compare:
 - *“The Contractor shall be deemed to be fully aware of all ground and subsoil condition on Site. No instruction of the Employer shall entitle the Contractor to time or cost”*
- with:
 - *“The Contractor shall be deemed to be fully aware of all ground and subsoil condition on Site. No instruction of the Employer in relation to the Site shall entitle the Contractor to time or cost”*

Interpretation

- Context: Courts will look at surrounding circumstances
- The wider *context* of the deal is admissible as evidence of meaning provided it was known or reasonably available to both parties. A reasonable business-person reads the text and negotiates a contract in the context of certain background information, market realities etc so the judges will take this into account. This context is not the same as ‘other documents’ not forming part of the contract, however.
- Ambiguity is not required to bring in this rule – i.e. no ‘plain meaning rule” (*Westminster City Council v National Asylum Support Services [2002] UKHL 38*)

Interpretation



CMG Training
The Irish Institute of Professional Education

- Business Common Sense
- *“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense”*

(Antaios Compania SA [1985] AC191)

- Not helpful – as seems to flout earlier rules!
- BUT: *“a court should be slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed... The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience has shown that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party”*

Arnold v Britton

Recent UK Supreme Court case (*Rainy Sky*) implies that it is most useful where there are two possible interpretations of a clause, then business common sense has a role to play.

Interpretation



CMG Training
The Irish Institute of Professional Education

- Reasonableness
- Again, the parties can agree something unreasonable or commercially ludicrous. But the courts should be hesitant to embrace something that is unreasonable.
- The key principle is that the more unreasonable the proposition, the clearer the drafting ought to be.

Interpretation



CMG Training
The Irish Institute of Professional Education

- *“The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear”*

L Shuler AG v Wickman Machine Tool Sales [1974] AC 235

Interpretation Clause



CMG Training
The Irish Institute of Professional Education

- “Correcting an Error
- The legal action that seeks to amend a contract is “rectification”. There has to be a genuine mistake – whether by one or both parties. If one party knows the other has made a mistake that will count heavily against it – close to a fraudulent act.
- However – these only end up in court because the parties are debating it, as parties can amend contracts by agreement whenever they want (subject to any processes laid out in the agreement itself, e.g. variation clauses)

Interpretation Clause



CMG Training
The Irish Institute of Professional Education

- Inconsistent Provisions
- Greater weight given to individually negotiated terms over 'template' clauses
- A more precise clause is likely to take precedence over an imprecise one
- Lawful effect (the interpretation giving a legal rather than an illegal effect will take precedence)
- Excluding or modifying legal remedies – strict interpretation
 - *“In construing...a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut that presumption”*
 - Gilbert-Ash (Northern) Ltd v Modern Engineering

Interpretation Clause

- *Contra Proferentem* – deriving from Latin, ambiguity is determined *against* the party that drafted the contract. Must be ambiguous in the first place. This might be used instead of allowing parol evidence to resolve a conflict.
 - In consumer contracts, legislation has bolstered this position (e.g. Unfair Terms in Consumer Contracts)
- ‘Market practice’ – but evidence needed and in practice difficult
- ‘Negotiations’ – not relevant other than for rectification. But may prove relevant background information known/available to both parties or to show commercial purpose of transaction (the “Recitals” should be used to ensure admissibility)



TIPS FOR WORKING WITH CONTRACTS

A large, faint, circular maze graphic is centered in the background. In the center of the maze, the letters "CMG" are displayed in a bold, sans-serif font.

CMG

Details Matter

© Copyright Darren Isaacson 2026

Inserting Details and Execution of Contracts



CMG Training
The Irish Institute of Professional Education

- Contract details need to be correct. If you are in court, a judge can only know what the contract states, not what the parties “intended”.
- It frustrates everyone, but lawyers will, and should, insist on details being correct
- Lawyers are paid to be precise with every detail. They will check everything and insist it is redone if not done correctly (or do it themselves having spent time calling or emailing the people with the information)
- Get it right first time is the best, safest and cheapest policy!

Inserting Details and Execution of Contracts



CMG Training
The Irish Institute of Professional Education

- An enormous waste of organisational time if done wrong
- Hourly rates this adds up, even at newly qualified lawyer or trainee rates
- If you are an in-house lawyer, the cost is time - yours and your organisations
- Maybe it means a payment gets delayed if contract execution is delayed
- Other party gets frustrated, everyone gets frustrated!

Parties to a Contract

- Use the full legal title (not the trading name)
- Insert registered address, which is often different from the head office address
- Insert the company number (this will save you in the next recession!)
- Check Companies Registration Office or other website with formal company secretarial details



[Square
Brackets!!!]

Square Brackets



CMG Training
The Irish Institute of Professional Education

Square brackets are generally used during contract negotiations or in templates as a PLACEHOLDER to imply that a piece of information has to be inserted OR is still being negotiated (e.g. contract sum)

Therefore...

Once the CORRECT information is inserted, remove!

Square brackets in an *executed* contract create a doubt - implies data may not be correct/final

Square Brackets



CMG Training
The Irish Institute of Professional Education

If the data doesn't suit a party and you end up in court, that party may end up disputing it

These arguments waste time, cost money etc

You don't want to have this argument in court/arbitration etc, so just get it right!

Consider especially contracts sums, dates, names of persons, email addresses, parties, purpose of contract etc

Square Brackets



CMG Training
The Irish Institute of Professional Education

[] (company number []) a company registered in Ireland at [] (the “Employer”)

should be

DI Limited (company number 123456), a company registered in Ireland at 123 Sandyford, Dublin 18 (the “Employer”)

Square Brackets



CMG Training
The Irish Institute of Professional Education

Square brackets may also contain OPTIONS - usually a slash will separate them. E.g.

“The Warrantor is carrying out the[civil/mechanical/electrical/lift/[other]] works package...”

So remove slash and all other options once the option is chosen

“The Warrantor is carrying out the civil works package...”



