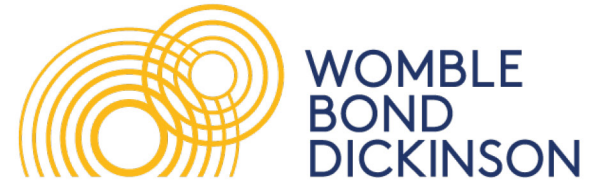


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ACGC In-House Legal Skills Institute

Contract drafting for in-house teams

1 - 2 December 2021

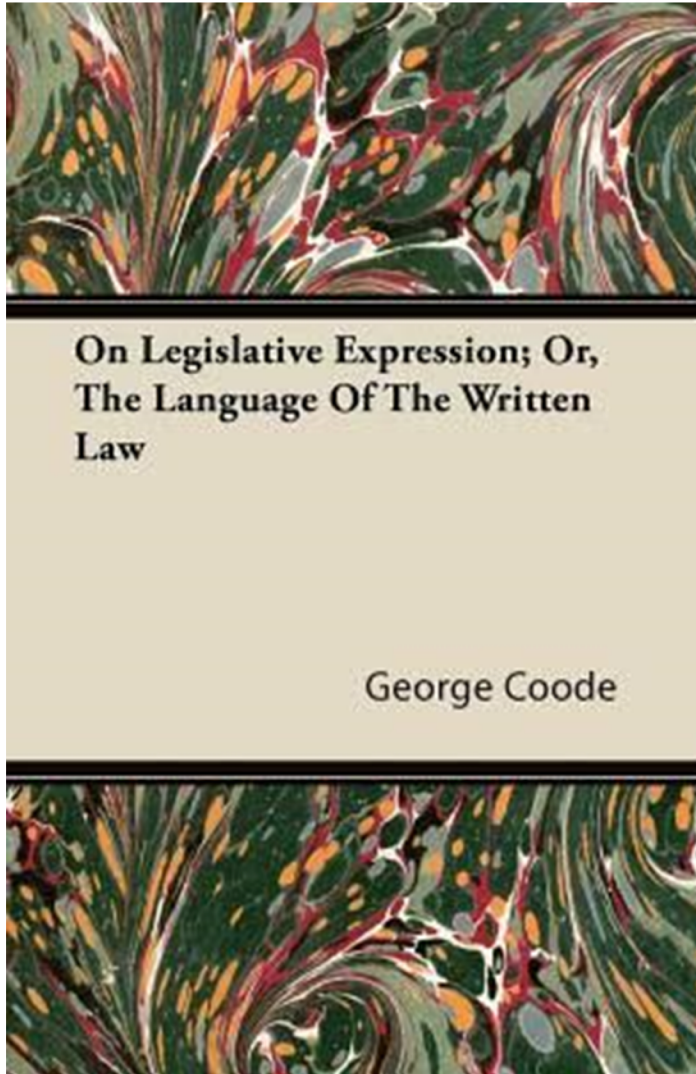


Commercial contracts: risk and price

- A contract cannot alter the amount of risk in a deal
- A contract can:
 - Identify
 - Allocate, and
 - Price risk
- When a party talks about a contract being “de-risked”, it usually means that risk is being passed to the other party
- If risk is inaccurately identified or inappropriately allocated, the price must be wrong

Basic – but always important

- Change of language = change of meaning
 - A risk when precedents have been assembled from various sources?
 - A risk when negotiations are conducted on screen?
- Incorporating Schedules and technical annexes
- Governing law and jurisdiction: split clauses?



"All that can be done by the law in regard of things is to confer rights, privileges, and powers on persons in respect of them – to command, prohibit or permit certain actions of persons in respect of certain things"

"...the essentials of every law are simple, and their direct expression is the perfection of law writing"
George Coode, On Legislative Expression: Or the Language of the Written Law (1845)

Technical knock-out v substantive argument

- Litigators will focus first on:
 - Time limits (eg deadlines for giving notice, issuing proceedings). Important for warranty claims, indemnities, termination.
 - Notice provisions (form and method(s) of service)
- Technical defects can effectively eliminate a claim without having to engage with substantive issues (eg *Phillip Hormell v EnerG* [2012] EWCA Civ 1059: “shall” and “may” used in successive subclauses)





Notice clauses

- Notice to terminate: *Obrascon Huarte Lain SA v AG for Gibraltar* [2014] EWHC 1028 (TCC)

“Wherever these Conditions provide for the giving or issuing of consents, determinations, notices and requests, these communications shall be:

