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Amending standard contracts: Anarchy or common sense?

Introduction

Amending standard contracts

1. I spoke at a seminar last year about various topical construction issues. Having come through the questions and answers session relatively unscathed, I was asked by one member of the audience on why it was that lawyers felt the need to prepare pages of amendments as long as the standard forms themselves; the clear message being that "if it ain't broke don't fix it". I do not recall my talk actually relating in any way to amending standard forms and so the question caught me a little off guard to say the least.

2. For a moment I actually had to consider this question very carefully myself. From the day I started as a trainee in the construction department of my firm, amendments to standard forms seemed to be the centre of the construction world. It was all we did. All the non-contentious lawyers were busy drafting them while the litigators were arguing about what they meant. With a bit of luck, the litigators were not arguing over their own colleagues' drafting . As a mainly non-contentious lawyer in a firm with some pretty well known litigators this particular risk has not escaped me.

3. Anyway, coming back to my answer to the chap in the audience. It was simply along the lines that we didn't produce those amendments unless the client (usually an employer) wanted us to. They were not produced simply to pass the time of day. I mentioned that the standard forms did not address the specifics of the project, were often weighted too much in favour of the contractor, needed updating to reflect changes in legislation etc but, needless to say, this chap was clearly of the view that regardless of this lawyers still felt the need to dabble with the wording far too much.

4. However, what I had to do was acknowledge that amendments are frequently sent out with a tender, without ever having been reviewed in any detail by the client. Clients' instructions are very often for the lawyer to issue their "standard amendments" to a particular form of contract. The only other clue as to what form these amendments are to take is that some need to be "bankable" or "employer friendly". The chap was not convinced by this answer. I will touch on how I think the situation can be improved later.

5. Today's presentation will run through my experience and approach to using standard forms and will include:

    - A reminder on why we use standard forms.
    - Why do lawyers feel the need to make so many amendments?
    - Examples of amendments
    - Some of the less clever amendments and the law of unintended consequences.
    - How we can make the process a whole lot slicker.

Why use a standard form?

6. The theory, of course, is that both client and contractor recognise them. Banks lending on projects also recognise them (although, as I mention below, they will often not accept them in their unamended form). Those administering the contracts understand what it is they are supposed to do and by when. Contractors recognise the main differences and know how to price the different forms of contract. All in all, everyone "knows the deal" if presented with a standard form. It should make the whole process of getting from the start of the project to final account a whole lot slicker, but as many of us have experienced, the process is often fairly painful just getting to contract in the first place.

7. The other significant advantage is that the wording of many standard forms has been subject to interpretation over the years by the courts. I can pick any number of clauses from JCT dating back to the 1963 version onwards and find a wealth of case law telling me what those clauses mean. Of course, it is this Judicial interpretation which often drives new versions of the contract or further amendments by the lawyers.

8. Of course, the standard form is not for everyone. There are always those who wish to go down the bespoke route. But even where you come across bespoke contracts you often recognise vast chunks of text taken straight from a standard form. Indeed, many bespoke forms seem to be nothing more than a standard form with the amendments incorporated in the text itself rather than in a schedule. I have even seen bespoke contracts where the clause numbers tally almost perfectly – so clauses 25 and 26 (time and loss and expense in JCT 98) appear as clauses 25 and 26 in the bespoke form. How convenient?

9. However, one of the main problems with the bespoke form is that it always rings alarm bells with contractors. They prefer the comfort of the standard form; even though on most occasions what the standard form gives with one hand the amendments take back with the other. But at least with standard forms both employers and contractors know roughly where they are starting from.

10. All in all then, this is appears a clear endorsement for the standard form.

11. So we know that standard form is generally a good thing and that provided we have chosen the correct form in the first place – which I touch on later - why is it necessary to make so many amendments?

Why make so many amendments?

(i) The contract does not reflect life on a real site

12. I used to work in-house for a developer/contractor and so have had more than my fair share of meetings in site Portakabins sorting out problems. One of the things this does teach you - and it teaches you a lot about construction - is that what happens on a real site is often quite a departure from what the contract says should happen.

