VARIATION BOILERPLATE CLAUSE

Need to know

The variation boilerplate clause regulates the manner in which a contract can be varied. The clause has important evidentiary and practical value because it encourages parties to ensure that any variations to the contract are documented and authorised by the parties. Including this clause in a contract minimises inadvertent or informal variations and helps to avoid disputes between the parties about what was and was not agreed to be varied. Outlining a clear procedure for variations also reduces the risk of waiver, which may arise where the requirements for a binding variation agreement are not met.

CAUTION: This clause has limited effectiveness because oral variations can occur even if prohibited by the clause. However, this clause should be included for its evidentiary value, because it documents the parties' intentions as to the agreed method of variation.

THE SAMPLE CLAUSES

Option 1 – no variation

No variation of this [deed/agreement] is effective unless made [in writing/by deed] and signed by each party.

Option 2 – no variation unless particular procedure followed

*No variation of this [deed/agreement] is effective unless made in accordance with the following procedures: [**insert procedures**].*

Option 3 – variation by a specified person

No variation of this [deed/agreement] is effective unless made [in writing/by deed] and signed by [an Authorised Officer of] each party.

1 What is this clause and why is it used?

1.1 What is a variation clause?

A variation clause details whether, and the extent to which, one or more parties to a contract can amend or vary the contract and provides the procedure that must be followed to vary provisions of the contract.[1]

For example, an agreement might contain a clause:

(a) stating that no amendment or variation can take effect unless it is in writing, signed by authorised representatives of each of the parties; or

(b) allowing a manufacturing party with the written consent of the other party to amendthe specifications of a manufacturing agreement so long as the amendment does not change the functions of the finished product, its size and maintenance.

1.2 What is the purpose of the variation clause?

The purpose of a variation clause is to set out theminimum requirements which the parties agree are needed to effect a change to the contract andthereby preclude all, or at the very least minimisethe incidence of, variations which are not made inaccordance with those formalities. The most important reason why parties include a variation clause is to ensure predictability and certainty (ie to ensure that the variation is agreed in writing).

There are, however, no guarantees that the clause will achieve its intended purpose as courtsappear reluctant to reject an oral variation which is clearly intended to be binding even if the parties have included a no oral variation clause inthe original contract (ie a clause which requires the variation to be in writing).

1.3 What does "variation" mean?

A "variation" alters the terms of an existing contract between the same parties. It may createa new contract, rendering the original contract of no effect, or it may keep terms of the original contract on foot, with variations or additions to those terms. A court will construe the agreementto vary to determine its effect on the original contract.[2]

All requirements necessary to create a valid and enforceable agreement must be satisfied to effecta variation. Any agreement that varies the terms of an existing contract must either be supported by consideration or executed as a deed.[3]

1.4 Are there any legal requirements for variations to be in writing?

Yes, a variation must be in writing if:

(a) there is a statutory requirement of writing; or

For example, variations to contracts for thesale of land,[4] and variations to contracts of guarantee made in the Northern Territory, Queensland, Tasmania, Victoria and Western Australia, are required to be madein writing.

(b) it relates to a deed.

Variations to deeds must be made by deedto be effective at law,[5] although in equity a simple contract is sufficient.[6]

Variations to these types of contracts must be evidenced in writing.[7] If the writing requirement isnot met, the original contract stands unaffected.[8]

2 How effective is it?

The major issue concerning this clause is its effectiveness.

2.1 Effectiveness of "no oral" variations clause

While commercial contracts often contain stipulations that they can only be varied in writingor that a purely verbal variation is not enforceable, such stipulations appear to be ineffective, except as evidence relevant to the question of whether a variation was in fact agreed.[9]

Courts will give due weight to the parties' expressintention that no oral variations should be effective, but that express intention appears to give way in the face of clear evidence of an oral variation agreed by individuals who clearly had both the authority and intention to make it.

Ellicott J noted in *Crothall Hospital* Services *(Aust) Ltd* (1981) 36 ALR 567 at 567[10]:

> *"It is open to the parties to a written contract to vary it. This may be done in writing or, except where the contract is required by law to be evidenced in writing,by oral agreement. The agreement to varymay be express or implied from conduct."*

It is doubtful whether the existence of a variationclause in an original contract would protect a party from being bound (by way of contract or estoppel) to a subsequent variation if:

(a) that party has engaged in conduct that amounts to a clear representation that it agrees to the variation; and

(b) the other party to the contract did in fact act on the representation.

Nevertheless, there is an important evidentiary and practical value to the clause. It encourages the parties to ensure that any variation is documented and authorised by all parties, thereby helping to avoid any dispute between them about what was and was not agreed to be varied.

