

FIT FOR PURPOSE UNDER DANISH LAW



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AGENDA

1. WHAT IS FIT FOR PURPOSE?
 2. HOW WILL DANISH COURTS APPROACH THE STANDARD?
 3. RELEVANCE OF STANDARD FORMS, e.g., FIDIC
 4. SUMMARY
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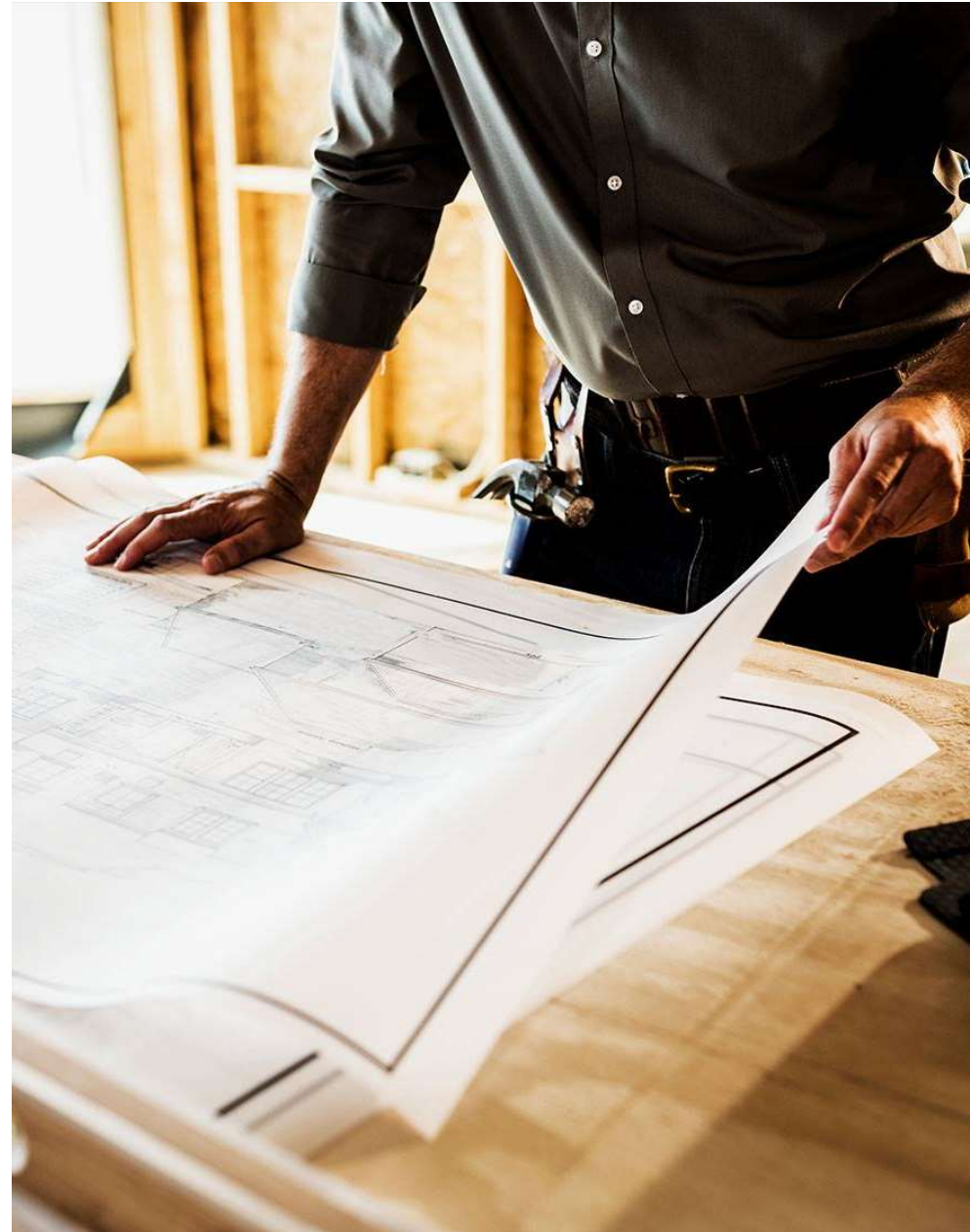
FIT FOR PURPOSE IN CONSTRUCTION CONTRACTS

WHAT IS FIT FOR PURPOSE?

- An obligation to ensure that the “work” will be fit for its intended purpose.

THE ESSENCE OF THE LIABILITY

- Compliance with standard practices and absence of negligence will not release contractor from liability.
- The contractor is accountable for failures in materials and/or methods even if these were widely accepted at the time of the construction.





