CILA & AIRMIC SEMINAR

Building Information Modelling

'Not Everything That Glitters is Gold'

by the CILA Construction, Energy & Engineering SIG and the Airmic Construction SIG

Speakers

Gary Holbrook, BAM
Phil Palmer, BAM
May Looi, Kennedys
John Farrell, Kennedys
Mike Skingsley, Crawford & Company

Introduction

Gary Holbrook, BAM

CILA & AIRMIC SEMINAR

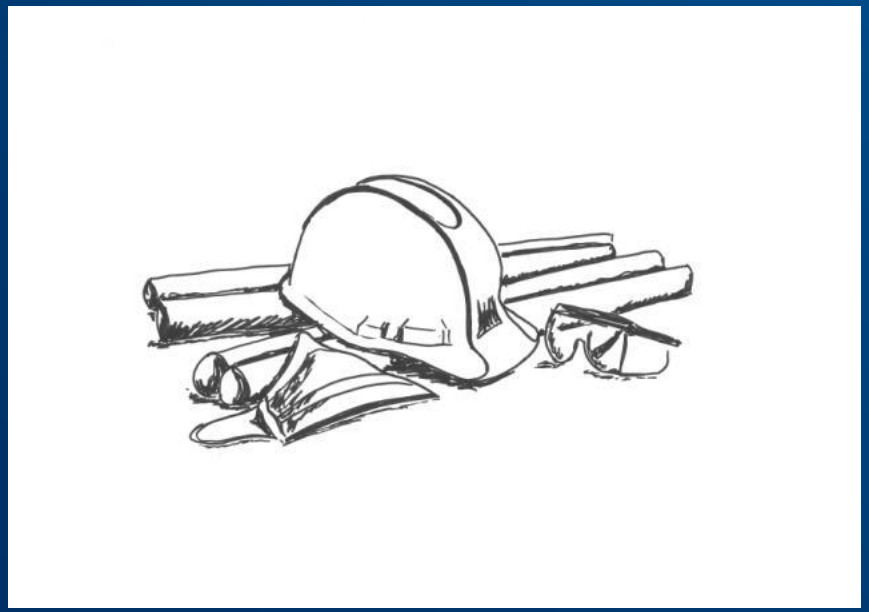
Building Information Modelling

'Not Everything That Glitters is Gold'

May Looi, Senior Associate
Kennedys Law

Kennedys
Legal advice in black and white

BIM: Legal, Contractual and Insurance Issues



May Looi

Senior Associate, Kennedys

BIM and Standard Form Contracts

- US standard form BIM contractual documents (AIA and ConsensusDOCS)
- Government guidance (BIM Task Group) and CIC BIM Protocol
- BS1192, PAS etc standards (c.f. not consistently used standards)
- NEC and JCT simply rely on inclusion of a BIM Protocol (c.f. risk of inconsistent terms and definitions)
- Article on standard forms contracts and BIM: *http://www.kennedyslaw.com/files/Uploads/Documents/Construction/Construction_Brief_January_2015.pdf*
- Article on integrated project insurance: *http://www.construction-manager.co.uk/features/taking-integrated-approach-insurance/*

Kennedys
Legal advice in black and white

Contract Terms

Why BIM can result in new or changed risk allocation and how contract terms can minimise the risks

Why do we need BIM-supportive terms?

- Certainty
- Efficiency
- Reliability
- Avoid gaps in liability
- Clear allocation of risk
- Clear understanding of parties' roles
- Minimises misunderstanding and unnecessary disputes

Why BIM needs its own contract terms

- Process and data
  - Models: Scope, content and contract status
  - Implementation/notification of design changes/variations
  - Storage, hosting and security (e.g. security measures against degradation, corruption and hacking (a particular risk for commercially sensitive projects)
  - Limitations on reliance on models and data
  - Clear BIM-enabled work stages (RIBA Plan of Work 2013- 8 common stages incorporating main envisaged BIM processes)

