Group Briefing
April 2019

Hot Topics in Construction Law: Spring 2019

AUTHORS

MARY LIZ MAHONY
SENIOR ASSOCIATE
+353 1 920 1066
maryliz.mahony@arthurcox.com

BRIAN GILLESPIE
ASSOCIATE
+353 1 920 2011
brian.gillespie@arthurcox.com

CIARA DOOLEY
ASSOCIATE
+353 1 920 1855
ciara.dooley@arthurcox.com

Does your contract say what you think? When and how can you enforce under a performance bond? How do you manage the Brexit minefield? These are some of the hot topics crossing the desks of the construction team at Arthur Cox. In this update, we bring you our take on these current issues...

DOES YOUR CONTRACT SAY WHAT YOU THINK: IS THE DEVIL IN THE DETAIL?

Construction contracts typically comprise a number of separate documents which, when taken together, constitute the entire contractual agreement between the parties. While parties will normally heavily negotiate the bespoke terms and conditions of their contract and ensure that the terms reflect the agreed risk allocation and obligations, the same attention is not always given to the schedules, appendices and other technical documentation which complete the contract documents.

Factors such as time or cost constraints may result in documentation being attached to a contract in a poorly presented, haphazard manner, and without the parties being fully aware of the effect of that documentation on their respective contractual obligations. In addition, documents which should have been included are left out and other documents are inadvertently included. This can easily lead to inconsistencies between documents.

It is often assumed that the inclusion of a 'priority clause' (such that negotiated terms take priority over general terms or conditions or technical documentation) is sufficient to reconcile such inconsistencies. However, a recent case gives a clear warning to those parties who fail to fully understand the manner in which the general obligations of the contract will interact with the specific technical documentation and, critically, whether both aspects are consistent.

In **Clancy**[1], E.ON employed Clancy Docwra Limited ("**Clancy**") to carry out groundworks using an amended JCT Sub - Contract. Clancy encountered adverse ground conditions (including an obstruction to the proposed route of works) which led to a dispute as to whether Clancy bore the risk of such ground conditions or were entitled to payment of additional sums to complete the works.

E.ON relied on their bespoke amendments to the sub-contract which passed the risk of ground conditions to Clancy. Clancy relied on tender documentation appended to the sub-contract which detailed the route of the works and showed that the tender did not contemplate dealing with obstructions. Despite bespoke

1 Clancy Docwra Limited v E.ON Energy Solutions Limited [2018] EWHC 3124 (TCC)

amendments, and a clause giving priority to those amendments, Clancy escaped liability for ground conditions because of the scope of work described in tender documentation appended to the sub-contract.

This case clearly flags the difficulties which can arise where schedules and other technical documentation are appended to a contract without the parties carefully reviewing their contract and understanding the impact of technical documents on risk allocation.

HOW SECURE IS YOUR SECURITY: UPDATE ON PERFORMANCE BONDS

While the requirement to provide a performance bond is standard on most significant construction projects, calls on performance bonds are relatively infrequent. Parties will, in general, do all they can to avoid calling in a surety unless something has gone very wrong. As such, there can be uncertainty as to how and when a performance bond can be called and what evidence is needed to satisfy a surety that monies should be paid.

While individual bonds will turn on their wording, the wording found in many bonds provide: "*The Guarantor shall…satisfy and discharge the losses and damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract…*" This wording has been recently considered in **Ziggurat**[2] in the UK.

In Ziggurat, it was found that this wording does not mean an Employer is required to obtain a court judgment or arbitration award in order to trigger a claim under a bond. The Court held that what is required is that the Employer has completed the ascertainment exercise required by the particular building contract - "*Any other result would destroy the commercial value and purpose of the Bond*". The Court also found that while it may be open to the surety to challenge the quantum of the claim this too, would depend on the wording of the Contract and whether it contained any "conclusivity provisions" in relation to the ascertainment exercise.

While Ziggurat is only of persuasive authority in Ireland, it is very useful when considering the impact of adjudicator's decisions on performance bonds. Adjudicator's decision are becoming increasingly common and Ziggurat clearly supports the proposition that such decisions should be sufficient for establishing an entitlement under a performance bond even if this is not explicitly stated in the bond. Given this, parties will often go further and agree to specifically call out an adjudicator's decision as providing conclusive evidence of an entitlement under a bond. While such wording is helpful to the Employer (as it will prevent the surety challenging the quantum of the claim), a surety will often insist that repayment provisions are included in the bond should the adjudicator's decision later be reversed on final determination. Such repayment provisions will create a direct obligation between the Employer and the surety and should be carefully considered by both parties.

ALLOCATION OF RISK: HOW TO NAVIGATE THE BREXIT MINEFIELD?

As Brexit (still) looms, there are increasing concerns about what Brexit will look like, its impact on the construction industry and associated risks, including the potential costs and delays arising from imports, exchange rates and regulation. There are a lot of unknowns as to how Brexit may impact the industry generally, or a specific project in particular and incorporating a "Brexit clause" into your contract may help. The key question to consider is how you wish to deal with the risks associated with Brexit (and the answer to this question may not be the same every time). Should there be a risk sharing or should one or other of the parties shoulder additional costs and delays which may arise?

While, from an Employer's perspective, it might look attractive to push this risk onto the Contractor, this approach may not give the best outcome or be either reasonable or practical, requiring the Contractor to build a significant contingency into the contract price. Some form of risk share may provide a more reasonable solution, and leaves it open to the parties to develop a dialogue in circumstances where Brexit does have an impact on the particular scope of works, whether through additional costs, delays or shortages of labour and materials. In addition to these considerations, sharing the burden of Brexit could also include agreed trigger events, notification procedures, consequences and remedies.

For parties who currently have construction contracts in place, it may be worth reviewing contracts to assess how Brexit may impact on specific projects; for example, what are the implications of delays to the project and how are damages for delay set out. If you are entering into a new contract now, it would be prudent to consider the specific implications which Brexit may have on the project. This can be done by including a provision expressly dealing with the Brexit-related risks, which will ensure that the parties have a clear mechanism which they can revert to when assessing the impact it may have on cost and time, while also providing at least some certainty!

2 Ziggurat (Claremont Place) LLP v. HCC International Insurance Company Plc [2017] EWHC 3286 (TCC)