Square Brackets (and such...)



CMG Training
The Irish Institute of Professional Education

The same applies to highlighted colour or “Comments” used as a reminder.

...as they may contain discussions/debates the parties have had about particular clauses and give additional information or alternative positions that, again, can become the subject of legal debate as to the content of the contract

Comments can be particularly dangerous...

Comments are generally a great tool for negotiating and explaining the thinking behind your drafting, BUT they need to be removed

Square Brackets – an exception!!!



CMG Training
The Irish Institute of Professional Education

GOVERNMENT PUBLIC WORKS CONTRACTS (construction contracts)

These use square brackets in the permanent text. The idea is that they contain information which is unnecessary but explanatory as to the purpose of the clause. This is a very novel approach, and works fine in theory, but is confusing given normal usage.

From the PWC contract:

“Clarifications, examples and reminders are included occasionally in square brackets to show that no significance is to be given to their absence elsewhere.”

Dates



CMG Training
The Irish Institute of Professional Education

A contract should be dated when the last party executes it

Not the first party

Not the day it goes in the post

Not the date work started (e.g. under an LOI or otherwise)

If the contract is to be effective from a different, earlier (or later) date, the drafting in the contract can make this clear - it is not a reason to incorrectly execute

A strict lawyer will require the document to be re-executed

Handwritten Amendments



CMG Training
The Irish Institute of Professional Education

Best policy - don't do them!

If you are doing them - the law is that to be 100% certain, both parties need to:

1. Initial; and
2. Date

EACH change.

Logically, this is the only way a third party could confirm that the parties to the contract both agree with the amendment. Otherwise one party could just single-handedly write in whatever changes they wanted after execution.

The background features a large, light teal circular maze pattern. In the center of the maze, the letters "CMG" are displayed in a bold, teal, sans-serif font.

Operative Provisions

Standard Clauses and Boilerplate Provisions



CMG Training
The Irish Institute of Professional Education

- Boilerplate clauses are clauses you see in most commercial contracts which perform useful and essential functions whatever the nature of the underlying transaction - often in terms of clarifying matters around contractual interpretation – and which are rarely heavily negotiated
- They've become relatively standard over time
- But important to be familiar with them to check the 'basics' are right

Standard Clauses and Boilerplate Provisions



CMG Training
The Irish Institute of Professional Education

- Some lawyers call certain, usually negotiated clauses, 'boilerplate' too because they appear regularly, e.g. force majeure, termination, consequences of termination, limitation of liability. No hard and fast rule, and the label isn't really important.
- Consider doing these first to 'get them out of the way'?

Boilerplate : Confidentiality



CMG Training
The Irish Institute of Professional Education

- Typically contains most of a standard Non-Disclosure Agreement/ Confidentiality Agreement restated
- Principle is no disclosure apart from defined purpose and to defined set of people (employees, consultants, advisors etc) without express permission – and provided they are under duty of confidentiality as onerous as the clause.
- Separate undertaking from such persons?
- Exceptions for knowledge in public domain, already known, already legally provided, law requires disclosure
- Notice if required by law
- No representations or warranties e.g. as to fitness, accuracy
- Ownership of materials/IP
- Data Protection

Boilerplate : Confidentiality



CMG Training
The Irish Institute of Professional Education

- Destruction of materials if requested
- Usually survives termination/expiry of contract
- Equitable remedies
- Usually unlimited liability
- Increasingly indemnities found too
- Sometimes get detailed if company is listed on a stock exchange

Boilerplate : Announcements



CMG Training
The Irish Institute of Professional Education

- Usually follow (or sometimes are part of) confidentiality clause
- Relates to not using branding/company name in advertising, making press releases about a deal etc.
-
- Stock market companies can be particularly sensitive

Boilerplate : Assignments



CMG Training
The Irish Institute of Professional Education

- At a minimum deals with 'assignment'
- Often will deal with subcontracting and 'transfer' (novation)
- 'Transfer' not a legal term
- The difference between 'assignment' and 'novation' – often mixed up, by lawyers too
- Assignment – 'benefit not the burden'
- "Benefit" – what the other party does for you
- "Burden" – what you do for the other party
- Without a clause, benefit can generally be freely assigned
- Consumer and land/lease contracts treated differently, seek legal advice
- Novation – benefit and burden – must seek consent
- Sometimes novation of certain agreements permitted – with form of agreement and the novation agreement exhibited to contract (e.g. design and build in construction)

Boilerplate : Assignments

- Subcontracting
- Without clause, subcontracting allowed
- In construction, subcontract usually deserves a clause of its own, sometimes including obligation to review terms of subcontract and obtain collateral warranties
- In general better if consent is in writing (ensures evidence if transfer is challenged) and in advance

Boilerplate : Assignments

- Often assignment/novation to lender is required without consent if a project is being financed
- Sometimes intra-group allowed without consent – though not all group companies have balance sheets, so do not automatically accept
- Advance notice sometimes an alternative to consent

Boilerplate : Set - off



CMG Training
The Irish Institute of Professional Education

- Common law/equity allows, so set-off is a default clause even if no text in contract – though contract may extend circumstances
- Therefore contract requires set-off to be removed as a right if that is parties' intentions
- Certain payments not subject to set off (e.g. Liquidated Damages, Service Credits)
- Present and future (extends legal/equitable rights to set off)
- Cross-contractual or within contract

Boilerplate : Conflict

- The purpose of these clause is to state that if two documents that form the overall agreement are contradictory (e.g. the clauses and the schedules) that one document will prevail.
- Sometimes set this out over multiple documents
- Be careful - some schedules might be on a par or more important than 'clauses' so do not blindly follow a formula
- Sometimes in the event of conflict one party is given power to determine which interpretation prevails
- Conflict clauses can also be found in the interpretation section at the start of the contract.

