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» Welcome

In this edition of the *ADR Digest*, David Longbottom, director of ADR Partnership Ltd considers the wording of performance bonds and the recent Scottish Court of Session decision of *Spiersbridge Property Developments Limited & Muir Construction Limited (2008)*. The case reviews whether such bonds can include an implied term to the effect that the employer is obliged after calling a bond to account to the contractor for any overpayment received.

We are delighted to have back construction law firm Minter Ellison as our guest writers with Ian Cocking, Partner and Joanne Smith, Registered Foreign Lawyer. Ian and Joanne consider the recent bid rigging scandal in the UK. This is particularly relevant in light of the Hong Kong Government's consideration of legislation to regulate anti-competitive practices in Hong Kong.

Patrick O'Neill, director of ADR Partnership Ltd, considers at what point a claim becomes a dispute and why it even matters, a point that takes on practical significance in arbitration proceedings.

In our last *ADR Analysis* we considered the preference of terms in the interpretation of contracts. In this *ADR Analysis* we continue with that theme and the use of the contra proferentem rule in resolving ambiguities and discrepancies in contract documents.

Finally, after a year in partnership we organised a cocktail party in the Library of the China Club at the beginning of June 2008 to celebrate this occasion. In the *ADR News* section we include some photographs of that event which we hope will become a regular annual fixture in the *ADR Diary*!

James B Longbottom
Managing Director



» Performance Bonds: The Devil is in the Detail



By **David S Longbottom** BSc(Hons) PgD(Law) MRICS
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Introduction

A bond is a legally enforceable financial guarantee given by a third party [the guarantor or bondsman] to a purchaser [the employer] to guarantee the obligations of a supplier [the contractor] of goods, works or services under a contract¹.

The purpose of the bond is to assist the employer to meet the extra expenses to remedy a contractor's default and/or complete the contract - for example, if the contractor becomes insolvent and the employer is subjected to finding another contractor to complete the works at, most likely, increased costs. An interesting point to note is that bonds do not always protect the employer as envisaged, as in the case of *Perar BV v General Assurity & Guarantee Company Limited (1994)*, when it was decided that insolvency was not a breach of contract². Hence, the drafting of the bond is crucial and professional advice should be sought to ensure that wording is inserted in the bond to get around such issues as the problem found in the *Perar* case.

The performance bond remains, alongside the parent company guarantee, the employer's principle form of protection against contractor default, as the retained retention amounts may be found to be insufficient to fully rectify a contractor's default or insolvency, however remote the possibility of insolvency may be³. In this article we will concentrate on unconditional and conditional bonds.

Unconditional Bonds

The terms and conditions of a bond determine both the circumstances and manner by which the bond can be called.

A conditional bond differs from an unconditional, on-demand bond in that it requires fault to be established and damages to be proved...

Whether a bond is unconditional or conditional is essentially a matter of construction of the bond.

An unconditional, 'on-demand' bond is an undertaking given by a bank to the employer that it will pay the employer on-demand or 'call' (as it is commonly referred to) the whole or part of the amount of the bond. An unconditional bond will normally contain the words:

"... on receipt of your first demand ..."

The obligation of the bank to pay the employer is unconditional and there is no requirement for the employer to justify default or the amount of damages to which it is entitled (subject to the limits specified in the bond, of course). The bondsman is also not obliged to enquire into the performance of the contract. However, for understandable reasons, and as demonstrated by case law, the bondsman may be reluctant to pay out the sums demanded. Additionally, there is no right for the contractor to claim set-off from the sum payable under the bond for the amount of a counterclaim it may have against the employer. In construction contracts on-demand bonds are typically 10% of the contract sum and, therefore, can amount to quite a considerable sum. Considering in effect the bond is 'cash-in-hand' or a 'certified cheque', the authors of *Keating on Construction Contracts* have commented:

"It is not understood why contractors ever agree to procure such [on-demand] bonds other than a belief that they will not obtain the contract if they do not ..."

