Entire Agreement Clauses: Call for Caution

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The purpose of an entire agreement clause (EAC) is to convey in an unequivocal manner that the written contract in which it is incorporated, solely encompasses what has been agreed between the parties, so that the latter might thereafter be precluded from instituting proceedings in connection with preceding agreements, discussions, negotiations, promises, undertakings, pre-contractual statements or representations made prior to concluding the written contract which is to embody all applicable terms governing their relationship.

EAC clauses are ordinarily encountered when dealing with the so-called “boilerplate” provisions (standardised language template texts) which, having not had the benefit of prior negotiation, have a tendency to be overlooked, without further consideration or thought being afforded as to their legal significance or implications – a tenuous position which might ultimately prove to be prejudicial to the interests of the parties to the contract who might seek to challenge or rely on the EAC’S provisions to support their respective legal positions.

EAC’s may be expressed or structured to convey one or more of the following legal applications:

The terms of the written contract in which they are incorporated shall constitute the entire agreement between the parties, and that any statements made prior to signing the contract document, shall be of no force and effect. This particular aspect will more often than not be applicable to all EAC’s. Neither of the parties to the contract shall seek to rely on any statement which is not expressly incorporated in the written contract. Any provision couched in such terms is referred to as a non-reliance clause.

The parties’ only available remedies in the event of a dispute will be confined to those that are specifically provided for in the written agreement, or shall be restricted to a claim for damages in the event that the defaulting party is in breach of contract. Any liability for a pre-contractual misrepresentation shall be excluded.

Whilst each of the foregoing aspects may conceivably be covered by the operative EAC, due consideration must necessarily be given to the extent to which such stipulations will have the desired effect when contracting parties seek to rely thereon. In this regard, valuable judicial guidance has been forthcoming in helping to cast light on the impact and implications of EAC’S, whereby relevant case authority, such as AXA Sun Life Services PLC (2011) EWCA Civ 133, serves as a most useful guide in highlighting potential pitfalls and certain preventative steps that may be taken by contracting parties to ensure that there are no grey areas or misunderstandings as to their precise meaning, nature and extent.

In the above case, AXA instituted claims for damages against the defendants (four of their designated insurance representatives), basing its actions for breach on the company's applicable standard terms of contract. In response to the defendants' contention that AXA had induced each of them to enter into their respective agreements by fraudulent and negligent misrepresentations, and collateral warranties, AXA contended that this issue was in fact governed by the terms of the following EAC which, as an integral provision of the defendants' contracts, had effectively precluded the latter from raising any challenge to AXA's claim:

"This Agreement …….. constitutes the entire agreement ……. This Agreement shall supersede any prior promises, agreements, representations or undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement."

Following a comprehensive analysis of the applicable legal principles impacting EAC's, the Court of Appeal's Rix L J concluded that AXA's submissions were short of convincing and that their liability for pre-contractual misrepresentations could not be side-stepped under the circumstances. In an endeavour to explain his reasoning, the learned judge placed due emphasis on what he considered the cornerstone of his argument, which he sought fit to refer to as "the essence of agreement". Indeed, this aspect appeared to have been the central theme of his reasoning and the focal point of the EAC in question. Elaborating on this point, Rix LJ was of the view that the specific wording of the EAC effectively encapsulated only those issues that the parties had actually agreed upon. This, he considered, was borne out by the fact that the EAC made no mention or reference to the word "misrepresentations". He went on to point out that whilst the EAC did embody the word "representations", this did not alter the position, nor did it in any way detract from the fact that its provisions were essentially one of agreement. In explaining this latter point further, the learned judge declared that the word "Agreement" in the EAC was capable, in the circumstances, of embracing pre-contractual statements which, by virtue of their strength, could conceivably be regarded as having been incorporated as terms of the written contract (thus, in effect, bringing them within the ambit of what Rix LJ 's "essence of agreement"). The upshot of the reasoning in AXA is that nothing short of unambiguous wording will do, if liability for misrepresentation is to be excluded by an EAC. Accordingly, to achieve this purpose, it should be clearly stated that the parties expressly agree that no pre-contractual representations were made, or that any liability for misrepresentation is excluded. In the case itself, the words of the EAC were not regarded as precise enough to absolve AXA from liability for misstatements which preceded the written contract.

In considering the implications of EAC's, the following matters also merit due consideration:

As a matter of policy, a contracting party cannot exclude liability for its own fraud. Thus, any attempt to exclude legal responsibility for fraudulent pre-contractual misrepresentations by way of an EAC, will not succeed (refer HIH Casualty and General I Insurance Ltd and Others v Chase Manhattan Bank and Others (2003)

UKHL 6, where the words “no liability of any nature ……. or for any information provided” could not absolve the representor from deceitful misstatements made prior to entering into a contract with the representee).