Boilerplate : Entire Agreement



CMG Training
The Irish Institute of Professional Education

- Prevents statements/documents not in written agreement form and contained within the contract from forming part of contract
- In particular pre-contractual statements/representations
- Also implied terms (though general statement may not be effective where the implied terms are intrinsic to the contract (*Axa Sun Life*))
- Usually also strengthens rules of interpretation about intention of the parties
- Usually has:
 - Statement of non-reliance (on anything other than what is in contract)
 - Restriction of liabilities for misrepresentation
 - Restriction of remedies – usually to those for breach of contract. Excludes rescission, and possibly damages recoverable in tort
 - Exclusion of fraudulent representation (though not necessary)
- Make sure all representations and terms are in the contract!

Boilerplate : Variation

- NB: Not 'Variation/Change Order' clause in construction/IT context where actual product to be delivered gets varied
- Deals with terms of contract
- Usually insists on 'in writing'
- Sometimes specific individuals/authority level required
- Not guaranteed that other variations won't be put through though – if parties have acted for an entire job as if a different clause was written, it would be difficult to argue that the 'variation' was not valid

Boilerplate : Variation

- But can assist in short term – particularly if a contract also has a waiver provision in it
- Technical point: a variation requires new ‘consideration’ – i.e. both sides to provide something for the new bargain

Boilerplate : Waiver (No Waiver)



CMG Training
The Irish Institute of Professional Education

- “Waiver” in law means giving up legal rights.
- Can give up expressly or impliedly (by action or inaction “waiver by estoppel”)
- A waiver clause ensures that a parties right to sue or take some other permitted action remains even if it has failed to enforce its rights in one or more instances (whether deliberately or mistakenly)
- Includes delay in enforcing (except where contract is very specific about length of time to enforce)

Boilerplate : Waiver (No Waiver)



CMG Training
The Irish Institute of Professional Education

- Essentially – ‘just because I let you off once doesn’t mean I will again’
- To counter the argument that the failure to enforce was a variation to the contract permitting something that was previously not permitted, or vice versa
- Allows the specific breach ignored to be claimed against
- Allows other breaches of the same type as that ignored to be claimed against (or just other breaches)

Boilerplate : Waiver (No Waiver)



CMG Training
The Irish Institute of Professional Education

Not guaranteed to be effective, but 'better in than out'!

- E.g. *“Tele2 Communication v Post Office [2009] EWCA Civ 9*
 - The Post Office had continued with the contract for 11 months after terminable breach, and then sought to terminate
 - Judge held the clause did not help, as the Post Office had essentially elected to affirm the contract by its conduct, and therefore abandon its right to termination. Judge noted no reservation of rights letter.
- Sometimes states that waiver only effective if 'in writing'

Boilerplate : Severance

- The purpose of this clause is to ensure that a contract or a clause will continue to be effective despite some defect in the drafting that would cause a court to strike it out
- All or part of a contract can become unenforceable if one clause was found to be illegal or contrary to public policy
- Clauses can be struck out if they are uncertain, even if only one part of it is uncertain

Boilerplate : Severance



CMG Training
The Irish Institute of Professional Education

- (These powers of court again point to lawyer's concern over drafting accuracy)
- Worth remembering some contracts can 'become' illegal because of new laws that come in during its term

Boilerplate : Severance

- Courts would seek to 'sever' the offending clause anyway, but perhaps in a more crude fashion than that described in the clause
- Therefore clause seeks to preserve as far as possible the deal between the parties
- Notwithstanding text of clause, the courts will not 're-write' the contract for the parties. The contract still has to achieve the requisite degree of certainty, and the clause should be capable of being removed without adding in much or anything by the way of new language. Also, if the offending clause constitutes the whole of the consideration for the contract, severance would not be allowed.
- So not a guaranteed way of ensuring mistakes are rectified by the court
- Obligation to negotiate usually not enforceable, BUT on occasion has been allowed (in special circumstances), and it may bring the parties to seek to negotiate

Boilerplate : Language



CMG Training
The Irish Institute of Professional Education

- Self-explanatory enough, but can be an issue if contracting abroad
- Some contracts are written in two languages – one language is usually stated as taking precedence, as interpretations may have slightly different meanings

Boilerplate : Costs

- This clause recognises default position so is unnecessary in the majority of situations.
- However if the parties have a different arrangement, the clause can be used to record the position (e.g. often a finance provider insists that its legal fees are paid for by a borrower).
- This is for more ‘transactional’ arrangements than commercial so will not review further for purpose of this discussion.

Boilerplate : No Partnership or Agency



CMG Training
The Irish Institute of Professional Education

- Ensures that the parties are not to be deemed partners by virtue of their contracting with one another – which might have financial, accounting and risk consequences
- Also ensures that one party has no right to bind the other as an agent (obviously this is not used where the agreement is an agency agreement)

Boilerplate : Further Assistance

- The purpose of a further assurance provision is to require parties to carry out any further acts necessary to give effect to the contract. This might include getting other parties to do things
- E.g. registering in the Land Registry, paying stamp duty, executing certain documents etc
- It can be seen as a 'sweeper' or 'mop-up' provision for items that may have been forgotten about by the parties (obviously it would be preferable to expressly set out what the parties have to do in the contract)

Boilerplate : Further Assistance



CMG Training
The Irish Institute of Professional Education

- . Absolute obligation, or reasonable endeavours?
- . Reasonable time period?

