The JCT Povey Lecture

UK standard forms of contract: Are the cultural and legal concepts of such contracts applicable internationally?

The Hon. Sir Vivian Ramsey

12 November 2015

Introduction

On Thursday 12 November the JCT Povey Lecture was given by The Hon. Sir Vivian Ramsey. His lecture, entitled 'UK standard forms of contract: Are the cultural and legal concepts of such contracts applicable internationally?', was presented at the Bevin Hall, Local Government House, Smith Square, London.

The JCT Povey Lecture is an annual event at which an eminent person is invited to give his/her thoughts on significant matters that are relevant to the construction and property industry.

The JCT Povey Lecture was inaugurated in 2003 as a public acknowledgement and tribute to Philip Povey who served the Joint Contracts Tribunal for 50 years.

Biographical Details

Philip John Povey – Barrister – commenced in construction as a legal adviser to the NFBTE, later became the Construction Confederation, in 1951. At the same time he began to assist the Joint Secretaries of the Joint Contracts Tribunal (the JCT).

Philip first became Director of Legal Services at the Confederation and then its Director General. He later became the first Secretary-General of the restructured Joint Contracts Tribunal Limited in 1998.

Philip's work for the JCT became well known through the publication of JCT Standard Forms of Contract, which in time found their way to many parts of the world. He had a keen mind, which steered him around what he viewed as the less important or parochial issues for which the industry seems to have a particular attraction and enabled him to get to the core of a problem and to resolve it. He was an extremely skilful draftsman who invariably managed to satisfy the demands of many disparate, often competing, bodies.

Although there were committees, working parties and individuals that provided valuable input, it was Philip who shouldered the burden of writing the text.

He retired from the JCT at the end of 1999 but died suddenly only 18 months later, in 2001.

About JCT

The Joint Contracts Tribunal was established in 1931 and has for over 80 years produced standard forms of contracts, guidance notes and other standard documentation for use in the construction industry.

The Joint Contracts Tribunal is an independent organisation representing all parts of the construction industry and is the leading provider of standard forms of building contract. The following are Members of JCT:

British Property Federation Limited
Contractors Legal Grp Limited
Local Government Association
National Specialist Contractors Council Limited
Royal Institute of British Architects
The Royal Institution of Chartered Surveyors
Scottish Building Contract Committee Limited

and JCT Council is comprised of five Colleges representing:

employers/clients (including local authorities)
consultants
contractors
specialists and sub-contractors
Scottish building industry interests.

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UK Standard Forms of Contract:
Are the cultural and legal concepts of such contracts applicable internationally?

Sir Vivian Ramsey

Introduction

1. Standard forms of contract were first developed from contract clauses which became common in the 1800s when industrial developments led to an increase in projects which required a more sophisticated contracting regime than had been used previously. This meant that certain clauses came to be commonly used and the previous use of Chancery lawyers to draft bespoke contracts became less common. It was also necessary to have someone who acted in an administrative role and the appropriate person became either the Engineer in the case of engineering contracts or the Architect in the case of buildings.

2. Because there were overseas contracts in which British parties had involvement, particularly in relation to civil engineering projects, UK standard clauses and administrative systems spread outside the UK.

3. The Royal Institute of British Architects produced the first edition of what was then the "RIBA Standard Form of Building Contract" in the 1870s but, following the formation of the Joint Contracts Tribunal, it changed to be the "JCT Standard Form of Building Contract".

4. Soon, professional bodies became involved in the process of developing standard forms of contract which incorporated those clauses and administrative systems. The Institution of Civil Engineers produced the first edition of what became known as the "ICE Conditions of Contract" in 1930. In 2010 it became known as the Infrastructure Conditions of Contract ("ICC") and was adopted by ACE/CECA

when the ICE decided to endorse only the New Engineering Contract, now NEC3. The ICC form has now been amended.

5. In August 1957 the first edition of the standard international form of contract for civil engineering contracts, the FIDIC Conditions of Contract, was published. Based on the ICE Conditions, this standard form became the universally accepted form for international civil engineering projects. In its fourth edition it is still widely used, particularly in the Middle East.

6. In this lecture I consider how UK standard forms, developed in the context of English construction law principles, have been and can be applied to other cultural and legal systems. In doing so I will review some particular aspects of standard form contracts.

