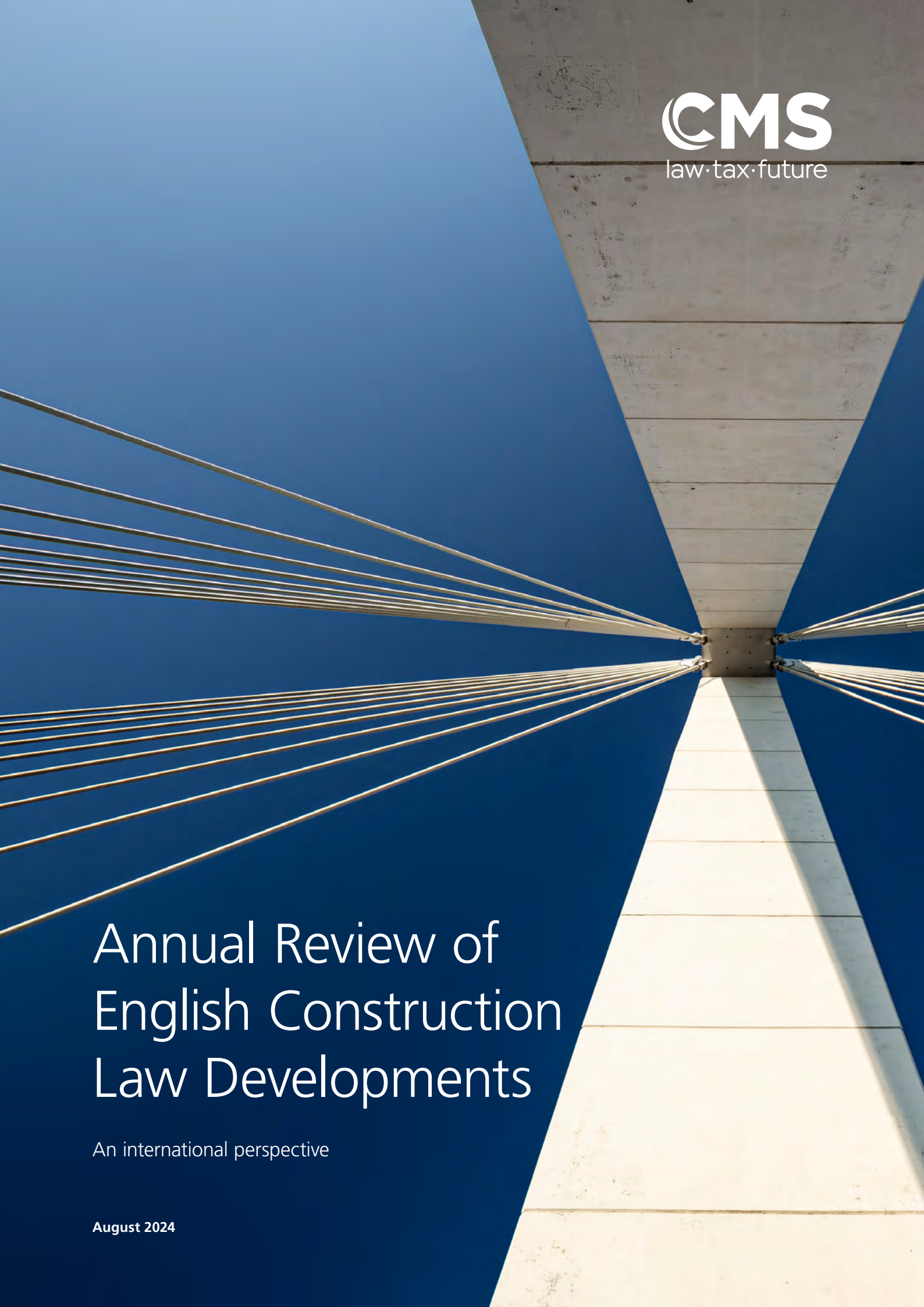

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Annual Review of English Construction Law Developments

An international perspective

August 2024

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I simply consider this to be 'mandatory literature' for anyone interested in construction law.

General Counsel, Global Energy Company

Introduction

Welcome to the 2024 edition of our internationally focused *Annual Review of English Construction Law Developments*, covering developments from across the globe relevant to international projects governed by English law.

Welcome to the 2024 edition of our internationally focused *Annual Review of English Construction Law Developments*, covering developments from across the globe relevant to international projects governed by English law.

This year's edition has a strong focus on exclusion and limitation clauses, with more than half of the review being devoted to these in the various forms in which they appear in international construction contracts. These include time-bars for delay claims, termination for convenience clauses, pre-conditions to arbitration and even insurance clauses, as well as straight-forward exclusions and limitations of general liability under a contract.

We have also included an article on choice of law provisions for non-contractual obligations, following some developments in the law governing English non-contractual claims relevant to construction projects. A growing number of jurisdictions now permit parties to specify the law governing their non-contractual obligations in addition to the law governing the construction contract. Both risks and opportunities exist for parties in this area. Our article provides a guide to help decide which combination of contractual and non-contractual jurisdictions (not to mention the choice of forum) will most benefit a party's interests.

The article on novation agreements and so-called "black holes" is a must read for anyone involved in restructuring construction projects due to insolvency or transfers of ownership. Such arrangements can sometimes lead to arguments that liability from a consultant or other members of the supply chain have disappeared into a "black hole" – usually because the original entity to whom the liability was owed is no longer involved with the project.

This year's edition also covers other notable developments in the international construction space, such as the introduction of standard form EPCM (Engineering, Procurement and Construction Management) contracts by the IChemE and soon FIDIC, as well as proposed amendments to the UK's local arbitration law.

As always, we hope you find this publication useful and we welcome any comments or feedback you may have. Should you wish to receive more frequent updates throughout the coming year, or for briefer summaries of developments earlier this year, please sign up for our Law-Now service at www.law-now.com and select "Construction" as your chosen area of law.

David Parton
Partner, Head of Construction
T +44 20 7524 6873
E david.parton@cms-cmno.com

Steven Williams
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Adrian Bell
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7367 3558
E adrian.bell@cms-cmno.com

The notification of delay claims under the FIDIC form: *Obrascon* challenged

A decision of the Court of Appeal of the Dubai International Financial Centre ("**DIFC**") has adopted a strict interpretation of the requirements for notifying delay claims under the FIDIC form, disagreeing with earlier caselaw from the English courts. A failure to notify claims on time can result in a loss of entitlement under the FIDIC form. The DIFC decision will therefore be of great importance to those dealing with extension of time claims under the FIDIC form.

Claims notification under the FIDIC form

Clause 20.1 of the FIDIC 1st Edition contracts require a Contractor who considers itself entitled to an extension of time or any additional payment to give a notice describing the "*event or circumstance giving rise to the claim.*" The notice must be given within 28 days after the Contractor "*became aware, or would have become aware, of the event or circumstance*". The clause also makes clear that if a notice is not given within this period the "*Time for Completion shall not be extended [and] the Contractor shall not be entitled to additional payment*".

Clause 20.1 also requires a fully detailed claim to be provided within a further 14 days (56 days under the 2nd Edition), but there is no express indication that a failure to do so will invalidate the claim.

Clause 20.2.1 of the FIDIC 2nd Edition contains similar provisions requiring notice within 28 days, but is even more emphatic in stating that, in addition to the Time for Completion not being extended and there being no entitlement to additional payment, a failure to comply shall discharge the Employer "*from any liability in connection with the event or circumstance giving rise to the Claim*".

Somewhat paradoxically, despite the stronger language in the 2nd Edition, a Contractor who has failed to give a notice on time is also given the ability to submit a fully detailed claim and include an explanation as to why "*late submission [of the notice] is justified*". The Engineer is then required to agree or determine "*whether or not the Notice of Claim shall be treated as a valid Notice*" taking into account the explanation given in the fully detailed claim. The 2nd Edition cites three circumstances which might may be taken into account by the Engineer for this purpose (such as prejudice to

the Employer due to the late submission) but these are said expressly to "*not be binding*".

These provisions leave significant ambiguity over whether the 28 day notice requirement in the 2nd Edition is a strict time-bar or whether in certain circumstances a Contractor who fails to notify on time might be contractually entitled to disapply the time-bar. On one view, if the Employer has already been discharged from liability in relation to the Claim, there is no rational basis on which the Engineer can decide to disapply the time-bar and resurrect the Claim; his power to do so might be interpreted as one to be exercised purely in its capacity as the Employer's agent if so instructed. Some support for this position may come from the pre-release version of the 2nd Edition Yellow Book which included a separate clause (clause 20.3) which permitted the Contractor to apply to the DAB for a decision that "*in all the circumstances, it is fair and reasonable that the late submission be accepted*". This clause was deleted in the final 2nd Edition versions and no fair and reasonable standard or any other objective criteria is now stated which might provide a basis for the making of a rational determination by the Engineer as to the disapplication of the time-bar. Weighing against these points, however, is the express requirement for the Engineer to include a decision on the point in its agreement or determination under clause 3.7, that clause requiring the Engineer to "*act neutrally between the Partis and [to] not be deemed to act for the Employer*".

It should also be noted that a new time-bar linked to one part of the fully detailed claim (the statement of legal basis) has been included in the 2nd Edition. This time-bar is subject to the same ambiguity which applies to the notification time-bar as to whether disapplication of the time-bar can be claimed as a matter of contractual entitlement in certain circumstances.

The rule in *Obrascon*

In *Obrascon Huarte Lain SA v A-G for Gibraltar*, the English Technology and Construction Court was required to consider the application of the notification time-bar to claims for extension of time under clause 8.4 of the FIDIC 1st Edition (clause 8.5 of the 2nd Edition). That clause sets out various events for which an extension of time is claimable if "*completion … is or will be delayed by any of*" those causes. Mr Justice Akenhead decided that the relevant "*event or circumstance giving rise to the claim*" for the purpose of the time-bar was the incurring of actual or prospective delay to completion, rather than the underlying event for which an extension was claimed. This was said to reflect the "*is or will*" wording of clause 8.4.

The decision in *Obrascon* was considered to be lenient for Contractors, as it permitted delay notifications under clause 20.1 to be deferred until a delaying event had actually impacted the progress of the works. This could be many months after the event itself. This lenient approach has now been challenged by an appellate decision of the DIFC courts.

Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC

In July 2017, Panther Real Estate Development LLC ("**Panther**") and Modern Executive Systems Contracting LLC ("**MESC**"), entered into a contract for the construction of the East 40 Building in Al Furjan, Dubai, a residential tower building consisting of 112 residential units (the "**Project**") (the "**Contract**") with completion scheduled for 16 December 2018.

The Contract was based on the 1st Edition FIDIC Red Book, as amended by the Particular Conditions and other detailed provisions. The governing law of the contract was DIFC law, and any disputes were to be resolved within the exclusive jurisdiction of the DIFC Courts.

During the course of the Project, MESC issued three extension of time ("**EOT**") applications between February 2018 and June 2019, all of which were rejected by the Engineer. Eventually, on 6 November 2019, Panther terminated the Contract, citing sub-clause 15.2 (which provided that Panther was entitled to terminate the Contract with immediate effect if, amongst other things, the maximum amount of delay damages was exhausted, as Panther asserted it was). The Project was ultimately completed by an alternative contractor on 1 May 2020.

Panther commenced proceedings for delay liquidated damages ("**LDs**") and other damages arising from MESC's failure to complete the Project on time, and MESC counterclaimed for prolongation costs and asserted that Panther had no right to terminate the Contract on the basis that MESC was entitled to an EOT such that the maximum amount of damages had not been exhausted (and the condition of termination was therefore not satisfied).

The DIFC Technology & Construction Division

At first instance, the DIFC's Technology & Construction Division found that Panther was indeed responsible for 306 out of 325 days of delay and only 19 days were attributable to MESC. However, MESC's claims for EOT and prolongation costs were dismissed, on the basis that the court found that, in contravention of sub-clause 20.1 of the Contract, MESC failed to:

1. notify the relevant delay events within 28 days of the time when it became aware (or should have become aware) of the delay event or circumstance relied upon for the claimed EOT; and
2. send a fully detailed claim with supporting particulars of the basis of the claims and the EOT within 42 days after it became aware (or ought to have become aware) of the event or circumstances giving rise to the claim.

In this regard, the time for notification was said to run from the date when MESC was aware (or ought to have been aware) of an event or circumstance that could give rise to a claim for an EOT, regardless of whether there was likely to be or had been any actual delay by that time.

As a result, the court held that Panther was entitled to terminate the Contract, as the cap on LDs had been reached, and Panther was further awarded LDs up to the contractual cap of 10% and its additional costs of completing the Project post-termination.

The DIFC Court of Appeal

The decision at first instance was appealed by MESC, challenging among other things: (1) the status of 42-day detailed claim requirement as a condition precedent; and (2) when the 28-day notice had to be given.

A condition precedent?

The DIFC Court of Appeal agreed with the interpretation of the judge at first instance, that the 28-day notice requirement was a condition precedent to MESC's entitlement, noting that "*the language could not be clearer*".

With regard to the 42-day detailed claim requirement, the Court of Appeal found that although the "*Contractor must keep records necessary to substantiate its claim, it must permit inspection of such records, and it must comply with the 42-day detailed claim requirement, [t]he penalty for failing to do some or all of this is spelled out in the last paragraph of Sub-Clause 20.1: 'any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.'*

On that basis, the Court concluded that the 42-day detailed claim was not a condition precedent to MESC's entitlement. A failure to comply with the requirement would, however, entitle an engineer to "*reduce the period of extension of time to take account of the difficulties of investigating the claim caused by the Contractor's failure to comply with its obligations*".

When does time begin to run?

With regard to the 28-day notice period, the Court of Appeal agreed with the judge at first instance that the obligation to give notice was triggered when the MESC became aware (or ought to have become aware) not of the delay or likely delay, but of the event or circumstance giving rise to the claim for an EOT.