Hence, on-demand bonds are generally opposed by contractors since:

- the bond can be called without the contractor being in default; and
- the bank will normally deduct the amount of the bond from the total credit it allows the contractor, thereby affecting the contractor's cash flow and ability to compete for, and undertake, other works. Alternatively, the bank may require a counter-indemnity from the contractor equivalent to the value of the bond.

Conditional Bonds

A conditional bond differs from an unconditional, on-demand bond in that it requires fault to be established and damages to be proved before the bondsman pays out the called money. Accordingly, it is perceived by contractors as being fairer.

Spiersbridge Property Developments Limited v Muir Construction Limited

An interesting recent case is *Spiersbridge Property Developments Limited v Muir Construction Limited*, Scottish Court of Session, (2008), (the 'Scottish case') which again brought up the question: when a bond is called, is the employer obliged to account to the contractor for any overpayment received?

An excerpt of the bond is as follows:

"On behalf of the contractor we [Bank of Scotland] hereby give you our guarantee and undertake to pay to you any amount or amounts not exceeding in total a maximum of [£593,250] on receipt of your first demand in writing to us at this office with your signature thereon confirmed by your bankers stating that the contractor has failed to perform and observe all the conditions and stipulations of this said contract."

The bond was for 10% of the contract sum and in November 2006, the employer (*Spiersbridge Property Developments Limited*) called an amount of about £500,000 and the bank made payment accordingly. Under a counter indemnity the contractor was required to pay to the bank the amount paid by the bank.

One of the contractor's contentions argued in Court was that there was an implied term in the contract such that in the event that the employer called the bond, the employer would be required to provide an account on the amount of the monies called and only retain the amount commensurate with its financial losses resulting from the contractor's breach(es) of contract (if any).

Lord Glennie noted that absent clear words to the contrary an implied term existed in the contract to the effect:

"In the event that ... the pursuer [employer] should make a call on the bond it would account to the defender [contractor] for the proceeds of the bond, retaining only the amount equivalent to any loss suffered by the pursuer as a result of the defender's breach of contract, if any."

This follows many other cases⁴ which suggest, when in the absence of clear words to the contrary, this general approach would be followed. Hence, when such a bond is called, there will, at some stage, be an accounting procedure undertaken.

Notwithstanding this, how could the contractor further protect his interests?



One of the contractor's contentions argued in Court was that there was an implied term in the contract such that ... the employer would be required to provide an account on the amount of the monies called and only retain the amount commensurate with its financial losses...

Reducing the Employer's Ability to Call the Bond

The employer's ability or ease with which to call the bond may be reduced by drafting conditions in on-demand bonds i.e. drafting the bond so that there are conditions which must be followed before the bond can be called.

A few examples are as follows:

- A possible avenue to stop wrongful calling on bonds is to incorporate a dispute resolution provision in the bond or to include a provision that payment will only be made upon production of a copy of an adjudicator's or arbitrator's award, or judgment of a court, together with a statement that the award/judgment has not been satisfied in full. However, since the Employer is unlikely to want to incur the time and costs of legal proceedings, such a provision is unlikely to be accepted by employers. Notwithstanding this, for the employer there is an advantage in such provisions, since having a fairer resolution and accounting process will allow contractors to price the reduced risk accordingly. Such an approach would change the bond to a conditional bond.
- Possibly more acceptable to the employer is to specify that the call on the bond must be accompanied by a statement signed by the employer's senior personal, approving the calling of the bond and stating that the contractor has become insolvent or that the contractor is in breach of the contract and has failed to remedy the breach of contract within 28 days of being required to do so (i.e. to insert a cooling-off period).
- A further method to reduce the risks of employers successfully calling a bond is to specify the precise wording to be used on the call. This is by inserting specific language which must be used when the bond is called, since not every employer is sufficiently well organized to follow such bond requirements precisely. This may include a requirement for authentication of signatures of those signing the bond and/or certified copies of relevant documents to accompany the calling of the bond. This is especially advantageous when the expiry date of the bond is looming and time may not be sufficient for the employer to satisfy all of the requirements needed to call the bond and, therefore, the bank may have no authority, or at least be reluctant, to pay the amounts demanded.