Boilerplate : Notice

- Simple enough – sets out details of where and how contractual notices are to be served
- Often includes names of individuals, or titles (the latter is better as individuals move on in their careers)
- These aren't often looked at, but they can be interpreted strictly, particularly where the notice relates to a material contractual provision – e.g. termination, claims etc.
- Also many contracts make notice within 'x' days of an event a condition precedent to a claim or some other remedy
- Depending on what side you are on, it may be more awkward (e.g. registered post only) or reasonable (email). However if in reality parties are using a particular form, a judge might not preclude a notice by that method, notwithstanding the clause. In general better not to be too prescriptive, as both sides may ultimately have to serve notices. Also consider impact on work/relationship/time for admin v. performance

Boilerplate : Counterparts

- These clauses simply note that every executed version of a contract constitutes ‘the contract’, even if each copy is executed by different parties. In these situations there is no single copy of a contract that all parties have signed.
- In cross-jurisdictional transactions, parties will not be present in the same room to sign an agreement. Sometimes each signs two documents, then gives the other one a copy (hence ‘signed and delivered’), so that each party has two versions of a contract with a different signature on it.
- Recognises that each party will usually want an original hard copy

Boilerplate : Counterparts



CMG Training
The Irish Institute of Professional Education

- E-commerce, e-signatures and cloud solutions make these clauses less necessary for smaller transactions
- Sometimes includes 'duplicates', i.e. multiple counterparts that *are* signed by all parties

Boilerplate : Third Party Rights



CMG Training
The Irish Institute of Professional Education

- Generally seen in UK contracts, not always in Irish
- This concerns common law rules re 'privity' which states that a person who is not a party to a contract cannot enforce the contract
- UK have allowed this in certain circumstances as set out in the Contracts (Rights of Third Parties) Act 1999 to remove perceived unfairness of rule in certain contexts
- The boilerplate clause is therefore usually found in UK commercial contracts to negate the legislation (or define specific limited circumstances where it applies)

Boilerplate : Governing Law

- Self explanatory
- If contract is silent, contract will be governed by law of jurisdiction that contract operates in if both parties are present in that jurisdiction
- But international companies, with different headquarters, each performing their part of the contract in a different country – or several countries? There can be arguments about which law might apply, which would have to be resolved.

Boilerplate : Governing Law



CMG Training
The Irish Institute of Professional Education

- Parties can choose a different jurisdiction to the one where the contract operates
- UK law is very popular amongst companies from common law jurisdictions contracting outside their own jurisdiction. If local courts used – local courts have to interpret/enforce contract under law of a foreign jurisdiction! (Lets see post-Brexit...)
- Though often disputes in such circumstances are handled using alternative dispute resolution (discussed later)
- Notwithstanding such clauses, mandatory laws of the country in which contract is being performed cannot be ignored (e.g. employment law)

Boilerplate : Jurisdiction

- Refers here to which courts have the right to hear disputes relating to contract
- Usually (and sensibly) is the same courts as the choice of law
- But sometimes, again in international context, jurisdiction itself is an issue which has to be resolved. Preference is usually to litigate in one's home country. There are various international treaties which deal with such issues.
- Location of assets of a country may also be a consideration

Boilerplate : Jurisdiction



CMG Training
The Irish Institute of Professional Education

- The court chosen can either 'exclusively' or 'non-exclusively' hear the case. The latter is more common, though it seems odd as it allows other courts to hear cases if both parties agree.
- Where contract has alternative dispute resolution, the jurisdiction clause may be drafted 'subject to' the relevant clause setting out the disputes procedure

Boilerplate : Rights and Remedies



CMG Training
The Irish Institute of Professional Education

- Either confirms that rights and remedies in the contract are the only rights or remedies available to the party, or that they are in addition to such rights
- Not usually seen unless the parties wish to make contractual rights exclusive

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Default is courts (and courts will always have ultimate jurisdiction)
- However parties often use other private methods
- Potentially quicker, cheaper, less formal, less confrontational
- Potentially more expensive too, because parties do not have to pay judges or court stenographers!

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Policy has increasingly moved in favour of alternative dispute resolution to save court time and hopefully limit fallout between the parties
- Courts are slow, formal, and expensive!
- Some alternative will be looked at briefly

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Expert Determination
- Often described as 'Rough Justice' or 'Quick and dirty'
- Parties hire an 'expert' to quickly determine an issue in a way that is not appealable
- Issue may arise re jurisdiction – i.e. the type of dispute that the expert can determine needs to be defined in the contract, and the actual dispute then needs to fall within that definition
- Often parties use experts to decide certain specific disputes
- Allows parties to get an answer and get on with life

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Mediation
- Deemed a 'facilitative' approach
- Not a binding process
- Parties arrive at compromise themselves, assisted by the mediator as a facilitator
- Solutions can be those outside of strictly legal outcomes
- Allows relationship to continue – “friendlier” forum
- Sometimes allows parties ‘get dispute off their chest’, and dissuades from taking it further

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Parties should both agree to be there, otherwise a waste of time
- Public policy especially favouring this solution

Boilerplate : Dispute Resolution

- Conciliation
- In theory like mediation but where conciliator provides a solution to the parties if they don't agree one
- Solution can be rejected and parties move to another method of resolving dispute (typically arbitration or courts)
- Solution can be outside pure legal rules (unless the parties decide otherwise) - note Public Works Contracts in construction context is deemed by some to be not really a conciliation because of this!
- In practice they can be treated very formally (though often this is lawyer's fault rather than the parties)
- However even if formal, it is (usually) cheaper and quicker than arbitration/courts, and can give an indication of outcome if parties proceed further (thereby persuading parties to stop dispute then - or sometimes to settle 'based on' the award with perhaps a minor differences

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Arbitration
- Like court, but private.
- Probably more expensive.
- Advertised informality rarely if ever found in practice
- Is private though
- Can be quicker (though often not)

Boilerplate : Dispute Resolution



CMG Training
The Irish Institute of Professional Education

- Can pick an arbitrator with understanding of the industry (though this is true of all other methods too)
- Can have different number of arbitrators
- Can have different rules

Boilerplate : Dispute Resolution

- Some drafting tips:
- Make sure there are specific number of days between steps, otherwise one party can stall and the other may have to go to court to enforce
- (e.g. how many days senior management have to resolve dispute, how many days to agree identity of decision maker etc)
- Make sure there are default rules if the decision maker can no longer act or if parties cannot agree on identity
- Consider 'joinder' provision so that related disputes can be resolved together (this can happen in court)

Standard Commercial Clauses



CMG Training
The Irish Institute of Professional Education

- Force Majeure
- Indemnity
- Interest
- Key Persons
- Time of the Essence
- Termination and Effects of Termination
- Liquidated Damages / Service Credits
- Limitation of Liability
- Conditions precedent

Standard Commercial Clauses: Force Majeure



CMG Training
The Irish Institute of Professional Education

- Deals with matters outside the reasonable control of the parties. Sometimes includes reasonable foreseeability (e.g. normal weather events – but what is normal? In construction often by reference to 5/10 years of weather as specific weather stations!)
- Definition:
 - ‘abstract’ only
 - ‘abstract’ with list of events as examples
 - Defined list of events only
- List often reads like dystopian horror movie plot!