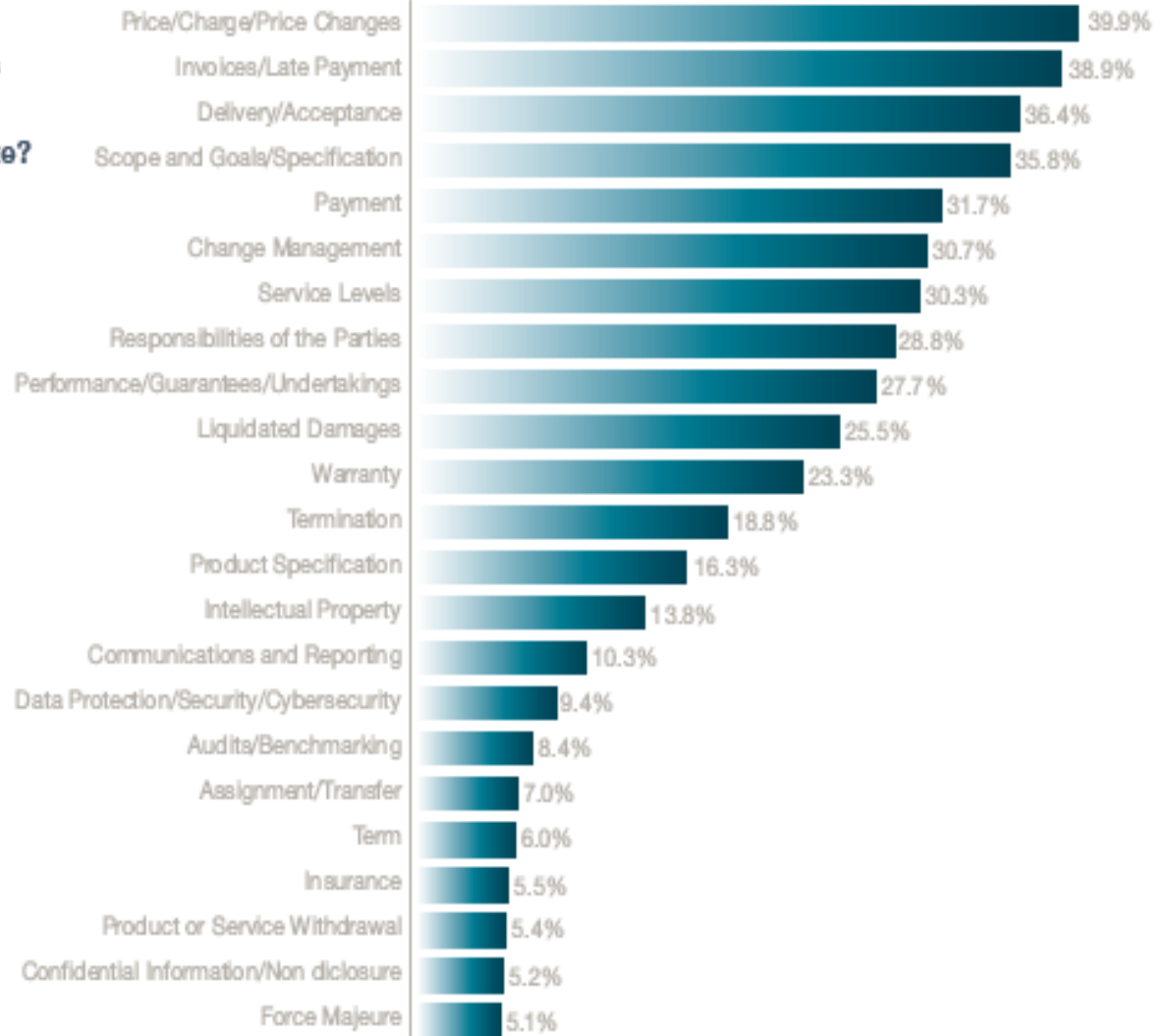
- (a) In writing and delivered by hand, sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender; and
- (b) Delivered, sent or transmitted to the address of the recipient’s communications as stated in Appendix A [*Note: this address was in Madrid*]

Notice of termination was delivered by hand at the Site Office

Chart 1: The top 30 'most negotiated terms' (based on surveys undertaken by IACCM during 2018, with replies representing more than 8,000 negotiators based in over 120 countries).

Year	2018	2015	2014/2013	2012	2011	2010	2009	2008	2007
1 Limitation of Liability	-	1	1	1	1	1	1	1	1
2 Indemnification	-	2	3	2	2	2	2	2	2
3 Price / Charge / Price Changes	-	3	2	3	3	3	3	3	4
4 Termination		9	4	8	11	7	6	7	11
5 Scope and Goals / Specification		11	5	6	5	6	8	8	9
6 Warranty		7	8	7	4	4	4	4	3
7 Performance / Guarantees / Undertakings		8	7	9	12	10	11	13	14
8 Payment		5	9	16	7	18	-	15	15
9 Data Protection / Security / Cybersecurity		18	17	18	15	5	5	10	7
10 Liquidated Damages		13	6	20	14	13	12	5	5
11 Delivery / Acceptance		10	10	12	8	8	7	9	8
12 Responsibilities of the Parties	-	12	12	4	16	12	14	-	-
13 Intellectual Property		6	13	11	17	15	13	-	-
14 Invoices / Late Payment		15	11	5	6	9	9	11	10
15 Service Levels		4	15	14	10	5	5	10	7

During the post-award phase of contract performance which terms are, in your experience, the most frequent cause of a claim or dispute?



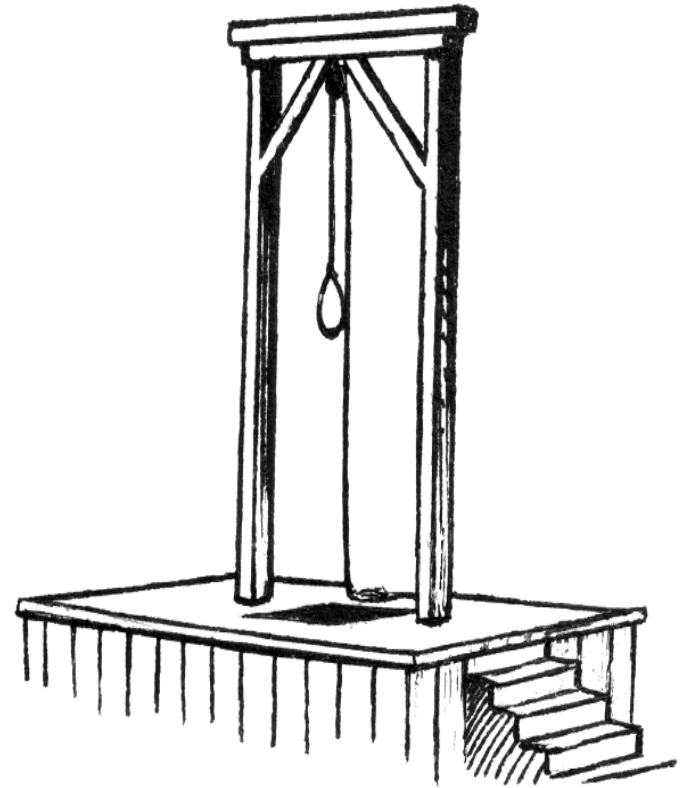
Sources of ambiguity: language, layout and meaning



Language, layout and meaning

- Telegraph from Governor:
- Shall I proceed with the execution?

