

# Collaboration or risk all: Risk and Liability Management

Kevin Corbett, Steve Bamforth,  
Nora Fung and Keith Lonsdale



# Collaboration or risk *all*: Risk and Liability Management

This Workshop will have 4 separate sessions comprising:

## *Sessions and leaders*

- Procurement, Collaboration and Commercial Reality: Kevin Corbett
- Unreasonable risk and insurance: Keith Lonsdale
- The Role of Local Associations: Nora Fung
- Case studies and scenarios: Steve Bamforth

## *Programme (fast track)*

- 10 minute presentation by each session leader;
- 15 minutes of workshop discussion; and
- 5 minute report back by the session leader



# Procurement, Collaboration and Commercial Reality

Kevin Corbett  
Group Legal Director

FABER MAUNSELL | AECOM



## *Procurement*

- Variety of forms and procurement routes available for our clients and their projects
- All commercial endeavours involve risk and construction operations are inevitably complex
- New and complex/challenging procurement (PPP, PFI, Alliancing, Concession)
- Legal jurisdictions – contrast the freedom to contract under common law (Singapore, HK) with the codified systems under civil law (Germany, France and Greece)



Overall, risk is about who pays *what, when and how much*



# Procurement, Collaboration and Commercial Reality

## *Procurement*

Typical risks that may be transferred to a consultant:

## *Legal*

- Unlimited liability (or rather the absence of a realistic financial limit of liability)
- Fitness for purpose (guarantees of performance) and unusual *standards of care*
- Joint and several liability for the defaults of others
- Indemnities
- Warranties to / reliance by third parties
- Scope obligation

## *Commercial*

- Financial limits of liability
- Liquidated damages, consequential and third party losses
- Scope change including re-working of design
- Bonding and Parent Company Guarantees
- Payment



# Procurement, Collaboration and Commercial Reality

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## *Collaboration*

- The perceived wisdom (although rarely followed) is that:  
*risks should be borne by the party who is best able to manage them*
- Is there really any merit/benefit in risk dumping? Who benefits?
- Risk Management:
  - Client, team and project selection
  - The written contract
  - Precise scope definition
  - Risk Register (identification, treatment and ownership – by all)  
*Pre and throughout contract execution*
  - Competence and skill of resource
  - Effective and real project management  
*Regular reviews, change control, communication and records*



## *Commercial reality*

- Client/project demands
- Resource constraints and competition
- Bargaining power in negotiations
- Risk dumping
- Acceptable/manageable risks
- Risk versus Reward
- The elusive search for certainty
- Collaboration/alliancing – improvement or bust



*The project is the goal*



## *Issues for Workshop consideration and discussion*

- (1) What are the challenges facing the consultant in terms of risk management
- (2) Is greater collaboration the goal and what can we do to encourage proportionate risk sharing and collaborative working by *all* involved
- (3) How would we like FIDIC to help

*One man's risk is another man's reward*





**Keith Lonsdale**  
**Partner, Berrymans Lace Mawer Solicitors,**  
**London**



When contractual obligations and available insurance clash.



# Unreasonable Risk and Insurance

## Typical Pitfalls:

1. Fitness for purpose obligations.
2. Provisions for the Consultant to indemnify the Client in the event of breach.
3. Obligations requiring procurement of something which is outside one of the parties control with the consent of a third party, which may or may not be given.
4. Terms which leave any matter to be agreed to the Employer's satisfaction.



# Unreasonable Risk and Insurance

Typical Pitfalls continued..!

5. Terms which oblige the Consultant to comply with documents (especially agreements between the Employer and third parties) which the Consultant has not seen in full.
6. Terms which oblige the Consultant to comply with any amendments which may be made to documents such as third party agreements or the Employer's Brief, which may be used to impose onerous obligations.



# Unreasonable Risk and Insurance

Typical Pitfalls continued..!

7. Terms which provide that any advice which is given, or report which is prepared, is given jointly for the client and third parties, such as the funder, (unless that is the consultant's specific intention).