Standard Commercial Clauses: Force Majeure



CMG Training
The Irish Institute of Professional Education

- Industrial Action – employees of contractor/subcontractors/suppliers often not included (could have paid wages)
- Default of subcontractors or third party suppliers? (should have been managed better?)
- Terrorism unfortunately more relevant now
- Conversely customer may want these excluded as excuses for performance

Standard Commercial Clauses: Force Majeure



CMG Training
The Irish Institute of Professional Education

- Applicability to both parties (should payment be effected?)
- Should FM event “prevent” “hinder” “delay”? Latter two should be included unless FM means performance of obligations are not possible
- Effect - typical bargain is excuse for non-performance, but costs lie where they fall, i.e. no recovery of costs

Standard Commercial Clauses: Force Majeure



CMG Training
The Irish Institute of Professional Education

- Non-performance can be temporary (whether for set period of time or otherwise) or permanent (i.e. contract terminates)
- Termination right often after set period of time
- Extension of time for performance to take into account suspension
- Obligations to protect works/mitigate losses/ mitigate time losses / reporting
- Notice conditions?

Standard Commercial Clauses: Key Persons



CMG Training
The Irish Institute of Professional Education

- Used to ensure specific individuals work on a contract
- Usually individuals advertised in tender process
- Stipulates extent to which the individual has to work (full time/at least x hours per week / on call etc) and whether on site or elsewhere
- Stipulates precise circumstances where they can be removed
- Stipulates requirements for any replacements – usually debate re extent of consent of the customer/client

Standard Commercial Clauses: Interest



CMG Training
The Irish Institute of Professional Education

- Simple clause - generally stipulates a rate for late payments under the contract
- Bear in mind that if contract is silent, the European Communities (Late Payment in Commercial Transactions) Regulations 2012 applies
 - ECB refinancing rate + 8%
- But this Regulation allows parties to agree otherwise
- Policy is to encourage prompt payment in particular for smaller companies

Standard Commercial: Time of the Essence



CMG Training
The Irish Institute of Professional Education

- Time is usually not material – instead the injured party gets damages for loss associated with lateness
- Or liquidated damages/service credits
- The legal effect of a clause making time of the essence means that a contract can be terminated if time limits within it are not met – which is often further than a client intends
- i.e. it guarantees that time limits are a material breach of contract

Standard Commercial: Time of the Essence



CMG Training
The Irish Institute of Professional Education

- This is a double edged sword!
- Usually still have to pay for work actually carried out
- Often more expensive to terminate and get someone else to complete (and usually more likely to be even later delivery)
- If stated without proviso, it will apply to both parties
- Even if only stated to apply to the service provider/contractor, such a clause will make it easier to claim contract extensions (and potentially associated costs too) where the employer has committed an act that delays the service provider

Standard Commercial: Time of the Essence



CMG Training
The Irish Institute of Professional Education

- If used, better to specify precisely the extent to which it is relevant
- An acceleration right (i.e. a right to require the service provider to move quicker to ensure delivery – even if it means extra payment) might be more practical/efficacious in terms of achieving the desired outcome if on time delivery is genuinely crucial

Standard Commercial Clauses: Termination and Effects of termination



CMG Training
The Irish Institute of Professional Education

- Sometimes these two separate items are combined in one clause, sometimes separate. Layout (or “geography” as some lawyers say) is irrelevant
- Without termination clause a right of termination still exists

Standard Commercial Clauses: Termination and Effects of termination



CMG Training
The Irish Institute of Professional Education

- There is a whole body of law around this:
 - where contract is impossible to perform (is 'frustrated') because of unforeseen events, or where those unforeseen events are so great as to cause the *raison d'être* of the contract to be irrelevant
 - where one party commits a repudiatory breach (i.e. that goes to the heart of the contract) such that they are essentially evincing an intention not to perform – in this circumstance the innocent party can 'elect' to terminate or to require the contract to be enforced
 - 'Discharge' by performance

Standard Commercial Clauses: Termination and Effects of termination



CMG Training
The Irish Institute of Professional Education

- Clauses give clarity to a contentious area of law by making termination rights (and processes) clear
- There are a few standard causes for termination, and specific contracts will often contain several others:
- Material breach (sometimes these are spelt out, e.g. non-payment, failure to remedy a defect by a particular time)
 - Breach capable of remedy (in which case time is given, or else a 'reasonable time' having regard to the nature of the issue)
 - Breach not capable of remedy – immediate
 - Repeated breaches (whether material or not) (in a particular period of time?) (so as to give rise to implication that guilty party has no intention or ability to perform)
- “Material” – based on nature of contract, the breach itself and its impact on the innocent party, circumstances of breach (not definitive, always based on particular facts so very difficult for a lawyer to answer “what does ‘material’ mean?”)