- Reply from London:
- No mercy must be shown.



Language, layout and meaning



Deepwater Horizon

Language, layout and meaning: a \$750 million comma...

- Drilling Contract required Transocean to maintain insurance covering its operations and to name BP and its affiliated companies
 - “as additional insureds in each of Transocean’s policies, except Worker’s Compensation for liabilities assumed by Transocean under the terms of this Contract.”
- **Question:** could BP access as an "additional insured" Transocean's insurance cover in relation to environmental damage?
- **Information:** The contract expressly excluded environmental liabilities from Transocean’s obligations.

Language, layout and meaning: a \$750 million comma...

- Drilling Contract required Transocean to maintain insurance covering its operations and to name BP and its affiliated companies
 - “as additional insureds in each of Transocean’s policies, except Worker’s Compensation, for liabilities assumed by Transocean under the terms of this Contract.”
- Question: could BP access as an "additional insured" Transocean's insurance cover in relation to environmental damage?

“I like cats and dogs which are black and fluffy”

- *Wood v Capita* [2017] UKSC 24
- “the Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer [...] against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service”

“I like cats and dogs which are black and fluffy”

- *Wood v Capita* [2017] UKSC 24
- “the Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer [...] against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company **following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person** and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service”



The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against

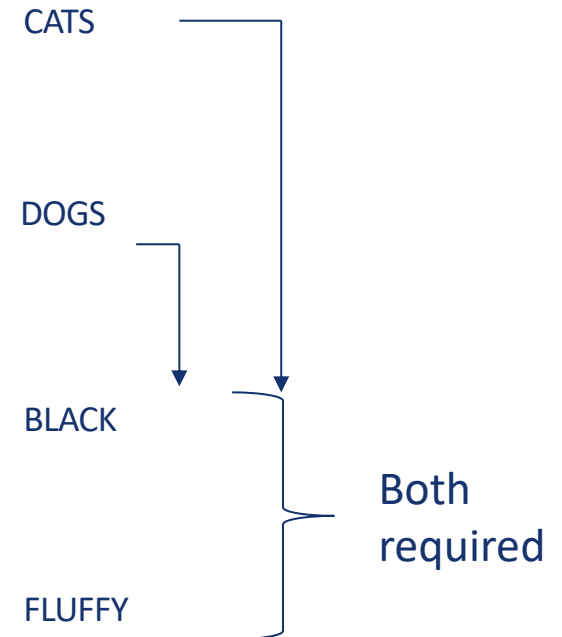
all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and

all fines, compensation or remedial action or payments imposed on or required to be made by the Company

following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and

which relate to the period prior to the Completion Date

pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service.



An aerial photograph of a modern office interior. The floor is composed of large, light-colored square tiles. On the left, there are vertical wooden slats. In the center, there is a long, narrow wooden bench. To the right, three people are walking across the floor. The lighting is bright and even, creating a clean and professional atmosphere.

Sources of ambiguity: definitions



Different words: different meaning

- “**Losses**” means all losses, damages, actions, claims, demands and liabilities, costs and expenses (including any interest and legal and other professional costs and expenses);

- “The Seller shall indemnify the Buyer against all losses suffered or expenses incurred as a result of any third party claim”



Different words: different meaning

- “**Losses**” means all losses, damages, actions, claims, demands and liabilities, costs and expenses (including any interest and legal and other professional costs and expenses);
- The Borrower hereby agrees to protect, indemnify, pay and save harmless the Issuing Lender and any of its Affiliates that has issued a Letter of Credit from and against any and all claims, demands, liabilities, damages, losses, costs, charges and expenses (including reasonable fees, expenses and disbursements of counsel and allocated costs of internal counsel) which the Issuing Lender or any of its Affiliates may incur or be subject to as a consequence, direct or indirect, of the issuance of any Letter of Credit



Different words: different meaning

- “**Losses**” means all losses, damages, **actions**, claims, demands and liabilities, costs and expenses (including any **interest** and legal and other professional costs and expenses);
- The Borrower hereby agrees to protect, indemnify, pay and save harmless the Issuing Lender and any of its Affiliates that has issued a Letter of Credit from and against any and all claims, demands, liabilities, **damages**, losses, costs, **charges** and expenses (including reasonable fees, expenses and disbursements of counsel and allocated costs of internal counsel) which the Issuing Lender or any of its Affiliates may incur or be subject to as a consequence, direct or indirect, of the issuance of any Letter of Credit



Literal meaning

- UCP 600 (for documentary credits) defines “Business Day” as:
 - “a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed”
- The intention was that time limits (including for checking documents) would be determined by days on which the bank which is to perform the act under the credit is regularly open for business.
- A literal reading would suggest that if any bank is regularly open in the relevant place (including, eg, retail banks rather than trade finance departments) then it is a “Business Day” and will count when calculating time limits.