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Engagement and provision of Services

1. *The Consultant shall carry out the Services and obligations of the Consultant set out in this agreement in accordance with its terms and all instructions of the client.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Standard of Care

2. *The Consultant warrants that it shall exercise in the performance of the Services the skill, care and diligence to be expected of a properly qualified and specialist member of the Consultant's profession, fully resourced (taking into account any eventualities which may occur), experienced in carrying out work of a similar size, scope, complexity, value and purpose to the project.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Standard of Care

3. *The Consultant warrants that it shall:  
ensure that the Consultant's design will comply with the said legislation and any permissions and consents and any conditions attached thereto which are obtained during term of the Consultant's engagement in connection with the project.*





# Unreasonable Risk and Insurance

Workshop discussion examples:

## Standard of Care

4. *The Consultant warrants that it shall:  
ensure the Consultant's design will perform in accordance with the Client's expectations.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Standard of Care

5. *The Consultant shall ensure that any budgetary requirements of the Client of the Project are met and shall ensure the most efficient and cost effective solution in design.*



Workshop discussion examples:

Standard of Care

6. *Where the Consultant wishes to make a change to the design intent of the Construction Works, as shown or described in any Consultant's Materials which the Consultant has previously submitted and which have been returned marked with "no comment", it shall notify the Lead Consultant providing copies of the relevant Consultant's Materials marked to show the required change. For the avoidance of doubt, where such change is required as a result of failure by the Consultant, the Consultant shall re-perform all those services necessary to take account of the change notified by the Consultant at no cost to the Client and shall be responsible for any delay to the Project consequent thereon.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Professional Indemnity Insurance

7. *Without prejudice to its other obligations and liabilities under this Agreement, the Consultant shall maintain professional indemnity insurance with reputable insurers without any unusually onerous conditions and with a limit of indemnity of not less than \$5,000,000 for each and every claim for a period from the commencement of its obligations hereunder to the expiry of a period 12 years from the date of practical completion of the Construction Works. The insurance shall cover all claims arising out of the performance of the Services or breach of this agreement.*



## Unreasonable Risk and Insurance

Workshop discussion examples:

### Termination, Suspension and Breach

8. *The client may forthwith by notice in writing to the Consultant suspend the engagement of the Consultant. Unless otherwise agreed the Consultant's engagement shall be deemed to have been terminated if the Client does not issue an instruction to the Consultant to resume work within one year after the issue of the instruction to suspend under this clause.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Termination, Suspension and Breach

9. *In the event of any breach of this Agreement, the Consultant shall indemnify the client in respect of all liability, damages, losses, costs and expenses of whatsoever nature and howsoever arising which it may suffer or incur as a result of or in connection with any such breach.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Law

10. *This agreement and all matters relating thereto shall be governed by and construed in accordance with English Law and subject to clauses 18 and 21 below, any Dispute shall be referred to and finally resolved by the Courts of England and Wales, providing that the Consultant shall not be entitled to refer any Dispute for decision or determination by any tribunal until after Practical Completion of the Construction Works has been achieved.*



# Unreasonable Risk and Insurance

Workshop discussion examples:

## Adjudication

11. *When either party has given notice to refer a dispute pursuant to this clause or, if applicable, clause 18, the other party shall not be entitled to make a separate reference pursuant to this clause in relation to that dispute unless the first reference is discontinued for any reason.*





# Unreasonable Risk and Insurance

Further examples of indemnities and collateral warranties from  
Various agreements

12. *Consultant agrees to hold harmless and indemnify the Client from any and all liability, including cost of defence, arising out of performance of the services described herein.*



## Unreasonable Risk and Insurance

Further examples of indemnities and collateral warranties from  
Various agreements

13. *Consultant agrees to hold harmless and indemnify Client from any and all liability, including cost of defence, arising out of the Consultant's negligence, whether it be sole or in concert with others, in connection with the performance of the services described herein.*



## Unreasonable Risk and Insurance

Further examples of indemnities and collateral warranties from  
Various agreements

14. *Design Professional shall indemnify and hold harmless the Client from any and all claims, damages, suits and expenses caused by or arising out of the acts, omissions, errors or negligence of the Design Professional.*



## Unreasonable Risk and Insurance

Further examples of indemnities and collateral warranties from  
Various agreements