13. A classic example of this is the snag list. I am not aware of a job where practical completion ("PC") has been granted without a snag list (but then equally the fact that I am aware of these jobs is usually because there are a whole host of other problems and the snagging may be the least of the parties' worries). I have seen snag lists that run to three lever arch files. By snag list I mean a list that is issued at the same time as PC rather than a list that is issued prior to PC listing those snags that need to be completed before PC will actually be issued. From a contractual point of

view they are very different.

14. On many jobs both the contractor and employer will be screaming out for PC to be granted. The contractor wants PC for obvious reasons (it stops LDs and insurance obligations, it starts the defects period, half retention is due for release etc). However, employers are also frequently looking for PC to be achieved prior to all the works being complete. For a developer handing over space to tenants it is often the trigger for rent or a rent free period to start. Shop fit outs in the lead up to Christmas are another classic case of works being certified as PC despite long lists of snagging and incomplete work. Once a major retailer has announced an opening date for a new store there is no going back. It has to open on that day regardless - within reason - of the state of completeness of those works.

15. However, despite there being a general misconception in the industry to the contrary, JCT does not expressly provide for a snag list.[1] It does allow for defects which appear during the defects period to be rectified but this is not the same as defects (or incomplete work) which are known to exist at PC. On this basis there is no shortage of jobs that are being certified practically complete subject to a snag list which the contract does not recognise.

16. On this basis, one of the most frequent amendments is for the contract to expressly include snag list provisions. If a contract administrator certifies PC when there is substantial incomplete or defective work then they had better be sure they have the client's agreement and then an undertaking on the part of the contractor to remedy that snagging. Whilst the client consent probably poses few issues in practice the undertaking by the contractor could be more problematic. How is it documented? It is most likely to take the form of an email from the contractor confirming he will remedy the snags within a certain period of time. But is it effective? What are the sanctions if the contractor does not? How does this breach link in with the other conditions in the contract such as termination or the right to engage others to do the work? The fact is that commercial reality probably trumps the contract. In practice, whilst half retention is due at pc this is unlikely to be released until the snags are put right. But it is a classic example of where the standard form contract and real life on a construction site part company.

17. A further example is practical completion itself. As I mention above this is crucial for a number of reasons and yet is not defined. The reasoning, of course, is that it is a matter of professional opinion for the architect.[2] The contract gives some guidance as to what is required[3] but on the whole is it simply the architect's professional opinion. The Courts have given us various guidance as to what it means and from this it is possible to draw some conclusions:

    - the works can be practically complete even though there are latent defects;
    - a Certificate of Practical Completion cannot be issued if there are patent defects;[4]
    - the architect does have a discretion to certify practical completion where there are very minor outstanding items work on a *de minimis* principle.

18. But isn't the point that as an employer you should have more of a say in whether what you asked for in the contract (and have paid for) is actually complete? For this reason it is not uncommon for amendments (and often the specification itself) to list the hurdles that need to be cleared before

1. Other standard forms deal with snagging as follows: GC/Works 1998 (Without Quantities) makes no reference to snagging (see clause 39). MF/1 2001 (Revision 4) expressly allows for a Taking Over Certificate to be issued where there are minor outstanding works and the contractor is under an obligation to remedy those within the time period stated in the Taking Over Certificate (see clause 29). ICE 7th Edition (Measurement Edition) allows for a Certificate of Substantial Completion to be given despite minor items of outstanding works and the contractor is required to give an undertaking to complete those works in a timescale agreed with the Engineer (see clauses 48 and 49).

2. This is not the case under the Design and Build contract where practical completion is a question of fact and not opinion. Note the difference in wording between clause 2.30 in the JCT 2005 Standard Building Contract and clause 2.27 in the JCT 2005 Design and Build Contract.

3. For example, under standard JCT the contractor is required to provide as-built drawings, O&M manuals (clause 2.40) and to provide such information as the CDM-Co-ordinator reasonably requires for the preparation of the health and safety file (clause 3.25.4).