Sources of ambiguity: same language, different understanding



Same language, different understanding

- Liquidated or ascertained damages
- Penalty?
 - **England and Wales:**
 - *Cavendish v Makdessi* [2015] UKSC 67. "Out of all proportion"
 - **India:**
 - Indian Contract Law Act 1872, s 74 as interpreted by the Supreme Court in *Kailash Nath v DDA* (2015) 4 SCC 136
 - **Malaysia:**
 - Contracts Act 1950, s 75
 - **Singapore:**
 - genuine pre-estimate of loss?

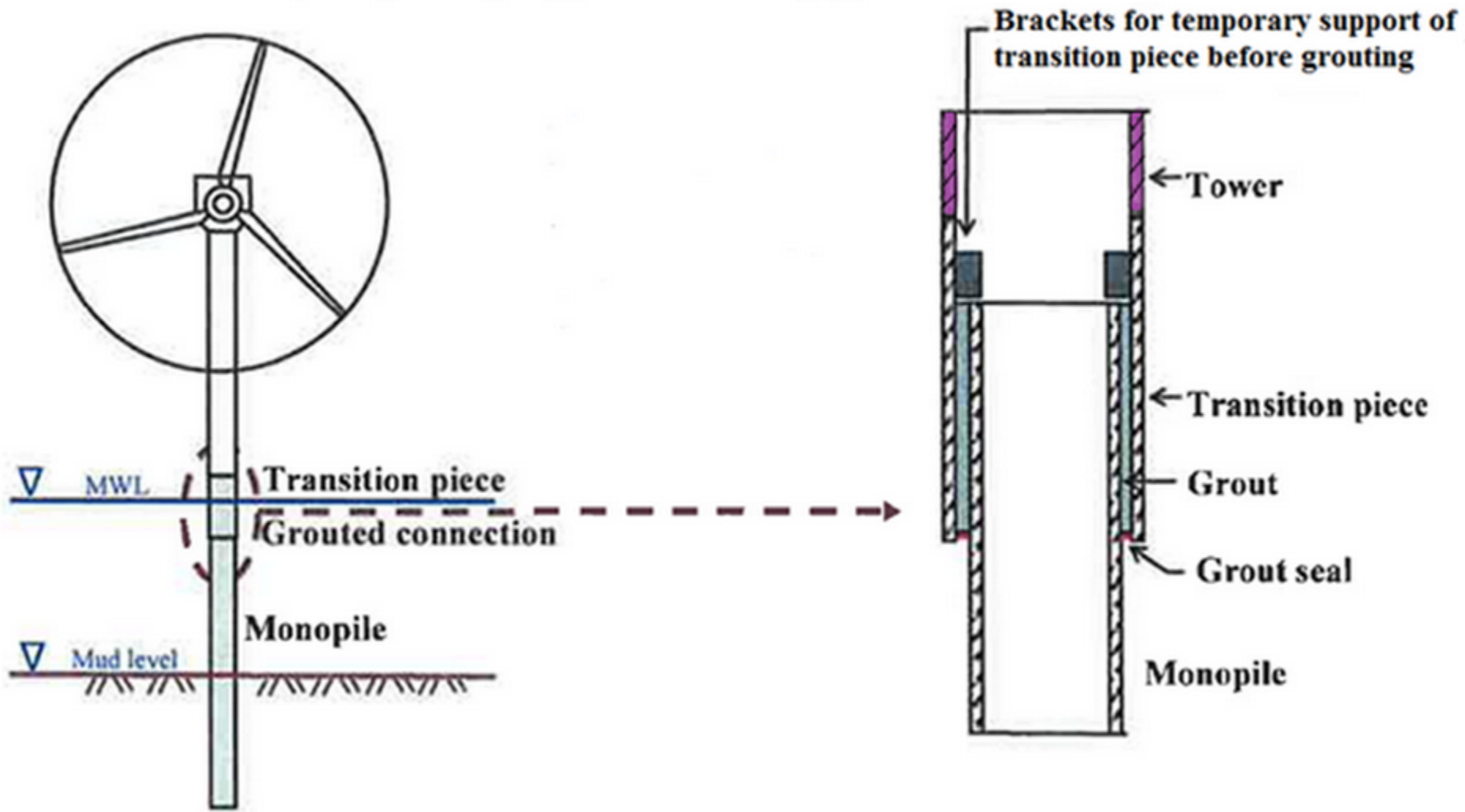
Same language, different understanding

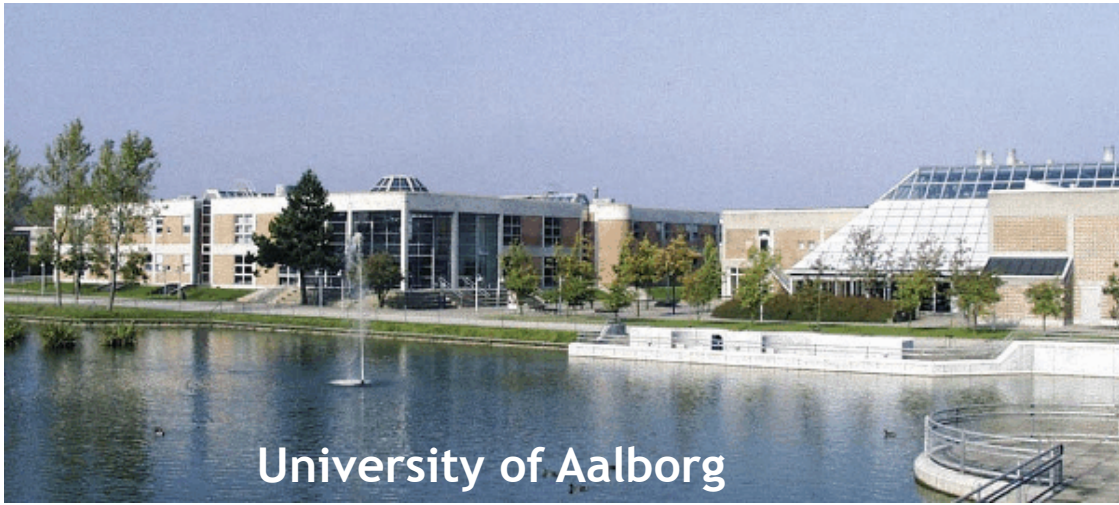
- What is the difference between:
 - Indemnify
 - Defend and indemnify
 - Defend, indemnify and hold harmless?

