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Do complex multi-page change control provisions meet the test for precision as set out in Edenred – Where is the wriggle room?

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A Brexit Prelude

- Accommodation to a post-Brexit future?
- The future of procurement law a function of other political calculations
- Unless rejoin some EU/EEA lite some freedom to rewrite law; probably within GPA constraints
- Business will want GPA to be able to keep open access to EU27 (at least within more limited scope provided for under GPA)
- Three broad alternatives
  - Keep the same rules with some necessary/considerable adaptations (see Peretz, www.monckton.com/great-repeal-bill-legal-issues-will-tackled)
  - A blank sheet
  - UNCITRAL
- Come to King's, Centre for European Law: UNCITRAL, WTO procurement disputes, NI/RoI, What should be put in place? Email me… or
  - http://estore.kcl.ac.uk/browse/extra_info.asp?compid=1&modid=2&deptid=13&catid=149&prodid=680

Article 72/Reg 72 (etc)

Article 72(1)

"Contracts and framework agreements may be modified without a new procurement procedure in accordance with the Directive..

where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter overall nature of the contract or the framework agreement."

Obviously note the only route to compliance, but the one you can prepare for

What does that mean?

- Recital 111

"Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. … It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the contact which are rendered by technical difficulties which have appeared during operation or maintenance. It should also be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service."

Edenred

- [2016] UKSC 45
- http://publicsectorblog.practicallaw.com/edenred-a-deceptively-narrow-decision-but-with-wide-reaching-consequences/
- In Supreme Court, but not below, the case was decided on the basis that there was no real modification.
- The lower courts decided on the basis of the existence of the clear, precise modification clause.
- But the Supreme Court did discuss this at the hearing and in the judgment.

Vague or Abusive Descriptions of Scope

- Supreme Court was conscious that one way of making it difficult to ascertain whether a contract was modified was to make the scope vague in the first place
- Suggestion that in those circumstances the original contract could be challenged as an abuse of right
  - Does that get around the obvious limitation problem
  - And some contracts just have to be vague on some things
  - Does this mean that all Provisional Sums are objectionable
  - Or construction using the observational method
  - Is it OK if it is common practice to be vague so that the RWIND tenderer will expect vagueness on this pointA number of questions raised unless addressed in Great Repeal Bill
- And where does the need for a direct functional link to the tender fit in?

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The Change Clause

- Supreme Court clearly not content to decide on this basis
- Recital 111 is strange
  - An eccentric selection of examples
- Fails to address any of the usual change clauses we might see in contracts for Construction, Build/Operate, services for IT, health etc
- So the court repackaged the Regs and noted that there are four aspects of a change or review clause that prevent modification from being substantial
  - Monetary value irrelevant
  - Modifications must have been provided for in initial documents (cf. Article 32(5), repetition)
  - The clause cannot authorise modifications that would alter the overall nature of the contract
  - **The clause must achieve a required degree of specificity**

The Required Degree of Specificity

- This is just a restatement of the problem
- Does it mean mechanical (price indexation), or without need for discussion or negotiation
- What of change clauses in the real world?
  - Valuers, certifiers, project managers, DRBs, arbitrators
- This is legislation without regard to what really happens
- The Supreme Court indicates that there is scope for debate about whether complex multi-page change control provisions will really ever meet this test!!

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Obviously note the only route to compliance, but the one you can prepare for

Construction

- Variation of Works
  - Lump Sum Fixed Price Contracts
    - Most like a typical contract
    - But with provisional sums, prime cost items etc etc
    - Variations will be remeasured using agreed rates
  - Measure and Value Contracts
    - *SIAC v Mayo*
  - Cost Reimbursable Contracts
    - Most NEC3 type
  - Contracts where no price stipulated

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Types of Variation

- Do work that is indispensable
- Change the works
- Omit works
  - Case C-549/14, Finn Frogne
- Acceleration
- Do work outside scope
  - Will this ever be possible?

Approaches to Valuation

- Simply use Agreed Rates
- Derive Varied Rates
  - Clear and precise?
  - Does the
- If omission/change so great that agreed rates inapplicable, then new rates to be fixed
  - But is overall nature of contract then changed
  - So work has been done but should have been a new contract
    - So should be quantum meruit
    - So?
    - So stick with the contract as is?
- Or value by reference to Cost

Clear Precise Unequivocal

- Most of these clauses are Clear
  - In the sense that the RWIND tenderer would no about them
  - Can read about them
  - Can go to conferences about valuing variations
- Precise and Unequivocal
  - What do the two words mean?
  - Does it mean an objective outcome?
  - Is the intervention of a third party Clear and Unequivocal?

Third Parties

- Precise and Unequivocal because in theory there is a single right answer?
  - Even if only revealed in a contract or dispute resolution process?
  - It's P & U because there is a single objectively true outcome that will be revealed by valuer/certifier/PM/arbitrator/court etc
  - Is *SIAC v Mayo* any help?
    - …*when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition.*

Can you take this further?

- Contracting Authority as its own valuer/certifier
  - *Balfour Beatty Civil Engineering v Docklands Light Railway* [1996] CLC 1435
    - Employer under duty to act fairly, reasonably and in good faith
    - This case law reveals the problem, perhaps there isn't an objectively correct outcome; rather that trust is placed in the valuer/certifier
- Mediation
- Med/Arb
- Pendulum Arbitration

And this takes us back to "Clear"

- Whether the dispute is a civil engineering contract
- Or an NHS Services contract
- Much of the contract refers to past experience, sometimes past performance of a particular relationship
- Can all EU RWIND tenderers really be expected to know all this?
  - But without it continued performance is difficult
  - Is pendulum arbitration clear enough?

Wiggle or Wriggle Room?

To wiggle is to move from side to side, or to and fro; from this we get wiggle room, defined in this space 20 years ago as ‘’an implicit opportunity for later flexibility . . . not quite an ‘escape hatch’ or a ‘way out.’”

For these two decades, wiggle room has been continually challenged by wriggle room, which has the advantage of alliteration. However, wriggle (from Old English wrigian, root of awry) means ‘’to squirm, writhe, move sinuously,’’ as distinct from wiggle, which denotes back-and-forth motion, not necessarily twisting.

I’m not knocking wriggle, which -- when followed by out in diplomatic parlance -- vividly calls up the picture of sneaky evasion by artifice. But when paired with room, wriggle has not succeeded in dislodging the more limited, precise and less pejorative wiggle.

William Safire 2004

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