The Situation in Hong Kong

The use of on-demand bonds continues to be prevalent in the construction industry. For example, in October 2006, the Hong Kong Housing Authority (HA) extended the requirement of contractors supplying on-demand bonds to all new works. However, the purpose of these bonds is said to enable HA to effect payment of outstanding wages to workers, a seemingly equitable purpose for a bond.⁵

However, this approach is contrary to that in the United Kingdom with the HM Treasury, Central Unit on Procurement, (No. 48 Bonds and Guarantees) advising that:

"Unconditional on-demand bonds are essentially unfair and Ministers have said that they should not be used in government procurement."

Whether the widespread use of on-demand bonds in Hong Kong will change remains to be seen. ❄

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Footnotes:

- ¹ HM Treasury, Central Policy Unit Guidance.
- ² The contract was JCT 81 which provides that when a contractor becomes insolvent his employment is "forthwith automatically determined" and, therefore, in this case the contractor could not be in default as a result of his insolvency as his employment was automatically determined upon insolvency.
- ³ However, see earlier article in the *ADR Digest Issue 1 Autumn 2007* on the financial burden of retention monies on the contractor.
- ⁴ For example, *Cargill SA v Bangladesh Sugar Corp (1998)*.
- ⁵ Press release, Friday 13 October 2006.

OFT Bid Rigging Scandal



By **Ian Cocking**, Partner and **Joanne Smith**, Registered Foreign Lawyer, Minter Ellison

Introduction

Readers may be aware that the UK industry is in the midst of a scandal affecting some of its largest construction companies. In this article, we consider recent comments that Sir John Egan is reported as having made about the scandal. In his view, procurement based on lowest price is a significant contributing factor, and also the slow progress that has been made in relation to partnering. We then compare the position in the UK with that in Hong Kong, where the introduction of a competition law is still under consideration by the Government.

The OFT Investigation

On 17 April 2008 the Office of Fair Trading in the UK (OFT) issued a Statement of Objections (SO) against 112 firms in the construction sector in England relating to accusations of bid rigging for public contracts worth hundreds of millions of pounds.

The SO set out formal allegations and evidence, to which the addressees had until 30 June 2008 in which to respond. The list of the 112 companies is published on the OFT website: www.ofg.gov.uk/news/press/2008/52-08.

More than 40 firms have already admitted some form of price-fixing, with 37 more applying for leniency in return for assisting in the investigation.

The OFT has made clear that no assumption should be made at this stage that there has been an infringement of competition law by any of the companies named in the SO. The parties concerned have had the opportunity to make written and oral representations which the OFT will take into account before making a final decision (likely to be published next year) as to whether competition law has been infringed, and as to the appropriate amount of any penalties the OFT may decide to impose on each of the firms concerned.

Allegations

The OFT alleges that the construction companies named in the SO have engaged in bid rigging activities including 'cover pricing' and 'compensation payment'.

Cover pricing describes a situation where one or more bidders collude with a competitor during a tender process to agree that one bidder will submit a price which is intended to be too high to win the contract. The tendering authority, for example a local council or other customer, is not made aware of the contacts between bidders, leaving it with a false impression of the level of competition and this may result in it paying inflated prices. Cover pricing allows a contractor to keep on a local authority's list of contractors, even if it has not got the capacity to take on fresh work.

Cover pricing arrangements have previously been found by the OFT and the Competition Appeal Tribunal to be illegal and in breach of the UK Competition Act 1998.

The OFT is reported as saying that the endemic practice of cover pricing would have pushed up public sector costs by 10%. The public sector construction budget is worth £40 billion a year.

