FURTHER ASSURANCES BOILERPLATE CLAUSE

Need to know

A further assurances clause evidences the agreement of the contracting parties to do everything necessary to complete the transactions contemplated by the contract. There is some debate about whether such a clause is necessary, given the implied "duty" to cooperate. However, as the application of the implied duty of cooperation is dependent on the individual circumstances of each case, it is currently recommended that a further assurances clause be included in contracts. A further assurances clause may indicate, for example, that the parties' intentions support the implication of a term requiring good faith performance.

However, given the Courts' willingness to imply a duty of cooperation, if the parties do not wish for additional steps to be taken (ie apart from those expressly identified in the contract), then a further assurances clause should not be included and should be replaced with a clause stating that no additional steps are required.

THE SAMPLE CLAUSES

Option 1 – general

Except as expressly provided in this [deed/agreement], each party must, at its own expense, do all things reasonably necessary to give full effect to this [deed/agreement] and the matters contemplated by it.

Option 2 – execute specific agreements/procurement etc

Except as expressly provided in this [deed/agreement], each party must, at its own expense, do all things reasonably necessary to give full effect to this [deed/agreement] and the matters contemplated by it, including:

(a) executing or ensuring the execution of documents;

(b) ensuring that relevant third parties do all things reasonably necessary to give full effect to this [deed/agreement] and the matters contemplated by it; [and]

(c) [insert any other relevant class of action appropriate for the transaction].

1 What is this clause and why is it used?

A further assurances clause is used to evidence the agreement of the contracting parties to do everything necessary to complete the transactions contemplated by the contract.

This clause is useful as parties may have to do further acts in order to give effect to the agreement, eg executing other documents or having to procure third parties to perform certain obligations. It also provides a "catch all'' should detail be omitted in the description of a party's obligations.

This clause was traditionally used in sale of land transactions to ensure that a vendor was bound to do such further acts as were required to perfect the purchaser's title to the property. In modern real property transactions, further assurances clauses are probably not strictly necessary in those jurisdictions which imply covenants as to title: for example, section 78 of the *Conveyancing Act* 1919 (NSW) expressly imposes an obligation equivalent to a further assurances clause on the transferor to do all things necessary to perfect title in the property being transferred.[1]

However, the principles developed in the context of "further assurances" clauses for the sale of land are still relevant for other types of transactions, and nowadays further assurances clauses can be found in a broad range of commercial contracts. They may be particularly helpful in the sale of a business (where assignments of contracts are to take place) or where intellectual property rights are to be transferred.

2 How effective is it?

2.1 Further assurances clauses are generally effective

It is clear from the case law that courts enforce further assurances clauses.[2] However, their interpretation or enforcement is:

(a) **limited to the extent of the contract:** Further assurances clauses will not be interpreted as requiring an act by one party that confers rights or disadvantages on the other that goes beyond what has been contracted for - see *Carlton & United Breweries v Tooth & Co*[3] and *Daniels v Pynbland.*[4] More recent case law has confirmed this principle in holding that the clause "*cannot operate upon some subject matter wider than that delineated by the deed itself*".[5]

(b) **not vitiated by faulty provisions:** The requirement to execute documents which are the subject of further assurances clauses is not vitiated by faulty provisions within the document. Whether a document contains a faulty provision is "beside the point" when it comes to the application of a further assurances clause.[6]

It is also apparent that further assurances clauses work in conjunction with other principles of contract law, in particular:

- the implied duty to co-operate; and
- potentially, the implied term of good faith (and reasonableness) in performance.

2.2 Duty to cooperate and further assurances clauses

It is arguable (see below) that the general duty to cooperate removes the need for a further assurances clause. For the reasons set out below, this is not a recommended path. This part discusses the implication of the duty to cooperate.

Courts have shown a willingness to imply the duty to cooperate into an agreement where there is no express intention contained within that agreement which would contradict it and so will impose an obligation on each party to do all that is reasonably necessary to secure performance of the contract.[7] In the seminal case of *Mackay v Dick,*[8] it was held:

> "*[Where] it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for*

> *the carrying out of that thing, though there may be no express words to that effect*."