15. *Consultant shall enter into warranties with such third parties as the Employer shall determine on such terms as the Employer shall determine.*



## *Issues for Workshop consideration and discussion*

(1)

(2)

(3)



## Role of Local Member Associations

**Nora Fung**

**Legal Director, ACE**



# Role of Local Member Associations

## ACE's Priorities:

- Speak with one voice
- Raise profile
- Elevate ethics and values



# Role of Local Member Associations

Priorities implemented through:

- Member-focussed activities – risk management
- Increasing client awareness
- Participation in FIDIC





# Role of Local Member Associations

Member–focussed activities:

- Risk management
  - Business Helpline (local rate number)
  - Review of agreements
  - Development of a Risk Management Toolkit
  - Development of an Dispute Resolution Panel
  - Use of ACE Agreements
  - Production of Briefing Notes – legal and commercial issues
  - Seminar programme
- Insurance – creation of a panel broker system with minimum terms
- Construction Liability Campaign



# Role of Local Member Associations

## Increasing client awareness

- Regular meetings with client bodies - regions and Sector Interest Groups
- Client participation in ACE activities – seminars and Advisory Group



# Role of Local Member Associations

## Participation in FIDIC activities

- Production and distribution of risk management guidance through the Risk and Liability Committee
- Use of standard forms



# Role of Local Member Associations

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The End. Thank you.



## *Issues for Workshop consideration and discussion*

- (1) Activities of other Member Associations
- (2) How else can FIDIC support such activities?



# Claims arising from Risk Dumping

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**Steve Bamforth**  
**Griffiths & Armour**



# Claims arising from Risk Dumping

- Contract Negotiations
- Design Errors and Alternative
- Surveys and Reports
- Health and Safety
- All that glistens .....



# Claims arising from Risk Dumping

## Contract Negotiations:

- agreeing Scope of Services and Adequate Fees
- effective Risk Management Tool

## Case Study:

### PPF Hospital Project

Auditor required fee of £200,000

Lead Consultant had allowed only £80,000

Auditor limited services – avoided liability

“Any business arrangement that is not profitable to the other person will, in the end, prove unprofitable to you. The bargain that yields mutual satisfaction is the only one that has got to be repeated.”





## Claims arising from Risk Dumping

### Design Errors and Alternatives:

- despite QA and QM systems large numbers of claims still involve simple mistakes.
- why?
- pressures on time and money.
- actions outside QM systems.
- contractors alternatives.
- failure to warn.

### Case Study:

- design of freshwater lagoon next to the sea.
- concrete specified for submission in fresh water.
- to save money client refilled with salt water.
- concrete corroded with remediation costs of £6m.
- consultant held liable for failure to warn.



# Claims arising from Risk Dumping

## Surveys and Reports:

- often undertaken for low fees.
- but can give rise to disproportionate liability.
- understand the purpose of the survey/report and who will use it.

Numerous case studies indicate that surveys/reports should be:

- personal to the client.
- confidential.
- non-assignable.
- exclude liabilities to third parties.



## Claims arising from Risk Dumping

### Health and Safety:

- increasing number of civil and criminal claims.
- e.g. Health & Safety at Work Act 1974

### Case Study:

Collapse of partially under-pinned church wall.

Consultant successfully prosecuted for failing to:

“ensure, so far as is reasonably practical, that persons ..... were not exposed to risks to their health and safety.”

### Key issues:

- interpretation of “ensure so far as is reasonably practical”.
- serious nature of criminal sanctions.
- need to err on the side of safety.
- unqualified obligations must be complied with – irrespective of cost.



# Claims arising from Risk Dumping

When “dumping” fails!

Clients have only successfully transferred risk when they get a cheque that doesn't bounce!

Case Study:

- consultant retained as M&E advisers for a major commercial development.
- significant delays and cost overruns.
- lengthy and expensive multi-party proceedings brought.
- matter settled out of court with PI insurers paying £3m.
- but the claimant had spent £4m in legal costs.
- risk dumping is often a myth – why do it?



# Claims arising from Risk Dumping

Issues for consideration and discussion:

- [1] Your examples of risk dumping in practice.
- [2] How do we spread the message?
- [3] Are governments “in” on the risk dumping act?

