

RESOLUTION

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Professional Quantity Surveying Services & Alternative Dispute Resolution Services

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Incorporated or not that is the question?

How many arguments revolve around whether a term or condition has been incorporated into a contract or not? Often the difference between incorporation or not is very subtle and turns on the wording used or even down to a single word. The principle of incorporation in law is long standing and dates back to the 19th century, in what are known as the old ticket cases. Onerous clauses have caused concern for judges since this date and probably earlier. The incorporation of these clauses into contracts, in order to become effective terms, is simplest via a signature. A party is generally bound by terms he has signed, whether or not he has read them. This promotes certainty and whilst harsh it protects a third party who may be relying on the validity of the signature on the contract and the terms within it. A leading case of L'Estrange v F. Graucob Ltd (1934) illustrates this, whilst the judges expressed regret at their decisions, it was found that a signature was fatal to a defence of signing but not reading a document. One of the judges at the court of Appeal stated.... "having put her signature to the document she cannot be heard to say she is not bound by the terms of the document because she has not read them!" Whilst the rule that a person is bound

by his/her signature is not an absolute one, it is generally accepted to be the case. Defences are available, 'non est factum', allows a party to deny the document as not being the one he thought he signed as he had no real understanding of it either through defective education, illness or innate capacity. A further defence is when a party is induced to sign a document, as a result of misrepresentation made to him/her. This is usually a verbal misrepresentation made in order to induce a signature on a document that conflicts with the verbal statement. A defence can be submitted in that the signed document was not purported to be contractual and was signed merely for administration purposes. For example, signing a time sheet may be incorrectly relied upon by one side as a contract when in fact it only gives effect to a previously concluded contract. Finally, the Unfair Contract Term Act 1977 protects against exclusive clauses which are deemed to be unfair or unreasonable.

Where a signature is not present a contract term maybe incorporated by notice, which must be given at or before the time of contracting and reasonable steps taken to bring the term to the notice of the other party. More onerous or unusual

terms must be clearly highlighted with greater steps taken to ensure that the other party is aware of the nature of the term to which he is likely to be bound.

A third method of incorporation after signature or by notice, is by virtue of a course of dealing or as a result of the custom of the trade. A series of transactions on a regular and consistent basis must be made to constitute a course of dealing. A relevant case establishing this principle was McCutcheon v David MacBrayne Ltd (1964): which failed due to a lack of consistency in their previous dealings.

The incorporation of terms is thus a complex and important matter in the establishing of contractual liability and requires expert opinion to consider all matters relating to what often becomes a significant area of dispute amongst contracting parties and no where more so than within the construction industry.

Should you wish to discuss any of the issues highlighted within the article with our directors please do not hesitate to contact us on 01480 426560.



The right to adjudicate—make sure you have a contract and an appropriate adjudication clause!

Adjudication proceedings in building contracts are carried out either under a clause in the contract or by Statute. What is clear is that if the contract falls into the definition of a construction contract, as set out in The Housing Grants, Construction and Regeneration Act 1996 (The Act) the adjudication clause is scrutinised by the Statute. In Epping Electrical Co. Ltd v Briggs and Forrester (Plumbing Services) Ltd (2007) the adjudication was executed under the CIC rules which provided that, if the Adjudicator failed to reach his decision in the time permitted, provided a replacement adjudicator was not appointed by one of the parties, his decision would be effective. Judge Harvey held that this rule did not comply with the Act and the late decision of the Adjudicator was not enforceable. The CIC rule 25 within the adjudication clause was ineffective. Why adopt a set of rules when the Scheme provides all that is legally required to comply? Where there is no adjudication clause, the adjudication will rely solely on the Statutory right to adjudicate under the Act. In the absence of any provisions the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme) provides the missing parts in the form of a default contract. The legislators recognised that both Act and Scheme were required to cope with the large number of construction disputes and more importantly the widespread failure in construction contracts to agree fundamental workable terms.

The courts have now developed counter logic to the legislators by adopting case law from cases such as RJT Consulting Engineers Ltd v DM Engineering Ltd (2002) and Bennett (Electrical) Services Ltd v Inviron Ltd (2007).

In RJT Consulting compliance with section 107(2) of the Act meant all of the agreement had to be in writing not just part of it. Does this mean that the Scheme now serves no purpose? If anyone argues implied terms imported from the Scheme, their opponent could counter argue quoting RJT Consulting and say there is a term missing, there can be no implied terms and so there is no contract in writing and no jurisdiction. RJT Consulting was not taken seriously by most adjudicators until recently, when at least two cases were reported citing the case as trite law. The law must be defined, RJT Consulting allows argument and an undefined rule of law, which requires overturning by the courts or in revised legislation. In Bennett the parties had conducted the contract on a letter of intent basis as with many cases in construction contracts, without making any eventual formal agreement. A typical example of the contract administration failure in the construction industry the legislators aimed to tackle. Letter of Intent cases are numerous and complex, the law relating is not analysed in depth here, however the issue is normally always whether there is a contract or not. It is generally held that if there is no contract, there can be no adjudica-

tion as the Act gives criteria for what constitutes a construction contract and thus the statutory right to adjudicate. In Bennett the letter of intent was headed with the magic words "Subject to Contract". These words under normal circumstances make it a condition precedent that a formal contract is to be entered into or there will be "no contract". In the event that a formal agreement is not entered into there is likely to be a declaration of "no contract", which is what happened in Bennett. The claimants thus failed to enforce the Adjudicator's decision valued at over £250,000.00. Surely this is not just? The legislators have failed to address specifically "no contract" letter of intent situations as adjudicators are more than capable of calculating the fair price for the work done or *quantum meruit* value that arises from a "no contract" situation.

In conclusion there is no doubt that serious risks now exist in the adjudication procedure caused by recent case law, contracts must be in writing in their entirety and a formal contract must exist. If this is the case why is there an Act and Scheme? Was it not the intention of parliament to introduce these measures to deal with the fact that construction contracts are rarely completely in writing, entire, formally completed and often possible of being construed as "no contract"? The Statutory right to adjudicate has clearly been eroded by the courts in enforcement cases. Until these serious anomalies are rectified by legislation, the advice is,

make sure you have a formal contract signed with all the terms agreed, an appropriate standard form is recommended.

It is a good idea to agree an adjudication procedure in any event, as if the contract falls outside the scope of the Act, say a contract for the supply of material only, then an adjudication clause in the agreement will not be scrutinised by the Act and thus arguably far simpler to manage and enforce. Typically, the clause might sensibly adopt the rules set out in Scheme. There is no law on the separability of an adjudication clause from the contract as is the case with an arbitration clause, it is probably expected that the adjudication clause should be contained in and be part of the contract. This could easily be incorporated by Statute to deal with "no contract" situations making the right to adjudicate any dispute between the parties irrespective of contract.

If you have a contract make sure there is an appropriate adjudication clause if you are not Act compliant you will still be able to adjudicate under the contract.

For further advice on contracts or adjudication clauses contact Jon or Ian at Arbicon ADR Ltd on 01480 426560.



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- Bills of quantities preparation and production
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- Budget and cash flow forecasting
- Quantity and procurement checks
- Material scheduling

- Contract procurement

Post Contract services

- Preparation of final accounts
- Contractual procedures advice
- Re-measurement
- Cost reconciliation reports
- Subcontract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of time claims

- Loss and expense claims
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- Support in litigation
- Risk management and dispute prevention
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Arbicon are actively seeking good quality QS staff to join their team and would like to hear from anyone interested in joining

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