This implied duty was considered again in *Butt v M'Donald*[9] and the principle stated by Griffith CJ was affirmed by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd.*[10] That is:

> "*it is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract*."

Campbell v Backoffice Investments Pty Ltd[11] affirmed the principle in MacKay although it was pointed out that a duty to cooperate cannot be implied where it is "*at odds with the terms upon which the parties have expressly agreed*".[12]

It is clear that an implied duty to cooperate will not apply in all cases and its application will be dependent on the individual circumstances of a case.[13]

2.3 Further assurances and the implication of a duty of good faith

It has been suggested in commentary that "*if the further assurances clause is expressed in strong terms and imposes an express obligation on the parties to do whatever is necessary to give each other the full benefit of the contract, it provides valuable support for any argument based on a duty of good faith and reasonableness*".[14]

While "*breach of the duty of cooperation will frequently occur by reason of a failure to act in good faith….a good faith duty is more general than a requirement of cooperation, and it is not a necessary incident of contracts that each party must consider the interests of the other when performing the contract*".[15] The status of good faith within the Australian law of contract is uncertain and the subject of much controversy.

3 Drafting and reviewing the clause

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

In light of the willingness of the courts to imply a duty to cooperate and the further development of the implied duty of good faith, it may be that further assurances clauses will not be a necessary or useful feature of future agreements.

In *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd (formerly known as Leigh Mardon Australasia Pty Ltd),*[16] it was stated that in those circumstances the further assurances clause "*add[ed] little or nothing to the obligations already imposed …. by virtue of the agreement itself and its implied terms*".

Further assurances clauses are also rarely contested or controversial so their value is not tangible. However, as the application of the implied duty of cooperation is dependent on the individual circumstances of each case, it is recommended that contracts continue to contain a further assurances clause. If the further assurances clause is not included, parties will need to rely on the implied duty of cooperation.

3.2 What are the sample boilerplate clauses?

There are two variations on the further assurances boilerplate clause. The first (above as Option 1) contains a general obligation "…to do all things reasonably necessary to give full effect…". The second (Option 2) specifically refers to agreement on further execution and procurement. It may be desirable to include this second variation to avoid any disagreement as to the scope of the clause.

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

(a) **To add the words "or desirable":** One variation on the wording of the further assurances clause is to include the words "*or desirable*", ie each party must do all things reasonably necessary or desirable to give full effect to the agreement.[17]

Depending on the interests of the party, the addition of the words "or desirable" could be advantageous as it could result in more acts falling within the requirements of the further assurances clause. Conversely, because of the subjective and ambiguous nature of the word "desirable", this would not be a favourable addition for a party who wanted to limit its obligations. As a general rule, and due to their ambiguous nature, we do not recommended that you include these words.

(b) **To make the clause the responsibility of only one party:** In some circumstances, for example where only one party is to benefit from a transaction or it is conventional in that type of transaction for a particular party to be responsible and pay for the costs of carrying out further assurances tasks, it will be appropriate for the clause to be drafted so that it is given by one party only.

(c) **To cover the issue of costs:** There may be considerable costs involved in complying with a further assurances clause. Consider if each party will bear its own costs or if the costs will be borne by one party (for example the party which is to benefit from the further assurances tasks).

(d) **To cover the issue of requests:** Consider whether one party must request the other party to undertake the further assurances tasks. Consider how costs will be borne if requests are made.

(e) **To cover timing:** Consider whether the performance of the further assurances tasks are time sensitive. If so, consider adding words such as "promptly", "within [*insert number*] days of being requested by [*insert name*]" etc.

4 Other Practical Considerations

Do you need a power of attorney?

Where particular actions are to be taken by one party at some time in the future, the other party may require that the first party give it an irrevocable power of attorney as security for its undertaking to perform those acts. The power of attorney enables the other party to perform those acts in the name of the first party in the event of the first party's failure to do so within a certain time.