As well as cover pricing, the SO alleges that a minority of the construction companies have variously entered into one or more arrangements whereby it was agreed that the successful tenderer would pay an agreed sum of money to the unsuccessful tenderer (known as a 'compensation payment'). These more serious forms of bid rigging are usually facilitated by false invoices. The UK Construction Confederation believes that only nine of the companies named in the SO were guilty of making compensation payments.

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Egan's Rethinking Construction

Sir John Egan, who wrote the seminal *Rethinking Construction* report in 1998 has been openly critical, saying:

"I have little sympathy for the government over this OFT investigation. What do they expect if they persist in procuring based on lowest price? I am very sad the public sector is still using this 'short cut' approach. It is still procuring on lowest price and as long as this is the case, proper tendering can't happen. Connected to this is the fact that the government is also still some way off partnership arrangements".

Rethinking Construction recommended that the industry replace competitive tendering with long-term partnerships, based on performance measurement and sustained improvements in quality and efficiency.



Historically the Hong Kong industry has been extremely reluctant to move away from lowest price tendering...

Egan thought that if clients ask how they can be satisfied that they are getting value for money (VFM), the answer lies in comparison between suppliers and rigorous measurement of their performance. With quantitative performance targets and open book accounting, together with demanding arrangements for selecting partners, VFM can be adequately demonstrated and properly audited. Egan also considered that the most immediately accessible savings from partnering come from a reduced requirement for tendering.

Theoretically there would be less scope for cover pricing or compensation payments in an open book environment. Of course, what remains to be seen, is whether the investigation reveals that they are in fact less prevalent in the open book environment advocated by Egan. It would be a major set-back for partnering were it to be worse.

Tang's Construct For Excellence

Three years after Egan's report, Henry Tang published *Construct for Excellence* in Hong Kong in January 2001 with broadly similar conclusions in relation to VFM and the role partnering could play. Whilst some progress has since been made in relation to both, Hong Kong could not claim to be in a very different position from the UK. Lowest price tendering still prevails, and is no guarantee of VFM.

In his report, Tang also advocated a VFM approach where proper consideration should be given to past performance. This would encourage suppliers to take a longer-term view, seek improvement in their performance continuously and benchmark themselves against industry standards. An objective and transparent system for assessing performance should reward those contractors that perform well and not just be used as a filtering mechanism to screen out underperforming contractors - although care should be taken to allow entry of competent newcomers.

Fundamentally however, there is nothing about the Hong Kong market that makes it any different from the UK, or immune to the problems of lowest price tendering. Therefore the findings of the Tang Report are as valid today as they were 7 years ago. The most significant difference between Hong Kong and the UK during the period since Tang and Egan has probably been the state of the construction economy: whereas the construction sector in the UK has been buoyant, the Hong Kong market is still under intense pressure and competition for work has been fierce, driving prices lower. There are clearly lessons to be learnt from the UK as to what could happen if, as expected, the Hong Kong economy improves and measures are not introduced to ensure VFM.

Historically the Hong Kong industry has been extremely reluctant to move away from lowest price tendering, and reasons such as ICAC type concerns are frequently cited as the reason inhibiting the growth of partnering. Yet, as we can see from the UK example, lowest price tendering is no guarantee of anything in a buoyant market. The Construction Industry

Council is the body responsible for taking forward Tang's recommendations, including those relating to driving VFM through changes to tendering and partnering, and it will undoubtedly be considering these issues in due course.

Competition Law in Hong Kong

Anti-competitive practices are no stranger to Hong Kong. However, unlike most jurisdictions around the world, Hong Kong does not have a general competition law regulator. The Tang report itself makes reference to a study commissioned by the Housing Authority in 1999 in which the prices of ready-mixed concrete increased by a total of 67% between 1994 and 1997 (although in fairness demand had hit new peaks at the time). Whilst various bodies were encouraged by the Tang Report to consider the feasibility of measures to promote competition, there was no competition law to be infringed. The Hong Kong Government is currently in the process of drafting legislation to establish its own cross-sector competition regulator which would regulate anti-competitive practices such as price-fixing, cartels and bid rigging like the OFT in the UK. The public consultation on the proposed legislation is due to end on 5 August 2008.