Controlling risk: complex contractual documentation



Appendix

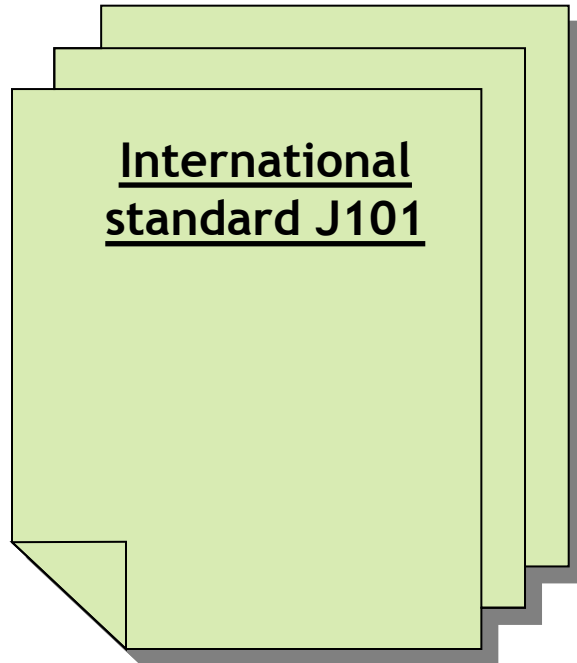




University of Aalborg



Independent classification and certification agency



International
standard J101

International
standard
J101

$$\tau_{kf} = \frac{\mu \cdot E}{K} \cdot \left[\frac{\delta}{R_p} \right]$$

δ "should be taken as 0.00037 R_p for rolled steel surfaces"



DNV carried out an internal review during August/September 2009. They discovered that there was an error in the value given for δ to be used in the parametric equation.

**Remedial works in
the sum of €26.25 million**

The task for the court

Jackson LJ:

"Ultimately the court must decide which party should pay the bill for repairing foundation defects in a situation where, (on the judge's findings) there has been no negligence or want of professional skill on either side. The problem arises because MTH was required to comply with J101, which contained a significant error."

"The court is confronted in this case with contractual documents of multiple authorship, which contain much loose wording. The task of the court is to identify the precise extent of the obligations imposed upon MTH."

Conditions of Contract, Clause 8

(iv) in a professional manner in accordance with modern commercial and engineering, design, project management and supervisory principles and practices and **in accordance with internationally recognised standards** and Good Industry Practice;

(viii) so that the Works, when completed, **comply with the requirements of this Agreement** and shall comply with all Legal Requirements other than the consented construction noise limit

(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and **fit for its purpose** as determined in accordance with the Specification using Good Industry Practice;

...

(xv) so that the design of the Works and the Works when Completed by the Contractor shall be **wholly in accordance with this Agreement** and shall satisfy any performance specifications or requirements of the Employer as set out in this Agreement; and

..."

"Good Industry Practice" means those standards, practices, methods and procedures conforming to all Legal Requirements to be performed with the exercise of skill, diligence, prudence and foresight that can ordinarily and reasonably be expected from a fully skilled contractor who is engaged in a similar type of undertaking or task in similar circumstances in a manner consistent with recognised international standards.

J101 is a detailed standard, which is intended to lead to offshore structures with a design life of 20 years.

Technical Requirements.

TR section 1 contains a general description of the works.

Paragraph 1.6 states:

"The Wind Farms are to be designed, constructed and operated to provide the lowest lifetime cost option capable of meeting the full requirements of this Specification. Maximum output with minimum maintenance and maximum availability to generate are the prime requirements of the scheme.

...

The Works, together with the interfaces detailed in Section 8, shall be **designed to withstand the full range of operational and environmental conditions** with minimal maintenance.

The Works elements **shall be designed for a minimum site specific 'design life' of twenty (20) years** without major retrofits or refurbishments; all elements shall be designed to operate safely and reliably in the environmental conditions that exist on the site for at least this lifetime."

Paragraph 3.2.2.2 : "The design of the foundations **shall ensure a lifetime of 20 years** in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."

Paragraph 3.2.3.2 requires the contractor's design to accord with national and international rules, as listed. The first item in the list is stated only to be valid if formally published, which it never has been. The second item in the list, which therefore occupies the top place, is J101 (2004).

Paragraph 3.2.5 requires the contractor to design and construct grouted connections in accordance with J101.

Paragraph 3b.5.1 states: "The design of the structures addressed by this Design Basis **shall ensure a lifetime of 20 years** in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."

Paragraph 3b.5.6 states: "All parts of the Works, except wear parts and consumables shall be designed for **a minimum service life 20 years.**"

Clause 5.3 - in the event of inconsistencies, the order of precedence of the contractual documents should be as follows:

- (a) the form of agreement
- (b) the conditions of contact and the List of Definitions
- (c) the commercial schedules and the schedule of prices, payment profile and draft programme
- (d) the Employer's Requirements
- (e) the annexes to the Employer's Requirements
- (f) volumes 2A, 2B and 3 of the contractor's tender return.