The position of the engineer or architect

7. It is clearly necessary to have a person who administers a construction contract. It is necessary to have a person who can make decisions on matters which arise during the course of the work. There are a number of situations in which that person has a right or an obligation to act. Taking the JCT 2011 Standard Form as an example, the duties of the Architect/Contract Administrator include, for instance, rights and obligations to provide the Contractor with further drawings, details and instructions under Clause 2.12; to give an extension of time under Clause 2.28; to issue a Practical Completion Certificate under Clause 2.30; to deliver a list of defects, shrinkages and other faults under Clause 2.38; to give consent to sub-letting under Clause 3.7; to issue instructions requiring a Variation under Clause 3.14; to issue Interim Certificates under Clause 4.9 and a Final Certificate under Clause 4.15; to ascertain or instruct the Quantity Surveyor to ascertain loss and/or expense under Clause 4.23; to give the Contractor notice of default under Clause 8.4.

8. It can be seen that in exercising certain of the rights and obligations the Architect/Contract Administrator is acting as agent for the Employer, for example in providing drawings, details and instructions and issuing Variations. In others, the rights and obligations exercised by the Architect/Contract Administrator require an exercise of discretion in determining, for example, whether Practical Completion has occurred, whether there are defects, shrinkages or other faults due to materials or workmanship not being in accordance with the Contract; the valuation of Interim Certificates and the Final Certificate and determining whether the Contractor is in default under Clause 8.4. In acting, in this way, it might be said that the Architect/Contract Administrator is exercising a role which requires a degree of independence and impartiality as between the rights and interests of the Contractor and the rights and interests of the Employer.

9. The position of the Engineer/Architect who is engaged by the Employer has created some difficulty. In English law the classic statement of the position was set out in Sutcliffe v Thakrah [1978] AC 727. In that case under the RIBA 1963 Standard Form of Building Contract, the Architect had issued Interim Certificates including the value of work which was defective. The Employer terminated the contract with the Contractor and was unable to recover the cost of putting right the defects in the work which had been certified by the Architect because the Contractor was in liquidation.

10. The House of Lords held that the Architect was liable to the Employer for negligent certification. In coming to that conclusion, the members of the House of Lords considered the position of the Architect and Lord Reid said as 737: "*The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.*"

11. Lord Morris said this at 751: *"The fact that a building owner and contractor agree that they will treat the certificates of the owner's architect as conclusive evidence that work has been duly completed does not of itself establish that the architect was an arbitrator between them. Neither does the circumstance that by its very nature the architect's function involves that he will act impartially and fairly. He must certainly so act because, there being a contract for work to be done according to the terms of the contract, his function is to see that the contract is carried out. But that does not without more make him an arbitrator. His duty is to act fairly when exercising his professional skill in considering whether work done satisfied the contract requirements as to work to be done: if that circumstance constituted him an arbitrator then at almost every stage he would be an arbitrator. His duty to act fairly does not at all conflict with, but rather is a part of, his duty to safeguard and look after the interests of the building owner who has employed him."*

12. Lord Salmon said this at 759: *"No one denies that the architect owes a duty to his client to use proper care and skill in supervising the work and in protecting his client's interests. That, indeed, is what he is paid to do. Nevertheless, it is suggested that because, in issuing the certificates, he must act fairly and impartially as between his client and the contractor, he is immune from being sued by his client if, owing to his negligent supervision or (as in the present case) other negligent conduct, he issues a certificate for far more than the proper amount, and thereby causes his client a serious loss."*

13. The Architect therefore acted as agent but in respect of the duty to certify had to act fairly and impartially, "holding the balance" as between the client and the contractor.

14. In other legal systems the position of the Engineer/Architect as the agent is not covered by such a refined analysis. The UAE civil code, for instance, treats

construction contracts as part of the law of "*muqawala*" or contracts to make a thing or perform a task, which makes no mention of this aspect.

