Incorporation by Schedule in Offshore Contracts

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Commercial contracts often incorporate terms from other documents, which can be in conflict with the main terms of the contract. This can cause problems for the courts and tribunals when trying to establish the parties' intentions. This article looks at some of the issues that can arise.

Incorporation of terms

It is increasingly difficult to find any commercial contract that does not seek to incorporate terms contained in a separate document. We perhaps see even more of this in EPC and OSV contracts than in other fields.

BIMCO contracts (for example) by their very nature require one to look to various different documents in order to find the intention of the parties. Supplytime 2005 has the boxes in Part I (which themselves make provision for the ever-present additional clauses), and the clauses in Part II, Annex A and Annex B. If that is not enough, very often the parties' own general terms and conditions, particular provisions or agreements for different operations, projects or geographical locations are also expressly incorporated. These additional provisions often give rise to difficulties in ascertaining what the parties have actually agreed, because there are inconsistencies between the terms of the contract and these additional provisions, which are often not tailored to the contract incorporating them, and not drafted with all of the other additional provisions in mind.

Interpretation in the courts

Generally, the English courts are reluctant to hold contract terms to be inconsistent with each other. The courts will try to put forward an interpretation that reconciles any potential inconsistencies while giving effect to the parties' intentions. However, where parties seek to incorporate terms from other documents or contracts on the basis of standard forms with special additions, it is even more likely to find terms that are truly irreconcilable. In such cases, the court will have to determine which clauses are to be preferred.

While lawyers make reference to the rules of construction, the English courts have been reluctant to set down many hard and fast rules as to how contracts should be construed or interpreted in such cases. Understandably, much of the guidance that has emerged is fact specific and constrained by the context of the particular case in which it was given. Nevertheless, some principles of wider application can be identified. For example, in a case where printed clauses on a standard form conflict with written or typed terms in a contract specially negotiated between the parties,

the latter are to prevail. Similarly, where a contract incorporates the terms of another document which conflict with the terms of the original contract, the courts have held that the terms of the original contract should prevail. The rationale underpinning these principles of construction seems to be that the terms specially negotiated by the parties must be taken to be those more likely to represent the parties' intentions.

Annexes

However, what we frequently see is that these additional provisions are identified as annexes, appendices or schedules to the contract, thus forming part of the contract itself, rather than provisions genuinely incorporated by reference. As such, where they conflict, we cannot necessarily simply cast them aside in favour of the provisions contained in the main body of the agreement when declaring what the parties' intentions must have been. What is to happen when a term contained in an annex cannot, on any reasonable reading, be reconciled with a clause in the main body? Governing law clauses nominating entirely different, or even marginally different, legal systems provide a prime example. Recently, we came across a dispute where the main body of the agreement stated that English law was to apply, while a term in the schedule stated that English law, 'as applied by [a South-East Asian jurisdiction]', was to apply. Quite what the latter provision actually meant in practice was another matter. Fortunately (or perhaps unfortunately from the perspective of developing the jurisprudence on this issue), the matter was superseded by other issues in the case and was never resolved.

Hierarchy clauses

Hierarchy or Order of Precedence clauses included in a contract, specifying which terms are to take precedence in a situation of conflict, go some way in helping the courts deal with this issue. However, recent decisions have shown that the courts will not jump at the chance to utilise such clauses, but will first try and do what they can to harmonise any inconsistencies between the terms. Taking Supplytime 2005 again as an example, such a term is included at the end of Part I:

'...in the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II and ANNEX "A" and ANNEX "B" to the extent of such conflict but not further'.

Incorporation by Schedule in Offshore Contracts continued

Not all contracts are blessed with such provisions, and those that are may include a hierarchy provision that does not cater appropriately for the particular conflict that arises. In a recent dispute arising out of an OSV charterparty, three annexes, each incorporating a different entity's standard terms and conditions, were attached to the standard form, each containing terms intended, to varying extents, to modify clauses of the main agreement. The main contract contained a hierarchy provision which provided that in the event of a conflict between the annexes and the main body of the agreement, the latter was to prevail, but it made no provision as to what was to happen if terms from the different annexes conflicted. The question arose as to whether the annexes should be read together as some sort of cumulative amendment to the main agreement. However, this approach of cutting and pasting terms from the different annexes together resulted in a most strained interpretation of the parties' intentions, especially as it was clear that the different annexes were premised on an unamended version of the standard form, not one amended by another annex.

A further difficulty arises when the main agreement and a schedule contain conflicting hierarchy clauses. This was the case in *Data Direct Technologies Ltd v Marks and Spencer Plc* (2009) EWHC 97 (Ch), where seemingly conflicting terms governing the payment of maintenance fees under a software licensing agreement arose. Ultimately and perhaps conveniently, the court did not have to confront the issue, instead putting forward an interpretation which, in its view, was able to reconcile the terms.

Summary

What is clear is that if one wants particular terms to be given effect, the best approach is to include them in the main body of the agreement, making sure that they do not conflict with any existing terms and removing the existing terms if they do. Incorporating by schedule or appendix will create more uncertainty than simply incorporating by reference. A well-drafted and comprehensive hierarchy clause can go some way to remedying this. However, where there are terms that conflict, there is always the possibility that they will be interpreted by a court in an unfavourable manner. Therefore, the safest option (much easier suggested than implemented) would be to ensure that all of the terms are synchronised correctly and, ideally, all are contained in the main body of the agreement.