The Court of Appeal refused to follow the reasoning in *Obrascon*, noting that:

> "*Delay to the contractual Time for Completion only occurs in fact when the works are not completed by the contractual completion date. The construction advanced by Akenhead J would mean that in, say, a three year project, if an event occurred during the first year which resulted ultimately in the works overrunning by a month or two after the Time for Completion in year three – and there would be no actual delay to the Time for Completion until then – then the 28-day notice under Sub-Clause 20.1 would only have to be given within 28 days of the moment in year three when Time for Completion passed without the works being completed. That would render Sub-Clause 20.1 – which is designed to ensure that claims are notified and dealt with swiftly – entirely ineffective for its purpose.*"

This conclusion appears to be based on a misreading of *Obrascon*. In that case, Akenhead J provided an example to illustrate his reasoning. The example involved a variation instruction given to widen a road. At the time of the instruction, the road works were not on the critical path and it was not foreseeable, therefore, that there would be any delay to completion. When the road works were started some 4 months later, it became clear that they were on the critical path and that the variation instruction would delay completion. However, a further month passed before the widening works actually took place and began to cause actual delay. In those circumstances, it was said that:

> "*Notice does not have to be given for the purposes of Clause 20.1 until there actually is delay [i.e. 5 months after the instruction] although the Contractor can give notice with impunity when it reasonably believes that it will be delayed [i.e. 4 months after the instruction]. The "event or circumstance" described in the first paragraph of Clause 20.1 in the appropriate context can mean either the incident (variation, exceptional weather or one of the other specified grounds for extension) or the delay which results or will inevitably result from the incident in question.*"

The *Obrascon* decision does not, therefore, suggest that a contractor could wait until the Time for Completion had been missed before giving its notice under clause 20.1. The confusion appears to stem from differing views as to what is meant in clause 8.4 by "*completion*

… is … delayed". Whether that means that the Time for Completion has actually been missed (as per the Court of Appeal in *Panther*) or only that a delay has occurred to the critical path (as per *Obrascon*).

Conclusions and implications

The Court of Appeal's decision is a highly significant one for users of the FIDIC form. Given the express time-bar language used in both the 1st and 2nd Editions, arguments commonly arise as to whether or not a Contractor has given notification in time. The *Obrascon* decision had allowed a reasonably flexible approach to be adopted for this question where extension of time claims were concerned. By contrast, the DIFC Court of Appeal decision requires that notice be given in all cases within 28 days of the Contractor's awareness (or when it ought to have become aware) of the event on which the claim is based, regardless of when any delay arising from that event is likely to impact the works.

Broader arguments can be made in favour of each of these opposing approaches. Proponents of the *Obrascon* approach may note that the DIFC's approach will require events to be notified under clause 20.1 which are not expected to impact the critical path and cause any delay to completion. This is because the critical path may change in the future and it may subsequently be shown that critical delay had been caused by the event (as per the example cited in *Obrascon*), but without an earlier notification within 28 days any entitlement to an extension of time will have been lost. Supporters of the DIFIC's position might counter that, even if the wording of clause 8.4 permits a delay to the critical path to be equated with a delay to completion, the approach in *Obrascon* still undermines the purpose of the notification regime by allowing a Contractor to defer notification until a delay has impacted the works. By that time, the Employer will have much less scope for considering mitigation options and for investigating the events claimed for, both of which are key reasons for the notification of extension of time claims in the first place.

It remains to be seen whether the DIFC's reasoning will support a direct attack on the *Obrascon* decision under English law. In this regard it is notable that the DIFC judges included an ex-English Commercial Court judge (Justice Sir Richard Field) and a former Privy Councillor and Scottish Appellate judge, Lord Glennie. Regardless of the applicable law, however, both the *Obrascon* and *Panther* judgments are likely to be influential in any dispute over the proper notification of EOT claims under the FIDIC form.

References:

Obrascon Huarte Lain SA v A-G for Gibraltar [2014] EWHC 1028 (TCC); *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* [2022] DIFC CA 016.

The use of good faith arguments in time-bar disputes

The *Panther Real Estate* case discussed in the previous article also considered an attempt to overcome a claims notification time-bar on the basis of good faith obligations imported by DIFC law. Such arguments are frequently made in international construction disputes and the approach taken varies considerably depending on the law governing the contract in question. In this article, we consider the approach to enforcing time-bar clauses under English law and in civil law jurisdictions before considering the unique circumstances of the decision in *Panther Real Estate*.

Time-bars under English law

The English courts have traditionally shown themselves to be supportive of enforcing time bar clauses if they are not strictly complied with. In *Multiplex Constructions v Honeywell Control Systems (No. 2)*, Mr Justice Jackson (as he then was) commented on the usefulness of time bar clauses in the context of extension of time claims:

"*Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent*".

Such clauses are intended to promote certainty and finality and ensure the orderly and timely provision of information so that matters such an extensions of time or claims for more money are dealt with promptly.

An English court will not ordinarily require any special language to be used for a time-bar clause to be effective. To the contrary, English courts have generally ruled that "*the words in a time-bar provision must be given their ordinary and natural meaning*" (*Waterfront Shipping Company Ltd v Trafigura AG*). A good example is *Steria v Sigma Wireless Communications* where the court found that an extension of time clause in an amended MF/1 subcontract, which gave the contractor certain entitlements "*provided*" a timely notice was issued, amounted to a condition precedent. Failure to serve the notice in time therefore debarred the contractor under that clause, despite the absence of express words to that effect.

As noted in the previous article both the FIDIC 1st and 2nd Editions contain express wording stating that an entitlement will be lost if a Notice of Claim is not given within the required time under clauses 20.1 and 20.2 respectively. The time-bar in the 1st Edition was upheld by the English Technology and Construction Court in the *Obrascon* decision noted in the previous article.

Good faith is of little relevance to the enforcement of time-bar clauses under English law. The doctrines of waiver and estoppel will in certain circumstances prevent a party from going back on a representation or common assumption that a time-bar provision would not be relied on. Short of this, and certain domestic legislation regulating the use of unfair contract terms, the English courts will not usually consider the fairness of a time-bar provision or whether the enforcement of the time-bar would be oppressive or abusive.

This position is unlikely to be changed much, if at all, by an express good faith clause in the contract. In *Costain Ltd v Tarmac Holdings Ltd*, a construction contract stipulated strict time periods for the referral of any dispute to adjudication and then to arbitration, failing which the disputed claim could not be pursued. The claimant failed to comply with these requirements but relied on a general obligation in the contract for the parties to act in "*the spirit of mutual trust and co-operation*" in an attempt to overcome the time-bar. The English Technology and Construction Court rejected the suggestion that such a clause required the parties to act fairly. In the Court's judgment:

> "*Taking the obligation of mutual trust and co-operation (or even good faith) at its highest, it meant that, in the present case, the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar … was either non-operative or would not be relied … I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant … that the time bar provision was not going to be relied on. But beyond that, … there can have been no further obligation, because otherwise the provision would have required the defendant to put aside its own self-interest.*"

On this view, an express good faith obligation does not add much to the existing doctrines of waiver and estoppel and has nothing to say about unfairness or injustice which might be caused purely by the application of the time-bar itself in any given case.

Time-bars in civil law jurisdictions

By contrast to English law, challenges are often made to the enforcement of time-bars in civil law jurisdictions based on the principle of good faith and rules against the abuse of rights. One or both of these norms are typically expressed as overriding and inviolate principles of law within the civil and commercial codes of such countries. In addition, civil law jurisdictions tend to allow for much broader scope in the interpretation of contract provisions than is the case in English law, with civil law tribunals more readily being able to moderate a clause according to broader notions of business purpose and the intention of the parties.

One example in an international construction arbitration setting is *JV of American and EU Dredging Companies v Red Sea Public Authority (RSPA).* The parties in that case entered into a contract for the first stage of a new port project in North Al Sukhna in Egypt. The contract contained a time-bar in very similar terms to clause 20.1 of the FIDIC 1st Edition contracts (the "**Time-Bar Clause**"). Claims for extension of time and delay damages were made by the contractor as a result of delays from other contractors working on the project. These claims had not been made within the 28 day period provided by the Time-Bar Clause and the employer sought to reject them on this basis (among others).

Article 147 of the Egyptian Civil Code provides that the "*contract makes the law of the parties*" and Article 150 provides that where the wording of a contract is clear, "*it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties.*" However, article 150 goes on to state: "*When a contract has to be construed, it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that loyalty and confidence which should exist between the parties in accordance with commercial usage.*"

These principles were acknowledged by the tribunal in considering the application of the Time-Bar Clause:

> "*The Tribunal recalls that the will of the parties, when expressed in unequivocal terms, must be respected. This principle is clear under Articles 147/1 and 150/1 of the Egyptian Civil Code as well as under French law. Indeed, according to the continual trend of the Egyptian Court of Cassation, the meaning of Article 150/1 of the Civil Code is that the Judge is bound to take the clear wording of the parties as it is, and is not permitted, under the pretext of interpretation, to deviate from its clear meaning …*"

With these principles in mind, the tribunal found that the Time-Bar Clause was "*clear and unambiguous*" and, as the contractor had not complied with the relevant notice provisions, "*it is in principle time-barred from claiming additional payments in respect to the event giving rise to the claim*".

Despite this finding, the tribunal was able to temper the strictness of the Time-Bar Clause by reference to the intention of the parties and the principle of good faith as follows:

> *"[The time-bar] should be tuned down in the event the Employer and/or the Engineer were aware, without any doubt, of the Contractor's intention to claim additional payments.*

Indeed, according to Mr. Seppälä, 'the notice of claim alerts the Engineer and the Employer to the fact that the Employer may have to pay the contractor additional money or grant him an extension of time by reason of a specified event or circumstances' … Thus, the true purpose of this Clause is clearly to inform the Employer and/or the Engineer and allow them to investigate the claim and mitigate the effects of the event. Accordingly, in order to appreciate if the Claimants complied with the requirements of Clause 20.1 C.C., the Tribunal will need to interpret this Clause in accordance with Article 150/1 of the Egyptian Civil Code and take into account the common intent of the parties and the purpose of this Clause.

The Tribunal is therefore of the opinion that even though the principle of Clause 20.1 C.C. is clear, it should be applied with flexibility. Thus, if the Tribunal must apply the law, that is the Contract (Article 147/1 of the Egyptian Civil Code), it also has to take into consideration good faith in the behaviour of the parties. Indeed, pursuant to Article 148 of the Egyptian Civil Code,

'A contract must be performed in accordance with its contents and in compliance with the requirements of good faith. A contract binds the contracting party not only as regards its expressed conditions but also as regards everything which, according to law, usage and equity, is deemed in view of the nature of the obligation, to be a necessary sequel to the contract.'

Accordingly, the Tribunal will appreciate, for each claim, whether or not the Employer and/or the Engineer were aware, without any possible doubt, of the Contractor's intent to claim additional payments."

It is not entirely clear from the tribunal's reasoning to what extent this tempering of the Time-Bar Clause flowed from its broader powers of interpretation under the second part of Article 150 or from the principle of good faith in Article 148. However, the tribunal's finding that the meaning of the clause was "*clear and unambiguous*" suggests that good faith was the determining factor.

In addition to prior knowledge of a party's intent to claim, or of the event giving rise to the claim, the principle of good faith has also been used to challenge reliance on a time-bar by a party who is responsible for the events giving rise to the claim. For example, in *ICC case 23229* a majority of the tribunal found, under a FIDIC Red Book 1st Edition contract, that where the contractor in that case had been delayed by events for which the employer was responsible (such as delays caused by other contractors of the employer), the principle of good faith provided for by the civil law system which applied to the contract meant that the employer could not recover delay damages despite the contractor's failure to give notices of claim under clause 20.1.

The principle of good faith in the Egyptian Civil Code, which derives from the French Civil Code, has been adopted in the civil codes of many middle-eastern countries, including the UAE, Jordan, Quwait, Bahrain, Libya, Qatar, Iraq and Syria. The writers of *The International Application of FIDIC Contracts* note that the equivalent good faith provision in the UAE Civil Code may also prevent the enforcement of a time-bar clause in the two cases identified above:

"Where the Contractor can demonstrate that, notwithstanding the lack of notice, the Employer was aware of the circumstances giving rise to the Claim and/or of the Contractor's intention to make a Claim, then the Employer is arguably acting against the

principle of good faith if it later seeks to rely on the formal time bar in the Contract. Similarly, it can be said that an Employer may be acting contrary to the principle of good faith if its own breach of contract or an Employer-risk event forms the basis of the Claim yet the Employer seeks to rely on the time-bar provision to circumvent liability."

Finally it is worth noting that the Civil Codes noted above all have provisions outlawing the abusive exercise of rights. For example, Article 5 of the Egyptian Civil Code states that:

"The exercise of a right is considered unlawful … if the benefit it is desire to realize is out of proportion to the harm caused thereby to another person …"

These provisions can provide a separate ground for challenging one party's reliance on a time-bar clause, particularly where that party was already aware of the events giving rise to the claim and the loss which would be suffered by the other party by enforcing the time-bar would be substantial.

Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC

This recent decision of the courts of the Dubai International Financial Centre ("**DIFC**") provides an interesting counter-point to the position under the UAE Civil Code noted above. The DIFC is a "financial free zone" established in 2004 by federal decree in the UAE. Under this decree, a free zone is empowered to enact its own civil and commercial laws to the exclusion of UAE law, whilst still remaining subject to UAE criminal laws.

DIFC Contract Law No. 6 of 2004 (the "**DIFC Contract Law**") was loosely modelled on English common law, as well as the UNIDROIT Principles of International Commercial Contracts. One aspect which departs from English law is the inclusion of an implied duty of good faith and fair dealing in Article 57. The article states simply that "*Implied obligations arise from … (c) good faith and fair dealing*".

Another departure from English law is the power given in Article 122 of the Contract Law to reduce the amount of any liquidated damages specified by a contract to a reasonable amount in certain circumstances. Article 122 reads as follows:

"(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances."

There are evident similarities between the power in Article 122(2) and the principle of an abusive exercise of rights referred to above, particularly in the comparison which is made between the harm caused and the benefit specified by the contract. The doctrine of penalties covers similar ground under English law, but has a more onerous test and does not allow a court to substitute a reasonable amount.

Both of these provisions were raised in the *Panther Real Estate* case in an attempt to avoid the enforcement of a time-bar clause. As noted in the previous article, this case concerned claims for extension of time made under a 1st Edition FIDIC Red Book contract. The DIFIC court found that these claims were time-barred due to the contractor's, MESC's, failure to serve Notices of Claim under clause 20.1.