4. *Jarvis & Sons v Westminster Cor.* [1979] 1 WLR and *HW Nevil (Sunblest) v William Press* (1081) 20 BLR.

practical completion can be achieved. These frequently include:

- the provision of all fire, gas, electrical safety certificates;
- as-built drawings in a particular format (at least in draft form with final versions being issued within a specified time after practical completion);[5]
- on larger projects, compliance with specific requirements eg the Green Guide which deals with safety requirements of sports stadia.[6] This can be particularly onerous for contractors. For example, a large football stadium cannot be operated until all safety licences have been granted. These will inevitably involve a certain amount of discretion on the part of the authority granting the licence and the person in charge of safety at the particular stadium. This can be a major sticking point; the contractor has designed and built the stadium in accordance with the contract and yet the stadium cannot operate and generate revenue for the employer until it has all the requisite operating licences. A brief reference to all licences being in place as a pre-condition to practical completion could prove expensive for the contractor if LDs are running.
- completion of all tests/commissioning. As buildings become increasingly hi-tech there is a greater need to commission the various systems. In many respects is a modern hi-tech office building (the domain of standard building contracts) any different to a process plant? It needs to "perform" as required by the contract and the only way this is verified is by way of complicated commissioning tests. For many years those building process plants have used specific forms of contract which contain all these testing provisions.[7] It is for this reason that is it not uncommon for an amendment to be made so as to define practical completion as having been achieved only where the tests referred to in the contract documents have been passed.

19. Obviously, contractors should be extremely wary of these pre-conditions to practical completion. The contractor is not going to want liquidated damages clocking up simply because he is missing "one tick in the box" on the list of conditions for practical completion.

(ii) The contract does not reflect the particulars of this project

20. No standard contract could ever reflect all the specifics of a project and some changes inevitably need to be made. The skill, of course, is amending only those parts which are relevant. There is rarely any point in having extensive amendments dealing with ground conditions when the works comprise the fit out of the 17th floor of an office block and yet I continually see these types of amendment. All this demonstrates is that someone has located the firm's precedent, added the parties' details and clicked "print".

(iii) The contract does not reflect the commercial bargaining strength of the parties.

21. This, of course, is one of the main drivers in amending contracts. Standard forms seek to achieve a balance between the parties but rarely is there a true balance in the bargaining strength of those parties. For the last few years some contractors have been able to pick and choose jobs in certain niche areas. This was particularly the case in high-end residential refurbishment where, if acting for employers, you would be lucky to get away with half a dozen amendments to a standard form. I suspect that if this has not already changed then it will do so over the coming months. However, I have yet to see a day where the contractor is in such a good

5. Standard JCT provides for this (see, for example, clause 2.30 and 2.40 in the Standard Building Contract), but the obligation is often amended further.

6. *Guide to Safety at Sports Grounds*, The Football Licensing Authority (commissioned by the Department for Culture, Media and Sport).

7. See, for example, the FIDIC Conditions of Contract for EPC/Turnkey Projects ("Silver Book") at clause 9. The FIDC Conditions of Contract for Building and Engineering Works Designed by the Employer ("Red Book") also contains extensive provisions even though, as the name suggests, it is aimed more at traditional building projects rather than process plant.

position that he actually wishes to amend standard forms in his favour but those times may come.

(iv) The Bank won't accept an unamended standard form

22. Again, another key driver in amending the contracts is the bank's requirements. To a certain degree banks have always been able to dictate terms and a convenient excuse for lawyers acting for employers is to say that the amendment is bank-driven and therefore non-negotiable. In the current climate this is unlikely to change.

