
CONTRACTS: A GLOSSARY OF JARGON

Introduction

Sometimes people use "legal jargon" when they are drafting, negotiating, discussing, entering or arguing about an agreement. This information sheet contains a list of some of the more common legal terms that you might come across in these instances. It is not an exhaustive list and is subject to any specific definitions, and the context used, within a particular agreement.

It is always best to seek clarification about the meaning of any unclear term in an agreement. Ask the agreement to be reworded if it contains jargon you feel uncomfortable with. If possible, seek independent legal advice on the proposed deal and the particular agreement you are entering.

Capitalised terms in the following definitions are also defined terms in this information sheet.

Agreement Arrangement or understanding between two or more Parties made verbally, in writing, by conduct or a combination of these forms. The term "agreement" covers both Deeds and Contracts. See Arts Law's information sheet on [Contracts: an introduction](#).

Alternative

Dispute Resolution Alternative Dispute Resolution (**ADR**) is a term that covers methods of attempting to resolve a dispute without going to court. Arbitration and Mediation are types of ADR. Agreements often contain a clause requiring the parties to participate in ADR and prescribing what processes they will follow if a disagreement arises in relation to the agreement. The inclusion of such a clause may often prevent a party from starting court proceedings without first following the process set out in the agreement.

Arbitration Method of dispute resolution where a private tribunal rather than the courts of competent Jurisdiction determines the dispute between the parties to an agreement.

Boilerplate clauses Term that lawyers use to describe the more generic clauses that appear in most agreements. Boilerplate clauses are often inserted at the end of an agreement under a heading like "General provisions". They include matters like Entire

Agreement, Jurisdiction, Waiver, Severability, Amendment and Governing Law clauses.

Breach Failure to comply with one or more terms or conditions of an Agreement. The verb "to breach" has a corresponding meaning.

Browsewrap Agreement A browsewrap agreement describes the situation where the terms of use (TOU) or terms of service (TOS) of the use of a website can be viewed on a linked page (such as via a button at the bottom of the home page) but the user of the website is not required to click a button to acknowledge that the user is acknowledging their acceptance of those terms and conditions. It is uncertain as to whether TOU/TOS that are presented in the form of a browsewrap agreement are legally enforceable as there can be questions as to whether the user had notice of the TOU/TOS or whether the user has, as a matter of contract law, acknowledged their acceptance of those terms and conditions.

Clickthru agreement A clickthru agreement describes when a purchaser of software or a subscriber to an online service must click a button before the software installation is completed or the online service can be accessed by the subscriber. A clickthru agreement also describes the process of completing an ecommerce transaction (such as the purchase of some product from a website) where the purchaser must click a button before completing the transaction. The legal effect of the purchaser being required to click-through the button (where there is notice given that there are terms and conditions that are to be accepted or rejected) is that the purchaser is acknowledging their acceptance of those terms and conditions. The assent to those terms and conditions by clicking through the button will take effect whether the purchaser chooses to read or chooses to ignore the terms and conditions.

Chain of title The 'chain of title' documents are the written Agreements that establish the ownership of intellectual property rights or the right to use intellectual property. The expression is used in the film and television production industry in relation to all the Agreements related to the underlying rights in the source material and the scriptwriting agreements that establish that the producer has the film adaptation rights from the copyright owner of the source material and from the script writers.

Common Law Judge made law; law developed through court decisions rather than by parliament in legislation.

Common seal a 'common seal' or 'seal' was the traditional way in which a company executed Contracts and Deeds. It is no longer a requirement that a company have a common seal, although some older companies may have and use a common seal. Section 127 of the Corporations Law 2001 (Cth) describes how companies can execute Contracts and Deeds.

Confidential Secret; not to be disclosed. The terms of Agreements are sometimes required to be kept confidential. Further, some Agreements contain a clause listing specific information arising from or shared under the Agreement that must be kept confidential.

Consideration Contractual promise is given in return for something of value. Consideration is the "price" given by each Party to a Contract in exchange of the contractual promise of the other Party. It refers to the "thing" that each Party gives to the other for

entering the Contract; the benefits exchanged between the parties. Often the consideration will be the price one Party pays to acquire goods or a service from the other Party and the transfer of the goods or performance of the work by the other Party to the payer. The benefit exchanged does not have to be monetary, but it must have some value. It is, however, not necessary for the consideration to have the same value as the promise in exchange of which it is given. Nominal consideration, for instance \$1, is sufficient.

Contract Agreement between two or more parties that requires Consideration to be legally binding and enforceable. Although the term contract is often used to refer to the document that outlines the rights and obligations of the Parties, a Contract is not always in writing and can also be made verbally, by conduct or a combination of writing, conversations and conduct. Arts Law recommends to have Contracts in writing, with an Entire Agreement clause. See Arts Law's information sheet on [Contracts: an introduction](#).

