



Getting the Contract Documents Right – Hacking your way through the contractual jungle

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Getting the Contract Documents Right – Hacking your way through the contractual jungle

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This morning's road map

- General issues
- Rules of contract interpretation
- Types of contract : specific issues
- What is a “good” contract?
- Tenders and negotiations
- Contract administration
- Q&A



General issues (1)

- Get it right from the start
 - get it in writing
 - make sure all the relevant documents are included.
 - set out all important terms. For instance, Chun Lee v Aoki, no implied term as to retention.
- Under hand, or under seal (deed)?
- The NSC letter of award problem



General issues (2)

- **Security:**
 - Collateral warranties
 - Bonds
 - Supporting guarantees and undertakings



Rules of contract interpretation (1)

- The goal: to ascertain the intention of the parties.
- Not as simple as it seems?
- Objective test, not subjective.
- Various rules.
- (1) Ascertain the meaning which a reasonable person, having all the background knowledge, would hold



Rules of contract interpretation (2)

- (2) The “*background knowledge*” - the factual matrix, reasonably available to the parties at the time of the contract.
- (3) Negotiations and previous statements of intention are excluded.
- (4) Don't look simply at the dictionary meaning of the words used. Look for - the meaning that the parties using those words, against the relevant background, would reasonably have been understood to mean.



Rules of contract interpretation (3)

- (5) The above can (i) choose between different possible meanings, but also (ii) in clear cases, show that the parties used the wrong words or syntax.
- (6) “*Natural and ordinary*” meaning. The courts tend against assuming the parties have made linguistic mistakes.
- (7) Business contracts should be construed in a way that makes “*good commercial sense*”, ie, try to avoid unreasonable results.



Rules of contract interpretation (4)

- (8) Special trade or custom meanings.
- (9) Documents forming part of the same transaction are to be construed together.
- (10) Can you look at alterations/deletions? Normally, the answer is no, because this is part of the negotiations. But, yes, in the case of changes to standard form contracts.



Rules of contract interpretation (5)

- (11) Contra proferentem rule.
- (12) Expressio unius rule.
- (13) Exemption/limitation clauses.



Main contracts (1)

- Choosing the best standard form
- Amendments and special conditions
- Pricing documents. Make them formally part of the contract?
 - B of Q
 - S of R
 - Tender breakdown



Main contracts (2)

- Order of precedence clause
 - GCC and SCCs
 - General and particular specs
 - Drawings
 - Correspondence
 - Tender tags
- Pre-contract correspondence
 - Make it part of the contract?
 - Some of it, or all?



Main contracts (3)

- **Some common mistakes:**
 - Inappropriate deletions from standard forms
 - Inappropriate inclusion of “helpful additions” that cut across remaining parts of the standard form
 - Unclear or unhelpful filling out of the schedules



Main contracts (4)

▪Some common mistakes (cont'd):

- o Unclear scope of works
- o Use of short hand expressions, hoping that the court or arbitrator will “imply” some usual terms
- o No express allocation of order of precedence
- o Associated to above, inconsistencies (direct or indirect) between various parts of the contract documents



Main contracts (5)

- **Some specific issues:**
 - Deletion of acts of prevention from the EoT clause
 - Making the giving of timely notice a condition precedent to the granting of an EoT
 - “Back to back” sub-contracts (see later discussion)
 - Filling out the schedules to the general conditions



Main contracts (6)

- Filling out the schedules to the general conditions
 - Make sure that what is typed in is (1) clear, and (2) responsive to the relevant general condition, and (3) not inconsistent with the relevant general condition
 - *Temloc v. Errill Properties* (1987, English Court of Appeal). The schedule said that the amount of LDs was “nil”. Held, that this meant that the employer lost his right both to LDs and to unliquidated damages at common law



Main contracts (7)

- Filling out the schedules to the general conditions (cont'd)
 - o Phillips v. Boulderstone Hornibrook (1994, NSW Supreme Court). The schedule said that the amount of LDs was “N/A”. Court reserved judgment, but tended to the same result as was reached in the Temloc case