In a bull market where the lowest tender price may not represent VFM, more performance based processes should be used for evaluating VFM and minimising the risk of anti-competitive behaviour.

Analysis

The OFT has made clear that cartel activity of the type alleged in the SO harms the economy by distorting competition and keeping prices artificially high.

In a bull market where the lowest tender price may not represent VFM, more performance based processes should be used for evaluating VFM and minimising the risk of anti-competitive behaviour.

Egan and Tang supported the wider adoption of partnering, or alliancing, and particular emphasis was placed upon past performance in determining VFM.

Although the implementation of legislation regulating anti-competitive practices is under consideration in Hong Kong, it is clear that, at present, there could be no equivalent OFT enquiry into allegations of potential cover pricing or compensation payments in Hong Kong. Some may therefore argue that the lowest tender price in Hong Kong is even less of a guarantee of value. ←

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➤ When Does a Claim Become a Dispute & Why Does it Matter?



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Introduction

A claim, a dispute, a difference or a disagreement? The terms seem almost interchangeable in the context of construction contract claims, however, this is somewhat misleading given the propensity of both the common law and statute to assign binding rules of construction as regards what certain terms are supposed to mean. The need to distinguish a claim from a dispute is an important one to get right, however, and is a question that has received much in the way of judicial consideration over the years.

Albeit a claim can result in a dispute, claims in themselves cannot be referred to arbitration but disputes can. It is a fundamental aspect of the whole arbitral process, therefore, that the difference between a claim and a dispute is understood in order to avoid the ineffective commencement of what might be an otherwise valid arbitration.

Before we consider the point at which a claim becomes a dispute, it is necessary to acknowledge, first of all, that a claim and a dispute are not the same thing. Further, it is important to recognise that one does not automatically lead to the other.

For the purposes of this article, a claim may be defined as:

"an assertion to one's entitlement to additional time and/or financial compensation."

A dispute, on the other hand, may be defined as:

"a disagreement over the validity of a particular matter."

All kinds of circumstances typically give rise to claims, including:

- the contract allocation of risk;
- incomplete scope definitions;
- Employer change; and
- the effects of neutral events that are the fault of neither party.

Given that claims may be inevitable on certain projects, what is it then that transforms these claims into disputes?

...a dispute can manifest itself not just by an express rejection of a claim, but by virtue of the conduct of the other party in response to that claim ...

A claim differs from a dispute in the sense that a claim is an assertion by one party only as to that party's entitlement to some form of relief under the contract, and as a consequence of an event which enables the claim to be made, or as a result of a breach of contract.

It is necessary to communicate that claim to the other party, and, since contracts typically require the contractor to do no more than give notice, maintain records and provide particulars, the degree to which the contractor can succinctly narrate the circumstances of the claim and demonstrate the effects of the events, can assist in the matter being resolved commercially without the need for it to become a formal dispute.

However, in those instances where agreement cannot be reached, then the point at which a claim formally becomes a dispute concerns the involvement of the party against whom the claim is being advanced, and their response or conduct towards that claim. Over the years, the courts have, on numerous occasions, had to decide whether or not disputes have actually arisen given varying sets of circumstances and the question in many instances can be a difficult one to answer. Consider the following scenarios, as examples, and the answer, as you can see, is not obviously clear:

- If a party continues to raise never-ending requests for further and better particulars, does a dispute ever actually arise?
- If a party remains silent on receipt of a claim, can a dispute be said to exist?
- If a party issues a counterclaim without addressing the claim, is there a dispute?
- If a party does not admit a claim (but does not reject it either), can it be said that there is a dispute?