LIABILITY IN DANISH CONSTRUCTION LAW

- No concept under Danish law that truly equals "fit for purpose" as applied under English law.
- A negligence-based liability is the cornerstone of liability under Danish law.
- AB 18 and ABT 18 Clause 12(1):
 - The work must be executed in accordance with the contract, good professional practices and the owner's instructions
- The "design build contractor" has an implied obligation to ensure that the work is fit for its intended purpose, however:
 - Only obliged to operate with "reasonable skill and care"
 - Not responsible if the used methods and materials was known to be widely accepted at the time it was used



WHATS THE FUZZ? (ROBIN RIGG)

- According to the contract the work should “[...] *be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification using Good Industry Practice...*”
- The contract further required for MT Højgaard as a minimum to:
 - a) Prepare the detailed design for the foundations in accordance with an international standard for design of offshore wind turbines known as “J101”(Specified Design Obligation)
 - b) Prepare a design for the foundation which ensured a lifetime for the foundation of 20 years (Specified Performance Obligation)
- In 2010, the grouted connections at Robin Rigg started to fail due to an error in J101.
- The Supreme Court held that the express obligation to ensure the lifetime of the foundations for 20 years trumped the obligation to use J101.

WILL COURTS LOOK AT FIT FOR PURPOSE AS A WARRANTY COMMITMENT? (1/2)

INTERPRETATION BY THE COURTS:

- Danish courts will only recognize that a warranty has been provided by the contractor if the language of the contract provides a sufficiently clear legal basis for concluding that an explicit warranty for a particular result have been provided by the contractor, cf. U1973.675H, TBB 2004.183, and TBB 1999.191.
- Courts typically set up strict requirements for the clarity of the parties' agreement, including priority of documents and obligations, especially if the contractor (as part of the warranty) assumes the risk for errors in the owner's tender documents.
- Generally; broadly worded warranties are not enough to shift the responsibility from the owner/employer to the contractor, cf. TBB 2008.701 ("as if"-clauses).





WILL COURTS LOOK AT FIT FOR PURPOSE AS A WARRANTY COMMITMENT? (2/2)

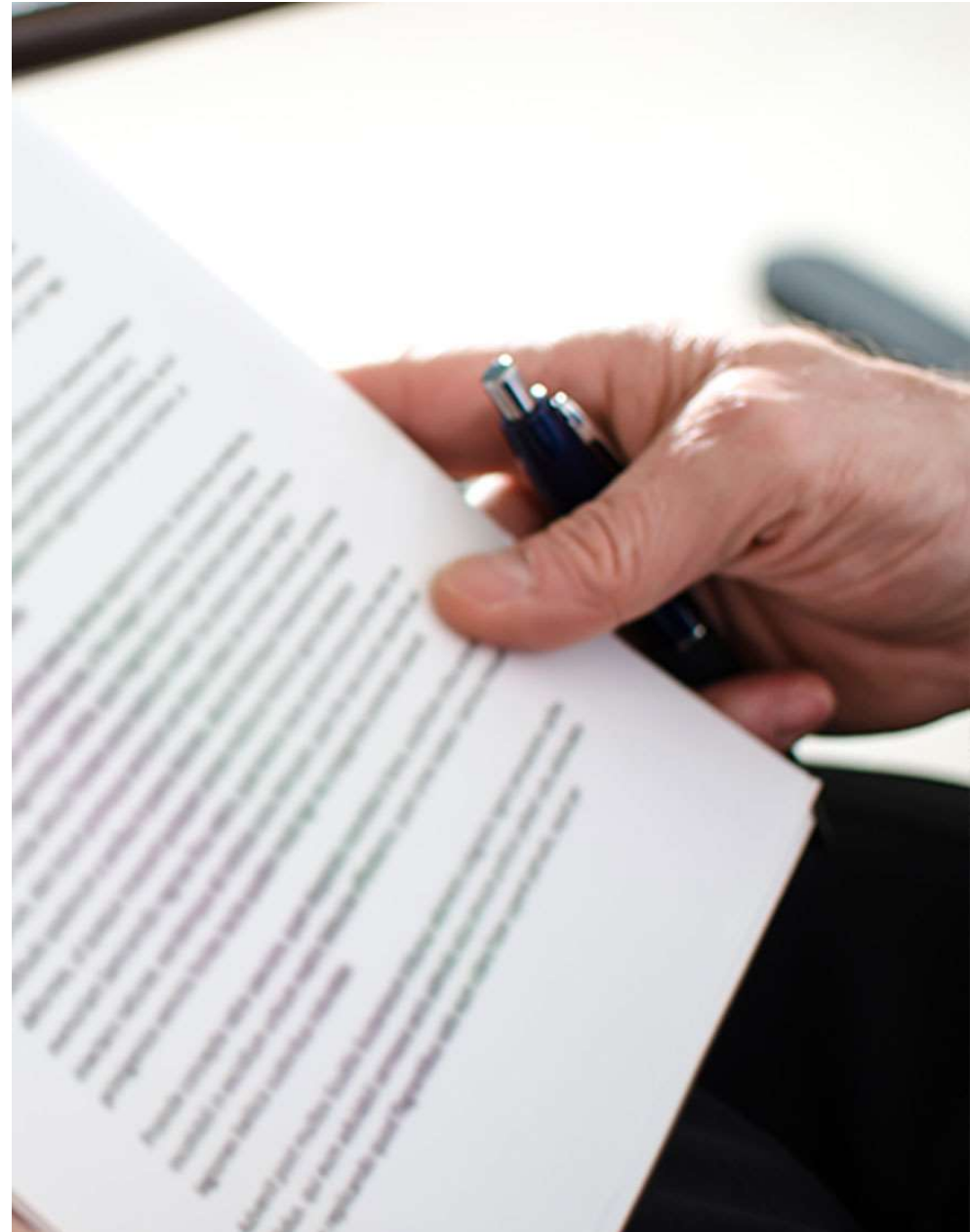
ASSUMPTIONS:

- More likely that a clause providing a commitment to achieve a specific attribute will be upheld, compared to more generally worded commitments, e.g.:
 - More likely to be upheld; A warranty that a specific function will be achieved.
 - Less likely to be upheld; A warranty that the construction will have a certain lifetime.

ASSESSMENT IN ACCORDANCE WITH ENGLISH LAW? (1/2)

Potential sources leading to application 1-1 of English understanding of “fit for purpose” liability in a Danish dispute:

- Q: Can “fit for purpose” be seen as lex mercatoria? A: Unlikely that Danish courts will consider “fit for purpose” as lex mercatoria (from a general perspective).
- Q: Does it follow automatically from the use of a FIDIC contract? A: No;
 - The rules of the country to which the contract is subject to must be taken into account.
 - However, it must also be taken into account that the terms in the contracts originates from common law.
- However; not unseen that Danish courts asserts English law interpretations when assessing matters that are not clarified in Danish law, cf. UfR 2007.1802H, UfR 2017.2023H and FED 2018.04Ø (The SIRI-case).





ASSESSMENT IN ACCORDANCE WITH ENGLISH LAW (2/2)

THE SIRI-CASE

- In 2009, the SIRI production-platform, located in the North Sea off Denmark, experienced significant structural cracks.
- The owners of the SIRI platform initiated a lawsuit against their insurance providers.
- Central to the legal dispute was the "Sue and Labor" insurance provision, a concept well known in English insurance law but "unknown" in Danish insurance law.
- The Eastern High Court found that the term "Sue and Labour" must be interpreted in accordance with English case law.

THE SIRI-CRITERIAS

- The Eastern High Court found that the term "Sue and Labour" must be interpreted in accordance with English case law, by applying the following test:
 - 1) Is it a specific term unknown in Danish law?
 - 2) Is the term is well established in English law also prior to the parties' agreement?
 - 3) Are the parties' agreement based on a standard form that originates from English law?

STANDARD FORMS

- FIDIC standard forms are being used increasingly in the construction industry in Denmark.
- Literature (e.g. Axel-Volkmar Jaeger and Gotz-Sebastian Hök):
“Well accepted that FIDIC forms of contract have a common law background”
- The standard forms among other contains fit for purpose-clauses. According to the guide to the 1999-edition of Red, Yellow and Silver book:
“Fitness for purpose is required, irrespective of the level of skill, care and diligence expected of the Contractor’s designers...”
- FIDIC’s understanding of “fit for purpose” is generally understood to correspond with the understanding of the term under English law.



FULL-EFFECT?

Q: However, is it reasonable to assume that Danish courts will apply the English “fit for purpose” liability standard with full effect?

Considerations that speaks against this conclusion:

- Restrictive interpretation of terms in standard contracts that turns out to be particularly burdensome
 - “Agreed documents” are interpreted less restrictive
 - However; FIDIC are not agreed documents
- Danish construction judges tend to have a high degree of loyalty to risk distribution under the AB system.
- May be questionable if modern FIDIC contracts can still be considered to originate from English law.



SUMMARY

- 1 Fit for purpose obligations, while prevalent in English law, does not have a Danish equivalent.
- 2 Danish courts may tend to exhibit loyalty to the AB system (as a fallback), but also recognize the weight of well-established concepts in English law and internationally respected standards like FIDIC.
- 3 Danish courts are probably reluctant to establish a warranty commitment that shifts the risk allocation unless very clear guidance have been given in the contract to this effect.
- 4 Standard contracts may be interpreted restrictively to prevent unforeseeable burdensome terms, but this principle applies to a lesser extend with regard to agreed documents or widely accepted standards.
- 5 The SIRI criteria highlights the importance of understanding when certain legal concepts derived from foreign legal traditions, may be assimilated into Danish contracts and could include “fit for purpose” as per English standards.

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»FIT FOR PURPOSE« IN LIGHT
OF DANISH LAW



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