Short notes on:

NON-VARIATION CLAUSES AND AMENDMENTS TO CONTRACTS

Introduction

Often both clients and legal practitioners alike avoid properly reading and considering the implications of certain legal clauses in agreements and legal documents. These are often standard clauses used in various documents as a result of their proven effectiveness. Attorneys refer to these as “boilerplate” clauses.

These have become such an integral part of agreements, both client’s and legal practitioner’s often fail to properly consider its practical implications.

One of these clauses, is often referred to as the “entire agreement” or “non-variation” clause. This is a very useful clause in order to create legal certainty not only in terms of variation or amendment but also of terms included through other written means such as emails and other forms of correspondence.

The clause

The non-variation and entire agreement clause reads something as follows:

“This Agreement constitutes the entire Agreement between the Parties.

No Party shall have any claim or right of action arising from any undertaking, representation or warranty not included in this document.

No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, will be effective unless reduced to writing and signed by or on behalf of the Parties.”

As such the following key aspects are to be observed:
• The Agreement is the entire agreement,
• Nothing whether in an email, discussion or other exchange not included in the Agreement can be relied on, and
• No addition, deletion, update or amendment shall be effective unless in writing and signed by both parties.

The practicalities

Firstly, the parties agree to stand and fall by the contents of the Agreement. As such, it is crucial that everything agreed to between the parties are included in the Agreement. Nothing should be omitted.

Secondly, any form of change or variation of the agreement whether to the effect of adding, amending, deleting or cancelling any portion or the entire agreement itself must be reduced to writing and signed by both parties.

Variations

As such besides reducing all amendments to writing and signing same, some industries are more prone to this as a regular occurrence than others, namely, the construction industry where variation orders often result when circumstances change. For example, a chosen finish which is no longer available or an addition needed. It is important to note that some variations have far reaching effects as unintentionally altering the design, which in turn could affect other provisions of the agreement.

What is more important though is that variations are constructed correctly. If these are not, then it could constitute a new agreement which is not subject to the remaining terms of the agreement seeking to be altered. This may have dire consequences if not properly considered such as adversely affecting guarantee provisions, which are of particular importance in construction contracts.

Conclusion
It is important not to read over any provisions in an agreement whether standard or not. It is also crucial to consider the practicalities surrounding these provisions and to seek professional advice when altering an agreement. Contact an expert at SchoemanLaw for assistance!