Court of Appeal

- The Court of Appeal found that there was a conflict or inconsistency between the “front end” of the contract and the Technical Annexes. Clause 5.3 gave priority to the “front end”.
- The Court of Appeal also found that a 20 year warranty of quality or fitness for purpose is a commercially significant term, and would not be “tucked away” in the Technical Annexes.
- The Court of Appeal concluded that the Customer/Employer was responsible for the costs of retrofit.

Supreme Court [2017] UKSC 59

- The Supreme Court overturned that decision:
 - There was no conflict or inconsistency between the “front end” and the wording in the Technical Annexes. The provisions addressed different issues, and when combined they created a 2-stage obligation: (a) to design and install in accordance with J101, and (b) to ensure an operational lifetime of 20 years.
 - The Technical Annexes were incorporated into the contract, and formed part of it. Contractual wording in the Technical Annexes must therefore be given full contractual effect.



Points to consider

- Documents in multiple authorship.
- Client reluctance to pay for full legal review of technical annexes/specifications.
- Document reading technology? (eg Kira, elastic search)
- **Drafting solutions**. Is it possible to ensure that wording in technical annexes cannot constitute or affect the interpretation of warranties?

Controlling risk: boilerplate clauses



The Entire Agreement clause

- What is (and what is not) within the scope of the agreement?
 - Extinguishing/superseding any previous agreements (eg MoU or Lol) – but take care where there are (eg) Data Sharing Agreements;
 - Extinguishing any prior statements (representations) not expressly set out in the agreement – but check whether statements have been incorporated as warranties or as “warranties and representations”;
 - Excluding remedies (eg actions in respect of innocent or negligent misrepresentation)



The Entire Agreement clause

1.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

1.2 Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement.

1.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

1.4 [Nothing in this clause shall limit or exclude any liability for fraud.]

Governing law and jurisdiction

- A governing law clause determines the law that will be applied when resolving a dispute.
- A jurisdiction clause determines the place where the dispute will be heard/resolved. Most jurisdictions require:
 - An expression of agreement (in writing or evidenced by writing); and
 - A clear demonstration of the parties' consent to the jurisdiction clause.
- Governing law and jurisdiction clause may be “split”.

Governing law and jurisdiction – check for restrictions

- Immovable property located within their territory (for example, Australia, Russia, India, Brazil, UAE and China).
- The registration and validity of intellectual property rights (mainly patents) (for example, Australia and Russia).
- The institution, liquidation or registration of legal entities (such as, companies, partnerships, limited liability partnership and trusts) (for example, Russia and India).
- Certain internal and constitutional matters relating to companies within EU member states



Governing law and jurisdiction

- Check the validity of one-way, unilateral or asymmetric jurisdiction clauses (eg, not recognised in Russian Federation and Turkey).
- English law recognises and enforces asymmetric jurisdiction clauses, differing from (eg) French Court de cassation which considers such clauses unenforceable because they are one-sided or “*potestative*”.
- Key issue in financial markets, ensuring that creditors can litigate in a debtor’s home court, or where assets are located.



Governing law and jurisdiction

- The risk of not agreeing governing law and jurisdiction.
- *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc*, [2013] EWHC 2968 (Ch): a contract can, in principle, be made in two different jurisdictions.
- In *Conductive Inkjet*, parties were forced to settle because they were locked into proceedings in the UK and in the US.

Excluding or limiting liability



Category of loss	Direct?	Indirect or consequential?
Loss of profits		
Loss of sales or business		
Loss of anticipated savings		
Loss of a particularly lucrative contract		
Data loss		
Loss of goodwill		



Excluding or limiting liability

- What does this clause exclude?

the Supplier shall not be liable under or in connection with this contract for any indirect or consequential loss including but without limitation:

- (a) loss of income;
- (b) loss of business profits or contracts;
- (c) business interruption;
- (d) loss of the use of money or anticipated savings;
- (e) loss of information;
- (f) loss of opportunity, goodwill or reputation;
- (g) loss of, damage to or corruption of data.



Excluding or limiting liability

- What does this clause exclude?

the Supplier shall not be liable under or in connection with this contract for any **indirect or consequential loss including** but without limitation:

- (a) loss of income;
- (b) loss of business profits or contracts;
- (c) business interruption;
- (d) loss of the use of money or anticipated savings;
- (e) loss of information;
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Excluding or limiting liability

- What does this clause exclude?

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- (a) loss of income;
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- (c) business interruption;
- (d) loss of the use of money or anticipated savings;
- (e) loss of information;
- (f) loss of opportunity, goodwill or reputation;
- (g) loss of, damage to or corruption of data; or
- (h) any indirect or consequential loss.