This does not, of course, apply where there is a statutory requirement of writing for a contract.

2.2 Effectiveness of procedural clauses

It is not certain that a procedural clause renders invalid any variations made not made in compliance with it, since the parties may, when making a variation, agree implicitly or even expressly to vary or ignore the procedure set outin the clause.

2.3 Consideration

A variation of an existing contract requires fresh consideration. The promise to perform an existing contractual duty is not consideration to sustain a variation.[11] As stated by Mason J in

Wigan v Edwards (1973) 47 ALJR 586 at 594:

> *"The general rule is that a promise to perform an existing duty is no consideration, at least when the promise ismade to the promisee under that contract, and it is to do no more than the promisor isbound to do under that contract. The rule expresses the concept that the new promise, indistinguishable from the old, is an illusory consideration".*

For example, if parties contract on the basis of afixed price for performance of services and the plaintiff is able to obtain a promise of extra payment in exchange for the promised performance of services, there would be no consideration provided by the plaintiff because there is no detriment in doing what was already owed and no extra benefit to the defendant in receiving what is due. The promise of extra payment is of no effect.[12]

However, if a party has made a new promise which goes beyond the pre-existing contractual duty, this may be sufficient to constitute consideration.[13] Generally, courts look to find consideration in contracts. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[14] *and Musumeci v Winadell Pty Ltd*[15] it has been held that consideration may be found in some distinct factual benefit to the promisor in performing the existing contractual duty (for example, saving thepromisor from having to find another contractor, streamlining payment schemes).

In practice, many commercial parties document their permitted variations by deed or by referringto the payment of a small sum by way of consideration in the written documentation.

These methods are designed to alleviate the riskof disputes over whether valid consideration (whether 'fresh' or a 'practical benefit') was givento support the variation.

2.4 Australian Consumer Law

Relevantly, a term in a standard-form consumer contract (as defined in the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**) that permits, orhas the effect of permitting one party, but not another party, to vary the terms of the contract may be unfair and void under the ACL.

3 Drafting and reviewing the clause

3.1 Should I always include it, and what happens if I don't?

The variation clause has real utility in commercialpractice as it is likely to protect parties against casual and unfounded allegations that variations have been made. A variation clause should always be inserted for its evidentiary value in demonstrating the parties' intentions as to the agreed method of variation. Unless there is clearevidence that all parties objectively intended to vary the contract, a court would not find a variation.

If you do not include a variation clause in your contract, assuming the contract is not one which is required by law to be in writing (eg, contracts for the sale of land or certain contracts of guarantee etc), then the parties would be free to amend or vary their agreement in writing or orally.

3.2 When, if ever, should I amend the clause?

Specific legislation may affect the requirements ofa variation. It is important that you amend the sample variation clause to reflect any applicable legislative requirements to your contract to ensure that any subsequent variation is valid.

For example, where under statute of frauds legislation, the original contract is required to be in writing, a variation must also be in writing. If itis not, the original contract stands unaffected.[16]

4 Other practical considerations

4.1 Variation distinguished from other related legal concepts

Variation must be distinguished from rescission, novation, forbearance, waiver, anticipatory breach, collateral contracts and counter offers:

(a) **Rescission**[17] may be distinguished from variation based upon the intention of the contracting parties, which may be express or implied. In Morris v Baron & Co,[18] Viscount Haldane said it is essential, if the agreement is to amount to a complete rescission, "that there should have been made manifest the intention in any event ofa complete extinction of the first and formalcontract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting";

(b) **Novation** is comprises a tripartite agreement that creates a new contract withdifferent parties in substitution (and supersession) of the original contract, whilevariation retains and only alters the originalagreement;

(c) **Forbearance or waiver** of a right under the contract or of a particular mode or manner of performance does not amount to a variation of the terms of that contract and the parties cannot sue on it. For instance, parties cannot sue for not delivering at an appointed time or cannot refuse delivery at the time;

(d) **Anticipatory breach** of contract is independent from a variation to the contract. It arises where a non-breaching party terminates an agreement because, prior to the time when performance falls due, it becomes clear that another party cannot,[19] or will not,[20] fulfil their obligation/s under that agreement. Provided the breach is sufficiently serious,[21] it is the non-breaching party's exercise of their right to terminate that gives rise to the anticipatory breach of contract. This action is not related to, and does not equate to, a variation of contract;

(e) **Counter offer** might be framed as an acceptance conditional upon the offeror's agreement to vary the terms of the offer (but is usually considered as a fresh offer that destroys the original offer, which is nolonger capable of acceptance). Counter- offers occurring prior to contract formationare outside the scope of variations contemplated by the sample variationclause; and

(f) **Collateral Contracts** (with the same parties as the main agreement) augment the obligations in the main agreement andconfer additional rights and obligations onthe parties, but do not vary the original terms.