Counterpart Copy of an Agreement; usually created so that each party may have its own copy. Sometimes there is a clause in an Agreement called a Counterparts clause that allows the different Parties to each sign their own copy of the Agreement as opposed to all Parties having to sign the one copy. Where the different Parties' signatures appear on separate copies, the Agreement is said to have been signed in "Counterparts." This can be helpful where it is difficult for all the Parties to sign the one document due to timing and/or geographic reasons.

Crowdfunding The 'crowd' of people linked through the crowdfunding website who give financial support to the project. See Arts Law's information sheet on [Crowdfunding](#).

Damages Amount of money sought or awarded to a Party to an Agreement to compensate the loss that Party has suffered because another Party has breached the Agreement. Usually the Damages awarded will be enough to put the injured Party in the position it would have been in if there had been no Breach.

Deed Special type of Agreement. Unlike a Contract, it does not require Consideration to pass from one Party to another to be legally binding and enforceable. Special formal requirements must be met when writing and executing (signing) a Deed and if the requirements are not complied with the Deed may not be valid and enforceable.

The description of the parties (at the start of the document) and the statements that describe the purpose of the document (the 'Recitals') and the operative part of the document should use the language of a deed (i.e. using the formal language, such as 'This deed witnesses', that is characteristic of a deed). A Deed also needs to: (i) state at the end that it is "executed as a deed" above where the document is signed and witnessed; (ii) be inscribed with the words "signed, sealed and delivered" where each signature of each party will be placed; (iii) have the signatures witnessed by a person who is not a party to the deed; and (iv) have the executed copies exchanged between the Parties (which is the 'delivery' of the deed). The use of a Common Seal is no longer a requirement in the Execution of a deed. Section 127 of the Corporations Law 2001 (Cth) describes how companies can execute deeds. See Arts Law's information sheet on [Contracts: an introduction](#).

end-user license agreement (EULA)

An EULA is the name given to a software license agreement that is the contract between the licensor and purchaser, which sets out the terms of use of the software. The EULA will be presented to the purchaser when the software is installed on a computer (if supplied on CD or DVD) or when the software is downloaded from a website, which will operate as a Clickthru agreement as to purchaser must click a button before the installation is completed. EULA can be used as an alternative to Terms of Use (TOU) or Terms of Service (TOS).

Entire agreement

Many Agreements include a clause stating that the written document is the complete understanding between the Parties. It means that any statement or promise that is not in the written document (but may have been made by a Party to entice the other to do the deal) is not part of the legally binding Agreement, and cannot be relied upon in relation to the Agreement. If you enter an Agreement that has an Entire Agreement clause, ensure that all the terms and conditions that are important to you are included in the written document. An Entire agreement clause provides certainty for the Parties that the document evidencing their arrangement is complete and exhaustive. The following is an example of an Entire Agreement clause:

"This agreement contains the entire agreement of the parties regarding its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this agreement and has no effect."

Exclusion**or Disclaimer**

Statement renouncing responsibility. A Disclaimer or Exclusion clause attempts to limit or exclude liability of a party. Be careful if you want to rely on a Disclaimer or Exclusion clause, as a court will not always recognise its validity. This is a difficult area and you should get some legal advice. For more information see Arts Law's information sheet on [Exclusion clauses, disclaimers and risk warnings](#).

Execute or Execution

The 'execution' of a Contract or a Deed is the formal act of signing the document. The verb "to execute" has a corresponding meaning.

Governing law

Country or State laws applicable to the Agreement. The Governing law will be used to interpret and make decisions on the Agreement. This is particularly relevant in the event of a contractual dispute where the Parties are based in separate countries or States. The Governing law clause usually is coupled with a Jurisdiction clause, that indicates where a Party must bring court proceedings if there is a dispute about the Agreement. The following is an example of a Governing law clause:

"This agreement is governed by the law in force in [eg country or State of residence of one of the parties, for instance New South Wales]"

Indemnity

Promise by Party A to reimburse Party B if Party B suffers loss or damage in the circumstances that are the subject of the Indemnity. An Indemnity clause is often coupled with a Warranty, where Party A promises something to Party B. If Party A breaches the Warranty and Party B is held liable to a third party for any damage resulting from the breach, the Indemnity means that Party A has to pay the

amount of loss that Party B incurs from its liability to the third party. The following is an example of Indemnity:

"The Composer must unconditionally indemnify the Producer against, and must pay the Producer on demand the amount of, all losses, liabilities and expenses that the Producer incurs because any of the Composer's representations or warranties under clause 16 is incorrect."

