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Legal Update
May 2016

Legal developments in construction law

1. Parties bound by arbitration clause that did not surface

A clause in a subcontract for painting submarines said that the contractor's standard terms and conditions were incorporated. The clause also said that a copy of the terms was on the reverse of the purchase order. Clause 18 of the terms was an arbitration clause but there was a problem. The copy of the purchase order sent to the subcontractor did not have the terms on the back. So did the arbitration clause apply?

The court ruled that it did. A reasonable person reading the subcontract clause would have no doubt that the standard terms were incorporated. The fact that they were not on the back of the purchase order did not affect this. It would, at all times, have been open to the subcontractor to request a copy of the terms.

Another subcontract clause said that the main contract terms were incorporated (unless inconsistent) and clause 19.05 of that main contract provided for arbitration, under the main contract, of subcontract disputes that were substantially the same as, or connected with, issues under the main contract. Clear words are required to incorporate terms in a contract between different parties so was clause 19.05 also incorporated? Since significant modifications would be required to incorporate it and it was not easy to see how it could be adapted without doing significant violence to the wording, in the court's view the subcontract clause wording was insufficiently clear to incorporate the main contract arbitration clause.

Barrier Ltd v Redhall Marine Ltd [2016] EWHC 381

2. How, and why, adjudicators should stick to the script

A developer of a house in Hampstead went to adjudication against its shell and core contractor, claiming liquidated damages. It failed, because the adjudicator decided time was at large, but the developer challenged the decision, saying that, in breach of the rules of natural justice, the adjudicator had failed to give the parties a fair opportunity to comment on his analysis for the decision. The court disagreed. What is fair depends on the circumstances and it is important to recognise the compressed and limited context of the decision, as demonstrated by the very short timetable imposed on the adjudicator and the difficulties this caused him. It was wrong to assess the fairness of the adopted procedure in a vacuum and to ignore the decision's provisional status. The issue of whether time was at large was in play between the parties and fully canvassed by them.

The adjudicator had also gone on to decide what was the reasonable date for completion but neither party had asked him to do this or made submissions on the issue. Was he entitled to do this? No, said the court. The adjudicator's reasoning might have been the logical next step, but, in deciding the issue, he exceeded his jurisdiction. Having the material to decide an issue is not the same as having the jurisdiction to resolve it. This part of his decision was, however, severable from the balance of his decision, which survived.

Stellite Construction Ltd v Vascroft Contractors Ltd [2016] EWHC 792

3. Does a contract change, that has to be in writing, have to be in writing?

An exclusive supply agreement contained a clause that said that it could only be amended by a written document signed by both parties. But was that clause really effective to stop the parties from varying the agreement by an oral agreement or by conduct?

Although, on the particular issues in this case, it was not necessary to decide the point, the Court of Appeal said that it was not. In principle, under English law, parties can agree whatever terms they wish (subject to public policy limits), whether in a document, orally, or by conduct. Consequently a clause such as that in the supply agreement did not prevent the parties from later making a new contract varying the original contract by an oral agreement, or by conduct. Difficulties of proof may, of course, arise but the facts then have to be determined by the court from the evidence.

Globe Motors, Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor [2016] EWCA Civ 396

4. New government public sector initiatives to support UK steel

In October 2015 the government issued guidance requiring all central government departments to consider the social and economic impact of the steel they source on all major projects. The government has now extended this requirement to relevant contracts of the entire public sector, including the NHS and councils. Public procurements involving steel supply will need to consider responsible sourcing, supplier workforce training, carbon footprint, staff health and safety and the social integration of disadvantaged workers. This is to allow major project buyers to take into account the true value of British steel, including its social impact. Contractors working for the public sector will also be required to advertise their requirements for steel so that UK firms can compete.

The government is also to establish, for use by the government and its contractors, a list of approved steel suppliers who meet stringent criteria that include high and robust health and safety standards, environmental impacts, responsible sourcing, supply chain management and training the workforce.

See: https://www.gov.uk/government/news/new-public-sector-boost-for-uk-steel

5. Is your company (or those you deal with) under control?

From 6 April 2016 most companies, LLPs and Societates Europaeae are required to hold a register of people with *"significant control"*. This is in addition to other information, such as registers of members and directors, and from 30 June 2016, LLPs and SEs must provide this information annually to Companies House when making the new Confirmation Statement. A statement of initial significant control will also be required from 30 June when applying to incorporate a new company, LLP or SE.

Reasonable steps must be taken to identify people with *"significant control"* and the new set of regulations set out what that means. In the case of a company, people with significant control include an individual who holds more than 25% of shares or voting rights or has the right to appoint or remove a majority of the board of directors.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf

6. The Modern Slavery Act – do you need to make a statement?

The 2015 Modern Slavery Act requires every UK business supplying goods or services, with total annual turnover of £36m or more, to produce a slavery and human trafficking statement for each financial year of the organisation. The statement must set out the steps taken (even if none) during the financial year to ensure that modern slavery is not occurring in their supply chains (which has its everyday meaning) and in their own organisation. Government guidance says that, for businesses to produce an effective statement, they will need to have a good understanding of their own supply chains in order to define the boundaries of the report and to support the identification of risk.

Although the Act has been in force since October 2015, businesses with a year-end of 31 March 2016 are the first businesses required to publish a statement for their 2015-16 financial year. An organisation is required to complete a statement for each financial year in which their turnover exceeds the threshold.

The statement must be approved and signed by a director, member or partner of the organisation and published on the organisation's website, with a link in a prominent place on the homepage, as soon as reasonably practicable after the end of their financial year. The government is encouraging organisations to report within six months of the organisation's financial year end.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.