15. It is however likely that civil law jurisdictions would rely more on the obligations of "good faith" which form part of those civil codes. For instance under Article 1134 of the French Civil Code, it is provided that "*Agreements lawfully entered into take the place of the law for those who have made them. …They must be performed in good faith.*" In the UAE, for instance, Article 243(2) of the UAE Civil Code imposes an obligation on contracting parties to abide by the terms of their agreement and under Article 246(1) of the UAE Civil Code "*The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."* Similarly good faith is also part of PRC Contract Law. Article 6 of that law states that "The parties must act in accordance with the principle of good faith, no matter in exercising rights or in performing obligations" and Article 5 states that "The parties shall abide by the principle of fairness in defining the rights and obligations of each party".

16. In this way the concept that the Employer's agent has to act "fairly" would, it seems, be reflected in an aspect of the Employer's good faith obligation in other jurisdictions. However, experience shows that in many jurisdictions the Employer finds it difficult to distinguish between the roles that an Architect/Contract Administrator has to perform as part of an obligation to act as the agent of the Employer and therefore seek instructions from the Employer and act in accordance with those instructions and, on the other hand, to act fairly as between the Employer and the Contractor in which case the instructions of the Employer have no such role.

Interpretation and implied obligations

17. Although all standard forms contain detailed express terms, in English law there are commonly implied terms relied on by construction lawyers. These terms relate to co-operation and non-hindrance in the performance of the contract by the

Employer and to carrying out the work in a good and workmanlike manner, with good and proper materials by the Contractor.

18. When interpreting contracts, the common law jurisdictions will apply rules so as to ascertain the objective intention of the parties but in English law this does not permit a party to rely on post-contractual conduct. In decisions of the Supreme Court in New Zealand in Vector Gas Limited v. Bay of Plenty Energy Limited [2010] NZSC 5 and Wholesale Distributors Limited v. Gibbons Holdings Limited [2007] NZSC 37, the Court considered that, to give effect to the common intention of the parties, reference could be made to post-contractual conduct.

19. Equally in other systems, particularly civil law jurisdictions, all relevant evidence is generally admissible and the court is charged with determining its weight and reliability. There is then an ability to rely on conduct which has taken place after the formation of the contract and, generally, up to the point where there is a dispute.

20. In civil law jurisdictions, as stated above, there is also an obligation of "good faith" in the performance of the contract. This can alter the approach to the interpretation of the terms of any agreement and can impose wider obligations in terms of a requirement to act fairly than would apply in common law jurisdictions.

21. Therefore, as a starting point the way in which standard forms are interpreted may vary from one jurisdiction to another based on the rules of interpretation. In addition the general approach to contractual obligations, given the duty of good faith, is likely to be different and provide a wider basis for obligations to be inferred or implied.

Notice

22. Most construction contracts make certain obligations and rights conditional on notice being given. The approach to interpreting the notice provisions can vary. In

English law, the courts have considered whether the giving of a notice, in a particular form or not, is a condition precedent to certain rights and liabilities or whether the rights and liabilities exist without the need for the notice. If the latter, then those rights and liabilities will be unaffected by the failure to give notice although there may be a breach of contract in failing to give the notice.

23. In principle a time limit may have one of two effects. It may be "mandatory" in which case a notice cannot be validly served other than within the period, so that a notice served outside the period is not valid. Alternatively it may be "directory" so that a document can still be validly served outside that period but there will, as in the case of a failure to give notice, be a breach of contract in serving the document late.

24. As Mr Justice Jackson said in Multiplex Construction v Honeywell Control Systems [2007] EWHC 447 (TCC): "Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."

25. An example of a notice provision which specifies the effect of a failure to comply is Clause 52(5) of the ICC Conditions of Contract:

> "If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he shall seek to make then the Contractor shall be entitled to payment in respect thereof only to the extent that the Engineer has not been prevented from or substantially prejudiced by such failure in investigating the said claim."

26. An example of a clause where the effect of failure is not specified is Clause 4.23 of the JCT 2011 Standard Form of Contract which was considered in WW Gear v McGee Limited [2010] EWHC 1460:

> "If in the execution of this Contract the Contractor incurs or is likely to incur direct loss and/or expense… the Contractor may make written application to the Architect/Contract Administrator…the Architect/Contract Administrator shall…ascertain…the amount of the loss and expense which has been or is being incurred; provided always that the Contractor shall:
>
> .1 make his application as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or was likely to be affected;
>
> .2 in support of his application submit to the Architect/Contract Administrator upon request such information as should reasonably enable the Architect/Contract Administrator to form an opinion; and
>
> .3 upon request submit to the Architect/Contract Administrator or to the Quantity Surveyor upon request such details of the loss and/or expense as are reasonably necessary for such ascertainment."