Sub-contracts (1)

- Sub-contract form compatible with the main contract.
Companion forms
- Don't break the contractual chain
- “Back to back” sub-contracts



Sub-contracts (2)

- “Back to back” sub-contracts
 - Very common practice in HK
 - The practice is still fraught with danger and uncertainty of outcome
 - *Astel-Peiniger (1994, Kaplan J)*. The words “*be directly applicable on a back to back basis but proportionally*”, were held to be sufficient to incorporate the arbitration clause
 - *Wo Hing v. Pekko Engineers (1998, Suffiad J)*. The words “*this s/c is based on back to back basis including payment terms*” were held not sufficient to incorporate, into the s/c, the pay when paid clause from the main contract



Sub-contracts (3)

- “Back to back” sub-contracts (cont’d)
 - Consort Engineering v. Leung (2002, HK District Court). The court assumed that a back to back wording raised no significant legal issues. However, neither party alleged that there was a legal issue, and in any event the case concerned disputes about scope of works, which is more amenable to a “back to back” analysis
 - Various cases since



Supply contracts (1)

- The battle of the forms
- Printed forms, with terms and conditions on the reverse side
- Beware the exclusions
- Excluding some or all of the implied warranties in the Sales of Goods Ordinance?



Consultancy agreements (1)

- Scope of services
- Standard of services
 - Due skill care and diligence
 - Due “professional” skill care and diligence
 - Best endeavours
 - Reasonable endeavours
 - Warranty of end result?
- Remuneration
 - Extra work



Consultancy agreements (2)

- Contractual indemnity for negligence
 - Avoids arguments about availability and extent of negligence claim
 - Extends the limitation period to 12 years for claims for negligence
- Intellectual property issues
 - Ownership of drawings and other design information



What is a ‘good’ contract? (1)

- A ‘good’ contract is in writing – and the terms are certain
- A ‘good’ contract is prepared and signed before work starts
- A ‘good’ contract sets out the rights and obligations of the parties (standard forms do these things):
 - Scope of the work (what needs to be done, incorporates dwgs)
 - Payment (when and how much)
 - Time (start, finish and liquidated damages)
 - Variations (instructions, valuation and payment)



What is a 'good' contract? (2)

- **An 'oral' contract is rarely a good contract - no certainty**
- **A contract that is reduced to writing some time after tender negotiations is not a 'good' contract - it is unlikely to be signed and will be open to challenge**
- **A contract that does not set out the rights and obligations of the parties is not a good contract**



Tender and negotiations : The tender

- **The tender documents set out the terms of the contract - the ‘rules of the game’**
- **The tender documents allocate the risks associated with the project (design, conditions, performance of others)**
- **The tender price must not only include the price of the works, but also must price the risks (time and money)**
- **Queries, tender qualifications and non-conforming tenders**
- **Beware the purchase order - it has a sting**



The tender negotiations (1)

- **The employer will attempt to reduce the tender price**
- **The terms of the contract are often changed during tender negotiations**
- **Matters that are progressively agreed should (must) be confirmed in writing**
- **Both sides should insist upon a Letter of Award that sets out the terms of the contract, as negotiated and finally agreed**



The tender negotiations (2)

- Be a professional negotiator - do it well
- While the negotiations mainly are about the price
- You must remember that it is also about risks
- Do not reduce your price without reducing your risks
- Be prepared to pay for risk reductions



Contract administration: How to do it?

- **Know the contract**
 - understand your rights and obligations
 - know the requirements - time bars, notices, applications etc
 - develop protocols, process diagrams, 'cheat sheets'
 - assign responsibility for compliance and follow up
 - sufficient support staff
 - record keeping and document systems
- **Address issues immediately - know your rights and then protect them!**
- **Why certificates are so important . . .**



Contract administration : What if you don't do it?

- He who has the paper wins the war
- He who can find the paper can shoot first
- Supportive staff = supported case



Q&A

Thank you for your participation.

Any Questions?