PALGRAVE GREAT **DEBATES IN LAW**

GREAT DEBATES IN CONTRACT LAW

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have accepted that the inclusion of such a clause excludes the finding of collateral contractual obligations.[94]

Some commentators dissent. David McLauchlan complains that such clauses may be simply *untrue*: the parties may in fact have intended that a collateral statement (outside the written contract) should have contractual effect, and the court should no more rely on an express EAC to contradict their intention than the parol evidence 'rule'.[95] Especially not when the EAC may often be 'part of the boilerplate that is not read and not expected to be read'; the term 'has no magical power to cause statements of fact to be true when they are actually untrue'. McLauchlin makes a powerful case, but would it not deny much of the point of the EAC (written making agreements impregnable) if, like the parol evidence 'rule' they are downgraded to presumptive status only? The case for enforcement depends on commercial convenience rather than belief in 'magical powers'.

Gerard McMeel complains that the courts have 'resuscitate[d] the now discredited parol evidence rule'.[96] But the criticism seems unconvincing. The whole *point* of these clauses is to affirm (or 'resuscitate') the parol evidence rule. Moreover, the 'rule' cannot be dismissed so readily when it has recently been described as 'fundamental to the mercantile law of this country' by Lord Hobhouse.[97] As stated in *Phipson on Evidence*, there is considerable advantage to the parties in having the document as 'a full and final statement of their intentions … beyond the reach of future controversy, bad faith or treacherous memory'.[98] Finally, from the straightforward freedom of contract perspective, enforcing EACs makes 'eminent sense', especially in the commercial context.[99] The parties have chosen, by inserting an EAC in the final contract, to make any collateral agreements unenforceable; it is 'elementary' to give effect to this choice.[100] One might recall Odysseus lashing himself to the mast of his ship so that he didn't jump overboard when he heard the Sirens' song: at the drafting stage the parties (or their legal advisers) want to make sure that they are not tempted to alter or supplement the contract informally, later on.

A much debated variant is the 'non-reliance clause'. After it was ruled that a simple EAC did not exclude liability for misrepresentation (as opposed to nullifying statements with *contractual* effect, i.e. collateral warranties),[101] drafters began to include clauses declaring that neither party had 'relied on' statements made by the other in agreeing to enter into the contract. Since reliance upon the statement is essential, if the courts give effect to such 'non-reliance' clauses

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[94] *Inntrepreneur v East Crown Ltd* [2000] 2 Lloyd's Rep 611.
[95] McLauchlan n. 83 above.
[96] G. McMeel, 'Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation' (2003) 119 *LQR* 272 at n. 97.
[97] *Shogun Finance v Hudson* [2004] 1 AC 919, [49].
[98] M.N. Howard (ed.), *Phipson on Evidence* (Sweet & Maxwell, 15th edn, 2000) pp. 1165–66 (quoted ibid).
[99] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537, [27].
[100] *SERE Holdings v Volkswagen* [2004] EWHC 1551 (Ch), [22] (Nugee QC); cf. Peden and Carter n. 91 above.
[101] *Alman v Associated Newspapers Group* (1980, unreported).