Effect of modifying clauses in standard-form contracts and the impact that this may have on their interpretation.

English law does not require a particular form to contracts, therefore the terms and ultimately risk allocation is the choice of the parties. Standard Form Contracts (SFC) aim to minimise the time and cost of negotiating contracts. Allocating risk proportionally between the parties is another; the party in the best position to deal and litigate the impact of a risk should bear the responsibility (Construction Briefing, 2012).

Some professionals in the industry believe that parties should not amend SFCs, through choice, as there is a complex interaction between many of the terms (Ndekurgi and Rycroft, 2009). Latham even recommended the use of standard contracts without amendments (Latham, 1994). Modification can eradicate the balance of risk and create legal uncertainty (Ndekurgi and Rycroft, 2009). Choice amendment was criticised by Lloyd QC in *Royal Brompton NHS Trust v. Hammond & Others*:

> "A standard form is supposed to be just that. It loses its value if those using it or, at tender stage those intending to use it, have to look outside it for deviations from the standard."

Despite these convincing arguments industry professionals who form contracts argue to the contrary, that no SFC could reflect the varying specifics of each individual project (Ndekurgi and Rycroft, 2009). Amending SFCs to shift risk to gain a commercial advantage can also be a contribution. There are however rare instances where amendment is necessary; certain clauses become obsolete or the industry shifts and requires the inclusion of certain terms. An example can be attributed to the terms regarding snag lists, as many of the SFCs do not make provisions for them (although MF/1 2001 and ICE 7th edition (measurement) do provide for them).

Regardless of the industry stance, amendment of SFCs should be approached with reluctance and caution as there could be extensive consequences. SFCs are developed by industry representatives who have an understanding of common projects problems. Amendments can disrupt the balance of risk and reduce the true purpose; to provide a fair contract framework which results in a successful project (Local Government Task Force, n.d.). The full scope of problems and impacts of modifying SFCs is too broad to consider them all, therefore I shall consider the main points.

The main problems can be apportioned to three different risks. First is alteration to clauses within the standard form. Many clauses are cross-referenced with others, a case in relevance is *Bramall & Ogden v Sheffield Council*, where the alteration of a Liquidated and Ascertained Damages term (16e clause of JCT 63) rendered it inconsistent with related terms. Thus the court interpreted this clause as unenforceable. Another alteration to a clause is shown in *Balfour Beatty v Docklands Light Railway Limited*. Clause 66 of an ICE 5th edition Contract, dealing with resolution of disputes, was omitted completely. Additionally, certifier of payments and extensions of time was altered from the "Independent" Engineer to the Employers Representative. Disputes arose but the deletion of Clause 66 meant an arbitrator had no power to "open up, review and revise" the decisions of the certifier. The court interpreted that it could only rule if there had been a breach of contract, as it was deemed that the parties' intention was to omit this clause.

Second is the interaction with common law shown in *Peak Construction v McKinney Foundations*. The printed text of an extension clause was amended which resultantly

meant the contractor was entitled to payment of inflation up to practical completion, even though he wasn't entitled to extension of time. Courts interpret that deletion of this clause means, if there is no term in the contract to grant extension of time and the employer obstructs by act or omission, the contractor then has an obligation only to complete in a reasonable time. Employer hence loses his right to recover liquidated damages, shown in the case in hand (Au & Chan, 2010).

Interaction with common law is also seen with implied terms of two types, by law and by fact. Terms are only implied where there is no conflict with express terms and where considered the obvious norm; contracts silent on a particular matter can have terms implied. Firstly we will look at implied terms by law. Naturally SFCs cover a large array of detailed matters and resultantly implied terms are usually irrelevant. However, the modification of SFCs may result in particular terms being implied.

There are two main types, commonly referred to as obligations of employer and contractor. For example a contractor is expected to provide services at the level of care expected of an ordinarily competent member of his profession. In *Berkeley Community Villages v Pullen,* words were deleted from a clause regarding the level of care expected from the contractor. The courts interpreted the clause in respect to what the parties had intended at the point of agreement. There are many more terms relating to the individual obligations of both parties (Craik & Pattern, 2007; Furst et al, 2008).

Many international instruments further these obligations. One, the International Institute for the Unification of Private Law (UNIDROIT), implies the duty to cooperate (5th Chapter). This obligation (Article 5.1.3) is placed alongside other principles; obligations of good faith and fair dealing, reasonableness (Article 5.1.2) and performance (Article 5.1.6). Hence on an international level, both parties have an obligation to cooperate. However, interpreting which party has ultimately failed with this obligation is determined on each case by the corresponding national court. Judicial decisions consequently vary depending on the jurisdictional nation and hence interpretation of clauses can vary (Durand-Barthez, 2012; Klimas, 2011). The duty to cooperate is seen in English common law with the case of *London Borough of Merton LBC v Stanley Hugh Leach Ltd.* Modification of clauses may leave contracts open to common law interpretation which may not reflect the intended terms of the drafter.