27. In WW Gear it was said in respect of the use of the phrase "provided that": "*This type of wording is often the strongest sign that the parties intend that there to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise.*"

28. Another example is Clause 61.3 of NEC 3 which was considered in Northern Ireland Housing Executive v Healthy Buildings [2014] NICA 27:

> "The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if
>
> - The *Contractor* believes that the event is a compensation event and

- The *Project Manager* has not notified the event to the *Contractor*.

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Price, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not."

29. In civil law jurisdictions the general provisions of the civil code look to compliance with the contractual provisions. In the UAE, for instance, Article 243(2) of the UAE Civil Code states that: "With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do." In addition Article 265(1) of the UAE Civil Code which deals with contract interpretation states that "If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties."

30. However a failure to comply with a notice provision will not necessarily prevent claims from being pursued. Again there are provisions of the Civil Code which can be relied on. In circumstances where it appears that the strict interpretation and imposition of the time bars would seriously prejudice the contractor, the contractor may rely on certain provisions of the UAE Civil Code to argue a more lenient approach be adopted.

31. These include the good faith obligation in Article 246(1) of the Civil Code. That provision may act so as to preclude the Employer from relying on the notice provision would amount to bad faith, for instance, where the Employer is in breach of contract and fully aware of the consequences of his breach, he may not be able to rely on a clause to escape liability. In addition Article 106 concerning the exercise of rights may also have an impact. Article 106(1) states that "A person shall be held liable for an unlawful exercise of his rights" and Article 106(2)(c) provides that "The exercise of a right shall be unlawful:… (c) if the interests

desired are disproportionate to the harm that will be suffered by others." The exercise of a right is therefore unlawful if it is disproportionate to the harm suffered by the other party and so reliance on a minor breach in relation to notice which has disproportionate effects may be held to be unlawful. There are further provisions as to unjust enrichment in Articles 318 and 319 which may affect the way in which notice provisions are treated.

32. The principles of good faith under Article 246, causing disproportionate harm under Article 106 and unjust enrichment under Article 318 and 319 therefore may be used to overcome onerous notice provisions and allow the claim to succeed even if there has not been strict compliance with a notice provision.

Unforeseen conditions

33. Under English law the Contractor takes the risk of unexpected matters which are necessary to complete the work: see Bottoms v York Corporation (1892) HBC (4th Edn) Vol 2 p.208. Under standard civil engineering forms of contract it is usual to have a clause which entitles a contractor to payment and/or extension of time when there are unforeseen conditions.

34. Clause 12(1) of the ICC Conditions of Contract is a well-known example of such a clause. It provides that: *"If during the carrying out of the Works the Contractor encounters physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions could not in his opinion reasonably have been foreseen by an experienced contractor the Contractor shall as early as practicable give written notice thereof to the Engineer."* If the Engineer is of the opinion that such conditions or obstructions could not reasonably have been foreseen by an experienced contractor then the Engineer can determine delay and cost due to the Contractor.

35. In civil law jurisdictions there are various provisions which may provide some relief from unforeseen physical conditions. For instance the Qatari Civil Code

Article 148 states: "If the object of the obligation is impossible in itself, the contract is null and void." and Article 188 of the Civil Code states: *"In contracts that are binding on both sides, if the execution of the obligation of one of the parties to the contract becomes impossible for some external reason in which he played no part, this obligation terminates, and the obligations that correspond to it terminate with it, and the contract is annulled automatically."* Therefore in cases where the unforeseen conditions lead to impossibility, this may enable a party to terminate the contract. Under the Hong Kong Government Contract Conditions when there was no clause allowing for recovery for unforeseen conditions, the concept of impossibility was used as a way of obtaining relief. There was a clause which provided that the Contractor was to carry out the Works “save insofar as legally or physically impossible”. It was therefore argued that where the conditions caused impossibility the Contractor had no obligation to carry out the works.