Standard Commercial Clauses: Termination and Effects of Termination



CMG Training
The Irish Institute of Professional Education

- Insolvency, bankruptcy, inability to pay debts, financial difficulty, or other credit event
- Termination for convenience – i.e. no fault termination
 - Other party should fairly be entitled to profit
- Change of Control?
- Reference to specific clauses (and/or agreement that breach of same are material)

Standard Commercial Clauses: Termination and Effects of Termination



CMG Training
The Irish Institute of Professional Education

- Clauses usually contain notice periods and modes of notice, which are usually very strictly interpreted, and therefore must be followed precisely
- May contain a requirement to negotiate amongst senior management and/or to utilise some/all dispute resolution procedures (e.g. mediation)
- Intentional breach – usually overrides any limitations of liability

Standard Commercial Clauses: Termination and Effects of Termination



CMG Training
The Irish Institute of Professional Education

- Consider whether contractual rights to termination are in addition to or to the exclusion of common law termination
- Effects of termination usually depends on the contract – very different in different industries
- Maybe different effects for different types of termination or who terminates?
- Survival of clauses?
- Obligation to cooperate to wind down contract/transfer to a new party?

Standard Commercial Clauses: Indemnities



CMG Training
The Irish Institute of Professional Education

- In a simple sense, indemnities are promises to pay the loss of another party
- In commercial situations, they are fairly used to cover losses which another party has no control over, and in particular to cover risks of third party loss, e.g.
 - Intellectual Property indemnities
 - Damage to third party property
 - Employees (e.g. TUPE)
 - Sometimes environment too
- Sometimes it is sought to indemnify for breach of contract. This is generally unnecessary and unfair on indemnifier, as
 - Type of damages covered can be greater than normal contract/tort damages (rules of remoteness may be excluded)
 - Duty to mitigate may be done away

Standard Commercial Clauses: Indemnities



CMG Training
The Irish Institute of Professional Education

- Can alleviate worse effects of indemnities through drafting
 - Does not remove duty to mitigate
 - No settlement without indemnifier consent
 - Indemnifier to have 'carriage' of the claims (i.e. runs the defence – like an insurance company would in a PI claim)
 - Specific triggers (e.g. negligence only, in which case negligence still has to be proved)

Standard Commercial Clauses: Liquidated (Ascertainable) Damages



CMG Training
The Irish Institute of Professional Education

- A liquidated damage clause provides for a fixed amount of damages (or a formula for finding the damage) suffered for an anticipated loss arising from a particular event.
- By fixing the amount of loss, it increases certainty and reduces litigation risk - once breach has occurred, loss does not have to be proved, and other legal hurdles to claim do not have to be jumped (e.g. remoteness)
- In contrast, unliquidated damages are damages for which quantum has to be proven
- Used in construction, engineering contracts, and other contracts where delivery by a particular date is required
- Rather than the innocent party proving its losses, losses are fixed
- Either party may 'lose' or 'win' by the parties fixing the loss, i.e. actual loss to the innocent party may be more or less than the liquidated sum, therefore you 'live or die' by the choice

Standard Commercial Clauses: Liquidated (Ascertainable) Damages



CMG Training
The Irish Institute of Professional Education

- Service Credits are often seen as liquidated damages, although on another analysis are seen as a method of adjusting price for failure to deliver
- At common law (note: not civil law), penalties are not allowed, i.e. damages are to compensate for loss only, they are not punitive
- Therefore liquidated damages must be a genuine pre-estimate of anticipated loss (at the time the contract was entered into) – Irish test – or “out of all proportion to any legitimate interest” (UK test - broader)

Standard Commercial Clauses: Liquidated (Ascertainable) Damages



CMG Training
The Irish Institute of Professional Education

- Also useful to state that the parties agree the damages are reasonable and proportionate
- If found to be penalties by a court (i.e. have no correlation to what might reasonably have been anticipated to be suffered for the delay or other breach) then they are at risk of being struck out

Standard Commercial Clauses: Limitation of Liability



CMG Training
The Irish Institute of Professional Education

- Limitation of quantum of damages
 - Overall aggregate liability for whole contract
 - Per annum aggregate amount
 - Per claim amount
 - Often referable to all or % of contract sum/annual fee
- Limitation of species/type of damages
 - Indirect/consequential loss / economic/ loss of contract / loss business etc
- Typically one only gets 'direct losses'

Standard Commercial Clauses: Limitation of Liability



CMG Training
The Irish Institute of Professional Education

- per *Hadley v Baxendale* (1854) Exch. 341 losses which are not too 'remote', meaning:
- (i) losses that 'flow naturally from a breach' and
- (ii) 'all losses which are in the contemplation of the parties at the time the contract was made as a probable result of the breach'
- Sometimes to limit indirect/consequential they are stated expressly, including in circumstances "where they are in the contemplation of the parties"
- Alternatively the contract (often in Recitals) sets out specific losses which is useful proof that the loss was in the parties' contemplation and therefore recoverable
- Limit damages to breach expressly stated in contract (i.e. lose common law rights)
 - Opposite of 'cumulative damages' boilerplate clause
- Certain losses are never limited, e.g. death, illness or personal injury, or intentional breaches of contract

Standard Commercial Clauses: Conditions Precedent



CMG Training
The Irish Institute of Professional Education

- Used in many circumstances in different types of contract
- In commercial (especially construction) contracts, they are typically referred to in the context of the making of a claim
- E.g. written notice of the existence of the claim to be in asap/within x days of the day circumstances arise which a contractor believes entitles it to a claim, and with particular details substantiating the claim (or else a follow up notice with the detailed provisions). Notices to be sent to particular individual(s)

Standard Commercial Clauses: Conditions Precedent



CMG Training
The Irish Institute of Professional Education

- If found to be a condition precedent, and notice (or other conditions) not given, claim will fail even if it would otherwise win
- To be a conditions precedent, it must be very clear, as it seeks to deny a party their normal contractual rights

Framework Agreements



CMG Training
The Irish Institute of Professional Education

- Sometimes called “Master Services Agreements”
- Useful for repeat business!
- Do the work up front and repeat contract for all orders for products/services over specific period of time
- A framework agreement with all T&Cs included within, and a short ‘call off’ form which incorporates the T&Cs by ‘reference’ and includes specific details of the order
- There can be variations on precise format, but concept is the same
- Think of framework as the ‘Launchpad’ and the ‘call off’ as the ‘space ship’ – possible to launch several ‘space ships’!
- It should be a structural/mechanical document

Framework Agreements



CMG Training
The Irish Institute of Professional Education

- Understand that termination of a call off does not imply termination of the framework and vice versa (unless specifically stated)
- Understand periods of time e.g. 3 year framework, but calls offs could last longer period, e.g. 2 years – therefore stuck with T&Cs for 5 years, not 3
- This is important re fixing prices in particular (alternatively prices can be on contract by contract basis – i.e. ‘commercials’ are negotiated each time, and then the legals are on basis of the framework)
- Obviously saves time and cost in the long run (and interaction with lawyers...)