In relation to Article 57 and the implied obligation of good faith, the DIFC Court of Appeal considered that clause 20.1 was clear in word and effect and admitted "*no scope for the postulated implied term or obligation of good faith*". In the Court's view, the obligation of good faith:

"is concerned with the implication of terms into a contract and the mode of performance by the contracting parties. Nowhere does it suggest that the contracting parties should not be held to their bargain, as set out in the Contract, or that the courts should get involved in re-writing the Contract for the parties so as to achieve some balancing or re-balancing of equities between them or to redress what one party claims to be an unfair consequence of the terms which have been agreed. The provisions of Sub-Clause 20.1, making the 28-day notice requirement a condition precedent to the grant of an extension of time, are clear. If the Contractor fails to give the appropriate notice within the stipulated time, he cannot get an extension of time. The contractually agreed time for completion remains in place. Sub-clause 8.7 provides for (liquidated) delay damages to be paid by the Contractor in the event that he fails to complete by the (unrevised) time for completion. Those liquidated damages are payable in an agreed amount (AED 42,500) per day, up to a maximum of 10% of the contract price. To accede to the Contractor's argument that delay damages for such delay should not be payable if and to the extent that the delay or some of it is caused by the Employer's actions or inaction would mean reaching a decision in flat contradiction to what the parties have agreed. The obligation of good faith neither requires nor permits such a course."

Such an approach mirrors English law's approach to implied terms, which are not permitted to contradict the express terms of a contract. The approach is also consistent with English law's approach to express good faith obligations, which the English courts have consistently held are to be read subject to the other express terms of a contract.

MESC fared no better in relation to its claim for a reduction in the amount of the delay liquidated damages payable under Article 122. The DIFC Court of Appeal considered this article to be directed at complaints that the amount of a liquidated damages clause was excessive in comparison to the delay losses which would be suffered by the employer. MESC's attempt to use the article to relieve it from the consequences of the time-bar was therefore misdirected:

> *"The Contractor's argument appears to assume that the relevant "non-performance" is its own failure to give the required notices under Sub-Clause 21. If that were the case, there would be a respectable argument for saying that the obligation to pay up to 10% of the contract price as liquidated damages for that failure would be grossly excessive. But this would be to mischaracterise the position. The liquidated damages are payable not for the failure to serve the required notices within the required time but for failing to complete by the contractually agreed completion date. There has been no attack on the amount of liquidated damages payable for that failure …"*

This appears to be a strict interpretation of Article 122 which may reflect the English law bias of the DIFC judges. On one view, the reference in Article 122(1) to "*a party who does not perform*" could be interpreted in broader terms than merely whether the contractual date for completion is met and might be said to extend to circumstances where delay would, but for the time-bar provision, have been excused under the extension of time provision. The Court also appears not to have considered the references in Article 122(2) to "*other circumstances*" which, on one view, may have permitted consideration of a broader range of circumstances than merely the financial balance between the actual delay losses suffered by the employer and the level of liquidated delay damages specified by the contract.

Conclusion

The enforcement of time-bar provisions remains an area of law where common law and civil law jurisdictions diverge. The outcome of the *Panther Real Estate* case provides a unique illustration of this tension, with the English law bias of the DIFC judges ultimately prevailing over the civil law inspired provisions of the DIFC Contract Law relied on by the contractor.

Contractors and employers involved on international construction projects would be well advised to take time in advance of a project to ascertain the governing law's approach to time-bar provisions. Parties from civil law jurisdictions in particular can be surprised to learn how strict common law jurisdictions can be with regard to the enforcement of time-bars. Parties may also wish to make amendments to the time-bar provisions or the applicable law of any given contract to ensure the legal reality of their contract meets the expectations of the project team.

References:

JV of American and EU Dredging Companies v Red Sea Public Authority (RSPA), final award, CRCICA case No. 281/2002, 28 June 2004; Multiplex Constructions (UK) Limited v Honeywell Control Systems Ltd (No. 2) [2007] EWHC 447 (TCC); *Waterfront Shipping Company Ltd v Trafigura AG [2007] EWHC 2482 (Comm); Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC); *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC); *D Charrett, The International Application of FIDIC Contracts (1st Edition, Informa Law, 2019); ICC case 23229 (2020) reported in C.R. Seppälä, The FIDIC Red Book Contract: An International Clause-by-Clause Commentary (1st Edition, Wolters Kluwer, 2023); Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* [2022] DIFC CA 016.

Do generally worded exclusion and limitation clauses cover repudiatory breaches of contract?

There is a growing debate under English law as to whether generally worded exclusion or limitation clauses are capable of applying to deliberate repudiatory breaches of contract. A decision of the Technology and Construction Court last year has attempted to sift through the opposing authorities and has upheld a liberal view which gives full effect to such generally drafted clauses. This is an important issue for parties involved in the negotiation of exclusion and limitation clauses under English law.

Does an interpretive presumption apply to exclusion or limitation clauses?

The leading authorities on exclusion and limitation clauses are the *Suisse Atlantique* and *Photo Production* cases, in which the House of Lords rejected the so-called doctrine of fundamental breach which disabled a party from relying on an exclusion clause where a contract had been brought to an end as a result of a fundamental breach of contract, such as by repudiation. Instead it was held that whether an exclusion clause was to be applied to any given breach of contract was a matter purely of contractual interpretation.

In a well-known passage from *Suisse Atlantique*, Lord Wilberforce noted that the usual rules of contractual interpretation meant "*the more radical the breach the clearer must the language be if it is to be covered*". Lord Wilberforce also noted that very broad clauses would be read down if they would otherwise deprive one party's obligations of all contractual force, as "*to do so would be to reduce the contract to a mere declaration of intent*".

Whether the requirement for clear language in relation to radical breaches gives rise to an interpretative presumption has been considered in subsequent cases including in relation to deliberate and intentional breaches. In *Internet Broadcasting Corporation Ltd v MAR LLC ("**Marhedge**")*, a Deputy Judge held that there was a strong presumption that an exclusion clause would not be found to cover a deliberate repudiatory breach of contract and that the presumption could only be rebutted by strong and explicit language. This differs from the decision in *AstraZeneca UK Ltd v Albemarle International Corp* where the High Court held that the correct approach was "*simply one of construing the clause, albeit strictly, but without any presumption.*" Mr Justice Flaux went on to state in that case that he considered the decision in *Marhedge* to be wrong on the basis it sought to revive the doctrine of fundamental breach which the House of Lords had concluded was no longer good law in *Photo Production*.

Similar issues were subsequently considered by the Court of Appeal in *Kudos Catering (UK) v Manchester Central Convention Complex*. A five-year exclusive supply agreement for catering services at two large convention centres contained a broad exclusion of any liability for loss of business, revenue or profits in favour of the operator of the centres. The operator was alleged to have repudiated the agreement and at first instance the exclusion was held to defeat a claim for loss of profits for the remaining period of the agreement. The Court of Appeal overturned this finding, deciding that the exclusion should be read as applying only to claims arising in the performance of the agreement, not its repudiation. The exclusion was situated within a broader clause dealing with indemnities and insurance. If an exclusion of all liability for financial loss in the event of a repudiation by the owner had been intended, the Court "*would have expected them to spell that out clearly, probably in a free-standing clause*". The Court rejected the suggestion that its approach was a resort to the doctrine of fundamental breach overruled in *Photo Production*. Rather, it was "*a legitimate exercise in construing a contract consistently with business common sense and not in a manner which defeats its commercial object. It is an attempt to give effect to the presumption that parties do not lightly abandon a remedy for breach of contract afforded them by the general law.*"

A similar conclusion was reached by the Court of Appeal in *Transocean Drilling v Providence Resources* where a broad exclusion clause covering loss of revenue and loss of profit was said not to contemplate a deliberate repudiation of the contract. The Court in that case

approved an earlier first instance decision (*A Turtle Offshore SA v Superior Trading Inc*) where a broadly worded exclusion clause in a towage contract was held not to apply to deliberate abandonment of the contract but only to failings during the performance of the contract:

> *"Had it been intended that the tug owners were not responsible for loss, damage and liabilities … occurring after the tug owner had chosen not to perform the towage contract by, for example, releasing the towage connection in order to perform a more profitable contract, then very clear words would be required because that would be a very radical breach indeed. Whilst the wide words of clause 18 are literally capable of applying to such a radical breach I do not consider that clause 18, if it is to be construed in the context of the [contract] as a whole and to give effect to the main purpose of the [contract], is fairly susceptible of only one meaning, namely, that it applies however radical the breach. The words, when read in the context of the [contract] as a whole, are also susceptible of applying so long as the tug owners are actually performing their obligations under the [contract], albeit not to the required standard."*

The *Marhedge* position was raised more recently in *Mott Macdonald Ltd v Trant Engineering Ltd*, where the Technology and Construction Court ("**TCC**") adopted the *AstraZeneca* critique of *Marhedge* and upheld a generally worded clause limiting liability to £500,000 against allegations of deliberate repudiatory breaches of contract.

Neither *Kudos* nor *Transocean* were considered in the Mott Macdonald case, but a further TCC decision decided last year covers similar ground and considers both of these Court of Appeal decisions.

Pinewood Technologies Asia Pacific Limited v Pinewood Technologies Plc

Two reseller agreements dated 28 July 2017 and 8 January 2019 respectively (the "**Reseller Agreements**"), were entered into between Pinewood and Pinewood Technologies Asia Pacific Limited ("**PTAP**"). Under the Reseller Agreements, PTAP was appointed exclusive reseller of Pinewood's automotive dealer management software (the "**Pinewood DMS**") in several countries across the APAC region.

A dispute arose whereby PTAP alleged that Pinewood was in breach of its general obligations under the Reseller Agreements to develop the Pinewood DMS and sought damages in the total sum of approximately USD 312.7 million (the "**PTAP Claims**").

Pinewood rejected PTAP's Claims in their entirety and counterclaimed for approximately £425,000. In defence to PTAP's Claims, Pinewood relied on, amongst other things, an exclusion clause contained at Clause 16.2 of the Reseller Agreements. This read in relevant part:

> *"[…] Pinewood excludes, in relation to any liability it may have for breach of this Agreement, negligence under, in the course of or in connection with this Agreement, misrepresentation in connection with this Agreement, or otherwise howsoever arising in connection with this Agreement, and such liability for (1) special, indirect or consequential loss; (2) loss of profit, bargain, use, expectation, anticipated savings, data, production, business, revenue, contract or goodwill; (3) any costs or expenses, liability, commitment, contract or expenditure incurred in reliance on this Agreement or representations made in connection with this Agreement […]".*

In reliance on clause 16.2, Pinewood applied for reverse summary judgment of PTAP's Claims. PTAP resisted Pinewood's application, relying on *Kudos* and claiming that Clause 16.2 was not sufficiently explicit to exclude liability for deliberate repudiatory breaches.

The TCC found that clause 16.2, on its proper construction, did apply to exclude PTAP's Claims. The Court adopted the *AstraZeneca* critique of *Marhedge* and rejected the existence of any general rule from *Kudos* or *Transocean* that required explicit language for the exclusion of repudiatory breaches. Clause 16.2 was therefore to be given its clear and natural interpretation which applied to all breaches of the Agreement, including repudiatory breaches.

In the Court's judgement:

> *"the propositions identified in Marhedge are unsafe and I decline to apply them in circumstances where they were plainly premised upon the existence of a strong presumption against exclusion clauses being construed so as to cover deliberate repudiatory breach – a presumption which is inappropriate."*

Although the Court did give detailed consideration to *Kudos* in reaching this conclusion, its consideration of *Transocean* was limited to statements of general principle and did not extend to the specific finding that the generally worded clause in that case did not extend to repudiatory breaches, nor to the Court of Appeal's approval of the *A Turtle* case where a similar finding was made.

Conclusions and implications

Whilst this case adds further weight to the *Astrazeneca* critique of *Marhedge* and the more liberal approach to the interpretation of exclusion and limitation clauses,

this area of law continues to be in a state of uncertainty. Given the Court of Appeal's comments in *Transocean* and its approval of the *A Turtle* case, the position is likely to remain unsettled until the Court of Appeal has a further chance to revisit the matter.

The use of generally worded limitation and exclusion clauses is commonplace in international construction contracts. The issue debated in these cases is, therefore, of considerable importance to parties involved in the negotiation and drafting of such contracts. Clauses which seek to specifically exclude liability for deliberate repudiatory breaches of contract are unlikely to be acceptable to most counter-parties. Yet without knowledge of the above case law, many parties will assume that generally worded clauses will not be capable of extending to such breaches. Unless such a broad exclusion is positively intended, parties would be well advised to include carves-outs for "wilful default" or "intentional breach" in any generally worded exclusion or limitation clauses included within their contracts.

References:

Suisse Atlantique Societe d'Armement Maritime SA v N V Rotterdamsche Kolen Centrale [1967] 1 AC 63 ; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034; *Internet Broadcasting Corporation Ltd v MAR LLC* [2009] EWHC 844 (Ch); *AstraZeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm); *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38; *Transocean Drilling U.K. Ltd v Providence Resources Plc* [2016] EWCA Civ 372; *Mott Macdonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC); *Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc* [2023] EWHC 2506 (TCC).

Do termination for convenience clauses cap loss of profit claims?

A Scottish court decision last year has considered whether a loss of profit claim for repudiatory conduct was capped by the notice period specified by a termination for convenience clause, which could have been operated by the defaulting party. The limiting effect of such clauses has been upheld previously, but this appears to be the first case in which the question has been considered in circumstances where the contract was affirmed by the innocent party, rather than terminated. The innocent party's affirmation of the contract resulted in its loss of profit claim being preserved for the remaining life of the contract and is an approach worthy of consideration by other parties in similar circumstances.

Termination clauses as limiters of liability

A party terminating a contract for repudiation or for another default by the other party will usually be entitled to compensation for loss of the contractual bargain. This will often take the form of a loss of profits claim for the remaining term of the contract. However, complications can arise where the defaulting party had a contractual right to terminate for convenience. Is the innocent party still able to claim for loss of profits for the remaining duration of the contract on the assumption that the right to terminate for convenience would not have been exercised? Similar issues arise where one party is given a discretion to approve the continuation of work or certain parts of it.

The case law on this issue is not entirely consistent. In a previous edition of this publication, we reported on an English Commercial Court decision in 2014 (*Comau v Lotus Lightweight*) which had taken a strict approach, finding that a termination for convenience clause eliminated a right to claim for loss of profit. The Court there noted that to find otherwise would ignore the limited nature of the innocent party's "expectation interest" in the contract: "*[it] was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any 'termination for convenience'*."

A somewhat different line was taken by the English Technology and Construction Court in *Willmott Dixon v London Borough of Hammersmith and Fulham* also decided in 2014. There a factual enquiry was deemed necessary to determine, in all of the circumstances, if and when the defaulting party would have exercised its right to terminate for convenience.