36. Equally in civil law jurisdictions, provisions dealing with “force majeure” may also be relied on. Under Article 402 of the Qatari Civil Code it states that *"The obligation terminates if the debtor proved that performance of it has become impossible for him for an external cause in which he has played no part."* Additionally, Article 256 provides that *"If the debtor does not execute the obligation in kind, or delays in executing it, he is obliged to pay compensation for the detriment sustained by the creditor, unless he proves that failure to execute, or delay in execution, was for an external cause in which he played no part."* Article 204 also provides that *"If a person proves that the detriment has arisen from an external cause in which he played no part, such as force majeure, or unexpected event, or fault on the part of the person harmed, or fault of a third party, he is not bound to pay compensation, unless there is a provision that rules otherwise."* The civil code also provides at Article 258 that *"An agreement may be made that the debtor will bear the consequences of force majeure or unexpected event"* and thus parties may pre-empt the risk in their contractual terms. Force majeure may therefore be relied on to prevent a party from having to pay compensation, such as

payment or liquidated damages where the site conditions were unexpected and arise from an external cause in which the party played no part.

37. A further aspect of civil law in relation to risks arises from provisions as to financial hardship. Article 658 (4) of the Egyptian Civil Code provides that: "If the economic equilibrium between the obligations of the employer and the contractor collapses due to exceptional events of general character, which were not taken into consideration at the time of contracting, and consequently the basis on which the financial valuation of the contract for works was made falters, the Judge may rule in favour of increasing the contractor's fee or terminating the contract." In France the concept of the "bouleversement de l'economie du contrat" requires works which are radically different from those originally agreed and that the scope of the works has changed.

Interest

38. Under several English standard forms of contract there is provision for the payment of interest. An example is Clause 60(7) of the ICC Conditions of Contract which provides that:

"In the event of

(a) failure by the Engineer to certify or the Employer to make payment in accordance with sub-clauses (2) (4) or (6) of the Clause or

(b) *any decision of an adjudicator or any finding of an arbitrator to such effect the Employer shall pay to the Contractor interest compounded monthly for each day on which any payment is overdue or which should have been certified and paid at a rate equivalent to 2% per annum above the base lending rate…"*

39. In jurisdictions where Sharia Law applies, the concept of Riba, which is part of Islamic law prevents the recovery of interest. However, in many countries the impact of Sharia law is limited to certain aspects of the legal system and

commercial matters are dealt with under a civil code or other statute which allows interest.

40. A number of states, Iraq, Libya and Syria broadly follow the Egyptian Civil Code which provides at Article 226 that *"If the object of an obligation is payment of a sum of money, the amount of which is known at the date of filing a claim, and the debtor delayed the payment then the debtor shall pay the creditor as compensation for delay 4% interest in civil matters and 5% in commercial matters. Such interest shall be calculated as from the date of filing the case."*

41. The Kuwaiti and UAE Civil and Commercial Codes distinguish between civil matters, with interest not being allowed by the Civil Codes and commercial matters, in which interest is permitted under the Commercial Codes. However, compound interest is not permitted.

Liquidated damages

42. Liquidated damages clauses are common in standard forms of contract. Their purpose is to agree in advance the consequence of a breach of contract on the part of a contractor so as to avoid the need for an employer to have to prove damages, particularly for those claims where damages are difficult to assess.

43. In English law two principles have been established. First, that where parties incorporate a liquidated damages provision, those damages are taken to be the sum which is recoverable for the breach and unliquidated damages are not also recoverable: see Temloc v Errill (1987) 39 BLR 30. This also finds expression in some standard liquidated damages provisions. For instance, Clause 8.7 of the FIDIC Red Book 1999 edition provides for the Contractor to pay delay damages and states that "delay damages shall be the only damages due from the Contractor for such default …."