Examples of Amendment Overkill

23. I recently came across the following amendment in the GC/Works/5 Framework Agreement (the amendment is underlined):

> The Partner or Director named by the Consultant in accordance with the instruction contained in the Appointment Particulars…shall be the point of contact between the Employer and the Consultant throughout the course of this Appointment and, subject to reasonable notice, will, on behalf of the consultant, attend all meetings with the Employer regarding matters relevant to this Appointment and will approve and sign all reports submitted to the Employer by the Consultant. No change in this named individual shall be made by the Consultant without receiving the prior written approval of the Employer. <u>If such approval is given the Consultant shall be responsible for replacing any such Partner or Director with a person appropriately qualified to carry out such duties who shall have been previously approved by the Employer.</u>

24. It is clear why an employer wants continuity on the project and these types of provision are not uncommon in other standard and bespoke contracts.[8] But is the amendment needed from a practical point of view? Is it really the case that on a long term framework agreement[9] the consultant is likely to suggest that the main point of contact for the client is someone without the relevant qualifications and who risks jeopardising the relationship? This is particularly the case given there is no obligation to instruct services under the appointment in any event[10] and so the consultant will be constantly "pitching" for the work by, you would assume, putting forward their best person for the job?

25. Is the amendment needed from a legal point of view? Firstly, the clause already says that the Partner or Director is to be the point of contact "throughout the course of the Appointment" (i.e. it is an ongoing obligation) and so there is no need for the amendment to state that Consultant is "responsible for replacing" that person; the clause already say this. Secondly, the clause already provides that any replacement must be approved by the employer and so the part of the amendment dealing with approval is unnecessary. Thirdly, in the unlikely event there is a breach of this clause what does the employer do about it? It is difficult to imagine how such a breach could give rise to a right to terminate without some very clear wording. On this basis, will the employer have to consider applying to court for an order for specific performance? It is not a case many employers would wish to run; the simple fact is that the consultant will receive no further work under the framework agreement.

26. The fact is that the amendment is both practically and legally unnecessary and yet adds to the time spent in agreeing the appointment.

Amendments worth considering

27. There are occasions when amending a standard form is necessary for clarification. It may be that in striving to achieve a fair balance between

8. See for example clause 4.3 in the FIDIC "Red Book".

9. The introduction to the GC/Works/ Framework Agreement (page 7) says that it is "designed to facilitate the procurement of consultancy services in connection with construction works for a period of three of three to five years".

10. Clause 1.9(2) provides that "During the term of the Consultant's Appointment…the Employer at its sole discretion may from time to time issue Orders to the Consultant…". Clause 1.9(3) goes on to say "Whilst it is the Employer's intention to give a reasonable number of Orders to the Consultant …the Employer is under no obligation to give the Consultant any or any number of such Orders…".

the employer and the contractor the drafting is not as clear as it could be. By way of example, the following wording dealing with the defects appears in the GC/Works two stage design and build contract:[11]

> 21(1) The Contractor shall without delay make good at its own cost any defects in the Works, resulting from what the Employer considers to be default by the Contractor or his agent or subcontractors or suppliers, which appear during the relevant Maintenance Period.
>
> 21(2) After completion of the remedial works by the Contractor, the Employer shall reimburse the Contractor for any cost the Contractor has incurred to the extent that the Contractor demonstrates that any defects were not caused by-
>
> (a) the Contractor's neglect or default, or the neglect or default of any agent or subcontractor of his; or
>
> (b) by any circumstance within his or their control.

28. Clause 21(1) adopts a fairly standard approach with regards defects (although leaves the decision as to what constitutes a defect firmly with the Employer). However, it is clause 21(2), and in particular paragraph (b), that requires further consideration. Having remedied the defects at his own cost this gives the contractor an opportunity to argue that the cause of the defect was not within his control or the control of his subcontractors. The guidance notes give no examples of when this provision may be relied upon by the contractor but it is potentially very wide reaching.[12] It seems more sensible to delete 21(2) and rely on whether or not something is, in fact, a defect for which the contractor is responsible (although in this case the compromise position is for a defect to be an objective determination and not the subjective view of the employer).

Some of the less clever amendments and the law of unintended consequences

29. The knack to amending contracts is to think very carefully about the impact a change to one clause may have to the rest of the contract. At the end of the day, the more you "dabble" the greater the risk of something slipping through the net, however careful you think you may have been. This sounds like a "get out of jail card" for the lawyer but is something clients need to be made aware of. A client should always be warned that the more they wish to amend contracts the greater this risk becomes.