The different outcomes reached in these two decisions reflect an underlying difference in approach to the assessment of damages. In one instance, the court permitted the contract breaker to rely on the *theoretical minimum* level of performance the contract allowed for and in the other the court required a factual investigation into the *likely* level of performance which would have been achieved.

The correct approach in these circumstances is usually governed by the characterisation of the obligations which were to be performed by the contract breaker. The leading case in this respect is the English Court of Appeal's decision in *Abrahams v Herbert Reiach Ltd* where the contract was one to publish a book and pay royalties to the author on the number of books published. The contract did not specify the number of copies that were to be published or the price of the book. The publisher repudiated the contract and the author sued for loss of royalties. The court found that the agreement was an enforceable contract which required the publication of at least one book. That left a question as to whether the author was entitled to royalties only on one book or something greater. Lord Justice Atkin held as follows:

> *"If a merchant makes a contract to deliver goods to a shipowner to be carried by him for reward, and the merchant fails to provide the goods, the Court must first find what is the contract which has been broken; and if it was to carry the goods to one of two alternative ports at different distances from the port of loading at rates of freight differing according to the distance, the only contract on which the shipowner can sue is a contract for carriage to the nearer port. The plaintiff cannot prove a contract for performance of the more onerous obligation. This explains why in cases of this kind the Court regards only the lesser of two alternative obligations. But in the present case*

there are no alternatives, and to adjust the rights of the parties the only method is to form a reasonable estimate of the amount the respondents would be in pocket if the appellant had kept his promise. Everything likely to affect the amount of the profit must be considered; the nature and popularity of the subject matter, the reputation of the authors, the cost of producing a book on that subject, the price at which it would command a sale, the business capacity of the publishers and the chances of earning a profit by the sale of the book. On the other hand the publishers are not bound to run risks contrary to their judgment; they would naturally and properly allow for fluctuation in the public taste for literature of this kind. An analogous calculation has to be made when a man having engaged to take another into his service for a time and to pay him a share in the profit of his business, refuses to employ him at all. In assessing the damages for the breach of this contract the question is not how the employer could carry on his business so as to make the least possible profit and so involve himself in the least possible obligation towards the plaintiff. Apart from his contract, he need not carry on business at all. The proper method of assessment is quite different; it is to make a reasonable computation of the amount the respondents would have received had the contract been fulfilled."

This passage has been applied in subsequent cases and is said to require the court to first ascertain whether the repudiated obligations are ones which allow for true alternatives in performance or whether they are a single obligation with a discretion as to the level of performance. For example, in *Durham Tees Valley Airport Ltd v BMIBABY Ltd*, an agreement between an airport and an airline gave the airline a discretion as to how many flights, and to where, it would operate. The airline was found to have repudiated the contract and a question arose as to whether damages should be calculated on the basis of the minimum performance possible under the contract. As the contract did not provide for alternative methods of performance, but rather a discretion:

"The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind."

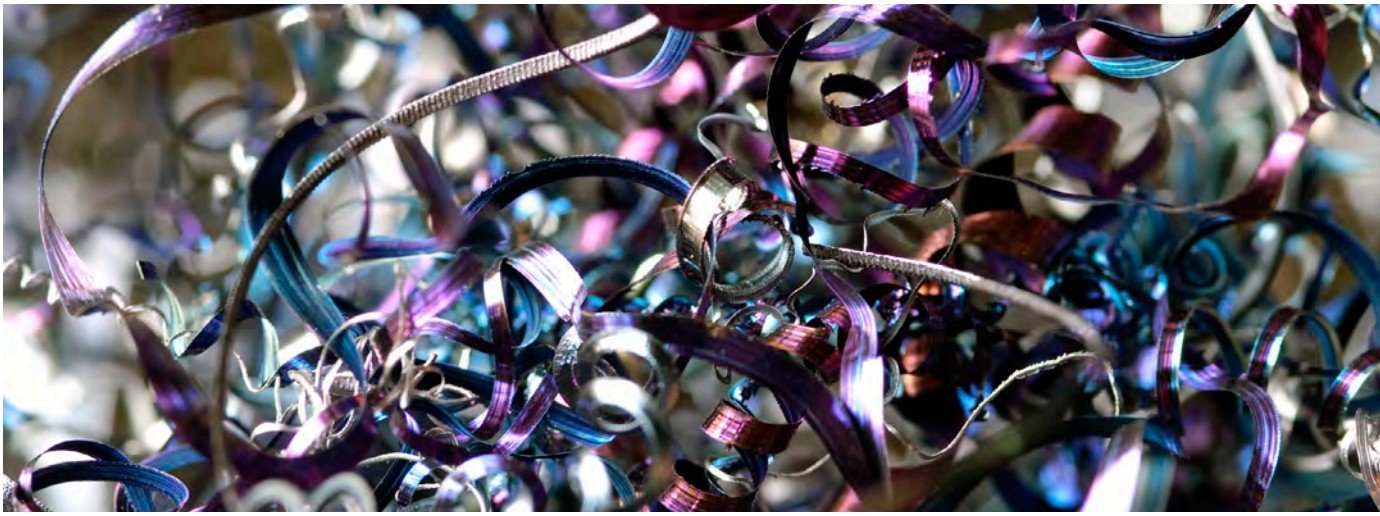
In this context, a termination for convenience clause in a construction contract poses some difficulties of categorisation. It is difficult to say that the clause gives rise to a real alternative mode of performance and nor does it turn the performance required of the employer into one with a discretion as to the level of performance. A termination for convenience clause simply provides a means by which the employer may be relieved of performance altogether. This difficulty of categorisation would appear to account for the different conclusions reached in the *Comau* and *Wilmott Dixon* decisions.

Dalton Group Limited v City of Edinburgh Council

This most recent case concerned a contract entered into by Edinburgh City Council (the "**Council**") to appoint Dalton Group Limited ("**Dalton**") as its exclusive purchaser of scrap metal. A dispute arose regarding the degree of contamination of the scrap being purchased – with Dalton alleging numerous incidents of hazardous gas pressurised cannisters being present in the scrap. There was an email exchange between the parties, following which Dalton claimed deliveries of scrap stopped, whereas the Council claimed Dalton had repudiated the contract by wrongly refusing to accept deliveries of scrap metal from the Council.

Dalton claimed that the Council had wrongfully repudiated the contract and brought proceedings to recover its lost profits over the remainder of the contract term. The Council raised a preliminary issue concerning the effect of a termination for convenience clause in the contract allowing the Council to terminate at any time by giving 3 months' notice. Given the Council had this right to terminate, it argued that damages should be assessed by the least burdensome method of lawful termination and therefore limited to 3 months' worth of loss of profit, rather than loss of profit for the time left to run under the contract.

In response, Dalton relied on the doctrine of election which gives a party faced with repudiatory conduct a choice to either (1) accept the repudiation and therefore treat the contract as terminated; or (2) affirm the contract and insist upon performance. Dalton claimed that it had affirmed the contract and had remained ready to accept scrap metal from the Council. Accordingly, Dalton argued that the contract had not been terminated and so the termination for convenience clause was irrelevant.



The Scottish Court of Session noted the well-established position that in an action for damages for breach of contract, the claiming party is entitled to recover damages which would put it in the position that it would have been in had the defending party fulfilled its contractual obligations. This principle meant, in the Court's view, that:

> *"Where, therefore, the breach of contract consists in a wrongful termination, the … damages will be assessed on the basis that the defending party would have lawfully terminated the contract. It is in these circumstances that the court asks itself, 'What was the least burdensome method by which the defender could have terminated the contract?'"*

The Court appears to have accepted, therefore, that the termination for convenience case could amount to a complete defence had the contract been wrongfully terminated.

However, Dalton's position was that the contract had never been terminated (whether lawfully or unlawfully), because it had not accepted the Council's wrongful repudiation (in line with a party's choice to affirm the contract when faced with a repudiatory breach). The Court noted that the Council *could* have exercised the termination provisions of the contract, but chose not to. The Court therefore concluded that "*in a case where the contract has not been terminated, damages do not fall to be assessed by reference to the least burdensome method of terminating the contract.*"

As a result, the Council faced a full claim for loss of profit, not limited to the notice period of 3 months specified by the termination for convenience clause.

Conclusions and implications

Whilst the Court's decision in this case does not directly address the tension between the *Comau* and *Willmott Dixon* cases, it appears to provide support for the approach in *Comau* by noting that, in a wrongful termination scenario, the question would be whether the defender could have terminated for convenience, not whether it would have done so.

The decision also provides a potential strategy for parties on the receiving end of repudiatory conduct where the defaulting party has the benefit of a termination for convenience clause. Accepting the repudiation and bringing the contract to an end will allow the defaulting party to argue that its liability is limited by reference to the termination for convenience clause. Affirming the contract, however, will avoid this result and, depending on the circumstances, may allow the innocent party to preserve a full loss of profit claim as illustrated in the present case.

This case also provides a good example of the importance of carefully considering contractual options whenever considering the termination of a construction contract. The Council could have easily protected its position in this case by seeking to terminate for convenience in the alternative to its primary position that the contract had come to an end due to Dalton's repudiation. It is good practice under English law, for this reason, to always include any alternative grounds of termination within a single notice of termination.

References:

Abrahams v Herbert Reiach Ltd [1922] 1 KB 477; *Durham Tees Valley Airport Ltd v BMIBABY Ltd* [2010] EWCA Civ 485; *Comau UK Limited v Lotus Lightweight Structures Limited* [2014] EWHC 2122 (Comm); *Willmott Dixon Partnership Ltd v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC); *Dalton Group Limited v City of Edinburgh Council* [2023] CSOH 4.

Choice of law for non-contractual obligations: risks and opportunities

A growing number of countries now permit parties to choose which law is to govern their non-contractual obligations. Non-contractual claims can in certain circumstances provide additional rights of action which are not otherwise available under a construction contract. The ability to choose the law governing such rights therefore provides an opportunity to employers and contractors to influence the extent to which such claims can be brought. In this article, prompted by an English court decision on the subject last year, we provide a summary of the relevance of non-contractual claims in English law construction disputes and some recommendations for how best to negotiate a choice of law clause in relation to non-contractual obligations.

Non-contractual obligations: what are they and how are they relevant to construction contracts?

Aside from specific statutory duties, certain non-contractual obligations apply under English law to regulate the legal relationship between private entities in addition to contractual obligations. These non-contractual obligations are referred to as "torts" in English law. They concern such matters as trespass, assault, fraud, and confidentiality, as well as a general right of action for "negligence" in respect of certain types of damage. Other jurisdictions refer to these obligations as "delict" or "civil wrongs".

Actions for the tort of negligence frequently appear in claims for defective work in England. These claims are often brought alongside claims that the work fails to comply with a contractual standard. In such cases, a claimant may allege that the works fail to achieve a certain contractual specification and/or that the work has been performed negligently.

There are a number of reasons why tort claims are made alongside contractual claims under English law. Claims in tort may allow the employer to take advantage of a longer limitation period (sometimes referred to as "prescription" in other jurisdictions) than is applicable to claims under a contract. Claims in tort may also permit the employer to recover a greater amount of damages depending on the circumstances. Tort claims therefore remain an important part of the law applicable to construction contracts in England.

The same is also true in other jurisdictions. For example, many civil law countries impose decennial liability on builders and/or consultants in relation to structural or safety related defects which emerge within 10 years from completion and which applies irrespective of the contractual arrangements agreed between the parties.

Choice of law for non-contractual obligations

In most jurisdictions there has traditionally been no ability for the parties to choose the system of law which will govern their non-contractual obligations in the same way as the law governing their contract is specified. Under English law, it was not thought possible for parties to nominate the applicability of English tort law regardless of the nature and location of the contract to which they had agreed (see *Morin v Bonhams & Brooks*). Applicability would depend instead on a comparison of the place in which the tort was committed with any other factors connecting the tort to England. An express choice of English tort law would only be one factor connecting the tort to England and could be outweighed by others.

This position was changed for EU countries by the Rome II Regulation, which took effect in 2009. The Regulation permits parties to expressly nominate the legal system which is to govern their non-contractual obligations. Such a nomination is permitted if the parties are pursuing a commercial objective and the nomination is expressed or demonstrated with "*reasonable certainty*". The Rome II position has been retained by the UK after its departure from the EU and is sometimes referred to as "Rome II UK".

Outside Europe, the position is much less uniform but a number of major jurisdictions have already adopted something close to the Rome II position or appear likely to do so in the future. For example, section 5-1401(1) of the New York General Obligations Law allows the parties to commercial contracts involving a value of US$250,000 or more to choose New York law as the

governing law of both the contract and their non-contractual obligations, regardless of where the parties or the subject matter of the contract is located. The position in Singapore is "*still an open one*" but academic opinion appears to favour the Rome II approach given Singapore's aim to establish itself as a centre for cross-border litigation (see *Ong Ghee Soon Kevin v Ho Yong Chong* and Professor Yeo Tiong Min, *The Effective Reach of Choice of Law Agreements*). By contrast, some countries, such as China, only permit a choice of law for non-contractual obligations *ex post facto* after a tort has been committed.

One question which is yet to be fully explored under Rome II UK is the extent to which existing contractual choice of law clauses will lead to the applicability of English tort law. For example, the clause in *Morin v Bonhams & Brooks* was thought to be sufficiently broad to express a contractual choice for – in that case – Monegasque tort law. It stated that "*all transactions to which these Conditions apply and all matters connected therewith shall be governed by Monegasque law*". One might however contrast the standard FIDIC choice of law clauses which state simply that "*the Contract shall be governed by the law of [relevant country]*" (1st Edition) and "*the Contract shall be governed by the law of the country (or other jurisdiction) stated in the Contract Data*" (2nd Edition). It may be open to question whether such a narrowly drafted provision would be capable of demonstrating with "*reasonable certainty*" that the parties intended to apply English tort law. Under New York law it is clear that such narrowly drafted clauses which refer only to the law governing the contract will not be sufficient to include non-contractual obligations: *Krock v. Lipsay*.

Why choose English tort law?

There are both procedural and substantive risk-based reasons why parties may wish to choose English tort law. Procedurally, if the contract is to be governed by English law, it is simpler if English tort law is to apply as well. Any arbitral tribunal will then only be required to apply a single system of law, rather than applying a mixture of English contract law and local tort laws.

Substantively, the primary relevance of English tort law to a construction project arises through the tort of negligence when considering liability for defective works.