44. The second principle is that liquidated damages provisions will not be enforced if they are held to be a "penalty": see the recent Supreme Court decision in Cavendish Square Holdings v El Makdessi [2015] UKSC 67. In that case the Supreme Court held that the "penalty rule" regulated only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. It said that the purpose of the law relating to penalty clauses was to prevent a claimant recovering a sum of money in respect of a breach of contract committed by the defendant which bore little or no relationship to the loss actually suffered by the claimant as a result of the breach. This concept provided the basis for the classic distinction in law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party. The court considered and applied the previous decisions in Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6 where it was held that a contractual provision would be penal if it was "unconscionable and extravagant" and in Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, where Lord Dunedin agreed with that and Lord Atkinson considered that the question was the nature and extent of the innocent party's interest in the performance of the relevant obligation.

45. The Supreme Court said that, in determining whether a contractual provision was penal, the true test was whether it was a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party could have no proper interest in simply punishing the defaulter. His interest was in performance or in some appropriate alternative to performance. Compensation was not necessarily the only legitimate interest that the innocent party might have in the performance of the defaulter's primary obligations. It held that, although the penalty rule was open to criticism, it would not be appropriate for the instant court to abolish it or extend it.

46. Therefore, in a typical case the liquidated damages provision may be similar to Clause 47 (1) of the ICC Conditions of Contract which provides:

"(a) … The Appendix to the Form of Tender shall include a sum which represents the Employer's genuine pre-estimate (express per week or per day as the case may be) of the damage is likely to be suffered by him if the whole of the Works is not substantially completed within the time prescribed by Clause 43 or by an extension thereof granted under Clause 44 or by any revision thereof agreed under Clause 46(3) as the case may be.

(b) If the Contractor fails to achieve substantial completion of the whole of the Works within the time so prescribed he shall pay to the Employer the said sum every week or day (as the case may be) which elapse between the date on which the prescribed time expired and the date the whole of the Works is substantially completed."

47. In some civil law jurisdictions a different approach is taken to liquidated damages. For instance under the UAE Civil Code, whilst Article 390(1) allows the parties to agree a fixed amount of damages in advance, Article 390(2) allows the court, upon a written petition from the aggrieved party, to decrease or increase the amount of damages to reflect the actual loss suffered. Evidently, the power of the courts to increase the amount of damages changes the nature and purpose of the liquidated damages clause and presents a risk that the other party will seek relief under this provision. In practice to establish the need for an increase or decrease the court of arbitral tribunal will require cogent evidence that there is a discrepancy between the actual loss suffered and the level of contractual compensation. However there are cases where the provisions have been applied. In the UAE Federal Supreme Court (Case No 103 of 2004) the court decided that the contractually agreed rate of liquidated damages was grossly exaggerated compared to the damage suffered by the party imposing liquidated damages and should therefore be reduced.

48. Another way in which the liquidated damages clause can be challenged is by Article 290 of the UAE Civil Code under which the court may reduce the liability

or award no damages, if the victim contributed to the events which caused the damage, or increased the damage. Equally, the provisions of Article 287 of the UAE Civil Code also allow a challenge to liquidated damages provisions when it states that, if the party can prove that the damage was caused due to a foreign element beyond its control, such as an act of God, an unexpected event, force majeure, an act of third party, or an act of the victim, that party shall not be liable for the damage unless the law or the agreement provides to the contrary. Whilst some of these provisions might have given rise to an extension of time and therefore meant that liquidated damages would not be applicable for that period of delay, this provides a further way to reduce liquidated damages.

49. A particular change in certain civil law jurisdictions is to refer not to "liquidated damages" but to "penalty for delay" in order to overcome the possibility of adjustment and rely on civil code provisions which allow penalties to be enforced.

Termination

50. Most standard forms include provision for termination of the contract either by the Employer or by the Contractor. The grounds usually include provision to terminate in the event of insolvency of the party and also in the case of default. The default for the Contractor usually requires a failure to carry out the works, such as failing to proceed "regularly and diligently" with the Works. The default by the Employer usually relates to a failure to make payment but may also, for instance in Clause 16.2 of FIDIC 1999, include a failure by the Engineer to issue a payment certificate within a specified period.

51. In some civil law jurisdictions, the ability to terminate is subject to the provisions of the Civil Code. For instance, Article 267 of the UAE Civil Code provides that a contract may be terminated in three ways: mutual consent, court order or by force of law. Whilst parties seek to rely on termination clauses within the standard forms, relying on the legality and validity of unilateral termination under Articles

246 and 258 of the Civil Code where the contract provides for such a mechanism, it is often asserted that there is a need for a court order.