The AXA case is authority for the proposition that terms implied into a contract to give it business efficacy, are not ordinarily affected by the wording of an EAC which purports to convey a general exclusion of implied terms. Such terms are considered to be of such nature that they are perceived as an integral component of the written contract (a fortiori, it follows that implied terms shall not excluded in circumstances where the EAC is effectively silent as to their inclusion/exclusion) (see Harrison and Others v Shepherd Homes Ltd and Others (2011) EWHC 1811). However, notwithstanding this general proposition, an EAC may nevertheless be effective in excluding certain implied terms, having regard to the particular facts of the case and provided clear words are used to reflect same. This was evident in ExxonMobil Sales and Supply Corporation v Texaco 2003 EWHC 1964 (Comm), where it was held that the EAC was capable of excluding terms implied by usage or custom when expressed to state that the contract was the “entire agreement.” and that there was “no other promise, representation, warranty, usage or course of dealing affecting it”. The word “usage”, in this context, was sufficient to convince the court that any implied term emanating therefrom would not thereby be incorporated as an integral part of the agreement.

An EAC would not be capable of preventing a party from bringing forth a claim for rectification in circumstances where it can be established that the document does not accurately reflect what had in fact been previously agreed between the parties.

A further aspect that may limit the effectiveness of an EAC as an exclusion device to pre-empt the incorporation of pre-contractual matters as terms of the contract, is that of “estoppel by convention”. This equitable concept may conceivably come into play where it has transpired that the parties concerned have, prior to concluding a written agreement, dealt with each other on the basis of certain assumptions (which they have duly relied upon), and it would be considered unfair if there were any subsequent attempt by one of the parties to negate such assumptions, by pointing to the wording of an EAC in support of this position. In effect, a party would be estopped from denying the existence of these assumptions, irrespective of the wording of the clause in question (refer Mears Ltd v Shoreline Housing Partnership Ltd (2015) EWHC 1396, where the court, per Akenhead J, having considered the implications of a pre-contractual arrangement, concluded that “The entire agreement clause does not exclude or limit reliance on any established and effective estoppel either on its express wording or by way of interpretation”.

An issue which ought to be addressed is whether a non-reliance component in an EAC is capable of being classified or construed as an exclusion clause, in which case other contractual considerations would come into play, in the form of the applicable contractual principles of Cyprus law which, in this context, would be the relevant statutory provisions of the Unfair Contract Terms Law (Law 93/1996). One school of thought is of the opinion that non-reliance provisions in an EAC should be perceived

as exclusion clauses, whilst a contrary point of view is that the EAC would effectively operate to ensure there is no liability at all, so that the question of whether it may or may not be an exemption clause is neither here nor there. In other words, pursuant to this line of argument, there would effectively be no liability emerging, which might be capable of exclusion.

If we are to accept that a non-reliance clause is capable of being identified as an exemption clause, Law 93/1996 would, as previously stated, come into play, whereby the clause in question would, inter alia, be required to satisfy the "good faith" test. In essence, the clause would be upheld as valid if it does not cause a significant imbalance in the rights and obligations of the parties, to the consumer's detriment (it will be recalled that Law 93/1996 is applicable to contracts between consumers who deal outside the parameters of a business transaction, and suppliers/sellers of goods/services). Under S5 (3) of the Law, the element of good faith may be assessed with due regard to the extent to which there was inducement, whether the subject matter of the contract was made available to a party's special order, the relative strength and bargaining position of the parties, and whether there was fair dealing on the part of the seller/supplier. Other statutory guiding factors which may be considered in this regard, are the particular circumstances known to the parties, the nature of the goods/services, and the other provisions of the operative agreement (S5 (2) of the Law).

The difficulties presented by EAC'S are perhaps most aptly expressed by Geoff R Hall who remarked that the interpretation of entire agreement clauses is one of the most confusing areas of contract law in Canada (Canadian Contractual Interpretation Law, LexisNexis Canada 2012, Page 270-271 (Hall). Needless to say, this rather graphic point of view is strikingly indicative of the need for contracting parties to be certain as to what they wish to incorporate in the operative contract document. At the same time it is a stark reminder that EAC's should not be taken at face value, but appropriately scrutinised or carefully drafted with a view to avoiding the potentially serious legal and financial repercussions that may otherwise ensue. Indeed it is crucial that, despite the standard nature of EAC's and an inevitable tendency to overlook or underestimate their contractual significance, expert legal advice should be sought by the parties concerned, to ensure that the operative contract document is properly drawn up to reflect and incorporate the entire agreement between them, and to make absolutely certain that no material issues have been omitted or overlooked, in a hasty attempt to place their signatures on the dotted line.