Excluding or limiting liability

- What does this clause exclude?

the Supplier shall not be liable under or in connection with this contract for:

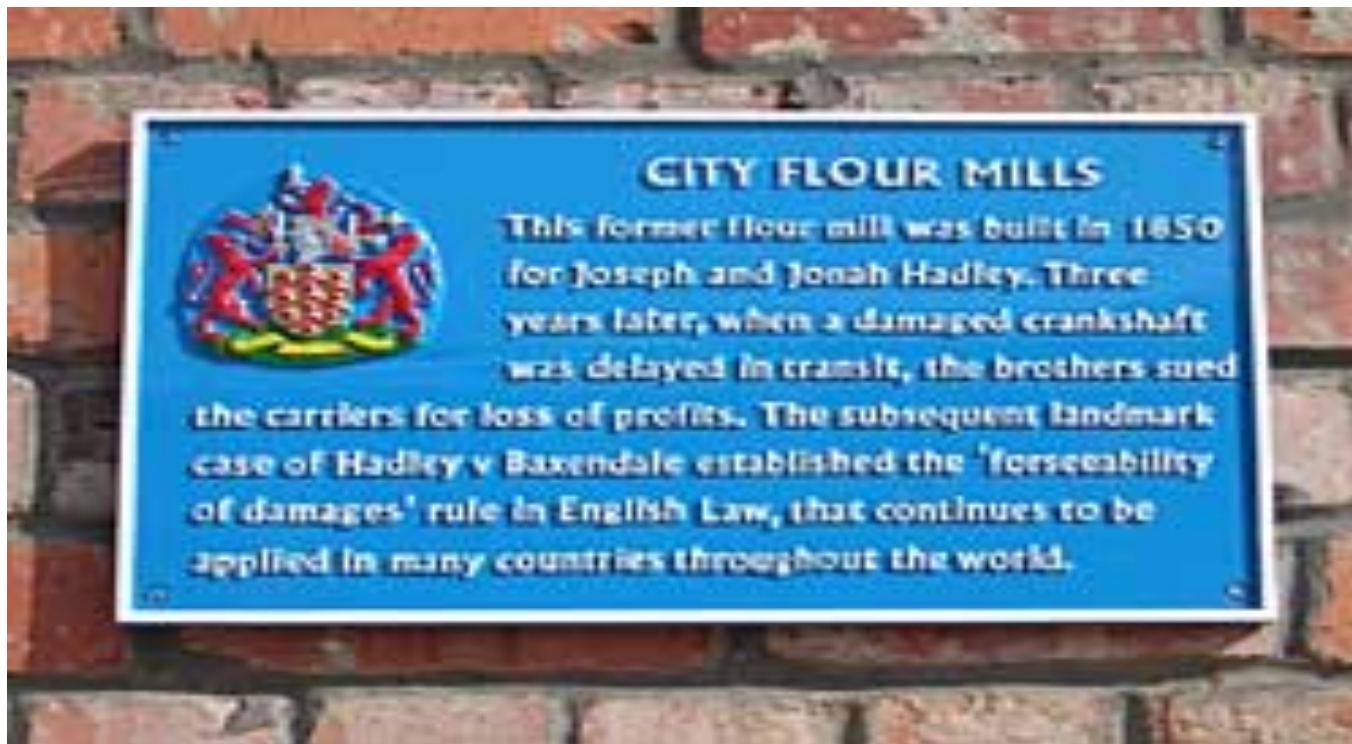
- (a) loss of income;
- (b) loss of business profits or contracts;
- (c) business interruption;
- (d) loss of the use of money or anticipated savings;
- (e) loss of information;
- (f) loss of opportunity, goodwill or reputation;
- (g) loss of, damage to or corruption of data; or
- (h) any **other** indirect or consequential loss.

Markerstudy v Endsleigh
[2010] EWHC 281 (Comm)



Damages

- *Hadley v Baxendale* (1854) 9 Exch 341



Damages

- **Limb 1:** The first limb of *Hadley v Baxendale* involves identifying loss which is fairly and reasonably considered as:
 - arising naturally, according to the usual course of things from the breach of contract, or
 - such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.
- **Limb 2:** Consequential loss is also referred to as “indirect loss” and “special damage”. The terms are interchangeable., a the time the contract is made.It covers loss that would be “too unusual” to recover under the first limb of *Hadley v Baxendale*.



Liability caps

- What is/is not covered by the liability cap?
 - Indemnities?
 - Liquidated damages?
- Does your liability cap extend to non-contractual claims?
- How do you find out?

What is a limitation of liability clause?

- One that expressly caps liability under the contract.
- Liquidated damages clause?
 - How does the figure for liquidated damages compare to likely losses (is this an area in which “genuine pre-estimate of loss” remains relevant?)
- Can an “indemnity” clause be a limitation or exclusion clause?
 - *Transocean v Providence* [2016] EWCA Civ 372
 - Mutual, “knock for knock” provisions



Damages

- How can you maximise your client's chance of recovering “special”, “indirect or consequential” or “limb 2” damages?

Drafting for remedies



Drafting warranties and representations

- What is a “warranty”
- What is a “representation”
- Does the difference matter?

- Warranties and disclosure letters

Different remedies?

- Warranties are contractual statements of fact (eg that goods will be meet specified quality standards)
- Breach of warranty leads to a contractual claim (general damages) and may be covered by a contractual liability cap.
- It is possible expressly to identify some warranties as so important that breach would justify termination as well as damages.
- Representations are different: they are pre-contractual statements of fact.
- The remedies for misrepresentation are (i) "rescission" and (2) damages that can be much higher than contractual claims.



Liability caps and exclusions

- Check whether your contract excludes or limits all damages, or only applies to "indirect or consequential loss"
- Check whether your contract caps all claims, or leaves some claims uncapped (eg indemnities)



Indemnities and liability caps

- Where an indemnity is given in a contract, the claim is made as a matter of contract law.
- Consequently, unless specifically excluded from its operation, the indemnity will be subject to any negotiated cap on contractual liability.

Drafting for discretionary remedies

- How can you draft to maximise your client's chances of securing a discretionary remedy?
 - Injunction?
 - Specific performance?



