Unexpected trap in contract terms prioritising contract documents

Speedread

A document priority clause generally won't overcome poor drafting in subsidiary documents, according to a new English High Court judgment.[1] Many commercial contracts (including most substantial ICT contracts) have schedules such as statements of work attached to the main contract. To reduce having to panel beat the schedules to get them "legally" right, parties rely on priority clauses by which the main contract terms gazump the scheduled terms.

That approach has always been flawed as most scheduled terms stand on their own and there's no priority issue. Particularly significant is that the terms of most importance are usually in the schedule not in the document that gets the legal focus: the main contract. The frequent focus by parties and lawyers on just the main terms is inexplicable.

This new case makes such flawed reliance on priority clauses even less tenable: usually, the overall contract including schedules will be interpreted to derive the intention of the parties. The courts won't just look at the terms that have the priority in the head contract document. That applies the modern approach to contract interpretation of *"determining objectively what a reasonable person with all the background knowledge reasonably available to the parties at the time of the contract would have understood the parties to have meant and one is looking to adopt the more rather than less commercial construction."* [2]

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The contract in this case had a typical priority clause, along with confirmation that all the documents are *"deemed to form and be read and construed as part of this Agreement"*. As the Judge said, such a contract is to be construed in the usual way by reference to all the documents forming part of the contract. It is only if there is an ambiguity or discrepancy between two or more contract documents that there needs to be regard to the order of precedence.

Generally there isn't a need for applying the priority clause, as the contract can be interpreted as a whole. The court said:[3]

> *"One can take an example where the [head contract] document required the powerhouse to be painted white but the [Schedule] required it to be painted black. That is on its face an irreconcilable ambiguity and the contract would be construed as requiring white paint. What one can not and should not do is to carry out an initial contractual construction exercise on each of the material contract documents on any given topic and then, so to speak, compare the results of that exercise to see if there is an ambiguity. If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the "order of precedence" to resolve an ambiguity which does not actually on a proper construction arise at all."*

Panel beating schedules involves time and cost, but it often produces far better outcomes.

1. RWE Npower v J N Bentley [2013] EWHC 978
2. Para 20 in RWE Npower
3. Para 24 in RWE Npower

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