- Interoperability
  - Compatible software and known interoperability issues
  - Suitability of hardware
  - Any responsibility for suitability and integrity of software selected (e.g. CIOB Complex Projects Contract makes Contractor entirely responsible)
  - Responsibility for checking integrity of data (sent or received) before issue or reliance
  - Risk of errors in data or models copied and relied upon, 'infecting' all the information flowing from it (in turn leading to disputes)
  - Information exchange/sharing processes

- Example of impact of interoperability:
  - US case of *Mortenson Company v Timberline Software Corporation* (1999) 93 Wash.App 819
  - A software error resulted in a contractor's bid being £2m too low, and the software provider's wide limitation clause excluding liability for "*any damages of any type*" was held to be enforceable

- Standardisation and Consistency:
  - Agreed standards (e.g. PAS1192), data exchange formats (e.g. IFCs and COBie), source of BIM objects (e.g. NBS National BIM Library)
  - Consistent terminology/definitions
    - CIC BIM Protocol take precedence in the event of inconsistency with other contract documents
    - Some CIC Protocol terms are different from the NEC3 terms
    - Parts of US ConsensusDOCS BIM Protocol are open to interpretation. E.g. under its Addendum, a party's potential responsibility for a model includes a "*Contribution*" that arises from that party's "*access*" to the Model. "*Access*" is not defined and "*Contribution*" is arguably wide enough to give rise to various interpretations

- Risk Allocation
  - More information and more integral use and reliance
  - Are the limitation clauses wide enough to capture BIM processes and data
  - Is there a consistent level of duty in all contract documents? E.g.“*reasonable endeavours*” (CIC BIM Protocol) vs. common law reasonable skill and care
  - Clear allocation of responsibility/risk allocation for:
    - Each element of design/Each BIM element
    - Loss of information (e.g. due to software defects)
  - Warranties/Indemnities/Duty of care for integrity of data Expressly exclude SOGA and SGSA implied terms (fitness for purpose and quality)
  - Priority of contract documents (to deal with conflicting terms)
  - Back-to-back down supply chain and across project team

- Copyright
  - Ownership of the design (can it be clearly separated)
  - Ownership of the models
  - Ownership of models outputs (e.g. cost data; FM data)
  - Cross-indemnities for infringement of IP rights

Kennedys

Legal advice in black and white

The BIM Information Manager/Co-ordinator

The BIM Information Manager/Coordinator

- Pivotal new role; not simply extension of existing obligations
- Ensures parties comply with processes and timings, and coordinates production and exchange of BIM deliverables
- Role must be clearly defined so parties appreciate importance of complying with directions and do not misconceive that the role involves any design or similar obligations
- Should be a wholly separate appointment document from other role/appointment within project to ensure:
  - Limitations to avoid unfair or unachievable obligations
  - Clearly separated from any design responsibilities. E.g. If undertaken by the architect (rather than a third party) as part of existing appointment, danger of overlap/merger between design and coordination roles, such as misconception that role includes checking or co-ordinating the design elements of the models

Brief checklist of some main issues to watch out for

- Models:
  - Are they mentioned in the contract?
  - Status, scope, who does what
  - Limitations on reliance and responsibility
- Interoperability:
  - Known issues?
  - Limitations/Exclusions for responsibility?
- Agreed storage, hosting, security processes?
- Agreed standards, data formats and processes?
- Standard of care for BIM work/services and risk allocation for BIM models and data
- Will limitations/exclusions be superseded by other contract docs?
- Have statutory implied terms been excluded?
- What responsibilities is the BIM Info Manager/Co-ordinator taking on?

Kennedys

Legal advice in black and white

Contact:

May Looi

Senior Associate

may.looi@kennedyslaw.com

020 7667 9216

CILA & AIRMIC SEMINAR

Building Information Modelling

'Not Everything That Glitters is Gold'

by the CILA Construction, Energy & Engineering SIG and the Airmic Construction SIG

Speakers

Gary Holbrook, BAM
Phil Palmer, BAM
May Looi, Kennedys
John Farrell, Kennedys
Mike Skingsley, Crawford & Company