Tortious liability can sometimes provide an advantage over contractual liability in the following ways:

— Under English law, the limitation period for contractual claims varies depending on whether the contract is executed as a deed (where the applicable period is 12 years) or under hand (where the period is 6 years). Whilst the basic limitation period for claims in tort is 6 years, this is able to be extended in latent damage cases to 3 years from the date on which claimant knew or ought to have known the facts necessary to bring a claim (up to a maximum of 15 years).

— The commencement of the limitation period for tortious claims may be later than for contractual claims, due to the rule that contractual claims accrue on breach whereas tortious claims accrue when damage occurs. For example, tortious claims for defects against subcontractors will accrue on practical completion of the main contract works (or possibly when a claim is made by the employer), whereas contractual claims will ordinarily accrue on the (usually earlier) completion of the subcontract works.

— Tortious claims may not be caught by contractual prohibitions against assignment.

— The rules on remoteness of damage are more generous in tort than in contract, however recent caselaw has held that these more generous tortious rules do not apply where tortious liability is concurrent with liability in contract, which is usually the case for claims in the tort of negligence (*Wellesley Partners Ltd v Withers LLP*).

These attributes of English tort law may provide advantages for employers in particular. However, opportunities also exist for contractors. In particular, a Court of Appeal decision in 2011 (*Robinson v PE Jones*) concluded that concurrent duties in tort in relation to pure economic loss arising from defective work or materials would not ordinarily arise in a construction contract.

Robinson v Jones

Under English law, a tort claim for defective work will usually be characterised as a claim for "pure economic loss" if it cannot be shown to be a claim for property damage (or personal injury). In such circumstances, it is not sufficient merely to show negligence on the part of the contractor; the claimant must also prove a relationship of sufficient "proximity", typically by showing an "assumption of responsibility" by the contractor for damage caused by defective works. Previously, claimants had sought to rely on their construction contract to demonstrate a sufficient assumption of responsibility by the contractor. If the contractor had agreed to be liable for defective work, then he must also have sufficiently assumed responsibility for the purposes of the law of tort. This was the argument made by Mr Robinson in *Robinson v PE Jones*.

Mr Robinson contracted with P.E. Jones, a firm of builders, to buy a property which was at that time under construction. Having gone undetected for more than 12 years, in 2004 testing by British Gas revealed that the

chimney flues and gas fires were defective. There was no damage to the property itself, but the works needed to be replaced. The loss was therefore pure economic loss. Seeking to gain the benefit of a longer limitation period, Mr Robinson argued that the builder owed him a duty of care in the tort of negligence as well as in contract.

Although the court recognised that a concurrent duty of care can arise in both contract and the tort of negligence, it held that a builder does not, by reason of the building contract, owe a tortious duty of care not to cause pure economic loss. The court drew a distinction between agreements with professional persons, such as architects or engineers, and building contracts, stating that there is likely to be an assumption of responsibility, and therefore a duty of care, in the case of the former but that the same cannot be said of building contracts generally. In a particularly strong passage of the judgment, Stanley Burnton LJ put the position as follows:

> *"… it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss. The same applies to a builder who is not the vendor, and to the seller or manufacturer of a chattel."*

This reasoning has been criticised on the basis that a building contract does involve a considerable assumption of responsibility by the builder, however, the Court of Appeal's decision will remain law in England until the matter arises for consideration by the Supreme Court.

This conclusion would not, however, appear to close the door on tort claims for defects. The distinction drawn by the court between professional or design contracts and pure construction contracts raises difficult questions where the two become merged, such as in Design and Build, EPC or Turnkey contracts. There may also be discrete aspects of a traditional construction contract where, on complex projects, the contractor can be said to be acting in a professional capacity. A decision of the Technology and Construction Court (the "**TCC**") last year has shed some further light on these borderline scenarios.

Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Limited

The Sheffield Teaching Hospital Foundation Trust (the "**Trust**") entered into a PFI Project Agreement with Hadfield Healthcare Partnerships Limited ("**Hadfield**") for the design and construction of a new ward block at the Northern General Hospital in Sheffield ("**the Hadfield Wing**"). Hadfield entered into a construction subcontract with Kajima Construction Europe (UK) Limited ("**Kajima**"). The Hadfield Wing achieved practical completion on 26 March 2007.

In 2017, the Trust identified potential defects in the fire compartmentation and other fire protection works of the Hadfield Wing. The Fire & Rescue Service determined that the Hadfield Wing was an excessive risk to persons in case of fire and as a result it was vacated for medical use. The Trust commenced TCC proceedings against Hadfield in 2020 seeking damages in the region of £13 million. Hadfield subsequently made its own claim against Kajima which relied on concurrent duties in tort as well as contractual rights. Kajima objected to Hadfield's tort claim in light of the Court of Appeal's decision in *Robinson v PE Jones*.

The TCC agreed with Hadfield that, despite the Court of Appeal's decision, this area of law "*remains unsettled and is controversial*". In the Court's opinion, Hadfield's claim was not precluded by *Robinson v PE Jones* for the following reasons (among others):

- There was a reasonable argument that *Robinson v PE Jones* could be distinguished because the contract in this case contained both design and workmanship obligations, did not contain any exclusion of Kajima's liability in tort to Hadfield (as was the case in *Robinson*) and must be construed in the context of complex PFI contractual arrangements.
- *Robinson v PE Jones* does not preclude the existence of a concurrent duty of care in tort where the factual circumstances give rise to an assumption of responsibility. That assumption of responsibility was found to arise in previous cases through the exercise of a "*special skill*", undertaken for the assistance of another.
- Mrs Justice O'Farrell considered that Hadfield were "*right to question, as a matter of law, whether there is any basis on which building contractors should be distinguished from other professionals when ascertaining whether there has been [a sufficient] assumption of responsibility.*" The Judge noted that the range of recognisable professions has considerably expanded and within the construction industry today there are many disciplines of special skill and expertise which could be described as professional.

This is the first TCC judgment to directly consider the extent to which the Court of Appeal's decision in *Robinson v PE Jones* prevents claimants from relying on concurrent duties in tort when pursuing workmanship or materials claims for pure economic loss. The TCC's decision emphasises that each claim will depend on its

facts and to be successful the claimant will need to show an assumption of responsibility which will often involve the identification of a "*special skill*". The door has, therefore, been opened to arguments which seek to meet this test by reference to the many and varied skillsets utilised in the modern day construction industry.

How to make an effective choice of law for non-contractual obligations

The growing willingness of a number of jurisdictions to allow parties to make a binding choice of law in relation to non-contractual obligations represents an opportunity for both employers and contractors to negotiate choice of law provisions which will best suit their own interests. As the above English law position shows, such a choice throws up a number of complex questions, both in accurately understanding the law in any given jurisdiction and comparing it to other jurisdictions to enable an informed choice to be made. We set out below something of a roadmap to allow parties to make the best choice for any given project:

— The starting point for consideration should be the proposed *lex fori* which is usually determined by the seat of arbitration. This is the legal system which will govern conflict of laws debates and, therefore, the extent to which a choice of law as to non-contractual obligations will be upheld. If an arbitration is seated in London, for example, Rome II UK will apply and the parties will have a free hand in deciding on the applicable law for non-contractual obligations. If the *lex fori* is more restrictive, this may be a reason to consider specifying a different seat.

— Once the ability to choose has been confirmed, an analysis should be undertaken as to those legal systems whose law of non-contractual obligations is likely to be most favourable to a party's interests. This is likely to require collaborative advice from an international law firm, such as CMS, who can readily identify the likely issues which will arise on a given project and identify the varying approaches taken to those issues in different jurisdictions across the globe.

— The approach of the *lex fori* to limitation issues should be considered as part of this analysis. As noted above, one reason for including tortious claims in construction disputes is to take advantage of the extended limitation periods which can sometimes apply. However, the conflict of laws rules of the *lex fori* may mean that the limitation rules of the jurisdiction chosen by the parties to govern their agreement or non-contractual obligations do not apply and the limitation rules of the *lex fori* apply instead. Arguments often arise in this context as to whether the limitation rules of the chosen jurisdiction are part of the "substantive" law of the jurisdiction (in which case they will apply) or are merely "procedural" (in which case the limitation rules of the *lex fori* are said to apply). An analysis of the approach taken to this issue by the *lex fori* may, therefore, impact an assessment of what might otherwise have been thought to be a favourable jurisdiction for non-contractual obligations.

— Local tort law should also be considered to identify any local requirements which cannot be contracted out of. Any choice of law for non-contractual obligations will be subject to these mandatory local law requirements and this may, therefore, affect the analysis as to which jurisdictions present the most favourable position for non-contractual obligations.

— Once a short-list of favoured jurisdictions has been arrived at, consideration should be given to the proposed law governing the contract. A choice of law clause which specifies one system of law to apply to the contract and another to apply to non-contractual obligations is rare and is likely to make for a more difficult negotiation. Employers in particular may already have fixed positions on the law that is to apply to the contract and a view should therefore be taken as to how that jurisdiction compares against a party's favoured list of jurisdictions for non-contractual obligations. A decision can then be made as to whether to accept the proposed law of the contract as governing non-contractual obligations also, to negotiate separate systems of law for each, or to press for a change to the proposed law of the contract to align it with a party's favoured jurisdiction for non-contractual obligations.

— Finally, care is needed to make sure that any choice of law for non-contractual obligations is expressed in sufficiently clear language. As noted above, Rome II countries (including the UK) require such a choice to be expressed with "*reasonable certainty*" and clauses which merely refer to the law governing the contract may not be sufficient for this purpose.

References:

Krock v. Lipsay, 97 F.3d 640; *Morin v Bonhams & Brooks* [2003] EWHC 467 (Comm); *Professor Yeo Tiong Min, "The Effective Reach of Choice of Law Agreements"* (2008) 20 SAcLJ 723; *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; *Wellesley Partners Ltd v Withers LLP* [2015] EWCA Civ 1146; *Ong Ghee Soon Kevin v Ho Yong Chong* [2016] SGHC 277; *Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Limited* [2023] EWHC 644.

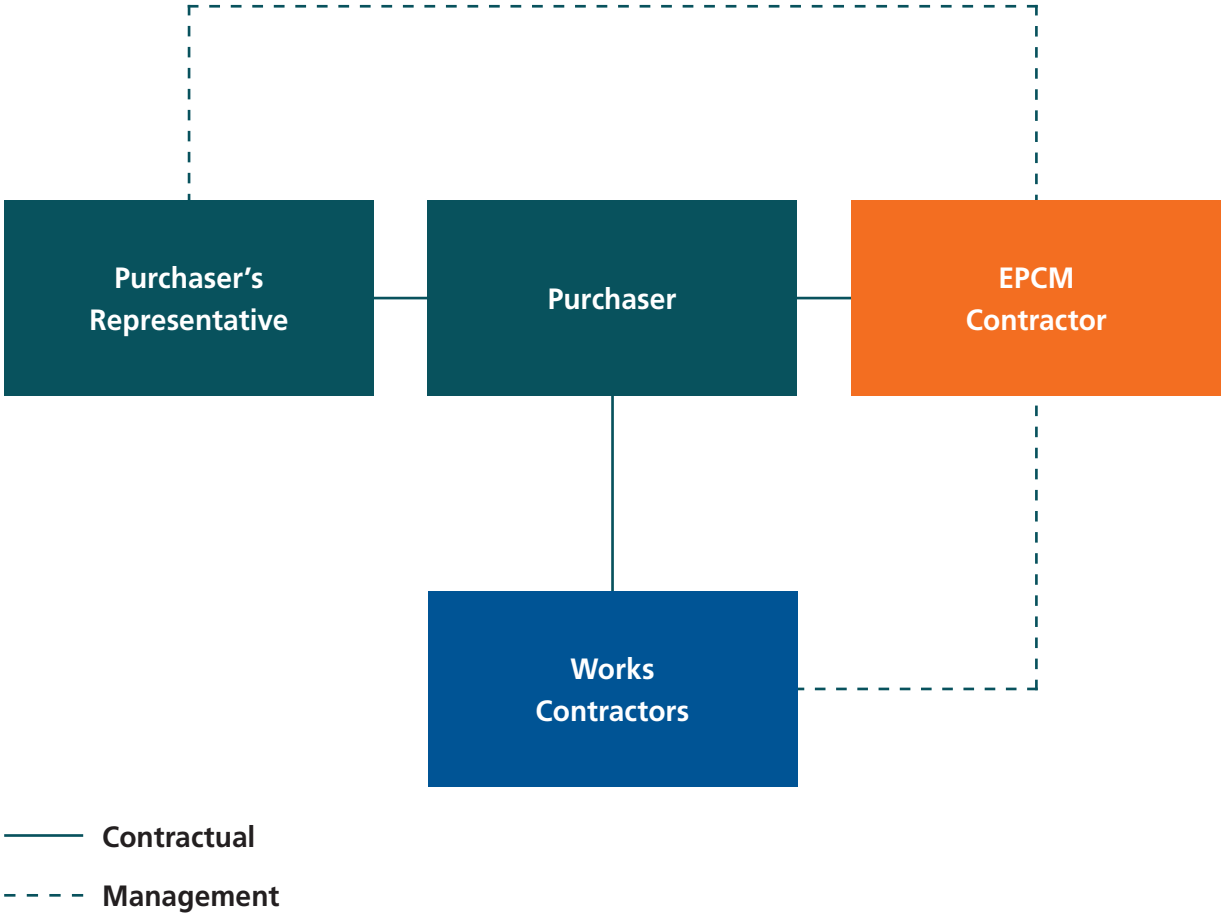
The rise of EPCM contracting

In May last year, the Institution of Chemical Engineers ("**IChemE**") added a standard form Engineering, Procurement and Construction Management ("**EPCM**") Contract, known as the Blue Book, to their suite of contracts. This is the first standard form EPCM contract to be published and FIDIC is expected to introduce its own EPCM contract later this year. This article explains the nature of an EPCM contract, its advantages and disadvantages, as well as some of the main features of the new Blue Book.

What is an EPCM contract?

EPCM is a form of construction management and, perhaps confusingly, is very different to EPC (engineering procurement and construction) which is based on a full turnkey project delivery. Under an EPCM model, a purchaser appoints an EPCM contractor to engineer and design the works, and to manage their delivery under a contract form that is more akin to a professional services contract than a works contract – but the EPCM contractor does not carry out the works itself and has no liability for any failures in the delivery of the works by the works contractors (save to the extent caused by the EPCM contractor's negligence in their management). Instead, whilst the EPCM contractor may assist with the tender process as part of its services, it is the purchaser that appoints each trade contractor directly under separate contracts. The purchaser also appoints a representative to act as its agent and interface with the EPCM contractor.