Secondly, implied terms by fact. Courts aim not to improve contracts as they believe parties should, on the whole, bear the consequences of their agreement (Furst et al, 2008). Courts regularly reiterate that implied terms must not contradict the express terms of a contract (Cooke, 2007). It must be noted that certain instances occur where express terms may be determined as unjust or unenforceable, this is covered later. Courts will therefore only imply terms by fact when it is obvious both parties meant for a clause to be included but unintentionally missed accommodating it, or when a term is required to give business efficiency as shown in *Gulf Import and Export Co v Bunge SA*. The business efficiency principle stems from the *The Moorcock* case (Wood et al, 2011).

The third area of risk concerns terms implied by statute. Modifying certain terms within a SFC may contradict an act and terms may then be implied. We shall look at two main legislations that impact on modification of SFCs.

Firstly *The Housing Grants, Construction and Regeneration Act (HGCRA) 1996*. The main purpose is to ensure contracts include for the provision of payments and dispute resolution. If amendment to any SFC contravenes the act then the statutory instrument

known as ‘Scheme of Contracts’ defaults into place (Helps and Sheridan, 2008). The amendment of a dispute resolution clause in a JCT 05 trade contract, to transfer the cost of adjudication for both parties to the contractor, was deemed non-compliant with the HGCRA and the Scheme of Contracts. *The Yulanda (UK) Co Ltd v WW Gear Construction Ltd* case saw the amended clause replaced with the provisions made by Part One of the Scheme of Contracts. Second is the *Unfair Contracts Terms Act (UCTA) 1997*. Generally, courts are reluctant to make a bad bargain good if there was consensus ad idem (Ndekurgi and Rycroft, 2009). UCTA can be misleading as it does not govern all unfairness within a contract; mainly concerns exemption and limitation clauses. Clauses that limit liability for death or personal injury, as a result of negligence, are an example of being unenforceable under UCTA. Section 2(2) declares any clause attempting to limit loss or damage caused by negligence is also unenforceable, except where a clause can pass a test for reasonableness, shown in *Regus Ltd v Epcot Solutions Ltd*. (Chappell, 2012; Ndekurgi and Rycroft, 2009). Courts can therefore interpret ambiguous clauses by using the reasonableness test, and some clauses may not even comply with statutory requirements, resultantly they may be interpreted as unenforceable.

Disputes normally arise when parties have different interpretations of modified clauses stemming from contract negotiation. Courts seek to deal with interpretation of ambiguous modified clauses with previous case law, common law and statutory regulations and at a last, may result to the contra proferentem and reasonableness principles (Furst et al., 2008). The contra proferentem principle follows that, where a party modifies a clause it is their responsibility to make the wording clear and so should lose out if there is ambiguity; shown in the case of *Enterprise Inns Plc v Palmerston Associates Ltd* (Taylor and Taylor, 2009). Lord Justice Moore-Bick stated how courts attempt to interpret clauses in *Ravennavi SpA v New Century Shipbuilding Co. Limited*:

> “... read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both parties in order to ascertain what they were intending to achieve...”

This follows from the point raised in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Bluementhal)*, where Lord Brightman stated:

> “the Buyers to so conduct themselves as to entitle the sellers to assume ...”

From this we can deduce that a court would generally adopt the interpretation which a reasonable person, who is considered to have all the background knowledge available to both parties at the time of the contract, would understand the parties to mean (Jaegar and Hok, 2010). This is the stance that the Supreme Court took in *Rainy Sky v Kookmin Bank.*

SFCs can be valuable to any project as they reduce the time and cost at the negotiation stage and provide a framework which can result in success. Modifications may be required to realign them with the constantly changing industry but any choice amendments should be considered thoroughly. Modifications can leave clauses ambiguous and even result in being unenforceable. Standard forms are drafted to deal with project problems, where many terms interact with one another. There are a large array of different standard forms, drafted for a multitude of different construction and procurement types, hence there is high probability of one being suitable. We can conclude that any form of modification can create legal uncertainty which may lead to courts interpreting terms in a unintended way. It is therefore important to consider the ramification of alterations, question whether changes

are necessary and ensure that terms do not have a detrimental effect on interlinked clauses and the contract as a whole.

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