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How Effective is an 'Entire' Agreement Clause?

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In a commercial agreement, one will notice several standard clauses, also known as boilerplate clauses, which essentially mean "*language which is used commonly in documents having a definite meaning in the same context without variation; used to describe standard language in a legal document that is identical in instruments of a like nature*".[1]

Some examples of boilerplate clauses are "*time is of the essence*", "*variation*", "*waiver*", "*governing law*" and "*entire agreement clause*" which may play an important role when the terms in the agreement are disputed by contracting parties.

What is an entire agreement clause?

An entire agreement clause *may* be worded as follows:

1. "*This agreement supersedes any previous written or oral agreement between the parties in relation to the matters dealt with in this agreement and contains the whole agreement between the parties relating to the subject matter of this agreement at the date hereof to the exclusion of any terms implied by law which may be excluded by contract*."

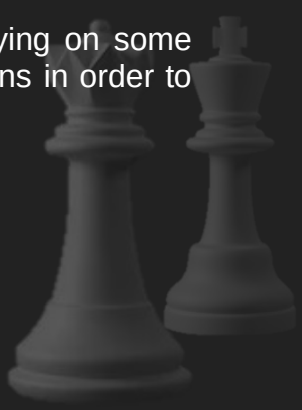
2. "*This agreement replaces any previous agreement, representation, warranty or understanding between the parties concerning the subject matter and contains the entire agreement between the parties*."

In the event of a dispute concerning a written agreement, one may advance arguments that there was a collateral contract, or that there were oral promises or representations made prior to parties entering into the agreement and thereby inviting the court to look into these agreements on top of the written agreement when interpreting the parties' intention — this is where the entire agreement clause comes into play.

Purpose and effect

The purpose and effect of an entire agreement clause were deliberated by the Chancery Division in *Inntrepreneur Pub*,[2] summarised as follows:

1. It precludes a party to a written agreement from relying on some remark or statement made in the course of negotiations in order to form a claim, to the existence of a collateral warranty.



1 *Black's Law Dictionary* (6th ed, West Publishing Co, 1990) at 175
2 *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 3 EGLR 31

2. It constitutes a binding agreement between the parties. The binding terms are stated in the agreement and not elsewhere.

3. Any promises or assurances made in the course of the negotiations shall have no contractual force, except those that are stated in the agreement.

This reasoning was also applied in the case of *Macronet*,[3] which was later referred to by the Court of Appeal in *Master Strike*:[4]

> "My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They cannot, therefore, be allowed to prove the second pre-contractual representation or the oral agreement and to rely on them."

However, it is to be noted that an entire agreement clause does not preclude consideration of a collateral contract made between a party and a non-party to the principal contract. The Federal Court in *Solid Investments Ltd*[5] held:

> "[68] We agree with the submission of learned counsel for the plaintiff that the Court of Appeal erred in failing to appreciate that such clauses operated only as between the contracting parties. **The defendant was not a party to the consultancy agreements and as such the alleged collateral contract between the plaintiff and the defendant should be treated as a separate and distinct contract and could not fall under the scope of the consultancy agreements. In our view the entire agreement clause did not preclude the plaintiff from setting up the alleged collateral agreement between the plaintiff and the defendant.** The cases referred to by the Court of Appeal namely, *Master Strike Sdn Bhd v Sterling Height Sdn Bhd* [2005] 3 MLJ 585 and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 dealt with issue involving the same parties to the principal agreement unlike our case." [*Emphasis added*.]

Practicality

In *Aset Nusantara*,[6] the plaintiff brought an action against one of the defendants seeking, among others, the return of hotels worth RM200 million as the defendant failed to fulfil his obligations under the written agreements. One of the arguments advanced by the defendant was that there was a collateral oral contract between the parties prior to the written agreements. The court held, among others, that the written agreements between the parties were unambiguous and consistently bore the agreed structure between the parties. The inclusion of the entire agreement clause evinced

3 *Macronet Sdn Bhd v RHB Bank Bhd* [2002] 4 CLJ 729 (HC)
4 *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 2 CLJ 596 (CA)
5 *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd* [2014] 3 MLJ 785 (FC)
6 *Aset Nusantara Sdn Bhd v Ekran Berhad & Anor* [2010] 7 AMR 197 (HC)

the intention of the parties that any oral promises or collateral contracts that may have been in the course of negotiations would not have any contractual force except those which had been agreed upon in writing. Otherwise, such clauses would serve no purpose.

In *Harin*,[7] the plaintiff commenced an action against the defendant for the balance of the commission due and payable based on a letter of award. In response, the defendant argued that under the subcontract agreement, there was no stipulation that it was required to pay up RM4 million out of the agreed commission of 13.5% upfront as claimed by the plaintiff. The trial judge allowed the plaintiff's claim and found that the defendant was required to pay the upfront as per the letter of award.

In allowing the defendant's appeal, the Court of Appeal held, among others, that the subcontract agreement merely stated that the defendant agreed to pay the plaintiff a commission sum of 13.5% but it did not specify when the commission was to be paid. Further, the subcontract agreement contained an entire agreement clause. In agreeing to this clause, the parties must be presumed to be precluded from relying on the letter of award or evidence of any witness to give a different meaning to the subcontract which contained the entire agreement clause.

In a recent case,[8] Rohana Yusuf FCJ in her dissenting judgment remarked that an entire agreement clause estopped one from relying on any purported representation by the other party, outside the scope of the written agreement and the implication of the entire agreement clause means that no extraneous evidence may be considered to interpret, to supplement or to contradict the obligations set out in the agreement.[9]

Conclusion

In a nutshell, in interpreting an agreement, the court will look no further than the four corners of an agreement. Therefore, contracting parties should include any oral agreements or representations which they intend to rely on in writing. Otherwise, these terms are unlikely to be part of the agreement when there is a dispute on the terms if the agreement contains an entire agreement clause.

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7 *Harin Corp Sdn Bhd v Rimbun Tekad Premix (Terengganu) Sdn Bhd* [2016] 3 MLJ 782 (CA)
8 *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571 (FC)
9 *Ibid*