ENDNOTES

[1] See also: *Conveyancing Act 1919* (ACT) s 78, *Conveyancing Act 1951* (ACT) s 3; *Law of Property Act 1936* (SA) s 42; *Conveyancing and Law of Property Act 1884* (Tas) s 7; *Property Law 1958* (Vic) s 76; *Property Law Act 1969* (WA) s 45. There are no equivalent provisions in the Northern Territory or in Queensland.

[2] See for example the consideration of the law applicable to further assurance clauses in *Carlton & United Breweries v Tooth & Co* (1986) 7 IPR 581 at 584 per Young J, and on appeal *Castlemaine Tooheys Ltd and anor v Carlton and United Breweries Ltd and anor* sub nom *Tooth & Co Ltd v Carlton and United Breweries* (1987) 10 NSWLR 468 at 482-484 and *Fox Entertainment Pty Ltd v Centennial Park and Moore Park Trust* [2004] NSWSC 214.

[3] (1986) 7 IPR 581 at 584 per Young J, and on appeal *Castlemaine Tooheys Ltd and anor v Carlton and United Breweries Ltd and anor* sub nom *Tooth & Co Ltd v Calrton and United Breweries* (1987) 10 NSWLR 468 at 482-484.

[4] (1985) 4 BPR 9716.

[5] *Fox Entertainment Pty Ltd v Centennial Park and Moore Park Trust* [2004] NSWSC 214 at 195

[6] Ibid [193].

[7] *Mackay v Dick (1881) 6 App Cas 251, Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304, Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607-8, the Supreme Court of South Australia in *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)* [2012] SASC 49 affirmed that an implied term to "*do all that is necessary to be done ...to enable the other party to have the benefit of the contract is well recognised and not controversial*" in commercial contracts [568], *Butts v O'Dwyer (1952) 87 CLR 267* (implied obligation on part of transferor to do all that was reasonable to ensure that consent obtained where contract to transfer land is subject to term that it is not to become effective unless consent obtained).

[8] *Mackay v Dick* (1881) 6 App Cas 251 per Blackburn J at 263.

[9] (1896) 7 QLJ 68, 70-1.

[10] (1979) 144 CLR 596, 607.

[11] (2009) 238 CLR 304.

[12] Ibid [168].

[13] See, eg *Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd* (1991) 29 NSWLR 44 at 60 per Giles J (duty did not require party to ensure that exercise of put option became binding where this would have amounted to warranty that Foreign Investment Review Board approval would be obtained), *RDJ International Pty Ltd v Preformed Line Products (Australia) Pty Ltd* (1996) 39 NSWLR 417 at 421 per Young J (duty does not require person to interrupt business activities merely because it sees the other getting into difficulties). See also *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986)* 40 NSWLR 631 at 635 per McHugh JA (with whom Kirby P and Glass JA agreed), CA; *Council of the City of Sydney v Goldspar Australia Pty Ltd (ACN 002 705 991)* (2006) 230 ALR 437 at 497, [2006]

FCA 472 at [162] per Gyles J (difficulty in `giving content' to the obligation).

[14] Joshua Thomson, Leigh Warnick and Ken Martin, Thomson Reuters, *Commercial Contract Clauses Online* (at October 2012) [60840]. The commentary is in relation to *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2008] 2 NZLR 418, which concerned a dispute over a contract that included an express assurances clause. There the New Zealand Court of Appeal considered conduct of the breaching party was wrongful even without resort to that clause. The Court did not expressly refer to good faith and reasonableness.

[15] Carter on Contract online at [30-020].

[16] (2009) 26 VR 551 [38].

[17] *Alstom Ltd v Yokogawa Australia Pty Ltd and Anor (No 7)* [2012] SASC 49; *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd (formerly known as Leigh Mardon Australasia Pty Ltd)* (2009) 26 VR 551.