The wealth of litigation that exists on this question has not so much produced a set of distinct rules which govern whether and under what circumstances a dispute has arisen (or not, as the case may be) - however, the decisions do provide general guidance on how to recognise whether a dispute can be said to have arisen or not, as shown below in **Figure 1**:

Figure 1: Recognising a dispute

Circumstance	Is there a dispute?
The claim is expressly rejected.	A dispute occurs on rejection of the claim.
The recipient remains silent and ignores all communications concerning the claim.	A dispute can occur on the basis of the no response and may be construed as a non-admission of the claim.
Prevarication or continued requests for further information.	A dispute can occur on the basis of an inference that the claim is not admitted.
A counterclaim is issued without addressing the claim.	A dispute can occur on the basis of an inference that the claim is not admitted.
A party does not admit the claim, but does not expressly deny it either.	A dispute can occur on the basis of non-admission.

Different outcomes are therefore possible given the different situations that can typically be encountered, however, in summary, a dispute can manifest itself not just by an express rejection of a claim, but by virtue of the conduct of the other party in response to that claim, and very often on the basis of an inferred non-admission of the claim.

Why Does the Timing Matter?

Whether and at what precise point in time a formal dispute comes into existence is of practical significance, and particularly so in arbitration proceedings. Given that *Section 2AA(1)* of the *Arbitration Ordinance, Cap 341*, states that the object of the Ordinance is to:

"facilitate the fair & speedy resolution of disputes by arbitration, without unnecessary expense",

it therefore follows that if a 'dispute' has not arisen, it would be open to a party in respect of a notice of arbitration to challenge the arbitration and rightly call into question whether the arbitration clause had come into play at all. Indeed, to go one stage further, it is trite law that a party cannot insist on arbitration if there is no dispute to be arbitrated. Thus, a claim cannot, in itself, form the basis of an arbitration if that claim has not yet materialised into a dispute. Albeit an arbitration does not automatically commence the moment a dispute arises, it must be triggered by a notice given by one of the parties to the arbitration agreement to the other party. The timing of the commencement of the arbitration is therefore in the hands of the parties but, nevertheless, the timing demands that a dispute be in existence before an arbitration can be validly commenced at all. The point at which the claim becomes a formal dispute is, therefore, of paramount importance in this respect.

Whether and at what precise point in time a formal dispute comes into existence is of practical significance, and particularly so in arbitration proceedings.

Dispute or Difference?

Given that the *Arbitration Ordinance Cap 341* gives the arbitral tribunal the necessary jurisdiction to conduct an arbitration, what if there is merely a difference between the parties but not yet a formal dispute? Is the commencement of arbitration proceedings somehow held in abeyance until that day on which the difference eventually becomes a dispute? We must look to see how strictly the term 'dispute' needs to be construed in establishing whether or not we have a matter that is capable of being referred to arbitration. We are assisted here by *Section 2* of the *Ordinance*, and, since the term 'dispute' is a defined term, a definition is provided to assist us. *Section 2* states that:

"dispute includes a difference"

A dispute (or difference) can therefore be referred to arbitration where a claim has been made by one party and there has been silence, consideration, modification or rejection of that same claim. In effect, there must be some matter that still needs a resolution after the parties themselves have attempted (or not, as the case may be) to resolve the differences between them. It is the point at which the consideration, modification or rejection takes place that the claim becomes a dispute or difference and is then capable of being referred to arbitration.

Arbitration Notices

The timing of a dispute has a very real practical significance since it is a pre-requisite for the submission of the notice of arbitration itself. The date of the arbitration notice is, in turn, important in ensuring that the time limits within the arbitration clause have been complied with (for example, a contractual requirement that the arbitration notice be submitted only after the expiry of 28 days from the date allowed in the contract for the engineer to review the matter and decide the dispute). Further, under *Section 4* of the *Limitations Ordinance Cap 347*, the arbitration must in any event be commenced within a particular period (generally 6 years but with some exceptions) after the date on which the cause of action accrued.