The background of the slide is a solid teal color. Overlaid on this is a large, faint, circular maze pattern. In the center of the maze, the letters 'CMG' are visible in a light teal color.

Reading and Drafting Contracts – General Points

© Copyright Darren Isaacson 2026



Reading Contracts:
Being
~~annoying~~
careful,
lawyers
often put
exceptions
before the
rule

- *The Parties shall, save in the circumstances of x, y and z, in which case the Parties shall instead do a, b and c, carry out and complete the Works...*
- *The Parties shall ~~[, save in the circumstances of x, y and z, in which case the Parties shall instead do a, b and c,]~~ carry out and complete the Works...*
- The exceptions text crossed out could be significant!
- Learn to put mental 'brackets' around different clauses to trace the main idea (the rule) before reading the exceptions
- Or real brackets (if you print off the contract if it helps)
- **Drafting: put the rule first and exceptions after**

Reading Contracts: “reasonable”, “best”, “all reasonable” endeavors



CMG Training
The Irish Institute of Professional Education

- Rising scale of obligation, but not absolute – i.e. to what extent must a party ‘try’ to meet an obligation
- Much case law on this, and can mean different things in different contexts and at different times (in general relevant time is time obligation is being sought to be performed, not time of conclusion of contract)

Reading Contracts



CMG Training
The Irish Institute of Professional Education

- 'reasonable endeavours' does not mean 'every' reasonable endeavour, usually a party does not need to sacrifice commercial interests
- 'all reasonable' means some, though probably less cost than 'best'
- 'best endeavours' means can put to significant cost, including taking legal action
- Absolute standard "shall" or "must" is more stringent than all these though – this is often forgotten!

Reading/ Drafting Contracts: Ask what the principles are in a clause first and/or nature of the deal



CMG Training
The Irish Institute of Professional Education

- It is much easier to read/draft the provision if you understand the principles that underlie it
- The clause is seeking to draft with precision so as to give legal effect to a principle which might be easily understood but hard to express.
- On the other hand, if the clause cannot be understood on its own terms (i.e. as drafted), it might not be drafted well or clearly enough
- But effectiveness of language is more important than its artistic merit – lawyers sometimes use ‘formulas’ of words that are legally understood (whether through case law or otherwise) even if they could be expressed more simply

Reading Contracts - Miscellaneous



CMG Training
The Irish Institute of Professional Education

- 'Subject to' – where clause A is subject to another, clause B, clause B will have precedence.
- 'Without prejudice to x' – whatever it is the clause goes on to say, does not prevent the party relying on the clause from relying on whatever 'x' might be (e.g. 'any other rights under this contract')

Plain English

CMG

Plain English



CMG Training
The Irish Institute of Professional Education

Good principles for business writing generally (legal or otherwise)

Avoid old or redundant “Ye Olde Englishe” / latin / old French etc words

Avoid unnecessary legalese

Focus on the clarity and presentation of drafting

Good grammar

See the audience as parties to the contract as well as the judge (though even judges like clarity...)

Plain English



CMG Training
The Irish Institute of Professional Education

Honourable Michael Kirby, past Justice of the High Court of Australia on the difficulty lawyers may have in using regular English when there is a legalese expression available. He suggested that perhaps...

“...those who conceive of themselves as members of an expert priestly caste, prefer a dead language because it conveys the mystery of technicality. English, after all, is a very mixed up tongue. And clients may be more willing to pay more for Latin”

In “The Ten Commandments for plain language in law”.

Paragraphs and Sentences



CMG Training
The Irish Institute of Professional Education

- One general idea per paragraph
- Majority of sentences should be no greater than 25 words
- Otherwise you strain the reader's memory
- Omit 'connecting words' and start new sentence (e.g. and/or/but etc)

Paragraphs and Sentences



CMG Training
The Irish Institute of Professional Education

- One idea per sentence
- Use decent sized font
- Gaps between paragraphs
- Use headings for clauses (but remember interpretation rule!)

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

By reason of	=	?
Due to the fact that	=	?
Because of the fact that	=	?
In view of the fact that	=	?
In light of the fact that	=	?
On the ground that	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

By reason of	=	because
Due to the fact that	=	because
Because of the fact that	=	because
In view of the fact that	=	because
In light of the fact that	=	because
On the ground that	=	because

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

By virtue of	=	?
For the purpose of	=	?
In order to	=	?
In relation to	=	?
In accordance with	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

By virtue of	=	by/under
For the purpose of	=	to
In order to	=	to
In relation to	=	about/concerning/regarding
In accordance with	=	by/under

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

As to	=	?
Bring an action against	=	?
Prior to	=	?
Pursuant to	=	?
Subsequent to	=	?
Herein	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

As to	=	about
Bring an action against	=	sue
Prior to	=	before
Pursuant to	=	under
Subsequent to	=	after
Herein	=	in this

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Bona fide	=	?
Ab initio	=	?
Estopped	=	?
In the event that	=	?
Forthwith	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Bona fide	=	good faith
Ab initio	=	from the beginning
Estopped	=	prevented
In the event that	=	If
Forthwith	=	immediately

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Not less than	=	?
Not more than	=	?
Thereafter	=	?
Sufficient number	=	?
Inasmuch as	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Not less than	=	at least
Not more than	=	at most
Thereafter	=	later
Sufficient number	=	enough
Inasmuch as	=	since

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

In every instance	=	?
In some instances	=	?
In most instances	=	?
Until such time	=	?
During the time that	=	?
There can be no doubt that	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

In every instance	=	Always
In some instances	=	Sometimes
In most instances	=	Usually/Mostly
Until such time	=	Until
During the time that	=	While
There can be no doubt that	=	Undoubtedly

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Determine	=	?
Financial consideration	=	?
Vendor	=	?
Purchaser	=	?
Furnish	=	?
On the part of	=	?