Below is a simplified representation of the main contractual and management relationships in an EPCM model:



Under EPC / turnkey procurements, the EPC contractor has full, single point responsibility for designing and delivering the works on time and typically for a lump sum. Under the EPCM model, the EPCM contractor performs professional services for designing, engineering and managing the works, but has very limited responsibility for the quality of the works beyond the scope of its design obligations, or the timing of their delivery (save to the extent due to its mismanagement, as mentioned above). In other words, a purchaser must look directly to its individual trade contractors for their respective failures.

As such, whilst there may be cost and time savings to be found in an EPCM model, the purchaser's risk allocation is disparate across a number of contractors, potentially making delay or defects arguments harder to establish against any one party.

The Blue Book

The IChemE has recognised that there are no off-the-shelf forms on the market for EPCM contracting, with parties tending to amend professional services forms (such as the IChemE Silver Book), or use a bespoke form, so has developed the Blue Book to fill this gap. It is similar in form to other IChemE books and it is intended for use alongside them (for example, for the works contracts, or where the EPCM contractor or the purchaser needs to procure other services). It is – as with the other IChemE forms – primarily aimed at process plant projects, but can be used more widely.

The new contract attempts to create a balanced approach between the parties, with a focus on collaboration and the use of ADR. It is jurisdictionally impartial to encourage international deployment, with a separate schedule for use in UK projects to enable compliance with local legislation. There are two other "option" schedules on offer as well. Option B turns payment from what would typically be a reimbursable basis, into a target cost mechanic, and Option C contains "*project specific options*", for example allowing for the use of a disputes resolution board, or expert determination. The Blue Book is heavily reliant on its schedules, of which there are 22 covering things such as scope, payment, testing regimes, performance guarantees, time for completion, liquidated damages and many more.

In addition to the design and engineering, the EPCM contractor is responsible for managing works, controlling the site and health and safety, programme development and contract, budget monitoring and forecasting, tendering works packages, overseeing testing and inspections, certification, and managing defects. The boundaries of the EPCM contractor's liabilities are however clearly drawn and, save in circumstances caused by its negligence, it is not responsible for defects in, loss/damage or delay, to the works, and is entitled to additions to the contract price for these types of events. Whilst liquidated damages may be levied if the EPCM contractor fails to meet times for completion of its services, the contract allows for a cap, and the extension of time entitlement is broad and includes any matter which entitles any works contractor to an extension of time, or a failure of a works contractor to perform. The purchaser's right to liquidated damages is lost if the EPCM contractor serves a notice to terminate for the purchaser's breach of contract.

Neither party to the contract has any liability for any wastage of process consumables, and importantly, liability for "*loss of profit / revenue / use / production, business interruption or similar damage, or for consequential or indirect loss*" is excluded. That exclusion is subject to certain carve-outs, but it should be noted that the EPCM contractor also benefits from an overall aggregate liability (which includes its liability for any liquidated damages) as well as a net contribution clause, potentially further limiting recovery.

In summary, the IChemE has successfully filled a gap by bringing to market an off-the-shelf form for EPCM procurement, but like all standard form contracts, one size may not fit all. Users should consider the form in detail against their own project needs and risk profiles, and consider whether any amendments are appropriate.

Pre-conditions to arbitration and the FIDIC 2nd Edition

Amendments to the FIDIC 2nd Edition contracts published in November 2022 have narrowed the definition of "Dispute" to more closely align it with the pre-conditions to DAAB and arbitration proceedings specified in clause 21 of the form. The narrower definition raises the potential for new jurisdictional objections to be made in DAAB or arbitration proceedings commenced without compliance with those pre-conditions. In this article we consider recent developments in the approach taken to arbitral pre-conditions in a number of international jurisdictions, before considering the specific issues raised by the amended definitions published by FIDIC.

Introduction

Multi-tiered dispute resolution clauses are a common feature of international construction contracts. At a very basic level, clauses may require parties to notify the existence of a dispute and to engage in good faith negotiations over it for a specified period prior to commencing a formal dispute resolution process such as adjudication or arbitration. More complex provisions can be observed in the FIDIC 2nd Edition dispute resolution procedure which requires:

- An initial Notice of Claim followed by a fully detailed Claim.
- A period of consultation and negotiation mediated by the Engineer under clause 3.7.1.
- Failing agreement, a determination by the Engineer under clause 3.7.2.
- If the Engineer's determination is disputed, a reference to the Dispute Avoidance and Adjudication Board (the "**DAAB**") under clause 21.4.
- If the DAAB's decision is disputed, a further period of negotiation under clause 21.5.
- If a negotiated settlement is not achieved, arbitration under clause 21.6.

Structured dispute resolution procedures like this serve an important purpose in providing a framework for the early resolution of disputes prior to full-blown arbitration proceedings, which are both expensive and time-consuming, and generally considered a last resort for the resolution of disputes. One disadvantage of such procedures is that the more detailed and complex they are, the more they tend to encourage arguments over whether their requirements have been complied with and the effects of any non-compliance.

As the last stage of such procedures is usually a formal reference to arbitration, non-compliance with preceding steps in the process often gives rise to arguments as to whether a reference to arbitration is valid and/or whether arbitrators have jurisdiction over the dispute as a result of the non-compliance. Such arguments will usually seek to characterise the preceding steps in the process as conditions precedent to the applicability of the arbitration clause. In the absence of compliance with the preceding steps, so the argument goes, the arbitration agreement does not apply.

The relevance of these arguments has been brought into sharp focus by the recent amendments to the FIDIC form which narrow the definition of "Dispute" and thereby the scope of the arbitration clause. We consider the prospect for jurisdictional arguments to be made as a result of these amendments at the conclusion of this article, but will first consider some recent developments in the approach to arbitral pre-conditions from courts across the globe.

The condition precedent approach

The approach originally taken by the English courts to preparatory steps required by an arbitration clause was to ask whether such provisions were properly interpreted as conditions precedent to the arbitration agreement. If they were, any arbitration commenced in breach of them was said to lack jurisdiction. This was the approach taken in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*, decided in 2014, where a clause requiring the parties to seek to resolve disputes by friendly discussions for a continuous period of 4 weeks before commencing arbitration was held to be an enforceable condition precedent, the breach of which would have deprived the arbitrators of jurisdiction.

This approach is also exemplified on the FIDIC form by *Partial Award in Case 16262*, decided by a London seated tribunal in 2010, which found that: "*a reference to the DAB was a condition precedent to arbitration and that, since that condition precedent has not been satisfied, the Arbitral Tribunal has no jurisdiction.*"

The decision late last year of a three-person bench of the Singaporean International Commercial Court in *CZQ v CZS* also adopts this approach. The case concerned a 1st Edition FIDIC Yellow Book contract and a bespoke version of the requirement for amicable discussions under clause 20.5 of that form. Non-compliance was said to deprive an arbitration tribunal of jurisdiction, but the Court ruled that the clause was not a condition precedent to the arbitration agreement. The Court's approach to the issue along condition precedent lines follows an earlier decision of the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* where a jurisdictional objection was upheld because a clause requiring mediation prior to arbitration had not been complied with and was a condition precedent to the arbitration agreement.

Admissibility vs jurisdiction

The approach under English law changed in 2021 with the decision in *Republic of Sierra Leone v SL Mining Ltd (Rev 1)*. After a review of international cases and academic writings, the English Commercial Court decided that a broader test based on a distinction between admissibility and jurisdiction was to be preferred:

> *"The international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction … if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction …, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility … The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the arbitrators."*

This approach was developed by a second English Commercial Court decision in *NWA v NVF*, also in 2021, with the court in that case expressing disagreement with the Singapore Court of Appeal in *International Research*.

The distinction between admissibility and jurisdiction has also recently been adopted in Hong Kong following a final appeal decision last year in *C v D*. The case concerned a requirement for negotiation and an executive meeting prior to arbitration. Jurisdiction was challenged on the basis that this requirement was a condition precedent which remained unsatisfied. The Hong Kong Court of Appeal adopted the "jurisdiction vs admissibility" approach and found that the existence of a condition precedent and its fulfilment were matters for the arbitral tribunal:

> *"In our view, it is an over-simplification to say that where a reference to arbitration is subject to some condition precedent, an arbitral tribunal's decision on whether the condition precedent has been fulfilled must necessarily be a jurisdictional decision … The true and proper question to ask is whether it is the parties' intention (or agreement) that the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal …"*

On further appeal to the Court of Final Appeal, the relevance of the jurisdiction / admissibility dichotomy was confirmed. Pre-arbitral conditions were to be regarded as "*presumptively non-jurisdictional*". As explained by Ribero PJ:

> *"Such a presumption is consistent with the consensual basis of the tribunal's jurisdiction: in the absence of unequivocal language to the contrary, an objection to how the tribunal has resolved an issue concerning a pre-arbitration condition does not challenge the tribunal's authority to arbitrate conferred by the parties' consent."*

Support for this presumption was drawn from Lord Hoffmann's remarks in the *Fiona Trust* case decided by the House of Lords in the UK, where a similar presumption was established for the interpretation of the scope of an arbitration clause, moving away from the traditionally more literal approach focusing on the use of prepositions such as "under" or "in connection with". This conclusion followed from the inherent unlikelihood that parties would wish to arbitrate only some of their disputes arising from a given contract, leaving others to be litigated:

> *"If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."*

The Hong Kong Court of Final Appeal also endorsed Jan Paulsson's rule of thumb for determining the jurisdictional nature of arguments over pre-arbitral conditions as whether "*the objecting party [is] taking aim at the tribunal or at the claim*". Paulsson, in his article, concludes as follows:

"To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:

– If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
– If the reason would be that the claim should not be heard at all (or at least not yet) the issue is ordinarily one of admissibility and the tribunal's decision is final."

These passages were also approved by the English Commercial Court in *SL Mining* and *NWA v NVF*.

FIDIC 2nd Edition Amendments

The 1st Edition contracts within the FIDIC rainbow suite contain no definition of the terms "claim" and "dispute". New definitions were included in the 2017 2nd Edition contracts and are shown below alongside their current form as amended by Amendments Issue No. 3 published in November 2022.

2017 2nd Edition	2022 amended 2nd Edition
*"**Claim**" means a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.*	*"**Claim**" means a request or assertion by one Party to the other Party (excluding a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 …) for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.*
*"**Dispute**" means any situation where:* *(a) one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise);* *(b) the other Party (or the Engineer under Sub-Clause 3.7.2 …) rejects the claim in whole or in part; and* *(c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 … or otherwise),* *provided however that a failure by the other Party (or the Engineer) to oppose* *or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.*	*"**Dispute**" means any situation where:* *(a) one Party has made a Claim, or there has been a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 …;* *(b) the Engineer's determination under Sub-Clause 3.7.2 … was a rejection (in whole or in part) of:* *(i) the Claim (or there was a deemed rejection under sub-paragraph (i) of Sub-Clause 3.7.3 …); or* *(ii) a Party's assertion(s) in respect of the matter as the case may be; and* *(c) either Party has given a NOD under Sub-Clause 3.7.5 … .*

It can be seen that the definition of Dispute has been narrowed considerably in the 2022 amendments:

- Previously the definition was drafted broadly to encompass any claim which had been rejected where that rejection had not been accepted or acquiesced in by the claiming party. It had also made clear that a failure to respond to a claim could constitute a rejection.
- The new definition requires the Engineer's determination process under clause 3.7 to be carried out, including the service of a Notice of Dissatisfaction or "NOD" before a Dispute can arise.
- It is no longer sufficient, therefore, that there is a disagreement between the parties over a given claim; that claim must have been taken through the Engineer's determination process and an NOD issued before the requirements for a "Dispute" will be satisfied.
- Previously a Dispute was defined by reference to the undefined term "claims", which was said to include the defined term "Claims", matters to be agreed or determined under clause 3.7, or "*otherwise*". This has now changed so that only the defined term "Claims" and clause 3.7 matters are included within the definition of "Dispute".

The result of this narrowing is that there are a number of situations in which the new definition of "Dispute" would not appear to apply, but where recourse to arbitration would ordinarily be expected. These include:

1. *Urgent disputes*. The clause 3.7 procedure comprises four time periods. Firstly, a reasonable period must be given for a party to respond to the Claim (clause 20.1). Then after referral of the Claim to the Engineer, there is a 42 day period for discussion and agreement, followed by a further 42 day period for the Engineer to reach his determination. A 28 day period then applies for the service of a NOD. The whole process is therefore likely to take between 3 to 4 months, particularly where one of the parties is uncooperative. There is no power for the Engineer to make interim or provisional decisions in urgent cases and parties may be forced to obtain interim or provisional orders before national courts (where possible) pending the completion of the clause 3.7 process.
2. *Legacy claims*. Claims for defective work in particular may arise many years after the Final Payment Certificate. By that time, the Engineer will have ceased its role and a question arises as to whether the Employer would be required to reinstate the Engineer or appoint a replacement in order for the clause 3.7 process to be completed in relation to such Claims.
3. *Local law termination or recission*. Under English law separate rights to terminate and/or rescind the contract at common law are likely to arise in many cases, applying in parallel with the contractual provisions in relation to termination. Difficult legal issues can arise as to the extent to which contractual provisions are intended to survive termination where such local law termination or recission rights are exercised. Dispute provisions would ordinarily do so, but arguments may arise as to whether the functions of the Engineer and the clause 3.7 process were intended to survive. If they do not, the ability to satisfy the definition of "Dispute" would be in peril and with it the ability to refer the dispute to the DAAB and subsequently to arbitration.
4. *Procedural disputes*. Points may arise as to the validity of the clause 3.7 process if the Engineer does not comply with clause 3.7 or exceeds his or her jurisdiction.

There is, therefore, ample scope for arguments to be made that certain types of disputes fall outside the definition of "Dispute". As the width of the DAAB and arbitration clauses depend on the definition of "Dispute", these arguments lead directly to a potential for jurisdictional objections where DAAB or arbitration proceedings are commenced without the definition of "Dispute" having been satisfied.