52. Whilst parties can agree that a contract should be deemed terminated, without the need for a court order, some parties insert wording to the effect that any termination of the contract is deemed to be exercised within the meaning of mutual consent as contemplated by Articles 218, 267 and 892 of the Code and without the need to obtain a court order under Article 271.

Limitation of Liability

53. Many standard forms include provisions which seek to exclude or limit liability. These provisions may take the form of clauses which seek to exclude liability for certain types of loss, for instance, consequential loss or may seek the limit liability to a fixed sum.

54. For instance, Clause 17.6 of the FIDIC Red Book states that "*The total liability of the Contractor to the Employer, under or in connection with the Contract other than [certain Sub- Clauses] shall not exceed the sum stated in the Particular Conditions or (if a sum is not so stated) the Accepted Contract Amount. This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.*"

55. However in certain civil law jurisdictions, there are provisions which impose liability which is not limited in this way. Under Article 880(1) of the UAE Civil Code, it is provided that a contractor and a supervising architect (which can include the supervising engineer) are jointly liable to compensate the employer for a period of ten years from the date of project handover, if the building suffers (a) total, or (b) partial collapse, or (c) there is a defect that threatens the stability and safety of the building. Parties may not agree to a shorter period as this is a mandatory obligation. This decennial liability is a strict liability and applies even if there is a defect in the land itself or the employer consented to the construction of

the defective buildings. The claim for compensation must be brought within three years of the collapse or discovery of the defect.

56. Thus, any provision which seeks to limit liability for this type of breach will be ineffective.

Conciliation/Mediation

57. In many standard forms of contract there is a multi-tiered dispute resolution clause which requires parties to use alternative dispute resolution methods, including forms of dispute avoidance, before they embark on more expensive and time consuming methods of dispute resolution.

58. One such method is conciliation which was introduced in the ICE Conditions of Contract (6th Edition). The other main method is mediation. As explained in the ICE Mediation/Conciliation Procedure 2012, during either process "*The Mediator or Conciliator explores with the Parties their interests, strengths and weaknesses, and perceived needs; to identify possible areas of accommodation or compromise; and searches for possible alternative solutions. Anything can be explored which could lead the Parties to an agreed settlement. Where the mediation/conciliation follows an Engineer's or a Project Manager's decision, the Parties are wholly free to explore options that were not available to the Engineer or the Project Manager.*"

59. The difference between the two processes lies in the fact that, in conciliation, if no settlement is reached and either party has requested the conciliator to produce a recommendation, the conciliator will issue a recommendation which under the ICE Procedure is the conciliator's "solution to the dispute which has been referred for conciliation." It cannot disclose any information which any party has provided privately to the conciliator and is to be based on the conciliator's "opinion as to how the parties can best dispose of the dispute between them and need not necessarily be based on any principles of the contract, law or equity."

60. In common law jurisdictions the use of mediation is now common and occasionally the use of conciliation or mediation with the mediator giving an indication of views is much less common. There are however a number of concerns in certain parts of the world with the use of mediation to resolve disputes. First, in certain parts of the world the ADR processes are not popular. Secondly, particularly in relation to public authorities, it is difficult to find someone who is prepared to take the decision to settle a case without there being a decision on the merits. Thirdly and related to that, is the fact that in areas of the world where there is corruption, there is concern that the person settling the case may seek to influence the outcome of the mediation so as to take some personal financial or other benefit in exchange for agreeing a more generous payment to the other party. Sometimes the benefit of a conciliator's recommendation is that it gives the parties an independent view of how the case may be settled which helps to provide a more robust basis for settlement. Therefore including a mediation clause in a standard form contract for use in certain parts of the world may not be seen as either desirable or appropriate.

Adjudication/DABs

61. Under contracts in a number of jurisdictions, including the United Kingdom, Australia, Singapore, Malaysia, there is now a compulsory system by which certain disputes can be referred to an adjudicator under statute. The starting point for such provisions was the Housing Grants, Construction and Regeneration Act 1996 which introduced the concept at s.108. There are now an increasing number of different provisions, often known as Security of Payment statutes. The concept is that, within a short time the adjudicator produces a decision on the dispute which is then temporarily binding until it is finally determined in court of arbitration proceedings or the dispute is settled.