Identify and replace Compound Prepositions / Legalese / Word Clusters



CMG Training
The Irish Institute of Professional Education

Determine	=	terminate
Financial consideration	=	payment
Vendor	=	seller
Purchaser	=	buyer
Furnish	=	provide
On the part of	=	by

Everyday English too!



CMG Training
The Irish Institute of Professional Education

Additional	=	?
Adjacent to	=	?
Discontinue	=	?
Endeavour	=	?
Facilitate	=	?

Everyday English too!



CMG Training
The Irish Institute of Professional Education

Additional	=	extra
Adjacent to	=	beside
Discontinue	=	stop
Endeavour	=	try
Facilitate	=	help

Use phrases instead of clauses



CMG Training
The Irish Institute of Professional Education

Identify all the “connecting” words, and consider ending the sentence and starting a new one. Contrast these with the “working” words, the ones that carry the meaning of the sentences

Looks for words “which”, “who” and “that” - often an opportunity to shorten a sentence, e.g.:

“The legislation, which had been enacted following the referendum, allowed...”

becomes

“The legislation, enacted following the referendum, allowed...”

Use phrases instead of clauses



CMG Training
The Irish Institute of Professional Education

Also...

And / but / that / whose / except / in particular / (sentences in brackets) / or / however / so / although /
because

...and excessive use of commas, semi-colons and colons (unless for lists)

Lists – use tabulation



CMG Training
The Irish Institute of Professional Education

- Ideally clauses, subclauses and lists are broken up in drafting, but not always the case
- If you have to read clauses that are not broken up - mentally do it

Example (bad)

The Vendor represents and warrants that: (a) Vendor has full right and power to enter into and perform this Agreement and its performance under this Agreement will comply with all applicable laws and not conflict with any other obligation Vendor may have to any other party; (b) Vendor will perform the Services in a timely, professional and workmanlike manner; (c) Vendor will not (i) incorporate any Background Technology or Third Party Materials into any Deliverables, or (ii) construct, create, design or otherwise build the Deliverables in such a way that requires Purchaser to use Background Technology unless (1) Vendor specifically identifies such Background Technology in the applicable SOW; (2) Vendor specifically identifies each OSS, if any, that Vendor intends to use and specified in an SOW; and (3) all proposed use has been specifically pre-approved by Purchaser in writing; (d) the Services and all Deliverables will be free of any viruses, worms, time bombs, Trojan horses or other harmful, malicious or destructive code; and (e) the Deliverables will not infringe the intellectual property rights of any third party.

Example (good) (some clause)



CMG Training
The Irish Institute of Professional Education

The Vendor represents and warrants that:

- (a) Vendor has full right and power to enter into and perform this Agreement and its performance under this Agreement will comply with all applicable laws and not conflict with any other obligation Vendor may have to any other party;
- (b) Vendor will perform the Services in a timely, professional and workmanlike manner;
- (c) Vendor will not:
 - (i) incorporate any Background Technology or Third Party Materials into any Deliverables, or
 - (ii) construct, create, design or otherwise build the Deliverables in such a way that requires Purchaser to use Background Technology unless
 - (1) Vendor specifically identifies such Background Technology in the applicable SOW;
 - (2) Vendor specifically identifies each OSS, if any, that Vendor intends to use and specified in an SOW; and
 - (3) all proposed use has been specifically pre-approved by Purchaser in writing;
- (d) the Services and all Deliverables will be free of any viruses, worms, time bombs, Trojan horses or other harmful, malicious or destructive code; and
- (e) the Deliverables will not infringe the intellectual property rights of any third party

Noun Phrases to Verbs



CMG Training
The Irish Institute of Professional Education

Please give consideration to using verb phrases instead of noun phrases

To

Please consider using verb phrases over noun phrases

Noun Phrases to Verbs



CMG Training
The Irish Institute of Professional Education

Make a complaint	=	?
take / make a decision	=	?
Make payment to	=	?
Take action	=	?
Draw conclusions	=	?
am/are in agreement	=	?
Make a recommendation	=	?

Noun Phrases to Verbs



CMG Training
The Irish Institute of Professional Education

Make a complaint	=	complain
Take / make a decision	=	decide
Make payment to	=	pay
Take action	=	act
Draw conclusions	=	conclude
am/are in agreement	=	agree
Make a recommendation	=	recommend

Noun Phrases to Verbs

Have a discussion about

=

?

Be in contravention of

=

?

Give consideration to

=

?

Provide clarification

=

?

Give an explanation

=

?

Noun Phrases to Verbs



CMG Training
The Irish Institute of Professional Education

Have a discussion about	=	discuss
Be in contravention of	=	contravene
Give consideration to	=	consider
Provide clarification	=	clarify
Give an explanation	=	explain

Active over Passive Voice



CMG Training
The Irish Institute of Professional Education

In the active voice the subject of the sentence acts. In the passive voice the subject is acted upon.

Essentially, state who or what is to carry out the action first, e.g:

“The table shall be moved by Barry” (passive)

“Barry shall move the table” (active)

Active over Passive Voice



CMG Training
The Irish Institute of Professional Education

It is clearer and shorter

It takes (or gives) responsibility

Using Passive is wordy/ long and can sound bureaucratic

Sometimes it is used for a particular reason (not getting someone into trouble!), but avoid in contract drafting



Thank You!