One response to these difficulties would be to argue for an implied entitlement to bypass the clause 3.7 procedure where the nature of the Claim makes following the procedure impractical. One problem with such an argument is that the amendments to the 2nd Edition also stipulate certain exceptions where the requirement to follow the clause 3.7 procedure is not to apply. These amendments have been introduced at clause 21.4 and cover the following disputes:

— if the Engineer fails within 56 days after receiving a Statement requesting payment, to issue the relevant Payment Certificate (Red and Yellow Books only);

— if the Contractor does not receive an advance payment, interim payment or final payment within 42 days after the due date specified in the contract;

— if the Contractor does not receive financing charges (i.e. interest) on any late payments within 28 days of a request for such charges;

— a dispute over a notice of intention to terminate from the Employer or the Contractor (under clauses 15.2.1 or 16.2.1);

— a dispute over a notice to terminate for default (under clauses 15.2.2 or 16.2.2), for an Exceptional Event (under clause 18.5) or for an event outside the control of the parties which entitles them to be released from further performance under the governing law (under clause 18.6) but not, oddly, a notice to terminate for convenience under clause 15.6.

By specifically identifying circumstances in which the clause 3.7 procedure may be bypassed for the purpose of a Dispute, these amendments would appear to strengthen the intention that the clause 3.7 procedure is to apply to all other Claims before a Dispute can arise.

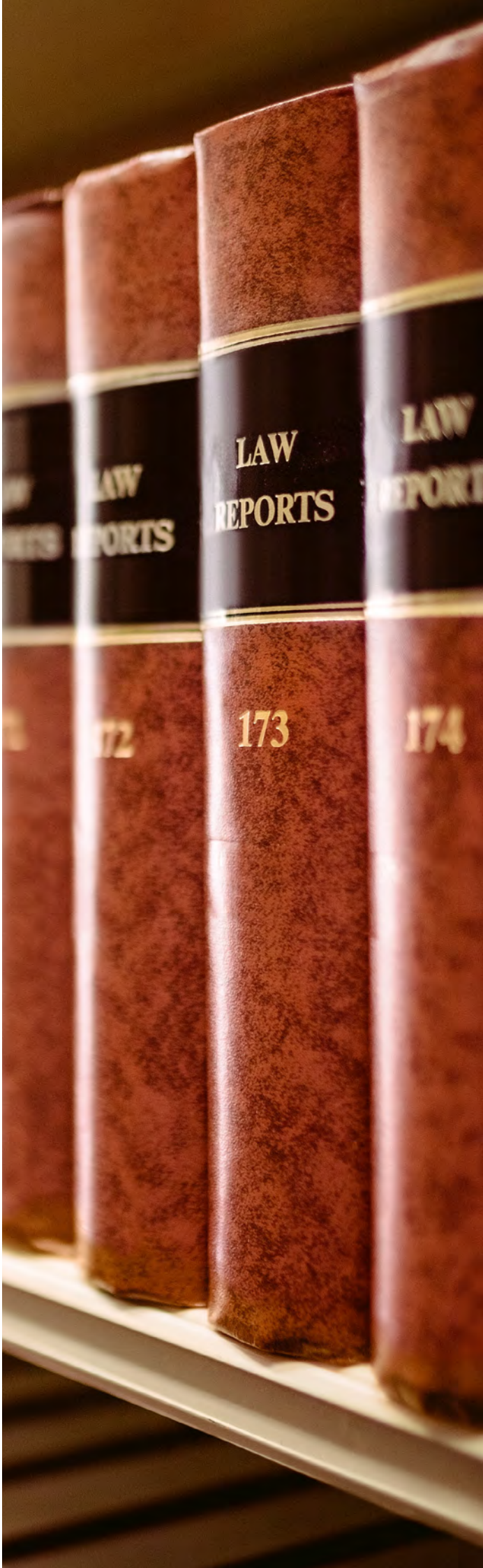
None of the above exceptions address the four situations discussed above, but it is notable that the clause 3.7 procedure is disapplied for disputes in relation to terminations under the contract (save for termination for convenience). This could be argued to be evidence of an intention that the clause 3.7 process was not to apply in disputed termination scenarios, suggesting that clause 3.7 was not intended to survive a termination under local law, such as for repudiation under English common law. This, in turn, would reinforce the argument noted above that termination or recission under local law principles may result in clause 3.7 no longer being applicable and the falling away of the right to refer a dispute to the DAAB or to arbitration.

Conclusions and implications

It seems inevitable that FIDIC's narrowing of the definition of "Dispute" will result in a greater number of jurisdictional arguments being raised in arbitrations commenced under amended 2nd Edition contracts. Whether these jurisdictional arguments find any greater acceptance by tribunals than was previously the case remains to be seen. On one hand, the definition forms the very subject matter of the agreement to arbitrate under the 2nd Edition contracts and its deliberate narrowing can be said to signal jurisdictional intent. On the other hand, Lord Hoffman's reasoning in *Fiona Trust* remains apposite and it is difficult to identify sensible commercial reasons why parties would wish to submit only some of their disputes to a DAAB and, if necessary, arbitration, while leaving other disputes to be dealt with by national courts. For the meantime, both contractors and owners would be well advised to consider omitting the 2022 amendments to the definitions of "Claim" and "Dispute".

References:

Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, 2005; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130; *Partial Award in Case 16262*, ICC Dispute Resolution Bulletin 2015 No. 1, page 75; *Republic of Sierra Leone v SL Mining Ltd (Rev 1)* [2021] EWHC 286; *NWA v NVF* [2021] EWHC 2666; *C v D* [2022] HKCA 729; *C v D* [2023] HKCFA; *CZQ v CZS* [2023] SGHC(I) 16.



Novation agreements and the risk of "black holes"

It is not unusual for construction contracts to be novated during the course of a construction project. This may be the result of a corporate restructuring or the sale of the business of one of the parties. Consultant appointments are also commonly novated where a contractor has agreed to accept responsibility for initial design work carried out by a consultant retained by the employer. Following a Scottish case on the subject last year, this article considers the risk of such novations creating a legal "black hole" flowing from the fact that the party to whom obligations were originally owed no longer has an interest in any claim for breach of those obligations.

The "no greater loss rule"

The right to claim damages for breach of contract is ordinarily assignable under English and Scots law – subject to any provisions in the contract to the contrary. It is a generally accepted principle that pursuant to such assignments (or "assignations" in terms of Scots law) the assignee takes the claim subject to any defences that exist as between the assignor and the contract-breaker and, as such, the assignee is unable to claim for more than the original assignor could have claimed for. The assignee cannot, for example, claim extra losses which arise from its own circumstances and which would not have been suffered by the assignor. We refer to this as the "no greater loss rule".

In a construction context, the no greater loss rule has caused difficulties where a defective building is sold to a third-party for full market value with an assignment of rights under the building contract agreed either before or after the discovery of defects by the purchaser. In such cases, it was argued that the assignee purchaser could not claim against the contractor for the defects because the original employer had received full market value and had therefore suffered no loss (the assignee being limited to the amount claimable by the assignor). As a result of these arguments, a slightly modified form of the no greater loss rule has been adopted in building cases: that the assignee can recover no more damages than the assignor could have recovered if there had been no assignment and if the building had not been transferred to the assignee *(Technotrade Ltd v Larkstore Ltd)*.

The "black hole" in *Blyth & Blyth*

The application of the above principles to novation scenarios was highlighted in a Scottish case decided in 2001, *Blyth & Blyth Ltd v Carillion Construction Ltd*. Carillion was the design and build contractor for a leisure development and agreed to accept a novation of an engineer's appointment between the employer and Blyth & Blyth. Carillion subsequently claimed against Blyth & Blyth in relation to tender documentation the latter had prepared for the employer prior to Carillion's involvement. Carillion claimed that the tender documentation had underestimated the scope and quantity of the work required and had caused Carillion to undervalue the works.

Carillion relied on broad wording in the novation agreement which stated that Blyth & Blyth's liability under its appointment "*whether accruing before or after the date of this Novation shall be to [Carillion]*" and that any services performed by Blyth & Blyth prior to the novation, "*will be treated as services performed for … [Carillion] and [Blyth & Blyth] agrees to be liable to [Carillion] in respect of all such services and in respect of any breach of the Appointment occurring before the date of this Novation as if the [Carillion] had always been named as a party to the Appointment in place of the Employer.*"

The Scottish Court of Session considered this wording to be insufficient to give Carillion a claim against Blyth & Blyth for its own losses in relation to pre-novation breaches of the appointment. In the Court's opinion, the novation operated in a similar way to an assignment so that the no greater loss rule applied and Blyth & Blyth's liability in relation to pre-novation breaches was limited by the amount of loss suffered by the employer. As the employer had not suffered any loss as a result of the alleged breaches – indeed, it could only have benefited from Carillion's undervaluation of the works – Carillion was unable to make good its claim.

The decision in *Blyth & Blyth* has been criticised by legal commentators, but has largely been addressed through improvements to the drafting of novation agreements to make clear that the contractor is entitled to recover its own losses in respect of pre-novation breaches by the consultant (see, for example, the City of London Law Society Standard Form of Novation Agreement).

SRB Civil Engineering UK Ltd v Ramboll UK Ltd

In this most recent case, the no greater loss rule has been further tested and potentially extended to allow for the impact of a novated building contract on downstream appointments entered into by the original contractor.

SRB Civil Engineering Limited ("**SRB**") entered into a Design and Build Agreement (the "**DBA**") with the Scottish Ministers in July 2011 for the design and construction of upgrade works to a motorway. SRB appointed Ramboll UK Ltd ("**Ramboll**") to provide design services in relation to the DBA (the "**Ramboll Contract**"). Pursuant to a company reorganisation, it was determined that a related company ("**SRB UK**") should take over SRB's role as contractor under the DBA. A Novation Agreement was entered into on 12

July and 7 November 2013 by SRB, SRB UK and the Scottish Ministers. As part of this agreement, the Scottish Ministers released SRB from any further performance of the DBA. The Novation Agreement also absolved SRB from liability for prior breaches in the following terms:

> *"All rights of action and remedies under or pursuant to the [DBA] vested in [Scottish Ministers] will from the last date of execution of this novation agreement lie against [SRB UK] and not [SRB]."*

Meanwhile, in August 2013, defects were found in the pavement of the motorway which formed part of the works and which SRB/SRB UK attributed to breaches by Ramboll of the Ramboll Contract. SRB assigned its rights under the Ramboll Contract to SRB UK in July 2018 so that SRB UK could be compensated by Ramboll in relation to its liability to the Scottish Ministers in respect of these defects.

SRB UK subsequently brought proceedings against Ramboll for alleged breaches of the Ramboll Contract and breaches of delictual duty (known as tortious duty in England). Ramboll submitted that the action should be dismissed. It claimed that SRB's obligations under the DBA had been extinguished as a result of the Novation Agreement – therefore, any loss which SRB may have suffered was avoided and as assignee SRB UK could not recover any greater loss than SRB could recover.

The Court did not accept the legal effect of the Novation Agreement was merely to extinguish the obligations and liabilities of SRB to the Scottish Ministers but instead held that such obligations and liabilities were "*transferred*" to SRB UK. Had SRB's liability merely been extinguished by the Novation Agreement, the Court considered that Ramboll's "no loss" arguments would have had force. However:

> *"That is not what happened here. … [SRB's] obligations to Scottish Ministers were replaced by [SRB UK's] obligations to Scottish Ministers. The effect of the Novation Agreement is that [SRB UK] became liable to the Scottish Ministers to make good the Scottish Minister's loss from the start of Design and Build Agreement."*

Conclusion

The arguments made by Ramboll in this case bear some similarity to those made in the sale of property cases noted in the introduction, where the seller/assignor had received full market value for the property and was therefore said to have suffered no loss. In the present case, it is a building contract which has been transferred by way of a novation agreement and the releases given to the assignor as part of that novation agreement have resulted in it being absolved from liability and no longer having a loss to pass down to Ramboll. Broadly speaking, therefore, it is the overall transaction which in both scenarios result in the removal of the assignor's loss. It appears that the Court has sought to achieve the same result which applies in the sale of property cases, effectively by asking whether SRB as assignor would have suffered the loss claimed for had it not assigned its claim to SRB UK and had it not entered into the Novation Agreement.

Despite these similarities in outcome, the approach in the present case marks a significant extension of the no greater loss rule established in previous cases. As Ramboll noted, SRB and SRB UK had voluntarily entered into the novation agreement with a view to absolving SRB of liability under the DBA. Ramboll had not been consulted in relation to the novation agreement and had not agreed to be liable to SRB UK. Whether these objections are properly overcome by the Court's more transactional approach to the no greater loss rule remains to be seen.

This case also highlights the importance of properly considering the impact of a novation on associated contracts and liabilities. A number of practical steps could have been taken by the parties in this case to avoid arguments over liability post-novation:

- The Ramboll Contract could have been novated to SRB UK at the same time as the novation of the DBA. This would have ensured there was no question as to whom Ramboll owed their obligations to under the Ramboll Contract.
- Contemporaneously with the novation of the DBA, SRB UK could have requested Ramboll provide them with a collateral warranty for their services under the Ramboll Contract. This would have established a clear contractual link between SRB UK and Ramboll.
- It may also have been helpful for the assignation of SRB's rights under the Ramboll Contract to have been made at the same time as the novation of the DBA. Although this would not necessarily have changed Ramboll's position in terms of its response to the proceedings, the timing gap in this case between novation and assignation would not be considered standard practice in analogous circumstances and is more likely to provoke a challenge.

References:

Blyth & Blyth Ltd v Carillion Construction Ltd 2002 SLT 961; *Technotrade Ltd v Larkstore Ltd* [2006] EWCA Civ 1079; *SRB Civil Engineering UK Limited v Ramboll UK Limited* [2022] (CSOH) 93.

The limiting effect of insurance clauses on supply chain coverage

Two English cases last year have clarified the central role of insurance clauses within construction contracts in limiting the extent of coverage provided by joint names policies to additional insured parties such as contractors and sub-contractors. These cases show that the full width of cover stated within a joint names policy may not be available to additional insureds where the terms of the applicable insurance clause specify a narrower scope of cover.

FM Conway Limited v The Rugby Football Union

In advance of the 2015 Rugby World Cup, the Rugby Football Union ("**RFU**") undertook a considerable upgrade programme to the facilities and infrastructure at Twickenham Stadium. The RFU engaged a number of contractors to perform the necessary works through a series of separate works packages or sub-projects. FM Conway Limited ("**FM Conway**") were appointed to install ducting to house new high voltage power cables. The installation and "pulling through" of those cables was a separate package to be carried out by a different contractor.

