

ANALYSIS



Corporate

Paradoxes of *non-binding* and *entire agreement* clauses being meta-clauses

Inasmuch as functioning as meta-clauses, *non-binding* and *entire agreement* clauses are paradoxical in a number of ways.

ÁNGEL CARRASCO PERERA

Professor of Civil Law, University of Castilla-La Mancha
Academic counsel, Gómez-Acebo & Pombo

Inasmuch as functioning as meta-clauses, *non-binding* and *entire agreement* clauses are paradoxical in a number of ways.

it states that something will exist or that something must be interpreted in a certain way at T2. An *entire agreement* clause contained in

the final contract is not a meta-clause, as it falls under neither Type 1 nor Type 2. Surprisingly, a final contract may contain *non-binding* meta-clauses; however, for this purpose, it is more advantageous to draft such clauses —

If the non-binding rule were also non-binding, the letter of intent would be internally inconsistent and invalid

§1. But before delving into the subject, let us define the concept of “*meta-clause*”. This term encompasses three types of clauses:

- 1) a contractual clause incorporated at a given moment in time, T1, whose syntax contains a reference to another clause — also issued at T1 — and which affects the regulatory value of that clause;
- 2) a contractual clause of a *factual or declaratory nature*, which does not create future “*obligations*”, and which refers to a state of affairs that will or will not occur at a given moment in time, T2, subsequent to T1 (for example, it declares the existence or non-existence of a state of affairs that has not yet occurred, or it declares the value that declarations of intent — which have not yet been made — will or will not have);
- 3) a contractual clause at T1 that imposes on the signatories a course of conduct to be followed in the negotiation of the final agreement.

§2. A *non-binding* clause in a letter of intent is a Type 1 meta-clause because it affects the validity or scope of other clauses in the same letter. An *entire agreement* clause contained in a letter of intent is a Type 2 meta-clause because

which are not intended to be *binding* — as *best efforts* obligations. A clause in the letter that seeks to obligate the parties at this stage to agree in the final contract to representations and warranties on the usual terms is a Type 3 meta-clause.

§3. Any Type 3 meta-clause must be deemed not to have been included.

• Non-binding clauses in letters of intent

§4. A *non-binding* agreement clause would be absurd, since there is at least one clause (the *non-binding* meta-clause) that must necessarily be *binding*. If the *non-binding* rule were also non-binding, the letter of intent would be internally inconsistent and invalid.

§5. Beyond this observation, a *non-binding* meta-clause cannot render *non-binding* those clauses in the letter that are, by their very nature, *binding*. Thus, letter clauses regarding (non-)exclusivity, confidentiality, interim period investment, conduct during interim period, costs and expenses, duration, governing law and jurisdiction, price range, consent to due diligence, representations and warranties, good faith, etc.

§ 6. If we continue down this path, it also makes no sense to declare, through a meta-clause, that the rest of the letter's clauses are non-binding. This is because these clauses would already be *non-binding* by their very nature — for example, because they are worded in a highly vague manner; because they are subject to conditions that are strictly at the discretion of one party; because they are subject to conditions that cannot occur within the term imposed on the letter but only thereafter; or because they are mere best-efforts clauses.

§ 7. Consequently, a *non-binding* meta-clause whose purpose is to declare that all or some of the clauses in the letter are *non-binding* is superfluous (and dangerous).

- **Binding clauses in future agreements**

§ 8. A meta-clause in a letter that declares in advance that, unless done in a certain way, the parties must or must not include certain clauses in the final contract ("The parties shall include in the contract the representations and warranties that are customary in this type of contract") is ineffective. These are Type 3 meta-clauses and must be deemed not to have been included.

§ 9. A meta-clause in the letter stating that the letter itself or part of it will be an integral part of the final contract is ineffective. This is because it is a Type 3 meta-clause.

§ 10. A meta-clause that already dictates the content of the future final contract is

ineffective, as it is again a Type 3 meta-clause. It is superfluous and absurd to predetermine the legal form in which the final transaction will take place.

- **Entire agreement clause**

§ 11. A clause of this type is a meta-clause, in that it asserts that any transitional agreements, cross-declarations, or significant pre-closing conduct not set out in the contract are not binding. This pre-closing material that is set aside would, to some extent—were it not for the meta-clause—be binding. Hence the importance of the *entire agreement* clause. If this material were or could be *non-binding ex ante*, the clause would be superfluous because it would merely state that what is not in the contract is not in the contract.

§ 12. Although it is not common, a good *entire agreement* clause emphasises that such "binding pre-closing material" cannot be used to fill any gaps in the contract either.

§ 13. If one thinks about it calmly, it would be logically impossible for an *entire agreement* clause to be included in a letter of intent, since the *entire agreement* clause only 'sweeps away' the material that may have been produced between T1 of the letter and T2 of closing. That said, it makes perfect sense to include in the letter an *entire agreement* clause referring to the time period from T0 to T1, thereby stating that anything not included in that letter has no contractual or pre-contractual value as part of the letter's content.