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The importance of the applicable law

Katherine Bell *Schellenberg Wittmer, Zurich*
Jesse Gardner *Singleton Urquhart Reynolds Vogel,*
Toronto

Xingyu Huang *Zhong Lun Law Firm, Hong Kong*
David Hume *Shearman & Sterling, Abu Dhabi*

Rupert Choat KC *Atkin Chambers, London*



The Scenario

An Employer and a Contractor enter into a contract for the Contractor to design and build a convention centre.



Question 1 (Allocation of risk of a matter which neither party can control)

The contract is (unusually) **silent** over whether the Contractor has any entitlement to relief for adverse weather events.

Assume a significant delay to the Con's works owing to:

- (a) An unseasonal hurricane or typhoon.
- (b) An unseasonal storm that is not as strong as a hurricane or typhoon.

Can the Contractor obtain any relief (time or money) for (a) or (b)?

Question 1 (Allocation of risk of a matter which neither party can control)

Most Employer friendly first:

Switzerland: (a) and (b) = Con unlikely to get time or money.

Hong Kong: (a) and (b) = ditto.

Mainland China: (a) Con *very* likely to get time but not money. (b) Con likely gets time but will not get money.

UAE: (a) = ditto. (b) possibly time but unlikely money.

Canada (exc. Quebec): (a) Con likely to get time but not money. (b) Con possibly gets time but very unlikely to get money.

Question 2 (Contractor's duty to warn of an error by the Employer's Agent)

During the works the Employer's Agent (who is a qualified engineer) instructs the Contractor to do X. The contract requires the Contractor to comply with all instructions issued by the Employer's Agent.

X is an error which it should be obvious to the Contractor is an error (e.g. gives the Employer a lesser product without any saving in price, time or otherwise) but which is not dangerous.

Does the Contractor have a duty to warn the Employer (or the Employer via the Employer's Agent)?

~~If the Contractor carries out X and X results in loss to the Employer, what must the Employer show as a matter of causation, e.g. must the Employer show that if warned it would have required the Employer's Agent to withdraw its instruction to do X?~~ **[This text will be omitted, but please address it in your answers]**

Question 2 (Contractor's duty to warn of an error by the Employer's Agent)

Most Employer friendly first:

Switzerland: Con has duty to warn.

Mainland China: Depends on factors such as the potential consequence of error X. If minor, then no duty to warn. Further, if error X, while not dangerous, may still cause the convention centre to be against mandatory laws and regulations, then there is a duty to warn.

Hong Kong: Depends on whether error X constitutes non-compliance with regulations. If so, then Contractor has duty to warn. If not, no duty to warn.

Canada (exc. Quebec): Possible duty to warn depending on the severity of error X. No duty to warn of minor errors.

UAE: Possibly yes, as an incident of the obligation to perform contracts in accordance with the requirements of good faith.

Question 3 (Contractual allocation of risk to the Contractor of a matter which the Employer might have controlled)

The parties' contract provides (in a similar manner to clause 5 of the FIDIC Silver Book 1999 and 2017):

“The Contractor shall be responsible for the design of the Works and for the accuracy of the Employer's Requirements...

The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements... Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from his responsibility for the design and execution of the Works...

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's design, they and the Works shall be corrected at the Contractor's cost, notwithstanding any consent or approval under this Clause...”

Question 3 (Contractual allocation of risk to the Contractor of a matter which the Employer might have controlled)

- The Employer's Requirements contain error A which would not have been apparent to a reasonably competent contractor until after the contract was concluded (e.g. when access to the site was obtained).
- Correcting error A puts the Contractor to considerable delay and cost.
- Error A is a result of:
 - (a) gross negligence by the Employer's engineering team;
 - (b) something less than gross negligence by the Employer's engineering team.
- Can the Contractor obtain any relief (time or money) for (a) or (b)?

Question 3 (Contractual allocation of risk to the Contractor of a matter which the Employer might have controlled)

Most Employer friendly first:

Hong Kong: (a) and (b): Con is unlikely to get time or money.

Mainland China: (a) Con entitled to time and money. (b) Con gets no relief.

Switzerland: (a) Con likely to get time and money. (b) Likely no relief.

UAE: (a) Con possibly gets time and money. An Employer cannot avoid liability for its 'gross fault' under UAE law. (b) Con possibly gets time, at least to avoid liquidated damages for delay, but likely not money.

Canada (exc. Quebec): (a) Con very likely to get time and money. (b) Con possibly gets time and money but unlikely.

Question 4 (Effect of exclusion of liability where gross negligence)

The Contractor completes its work and a defect is discovered. The Contractor corrects the defect, but the Employer nevertheless suffers a massive loss of profit.

The contract excludes any liability by either party for loss of profit by the other party.

The defect is a result of gross negligence by the Contractor

Is the Contractor liable for the Employer's lost profits?

Question 4 (Effect of exclusion of liability where gross negligence)

Most Employer friendly first:

UAE: Con liable for Emp's lost profits (as cannot avoid liability for consequences of gross fault) provided the lost profits quantification is sufficiently certain.

Switzerland: Con liable for lost profits (if further requirements met) as exclusion inapplicable due to gross negligence.

Mainland China: Con liable for lost profits (as cannot avoid liability for consequences of gross negligence) if lost profits proved to high standard of certainty.

Hong Kong: Contractor is likely not liable for lost profits due to the exclusion clause.

Canada (exc. Quebec): Con is likely not liable for lost profits due to the exclusion clause.



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