The new cables were damaged in the course of being pulled through the ducting installed by FM Conway. The cost of replacing the damaged cables was recovered by the RFU under a project insurance policy (the "**Policy**"). RFU's insurers then brought a subrogated claim against FM Conway alleging that the damage to the cables had been caused, among other things, by defective installation of the ducting on FM Conway's part.

The Policy was expressed to cover, in addition to the RFU, the "*Contractor for each Project*" as well as "*all other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project*". The Policy also included a waiver of subrogation clause stating that the insurers "*agree to waive all rights of subrogation which they may have or acquire against any insured party …*". FM Conway claimed that it was an insured party under the policy and protected from subrogation claims.

The RFU's insurers relied on the terms of the building contract between the RFU and FM Conway, a 2011 JCT Standard Building Contract, which incorporated the JCT's standard Option C insurance clause. This clause required the RFU to take out a joint names insurance policy on certain terms covering the Works. However, such a policy would not have covered the damaged cables. By contrast, the Policy taken out by the RFU covered all the packages of work involved in the upgrade programme and did provide cover in respect of the damaged cables.

The RFU's insurers argued that FM Conway should only be insured under the Policy to the extent required by the JCT insurance clause and that the waiver of subrogation under the Policy should only apply to that extent. On this basis, FM Conway was not an insured party in respect of the cable damage claimed by RFU under the Policy.

The insurers succeeded with this argument at first instance before the English Technology and Construction Court. An appeal brought by FM Conway was rejected by the English Court of Appeal.

Given the Policy had been taken out by the RFU, the Court of Appeal emphasised the need to establish the RFU's intention and its authority to extend cover to FM Conway. Lord Justice Coulson summarised the approach to be taken as follows:

> *"In circumstances where it is alleged that A has procured insurance for B, it will usually be necessary to consider issues such as authority, intention (and the related issue of scope of cover). … where there is an underlying contract then, in most cases, it will be much the best place to find evidence of authority, intention and scope … That is not to say that the underlying contract will always provide the complete answer. Circumstances may dictate that the court looks in other places for evidence of authority, intention and scope of cover …"*

FM Conway relied on pre-contractual discussions in an attempt to show that the RFU had intended, and was authorised, to provide cover to FM Conway on a much broader basis. These discussions were to the effect that comprehensive insurance cover was to be taken out by RFU which would create a fund to make good loss and damage and avoid disputes between the parties and their insurers. In particular, it was said to have been

envisaged that this cover would be broader than the joint names policy required by the JCT Option C insurance clause.

However, in the Court's view, the best evidence of the RFU's intention, and its authority, in relation to the Policy came from the building contract and a letter of intent which preceded it. It was clear under these documents that the JCT insurance clause was to apply and this did not require cover in respect of damage caused by FM Conway's own defective work. The fact that pre-contractual discussions had been had as to a broader insurance arrangement was not sufficient to displace the strong indicators of intention and authority provided by the contract and letter of intent.

Sky UK Limited v Riverstone Managing Agency Limited

Another case decided last year provides an interesting illustration of how these principles may be used by insurers to argue for restrictions in cover. The case concerned a headquarters building constructed by Mace Limited ("**Mace**") for Sky UK Limited ("**Sky**"). Design failings led to the widespread failure of the roof components due to water ingress during construction.

Sky obtained a Construction All Risks policy for the project. In accordance with the construction contract, Mace was an additional insured under the policy, but Sky was the only contracting party aside from the insurers. Both Sky and Mace claimed under the policy in respect of the failure of the roof components and the need to replace the roof.

Insurers argued that Mace was not an insured in relation to the roof damage on the basis that (i) Mace was only an insured in respect of damage occurring up until Practical Completion under the construction contract; and (ii) that it was only insured in respect of damage which had been replaced or repaired prior to Practical Completion.

The English Commercial Court agreed that Mace was only an insured up until Practical Completion, primarily because its interest in the building ceased at that point, with possession of the site reverting back to Sky. The insurers' second contention relied on the following clause from the insurance clause within the construction contract:

> *"After any inspection required by the insurers in respect of a claim under the Joint Names Policy has been completed, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works."*

Insurers argued that this clause showed an intention that the policy would fund only such remedial works as might be necessary to enable damaged property to be repaired and to reach Practical Completion. In the Court's judgment, this clause was not intended to impose a limitation on the policy required by the construction contract. That was evident, in part, from the fact that, as part of the insurance arrangements agreed under the construction contract, Sky had agreed to waive claims against Mace in relation to damage occurring prior to Practical Completion, irrespective of

whether remedial works were carried out prior to Practical Completion or at all, in return for Mace's agreement to carry out remedial works, if so requested, for no more than the net sum received by Sky under the policy. In other words, "*the fundamental core of what the parties agreed was only that they would apply a self-contained compensatory or risk management scheme to loss and damage due to acts or omissions by Mace and its sub-contractors occurring prior to Practical Completion.*" This insurance-based scheme did not depend on whether the damage had been remediated prior to Practical Completion.

Conclusions

The Court of Appeal's decision in the *FM Conway* case provides significant clarity as to the operation of joint names insurance taken out in respect of construction work. Importantly, it is now clear that the mere fact such a policy states that it covers the interests of named or identifiable third parties does not of itself give those third parties the right to enforce its terms. When a person becomes a party to an insurance policy as a consequence of the actions of another person, it is likely to be the terms of the contract between the insured party and that other which govern the extent of the insurance.

Contractors and sub-contractors should not, therefore, assume that they are automatically covered by a project-wide joint names insurance policy that has been put in place on their behalf and they should review the terms of their contract carefully. It is this, rather than the policy itself, that will determine the extent of cover.

Parties should also pay close attention to any process based obligations contained within the insurance clauses of their construction contracts, as these may give rise to arguments similar to those raised in the *Sky UK* case that coverage was intended to be limited by those obligations. Whilst the insurer's argument on this point ultimately failed in that case, the fact that the argument was made at all shows how sensitive these types of coverage disputes have become to the precise words of the insurance provisions in the underlying construction contract.

Finally, it is worth noting that the insurance clause considered in the *FM Conway* case was phrased in terms of the Employer procuring a joint names policy with cover "*no less than*" that specified in the contract. Such language was not sufficient to allow FM Conway to take advantage of the broader terms of the Policy, but it is conceivable that a more generously worded clause could do so.

References:

FM Conway Ltd v Rugby Football Union [2023] EWCA Civ 418; *Sky UK Limited v Riverstone Managing Agency Limited* [2023] EWHC 1207 (Comm).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Reform of the UK Arbitration Act 1996

Draft revisions to the UK's Arbitration Act 1996 were proposed by the England and Wales Law Commission in 2022 and were the subject of extensive consultation leading to a final Law Commission Report in 2023. Legislation giving effect to the report's recommendations was introduced into the UK Parliament late last year and has now been re-introduced following the UK's recent general election.

The Law Commission Recommendations

The purpose of the Law Commission's review was to determine whether any amendments to the Arbitration Act 1996 (the "**Act**") were needed to ensure that it "*remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration.*"

The review included two consultation papers, culminating in a final report and draft Bill. Given that the Act has largely stood the test of time and continues to function well, the final report concluded that "*root and branch reform is not needed or warranted.*"

Consequently, some proposals that were extensively debated during the consultation period were ultimately not included in the final recommendations or the Commission's draft Bill. For example, the Commission declined to include a heavily debated amendment that would have made arbitrations confidential by default.

The Commission ultimately focused on a handful of "*major initiatives*" that streamlined certain procedural matters and addressed certain changes in arbitral practice and the English common law since the Act's initial passage in 1996. Those major initiatives are outlined below.

Revising the framework for jurisdictional challenges

Section 67 of the Act allows parties to challenge an arbitral award on the basis that the tribunal lacked jurisdiction. In *Dallah v Pakistan*, the UK Supreme Court established that section 67 requires a full rehearing. The consultation process revealed that a considerable number of stakeholders viewed this process as unnecessarily increasing costs and delays. Another critique was that section 67 afforded the losing party an opportunity to obtain new evidence and develop new arguments before the court that had not been presented to the tribunal, thereby allowing the losing party to use the arbitral proceedings as a "dress rehearsal" before having a second bite of the cherry before the courts.

The Arbitration Bill rectifies this criticism. The court will not entertain new jurisdictional objections or new evidence (unless it could not have been put before the tribunal even with reasonable diligence), and the evidence will not be reheard other than in the interests of justice. This substantiates the principle of competence-competence — i.e., the tribunal's power to rule on its own jurisdiction — and streamlines the arbitration process for users.

Clarifying the law

Uncertainty can arise when a contract fails to stipulate the law applicable to the arbitration agreement, which is severable from the rest of the contract. While the English courts have applied the principles outlined by the UK Supreme Court in *Enka v Chubb* to make this determination, consultees suggested that, in practice, the application of those principles often amounted to a complex and unpredictable exercise.

The Bill provides that, absent express party agreement, the law of the seat of arbitration will govern the arbitration agreement. This change creates simplicity and certainty. If the arbitration is seated in England, for example, the arbitration agreement will likewise be governed by English law, regardless of the law applicable to the substance of the dispute.

Arbitrator disclosures

The Bill codifies an arbitrator's duty to disclose any circumstances that reasonably give rise to doubts as to their impartiality, codifying the general duty of disclosure set forth by the Supreme Court in *Halliburton v Chubb*. This duty applies both to situations known to the arbitrator and matters the arbitrator should reasonably know.

The Bill stipulates that the duty of disclosure applies to pre-appointment discussions. Rather than creating an exhaustive list of what should be disclosed, the Bill focuses on the general principle, thus allowing arbitral rules and the common law to provide additional guidance in specific contexts.

Summary disposal

Unless the parties otherwise agree, the Bill allows arbitrators to make awards on a summary basis on issues that have no real prospect of success, creating efficiency and discouraging unmeritorious claims. The parties are granted autonomy to agree on a threshold for summary disposal or disapply it entirely. Even where a party has applied for summary disposal, the arbitrator does not have to accede to the request.

Accordingly, the Bill allows parties to resolve certain disputes more efficiently while providing a structure to ensure a fair summary disposal procedure.

Arbitrator immunity

Under the current Act, arbitrators who resign may be liable to the parties for legal fees incurred in appointing another arbitrator. Parties can also revoke a recalcitrant arbitrator's authority or apply to the court for the arbitrator's removal. According to case law, an arbitrator could potentially incur personal liability for the costs of such a removal application.

The Bill strengthens arbitrator immunity against liability for resigning (unless shown that the resignation is unreasonable) and applications for removal (unless the arbitrator acted in bad faith).

This encourages arbitrators to make robust and impartial decisions without fear of personal liability. By allowing costs liability only in certain circumstances, the reform strikes a balance between protecting arbitrators from personal liability and providing parties with some recourse in cases of bad faith or unreasonable arbitrator conduct.

Emergency arbitrators

Since the Act's passage in 1996, it has become increasingly common for arbitral rules to allow for an emergency arbitrator to be appointed on an interim basis at the start of an arbitration. The emergency arbitrator is empowered to make orders on urgent matters, such as the preservation of evidence. Once the full tribunal is constituted, it can then review the interim order.

The Bill does not specify how emergency arbitrators should be appointed or extend all provisions of the Act to them. However, it does provide support for emergency arbitration in two ways. First, it allows courts to enforce an emergency arbitrator's peremptory orders. Second, it also allows emergency arbitrators to give arbitral parties permission to apply to the court for an order under section 44(4) of the Act, essentially granting emergency arbitrators the same powers as arbitrators hearing the full case.

Predictability, neutrality and excellence

London has long been a key seat for international arbitration. Indeed, the Law Commission estimates that at least 5,000 arbitrations take place in England and Wales every year, contributing more than £2.5 billion to the English economy. There are very good reasons that parties from around the globe continue to resolve their disputes through English law governed arbitrations seated in London. The Bill goes a long way to ensure that England's status as the front-runner in the international arbitration field is maintained by providing commercial parties with what they want — predictability, neutrality and excellence.

References:

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46; *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1)* [2020] UKSC 38.

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International English Law Construction Contacts

Paul Smith
Partner, Energy Projects & Construction Practice Group Manager (London)
T +44 20 7367 3475
E paul.smith@cms-cmno.com

Steven Williams
Partner, Co-Head of ICE Disputes (London)
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Matthew Taylor
Partner, ICE Disputes (London)
T +44 20 7524 6341
E matthew.taylor@cms-cmno.com

Robert Wilson
Partner, ICE Disputes (London)
T +44 20 7367 3682
E rob.wilson@cms-cmno.com

Philip Norman
Partner, ICE Disputes (London)
T +44 20 7067 3311
E philip.norman@cms-cmno.com

Emma Schaafsma (Kratochvilova)
Partner, ICE Disputes (London)
T +44 20 7367 2316
E emma.schaafsmakratochvilova@cms-cmno.com

Greg Sibbald
Partner, ICE Disputes (Dubai)
T +971 4 374 2858
E greg.sibbald@cms-cmno.com

Lynette Chew
Partner, ICE Disputes (Singapore)
T +65 6422 2840
E lynette.chew@cms-holbornasia.com

Damien Watkin
Partner, ICE Disputes (Abu Dhabi)
T +971 58 211 8580
E damian.watkin@cms-cmno.com

David Parton
Partner, Head of Construction (London)
T +44 20 7524 6873
E david.parton@cms-cmno.com

Adrian Bell
Partner, Co-Head of ICE Disputes (London/Dubai)
T +44 20 7367 3558
E adrian.bell@cms-cmno.com

Phillip Ashley
Partner, ICE Disputes (London)
T +44 20 7367 3728
E phillip.ashley@cms-cmno.com

Sarah Grenfell
Partner, ICE Disputes (London)
T +44 20 7367 3549
E sarah.grenfell@cms-cmno.com

Aidan Steensma
Of Counsel, ICE Disputes (London)
T +44 20 7367 2137
E aidan.steensma@cms-cmno.com

David Moore
Partner, Projects/Construction (Dubai)
T +971 4 374 2829
E david.moore@cms-cmno.com

Kelvin Aw
Partner, ICE Disputes (Singapore)
T +65 6422 2841
E kelvin.aw@cms-holbornasia.com

Jeremie Witt
Partner, ICE Disputes (London & Brisbane)
T +61 7 3184 9111
E jeremie.witt@cms-cmno.com

Jay Randhawa
Legal Director, ICE Disputes (Riyadh)
T +966 56 418 0323
E jay.randhawa@cms-cmno.com

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Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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