Force majeure



Contractual disputes and supply chain disruption

- Contractual disputes are likely to be a significant post-crisis feature as businesses seek to recoup or mitigate losses.
- Key areas of dispute will include:
 - Frustration and force majeure
 - Remedies for delay
 - Termination for cause; termination for convenience
- How do these contractual concepts and provisions interact?

A frustrating event?

- For frustration to apply:
 - the frustrating event must occur after the contract is formed;
 - the frustrating event must strike at the root of the contract and be outside the contemplation of the parties at the time they entered into the contract;
 - the frustrating event must not be due to either party's act or omission; and
 - further performance on the contract is impossible, illegal or has radically changed from that which was contemplated at the outset of the contract.
- Frustration potentially applies where there is no contractual provision to cover the circumstances.

A frustrating event

- What is the effect of the potentially frustrating event?
 - Mandatory block on performance, or voluntary decision?
 - If voluntary, what was the reasoning? Documented?
- The question is, essentially, one of causation:

“frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do”. (Lord Radcliffe, *Davis Contractors v Fareham UDC* [1956] UKHL 3)

Is there room for frustration?

- Check interaction with:
 - Delay clauses?
 - Interest provisions on late payments?
 - Termination/break rights?

Force majeure?

- “Certain events, beyond the control of the parties, may inhibit the parties from fulfilling their duties and obligations under project agreements.
- To avoid the resultant breach of contract, parties may prefer to excuse contractual obligations to the extent that they have been so inhibited”

World Bank infrastructure and law website

Force majeure?

- In common law jurisdictions (eg England and Wales), force majeure is purely contractual.
- Key elements are:
 - Definition of the “force majeure” event
 - Occurrence of the defined event
 - Impact on contractual performance – Prevent? Prevent, hinder or delay? Prevent, hinder, delay or make more costly?
 - *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93

Force majeure

- ***Tsakiroglou v Noble & Thorl [1961] 2 ALL ER 179***
- Suez canal closed in 1956
- Contract for shipment of Sudanese groundnuts

"In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."



Force majeure



- "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

Force majeure

- if a party is prevented, hindered or delayed in or from performing any of its obligations under this agreement [or if performance is made materially more difficult or costly] by a Force Majeure Event (Affected Party), the Affected Party shall not be in breach of this agreement or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.

What is the effect of your force majeure clause?

- Many force majeure clauses provide that the occurrence of a defined event will suspend or release contractual obligations.
- While the force majeure event applies, there is no breach of contract (and therefore no rights of action for breach).
- Some force majeure clauses provide that the occurrence of a defined event will block recovery of damages for breach. These clauses may be interpreted and applied as exclusion clauses.



Force majeure

- Is the defined force majeure event the cause, or only a cause of non-performance?
- *Seadrill Ghana v Tullow* [2018] EWHC 1640 (Comm)
 - the defendant was unable to rely on a force majeure clause in its contract with the claimant, where one of the two factors preventing it from carrying out drilling work in Ghana had not been a force majeure.
- Finally, what happens under your contract once the crisis has passed?

Termination

- Act quickly, but act with care.
- Terminating without good cause can amount to “wrongful termination”.
- Does your right to terminate apply if the force majeure event has ceased?
- Purporting to terminate, but failing to meet notice requirements, can be wrongful termination. Check the provisions for form and service (eg personal delivery?)

Good faith?

- Is there an emerging doctrine of “good faith” in contractual performance?
- If so, how might it apply in case of force majeure?

Performance bond or guarantee?



Performance bond or guarantee?

- The phrase “performance bond” is often misleading. Many performance bonds are actually guarantees.
- Bonds and guarantees are related but they are very different legal instruments.
- The right to claim under a guarantee is linked to non-performance of the underlying contract.
- Under a bond, the bank to pay is required to pay on demand regardless of the underlying contract.

Performance bond or guarantee?

- Bank agreed to:
 - “irrecoverably, absolutely and unconditionally guarantee, as a primary obligator and not merely as surety, the due and punctual payment by the buyer” and that
 - “upon receipt by us of your first written demand stating that the [buyer] has been in default of the payment obligation for twenty day, we shall immediately pay to you...”
- Court initially found that this wording created a guarantee. Court of Appeal reversed that decision, considering greater weight should have been given to the presumption of a demand guarantee and therefore the bank was obliged to pay regardless of the position with the underlying contract.

Performance bond or guarantee?

- If the following elements are present in your document, there will usually be a presumption that it is an on-demand bond where the instrument:
 - Relates to an underlying transaction between parties in different jurisdictions
 - Is issued by a bank
 - Contains an undertaking to pay “on demand” (with or without the words “first” and/or “written”)
 - Does not contain clauses excluding or limiting the defences available to a guarantor



Termination



When can you terminate?

- Breach?
- "Material breach"?
- Specified event (eg insolvency)?

- NB – specified event is not necessarily a breach.
 - *Phones 4U v EE* [2018] EWHC 49
 - Notice to terminate served as soon as there was an insolvency event
 - Claim for damages for loss of bargain was rejected. Damages follow a breach. Termination was not for breach

Pause before terminating – but not for too long

- Risk of wrongful termination (damages are assessed by payments that would have to be made if the contract remained in place)
- Risk of waiver or estoppel if response to breach is delayed
- Risks increased by more sophisticated and technology-driven supply chains/logistics? – Internet of Things?



Termination – which clause?

- *Ilkerler Otomotiv v Perkins Engines* [2017] EWCA Civ 183
 - Right to terminate for convenience (6 months)
 - Right to terminate for breach (remediation period allowed)
 - Court found there was no duty of "good faith" requiring the defendant to choose the termination clause that would allow the claimant to remedy a breach and keep the contract alive.



Questions?



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