62. If an English standard form is used in other jurisdictions then it is necessary to ensure that the contract complies with the requirements of local legislation rather

than the wording of the English domestic adjudication provisions. For example, in certain jurisdictions the adjudication has to be commenced within a time limit rather than "at any time".

63. In addition to the appointment of a person to act as an adjudicator, it is common, particularly in the FIDIC suite of contracts for there to be provision for a Dispute Adjudication Board (DAB) under which each party appoints a member of the Board and the Chairman is then appointed by the parties, the two other members or by some other methods. The DAB then considers the dispute and issues a decision. One of the aspects that has caused difficulty is the process by which such temporarily binding decisions are enforced. This has been the subject of a number of decisions in the Singapore courts, with the Court of Appeal giving the latest decision in PT Perusahaan Gas Negara (Persero)TBK v CRW Joint Operation in May 2015. The contract provided that, in relation to the decision of the DAB, "*The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award.*"

64. The issue was how that DAB decision could be enforced. The Court of Appeal by a majority held that it could be enforced by a party seeking an interim award from an Arbitral Tribunal which would then be enforced by the court. There was nothing wrong with there being such an award as an initial stage of an arbitration in which a party sought to open up review and revise the decision and the failure to pay did not give rise to a further dispute which had to be referred to the DAB before it could be referred to arbitration.

65. The countries which have introduced the adjudication process for construction disputes have necessarily had to ensure that after the rapid decision is made there is an effective process in the local courts to enforce the decision. In the Technology and Construction Court in England and Wales such enforcement proceedings usually are heard and decided within 2 to 4 weeks of the court

proceedings being commenced. If, therefore, an adjudication provision is introduced into a standard form of contract which is used where the local courts do not have the ability to provide a rapid enforcement procedure or where, as shown by the case of PT Perusahaan Gas Negara (Persero) v CRW above, the process is not properly thought out, the benefit of the adjudication process can be lost and the parties receive no benefit from a rapid and "temporarily binding" decision.

Arbitration/Courts

66. Most standard forms include a provision which specifies that the final process by which disputes are resolved is either arbitration or litigation in the courts. Absent an arbitration agreement the default provision will be the local courts. Whilst local courts may be acceptable to parties both of whom are based in that country, they are likely to be less acceptable where there is an international element so that one party is based in the country but another party is based in a different country. Where that happens, then the traditional choice has been international arbitration under which the parties choose a particular place to be the seat of arbitration and may also agree that the arbitration should be administered by, for instance, the International Chamber of Commerce (ICC). English standard forms rarely provide for a seat of arbitration, as England will be the place of arbitration and the Arbitration Act 1996 will apply. Where there is a foreign element it is important to decide whether to have international arbitration and, if so what the seat of the arbitration will be and what law will apply as the substantive law.

67. Traditionally many contracts between foreign parties or with subject matter relating to overseas disputes have included reference to the disputes being determined in the English Courts, often choosing the Commercial Court or the Technology and Construction Court. Increasingly, jurisdictions are introducing International Commercial Courts where disputes can be referred instead of choosing international arbitration. Such courts have been set up in Dubai, Qatar and now Abu Dhabi in the Middle East and, building on its popularity in the region, a new international Commercial Court has been set up in Singapore. There

are a number of differences between international court and international arbitration proceedings and, as a matter of cultural preference as well as other factors, some parties see an advantage in one form of proceedings rather than the other.

68. Whatever decision it is clear that parties considering the use of English standard forms of contract must consider carefully wider issues than those applicable to the English law position.

Conclusion

69. Most international construction projects are conducted using the English language as the language of the contract and as the project language of communication. That makes an English language standard form of contract an appropriate choice. However, the way in which the contract provisions are used and interpreted will differ depending on the cultural or legal systems in which the contract is being operated and care needs to be taken to ensure that these aspects are taken into account. Unless that is done the provisions will not properly deal with important aspects and may even render the contract or parts of it unenforceable.

The Joint Contracts Tribunal Limited
28 Ely Place
London
EC1N 6TD

E-mail: stanform@jctltd.co.uk

Website: www.jctltd.co.uk