Injunction Urgent remedy sought by a Party in court. An Injunction is a court order making a person do, or stopping a person from doing, something. It is sought urgently from a court in circumstances where the whole purpose of the Agreement would be defeated and Damages would not adequately compensate the Party seeking the Injunction for the loss it is likely to suffer from the other Party's actions or omissions.

Jurisdiction Scope of a particular court to determine a particular matter. The Jurisdiction clause usually indicates where a Party must bring court proceedings if there is a dispute about the Agreement. A Jurisdiction clause is often linked to the Governing law clause. The following is an example of a Jurisdiction clause:

"The parties submit to the exclusive jurisdiction of the courts of New South Wales and their appellate courts."

Liability Liability is someone's legal responsibility, duty, or obligation to compensate another person for the harm the first person has caused by breaching legal duties to the other person. Liability can arise under an Agreement, from the Common Law or from Legislation. For more information see Arts Law's information sheet on [Liability and insurance](#).

Legislation Acts, regulations or other legal instruments containing the laws made by parliament, or by authorities that have been delegated law making powers by parliament. In Australia, there is Commonwealth (national) legislation and State-based legislation.

Letter of intent A 'letter of intent' is usually understood to be a document that is specifically drafted to negate any contractual intent. That is, from the point of view of an objective bystander - an objective, reasonable person - the parties did not intend the document to be a legally binding contract. Other expressions that are sometimes used to describe a document that is not intended to be a legally binding contract are: 'letter of comfort' or 'framework agreement', 'understanding' or 'memorandum of understanding' (MOU). The title to a document does not determine its legal effect; therefore the complete document must be reviewed in order to determine whether, on an objective assessment of the document, the parties intend the document to be a legally binding contractual commitment. Therefore it is possible that a document that is described to be a 'letter of intent' or 'MOU' or any other similar title, may be determined to be a binding legal commitment.

Limitation period Period of time that an aggrieved Party has to commence legal proceedings against another Party. The Limitation Period varies depending on the Jurisdiction and the issue in dispute.

Litigation	Conduct of court proceedings.
Mediation	Form of Alternative Dispute Resolution where an independent person meets with the Parties to help them formulate their own solution to solve their conflict. Mediation is often a more informal and less expensive way to resolve a dispute than going to court. It can be particularly useful where the parties have an ongoing relationship and need to deal with each other also after the dispute.
Memorandum of understanding (MOU)	See Letter of intent.
Nominal consideration	is something of value or some benefit that passes in an Agreement that has no relation to the actual value that the party receiving the nominal consideration may actually receive from entering into the contract. It may be necessary to include nominal consideration in an Agreement because of the contractual law requirement that Consideration must pass between the parties to a Contract. Nominal consideration can be anything that may be considered to have some value; a common form in which nominal consideration is expressed is "the payment of \$1 (receipt of which is acknowledged)".
Notice of Custodial Interest	Notice attached to a particular subject-matter to indicate that the subject-matter (such as an artwork, object, music, film etc) embodies traditional knowledge of a particular Aboriginal and/or Torres Strait Islander community. The Notice of Custodial Interest indicates that permission of the custodians of that knowledge has been sought and given for specific uses of that knowledge, and alerts others that the custodians should be contacted for any other use of the subject-matter. A Notice of Custodial Interest is important when an Agreement deals with anything that might contain Aboriginal and/or Torres Strait Islander objects, knowledge, culture, language or works. The following is an example of a Notice of Custodial Interest. <i>"The music/songs in this film embody traditional ritual knowledge of the [name] community. It was created with the consent of the custodians of the community. Dealing with any part of the music/songs for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the [name] community, and may also breach the Copyright Act 1968 (Cth). For enquiries about permitted reproduction of this music/these songs, contact [community]."</i>
Party	Any participant to an Agreement or Litigation. "Parties" has a corresponding meaning.
Period	Length of time for which an Agreement operates (see also "Term").
Precedent	Template used as a guide to preparing a similar type of Agreement. The term "Precedent" can also refer to a prior court decision that is authority for a particular legal position or argument.
Protocols	Protocols refer to appropriate conduct. In recent times, a number of Protocols have been developed for use when interacting with Aboriginal and/or Torres Strait

Islander people and their communities. Protocols are made in good faith and encourage mutual respect. They are not legally binding unless terms of an Agreement oblige Parties to follow them.

Recitals Section in an Agreement where the Parties outline the circumstances that cause them to enter the Agreement. Recitals are also sometimes called "Background". They are usually not a legally binding part of the Agreement but are considered by a court when interpreting the Agreement if there is any ambiguity in the clauses and words used in the Agreement. Recitals often include a statement indicating the intention of the Parties.