30. Those amending contracts must always have in the back of their minds the contra proferentum rule. For those of you not familiar with this rule, essentially it provides that if there is an ambiguity in a document which means a clause could have two alternative meanings (which other methods of construction have failed to resolve), then a court may construe the words against the party who put the document forward (i.e. usually the employer) to give effect to the meaning more favourable to the other party. This can be a significant risk for employers.

31. The case of *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway*[13] is a good example of the dangers involved in amending standard forms. In this case the contract was an ICE 5th Edition, but two significant amendments had been made. Firstly, the independent engineer was replaced by an Employer's Representative and, secondly, clause 66 (containing the dispute provisions, in particular the arbitration clause) had been deleted entirely. It is important to note that had the arbitration clause not been deleted it would have contained the right of the arbitrator to "open up, review and revise decisions of the contract administrator".

11. GC/Works/1 Two Stage Design & Build (1999).
12. GC/Works/1 Model Forms & Commentary at page 80.
13. (1996) 78 Build. L.R. 42

Given the clause had been deleted, did the court have the power to open up, review and revise decisions of the Employer's Representative? The court held that they did not have such power and the contractor's entitlement to payment and extensions of time was dependent on the judgement of the Employer's Representative. Whilst it was held that the Employer's Representative had a duty to act honestly, fairly and reasonably (although the contract did not say this expressly), the court held that there was no means of challenging the Employer's Representative's decisions and that they became final and binding. I suspect this was not the intention of either party but it is a stark lesson that the law of unintended consequences applies to what appear to be the most innocuous of amendments.

32. A further example is the case of *Masons v WD King Ltd*.[14] In this case the court had to consider an amendment to the GC/Works/1[15] contract regarding acceleration. Masons (the law firm) had started proceedings against the defendant for unpaid fees in relation to a project for new university accommodation in Bath. The defendant was part of a joint venture which had agreed to provide the accommodation to the university on terms that if it was not ready on time then the university would not pay rent until the following year. On this basis Masons had redrafted the standard contract to give the project manager a power to instruct the contractor to re-sequence, accelerate etc. Under the standard form, clause 38 already includes acceleration provisions but these are essentially at the employer's cost. The new clause 38 provided:

> In the event the PM is of the opinion that the Contractor's rate of progress in carrying out the works is likely to prejudice completion of the works or any section by its date for completion, and to the extent that in the opinion of the PM this is due to a cause which is not listed in Condition 36(1), the PM, acting reasonably, and taking account of the Contractor's representations may instruct the Contractor as to the measures he requires the Contractor to take to retrieve the position and the Contractor shall comply with the same at no cost to the Employer. Without prejudice to the generality of the foregoing, such instructions may include the requirement to re-sequence works, to accelerate completion of the works and/or require the Contractor to increase his on and off site resources

33. Unsurprisingly, the works started to fall behind and the PM instructed the contractor to take various measures under clause 38 but the works still completed late. Worse still for the employer was that an agreed cap on liquidated damages under the contract had been reached and so the employer lost a year's rental income and so looked to the contractor to recover this. Under the adjudication which ensued between the employer and the contractor, the adjudicator decided that whilst the contractor had made no effort to comply with the PM's instructions under clause 38 as the damages for delay were governed solely by clause 55 (liquidated damages) the employer could not recover further for breach of clause 38. Essentially, there was no sanction for failing to comply with clause 38 and it did not give rise to a liability for unliquidated damages.

34. This is a further lesson in the need to think through what the amendment is seeking to achieve and the consequences and sanctions available in the event of non-compliance.

How to make the process a whole lot slicker

35. The comments from some within the industry about lawyers unnecessarily amending standard forms may not be wholly unfounded. I come across pages of amendments which are often wholly irrelevant to the project (as I

14. [2003] EWHC 3124 (TCC)

15. The contract was the Single Stage Design & Build (1998) version.

touch on above, lots of amendments about ground conditions when the work is the fit out of a 17th storey office block) or amendments which are far in excess of the commercial risk involved. So how can things be improved?