In the event that a Claimant failed to submit an arbitration notice within the given time limits, then the claim would effectively fail for the purposes of arbitration by virtue of being time-barred. The arbitration notice, therefore, stops the clock running under the *Limitations Ordinance* and forces the other party into having to commence measures in appointing an arbitrator. The date upon which the claim becomes a dispute, or difference, is therefore a critical part of the whole process in being a pre-requisite for the commencement of the entire arbitration process itself.

A final point concerning the importance of timing relates to the scope of disputes that may be referred to arbitration. Only those disputes which are in existence prior to having commenced the arbitration are likely to be covered by the arbitrator's jurisdiction, there being no jurisdiction applicable to disputes which manifest themselves after this date irrespective of how the pleadings have been drafted or amended (unless, of course, the parties agree otherwise and the arbitration rules permit the introduction of new claims and counterclaims). The point at which a claim becomes a dispute therefore takes on added importance, since in order to arbitrate all the claims matters on a given project, those matters must first of all have all translated into disputes or differences. Any failure to comply with either the applicable preliminary steps or the admissibility criteria specified in the contract or indeed in the arbitration clause, may result in the arbitral tribunal refusing to hear the matter on the basis that the issue is inadmissible.

On the basis that parties enter into commercial contracts on the common agreement that any disputes that arise between them should be referred to arbitration, then the word 'dispute' needs to be construed in such a way that permits that intent to be carried out in practice. As to whether the dispute is founded on a genuine claim or indeed has an indisputable defence is a matter for the tribunal to decide, however, this makes little difference if the arbitration agreement is subsequently found to be inoperative or the award is successfully challenged on the basis that the tribunal had no substantive jurisdiction in any event, to deal with the matter.

The concept of finality of an arbitral tribunal's award is one of the strong points of arbitration and given that this is what commercial parties are ultimately seeking, the last thing a party wants is to find themselves involved in challenges as regards the jurisdiction of the tribunal itself on the question of whether there is a valid dispute and whether all the correct preliminary steps and admissibility criteria have been satisfied. Careful consideration therefore needs to be given in identifying what it is that you are dealing with - a claim, a dispute, a difference or a disagreement. <

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ADR | Analysis

➤ Contra Proferentem

It is always important to give words clear and unambiguous meaning. Where there are ambiguities or discrepancies, the courts will generally take a very strict view and may invoke the rule of *contra proferentem*. The rule comes from the latin maxim *verba chartarum fortius accipiuntur contra proferentem* - the words, or written documents, are construed forcibly against the party offering them and is best explained in *Keating on Construction Contracts (Eighth Edition)* as follows:

"If there is an ambiguity in a document which all the other methods of construction have failed to resolve so that there are two alternative meanings to certain words, the court may construe the words against the party who put forward the document and give effect to the meaning most favourable to the other party."

Much therefore turns on the party who puts forward the relevant clause or description relied upon. Equally, the nature of the clause or description may play a large part in whether the courts invoke the *contra proferentem* rule.

What then is the position with standard forms of contract, that are negotiated at arms length between bodies representing the interests of employers and contractors? It would seem likely from the English case of *Tersons Ltd v Stevenage Development Corporation (1963)* that the *contra proferentem* rule will not necessarily apply to such contracts. Pearson LJ expressed the following view:

"In my view the maxim has little, if any, application in this case. The General Conditions of Contract are not a partisan document or an imposed standard contract as that phrase is sometimes used. It was not drawn up by one party in its own interest and imposed on the other party. It is a general form, evidently in common use, and prepared and revised jointly by several representative bodies including the Federation of Civil Engineering Contractors. It would naturally be incorporated in a contract of this kind, and should have the same meaning whether the one party or the other happens to have made the first mention of it in the negotiations."

However, where the standard form is subsequently amended by one of the parties so that the amended provisions no

longer reflects the standard form negotiated by the bodies representing the interests of employers and contractors, then the *contra proferentem* rule might indeed apply. ❄

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ADR | News

➤ Our first year in partnership: Drinks at the China Club, 5th June 2008



Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at info@adrpartnership.com

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