Remedies Outcomes available to a Party if the other Party breaches the Agreement. Remedies include Damages and Injunctions.

Representations Statements or promises made by one Party to the other Party as a fact (see also "Warranty"). Representations are often made by one Party to entice the other Party to enter the Agreement.

Rights Entitlements made available by law or under an Agreement.

Severability In the context of Agreements, Severability refers to whether a part of the Agreement that a court finds to be invalid, for example because it is illegal or too uncertain, can be removed from the Agreement or whether its invalidity causes the whole Agreement to be invalid. A Severability clause is often included in an Agreement to indicate the Parties' intention that the Agreement continues without any part the court finds invalid. The following is an example of a Severability clause:

"Invalidity of any clause of this agreement will not affect the validity of any other clause except to the extent made necessary by the invalidity."

A Severability clause does not guarantee that the court will allow the Agreement to survive if certain of its clauses are invalid. That decision is up to the court's discretion and depends on the importance of the invalid part that would have to be "severed".

Subject to contract Where the parties in negotiations wish to ensure that a legally binding Agreement does not exist as a result of the oral or email communications then the parties to the negotiations should expressly state in the emails or letters or telephone communications or meetings between the parties, that their negotiations will take place "subject to contract". That is, the intention of the negotiating parties is that a legally binding Agreement will only be made in a formal document that is signed by the parties.

Sunset clause Clause stating that the Agreement will end after a certain date.

Term Length of time for which an Agreement operates (see also "Period").

Term can also be used to describe any clause of an Agreement (eg. "a term of the agreement", "terms and conditions").

Terms of use (TOU) or

Terms of service (TOS) is the name given to the agreement that is the contract between the licensor and purchase of software or the user of a website or online service, which sets out the terms of use of the software, website or online service. TOU/TOS may be used as an alternative to end user licence agreement (EULA). The TOU/TOS may be presented to the purchaser or user in the form a clicktrou agreement or a browwrap agreement.

Territory Any geographical area that the Agreement relates to.

Third party Person or other legal entity (eg. a company) that is not a Party.

Time is of the

Essence This expression means that the times specified in the Agreement are critical to the Agreement. It means that time is so essential to the deal that if one Party does not comply with the timing requirements, the other Party can immediately terminate the Agreement (and sue for Damages). If you enter an Agreement where "Time is of the Essence" it is imperative that you comply with the timing and dates stipulated, for example for the delivery of an artwork.

Variation A Variation clause addresses how changes can be made to an Agreement after it has been signed. It usually requires that any change to the Agreement be in writing signed by both Parties. A Variation clause is often coupled with an Entire Agreement clause and is intended to avoid confusion over the Terms of the Agreement and prevents a Party arguing that an Agreement was varied orally. The following is an example of a Variation clause:

"This agreement may only be changed in writing signed by all parties."

Waiver, to waive To waive one's rights means to intentionally give up ones rights.

If a Party does not react quickly to another Party's Breach of the Agreement by seeking compliance with the Agreement, an assumption might arise that that Party acquiesces to the Breach and waives, i.e gives up its right to seek compliance with the Agreement. A "no waiver" clause attempts to dispel that assumption and allows the Party that does not react to another Party's Breach immediately to later seek recourse and enforcement of the Agreement. Such a clause may not always be upheld in court if argument dispute arises but it indicates the intention of the Parties that any Waiver must be a conscious decision and should not be implied. The following is an example of a Waiver clause:

"A failure by either party to take action to enforce its rights does not constitute a waiver of any right or remedy under this agreement unless it is in writing signed by the party granting the waiver."

Warranty Assurance where one Party promises that that a certain fact is true. A Warranty may be express or implied. A Warranty is often coupled with an Indemnity. The following is an example of a Warranty:

"The Artist warrants that the Artist is the sole author of the image and owns or has been granted all rights and interests in the Image necessary to grant the licence under this agreement."

Without prejudice Statement (including an offer to settle a dispute) that is not intended to affect any Right of either Party.

If one Party proposes a solution to a dispute that has arisen to the other Party in a Without prejudice communication, the Party is not bound by the terms of the communication if the matter is not resolved and results in dispute resolution proceedings, including a court action. For example, the Party that proposed the settlement terms may seek more than it offered to settle for in the Without prejudice communication. Some communications are "without prejudice" in their nature but it is always a good idea to label documents with these words for additional clarity.

Further information

Other Arts Law information sheets on contract related issues include:

- [Contracts: an introduction](#)
- [Contracts: Getting it write/right](#)
- [Exclusion clauses, disclaimers and risk warnings](#)
- [Liability and insurance](#)

Contact Arts Law (www.artslaw.com.au), tel. (02) 9356 2566 or toll-free outside Sydney 1800 221 457

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