ENDNOTES

[1] A variation clause preserves the principle that a contract can only be varied with the consent of both parties. A unilateral variation is not binding if the parties have clearly stated that consent of both parties is required to give effect to the variation. If the parties have agreed that unilateral variations of a limited kind are permissible, then they will be binding assuming the agreement for this to happen forms part of the original agreement. See also *the Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) and the prohibition against 'unfair' unilateral variations rather than unilateral variations per se. This is also consistent with *Leveraged Equities Ltd and Another v Goodridge* (2011) 191 FCR 71 and the abilityto agree to novation in advance without further agreement between the original party and the incoming party, with agreement between the outgoing and incoming parties being sufficient to effect the novation. Historically where a deed was altered before it became operative, the rule in *Pigot's Case* ((1614) [1588–1774] All ER Rep 50) did not invalidate it, but the obligor could not be held to the obligation in its altered form, because it had never made or assented to such an obligation. In NSW only, section 184 of the *Conveyancing Act* 1919 has abolished the rule in Pigot's Case and provides that a material alteration to a deed (or to a dealing under the *Real Property Act* 1900 (NSW)) does not by itself invalidate the instrument or renderit voidable or otherwise affect any obligation under the deed. See also *Karacominakis v Big Country Developments Pty Ltd & Ors Big Country Developments PtyLtd v Chadlace Pty Ltd J W Wall Investment Co Pty Ltd v Big Country Developments Pty Ltd & Ors Hollingsworth & Anor v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [47].

[2] *See Dan v Barclays Australia Ltd* (1983) 46 ALR 437 at 448per Wilson and Dawson JJ (in dissent in result) and approved in *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR520 at 534.

[3] *Williams v Roffey Bros & Nicholls (Contractors) Limited* [1991] 1 QB 1.

[4] *Conveyancing Act 1919* (Cth).

[5] *Berry v Berry* [1929] 2 KB 316 at 319.

[6] *McDermott v Black* (1940) 63 CLR 161; *Berry v Berry* [1929] 2 KB 316 at 319; *Pappas v Rimar Pty Ltd* (1984) 55 ALR 327 at 333.

[7] *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 243-4.

[8] *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 243-4.

[9] *Liebe v Molloy* (1906) 4 CLR 347 at 353-5; *Commonwealth vCrothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567 at 567; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251; GEC *Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 at [291], [394]-[395], [467]. The issues raised by 'no oral'variation clauses are discussed at length by Finn J in *GEC Marconi Systems* at [213]-[223].

[10] See the authorities cited in *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91 at [35]; *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87; (2019) 373 ALR 591 at [122]; cf *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119; [2018] UKSC 24.

[11] *Stilk v Myrick* (1809) 170 ER 1168.

[12] Seddon, N, Bigwood, R, Ellinghaus, M, *Cheshire and FifootLaw of Contract,* 10th ed, 2012, Lexis Nexis at p203.

[13] *Hartley v Ponsonby* (1857) 7 E&E 872; 119 ER 1471; *NorthOcean Shipping Co Ltd v Hyundai Constructions Co (The Atlantic Baron)* [1979] QB 705; [1978] 3 All ER 1170.

[14] [1991] 1 QB 1; [1990] 1 All ER 512.

[15] (1994) 34 NSWLR 723.

[16] *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) PtyLtd* (1957) 98 CLR 93 at 113 (Dixon CJ and Fullagar J).

[17] An agreement to rescind (or terminate) the contract discharges the parties from the duty to perform their contractual obligations.

[18] [1918] AC 1 at 19 per Viscount Haldane. See also *Dan v Barclays Australia Ltd* (1983) 46 ALR 437 at 448 per Wilsonand Dawson JJ (in dissent in result) and approved in *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 534.

[19] *Sunbird Plaza Pty Ltd v Maloney* [1988] HCA 11, [26] (Mason CJ), [46] (Gaudron CJ); both citing *Rawson v Hobbs* [1961] HCA 72, [10].

[20] *Rawson v Hobbs* [1961] HCA 72, [10] (Dixon CJ); *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* [1978] HCA 12, [24] (Jacobs, Mason and Stephen JJ).

[21] See *Hochster v De La Tour* [1853] 118 ER 922; *Francis v Lyon* [1907] 4 CLR 1023; *Loughridge v Lavery* [1969] VR 912; *Afos Shipping Co SA v Pagnan* [1983] 1 All ER 449.