(i) Understand the project

36. This may seem so obvious but it is surprising how there can be fundamental breakdowns in communication between lawyers, clients and their project teams actually doing the work on site.

37. It is useful to read some of the contract documents which have been produced by the project team, such as the employer's requirements, preliminaries or specification. There is a tendency for lawyers to regard these as beyond their remit. Whilst they may not be able to advise on all the technical aspects when you actually read these documents, there are all sorts of issues that crop up and that are often either not covered by the contract at all or, even worse, the contract actually says something completely different.

38. A good example of this is work by the employer's own direct contractors. I have seen provisions in the specification/scope which seek to place all this risk firmly with the contractor. This, of course, is not what a standard contract will generally say and would need a very clear amendment to achieve this. Time spent reviewing these documents is often far more productive in terms of dealing with project specific issues than trying to guess at what amendments may be needed by speaking generally with project teams. Remember, the project documents are, by their very nature, project specific and have been written by those who will work on the project and have probably been involved from the outset. The standard contract is not.

(ii) Understand your client's business and what concerns him

39. Developing and contracting is a risky business. Those involved in the construction business are risk takers; something us risk averse lawyers often fail to understand. Lawyers have to consider this when amending standard forms or reviewing amendments from the contractor's point of view. As part of the exercise of drafting or reviewing contracts (depending on who I am acting for) I will often ask the client to list the 10 worst projects they have been involved in and why they went wrong. This exercise tends to separate the lawyer's understanding of risk from the risks which your own client's experience says are most likely to occur on site. It also results in much better drafted amendments.

(iii) Choose the right standard form

40. This has got to be the starting point. In writing this talk I had a quick look in our contracts library. By the time you have looked at all the main publishers' forms (JCT, FIDIC, ICE, IChemE, IMechE, GC Works, NEC, etc.) it contained over 50 standard forms of contract. This is before you consider the relevant subcontracts and any standard professional appointments.

41. So at the end of the day it is likely there is a contract to suit your project. However, many employers like the familiarity of a particular standard form they have used over the years; even though using a different standard form may make life a whole lot easier for all concerned. I have seen IChemE Green Books (cost reimbursable) with target costs provisions added on. But IChemE actually publish the Burgundy Book which is a specific target cost contract. It seems to be making work for all

concerned. I have also seen traditional design and build projects shoehorned into the FIDIC Silver Book (which places much more risk on the contractor than traditional design and build and so the contract had to be "de-risked"). It results in so many amendments that you risk the contract simply no longer "hanging together". So the moral has to be to choose the right standard form in the first place to minimise the need for amendments. This way, there is far more chance of the final contract actually working.

(iv) Be able to explain and justify your amendments

42. Whilst the first set of the amendments may be drafted by the employer's lawyers and then, but not always, reviewed by the contractor's lawyers, the final negotiations are sometimes left to the respective project teams. If I am asked to draft or review amendments I make a conscious effort to explain them (ideally what the effect of this amendment is in practice by use of examples). This sounds obvious but you would be surprised at the number of times I simply see the words "not agreed" against a schedule of amendments. An explanation next to a "not agreed" comment can often elicit what the real issue is and perhaps why the amendment is justified on the particular project.

43. Given that project teams may finalise the amendments, the lawyer should be proactive and suggest possible compromise positions. At what point in the negotiations these are offered up is a matter of tactics but having it ready to go means it speeds the process along and there is a better chance of getting what you want instead of being presented with a less than attractive compromise by the other side.

(v) Keep the amendments simple and to a minimum

44. This goes without saying. The record, as far as I am aware, for the most amendments made to a standard form goes to a fairly well-known law firm which produced 226 pages of amendments to the standard JCT design and build contract. That standard contract is 106 pages long. In fairness, those amendments did include a couple of warranties, a parent company guarantee and a list of pre-construction services but even so.

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