

Annual Review of English Construction Law Developments

An international perspective

August 2023

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

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Introduction

Welcome to the 2023 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 review contains a strong focus on the FIDIC form, with new amendments, a new Guide and a new Second Edition having all been released last year. We also take a close look at the legal requirements for a valid termination in light of the more stringent notification requirements under the Second Edition contracts.

Delay claims are also major focus of this year's edition. Three articles on this topic cover significant developments as to the law on concurrent delay, the implications of differently worded extension of time clauses and whether unenforceable liquidated damages clauses operate as a cap on general damages for delay (an old chestnut which may finally be starting to crack).

The remainder of this year's articles have a dispute resolution focus. Members of the UK's highest court have had cause to consider the operation of "without

prejudice" privilege in the context of a large construction project. The law as to jurisdictional objections arising from non-compliance with pre-arbitral conditions in multi-tiered dispute resolution clauses seems one step closer to being settled thanks to a Court of Appeal decision in Hong Kong. And the use (and possible abuse) of litigation funding in international arbitration seems set to rise with a recent English Commercial Court decision confirming that the recovery of litigation funding costs may be ordered by arbitration tribunals under the English Arbitration Act.

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.



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FIDIC Second Edition Amendments and Guide

Late last year, FIDIC released a set of amendments to its Second Edition Red, Yellow and Silver Books. These are said to have been in response to feedback from the industry since the publication of the Second Edition contracts in 2017. Accompanying the amendments was an updated version of the FIDIC Contracts Guide for use with the Second Edition contracts (the “**Guide**”). A number of significant points arise from the amendments and guidance which we report on below.

The scope of the dispute resolution provisions

The most significant of the amendments made concerns the definitions of “Claim” and “Dispute”. These now read as follows:

*“**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 [Agreement or Determination]) 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 has made a Claim, or there has been a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 [Agreement or Determination];

(b) the Engineer’s determination under Sub-Clause 3.7.2 [Engineer’s Determination] 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 [Time limits]); 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 [Dissatisfaction with Engineer's determination].

The definition of "Dispute" in particular has been narrowed as follows:

- 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 exclusion of "claims" more generally from the definition of Dispute appears to be an intentional step to exclude certain disputes from the definition. The Second Edition Guide comments as follows:

"It should be noted that this definition of 'Dispute' refers to a Claim but not to a claim. As explained in the guidance above for the definition of 'Claim', claim under the 2017 Books has a different meaning to that of Claim. Therefore, 'Dispute' as defined and used in the 2017 Books is confined to disputes between the Parties. It excludes any dispute arising from a claim made by a Party against a third party under the Performance Security, under a guarantee, under an insurance policy, or in connection with intellectual/industrial property rights."

It may be questioned whether this intention has actually been carried through in the drafting of the new definitions. The definition of "Claim" remains very wide and includes requests for an "entitlement or relief ... in connection with, or arising out of, the Contract or the execution of the Works". Clause 20.1 also notes that the "entitlement or relief" needed for a Claim "may be of any kind whatsoever". Such wording would ordinarily be sufficient to include disputes arising in respect of

performance securities or intellectual property rights pertaining to the project in question.

It is also unclear what purpose would be served in excluding certain claims from the ambit of the dispute resolution provisions. The definition of "Claim" forms part of the definition of "Dispute", which in turn is used in clause 21 to define the jurisdiction of the Dispute Adjudication and Avoidance Board ("DAAB") and the scope of the arbitration agreement. If certain claims are to be excluded from the definition of "Claim", any dispute arising from them would not be capable of being referred to the DAAB or to arbitration and would have to be litigated through national courts instead.

A similar point applies to the narrowing of the definition of "Dispute" to the engineer determination procedure under clause 3.7. In the event of a disagreement between the parties, the clause 3.7 procedure will need to be completed before there is a "Dispute" which can be referred to a DAAB or arbitral tribunal. This is likely to cause difficulties in certain situations such as the following:

- **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 are likely to be forced to obtain interim or provisional orders before national courts (where possible) pending the completion of the clause 3.7 process.

- **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 a Claim for defective work.

- **Local law termination or rescission.** Under English law separate rights to terminate and/or rescind the contract at common law are likely to arise in certain circumstances, 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 rescission 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 was intended to survive. Were they not to survive, 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.

- **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. Under the new definition of “Dispute” such points may enable a party to argue that no Dispute has formed and that no reference to the DAAB or to arbitration can be made until the clause 3.7 procedure is carried out afresh.

One response to these difficulties would be to argue for some 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 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 read as follows:

“In addition to the situation described in the definition of Dispute under Sub-Clause 1.1.29 above, a Dispute shall be deemed to have arisen if:

- (a) there is a failure as referred to under sub-paragraph (b), or a non-payment as referred to under sub-paragraph (c), of Sub-Clause 16.2.1 [Notice];*
- (b) the Contractor is entitled to receive financing charges under Sub-Clause 14.8 [Delayed Payment] but does not receive payment thereof from the Employer within 28 days after his request for such payment; or*
- (c) a Party has given:*
 - (i) a Notice of intention to terminate the Contract under Sub-Clause 15.2.1 [Notice] or Sub-Clause 16.2.1 [Notice] (as the case may be); or*
 - (ii) a Notice of termination under Sub-Clause 15.2.2 [Termination], Sub-Clause 16.2.2 [Termination], Sub-Clause 18.5 [Optional Termination] or Sub-Clause 18.6 [Release from Performance under the Law] (as the case may be);*

and the other Party has disagreed with the first Party’s entitlement to give such Notice;

which Dispute may be referred by either Party under this Sub-Clause 21.4 without the need for a NOD

(and Sub-Clause 3.7 [Agreement or Determination] and sub-paragraph (a) of Sub-Clause 21.4.1 [Reference of a Dispute to the DAAB] shall not apply).”

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 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 over terminations under the contract. This reinforces the point made above that termination or rescission 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. This is because the above amendments show an intention that the clause 3.7 process was not to apply in disputed termination scenarios, making it more difficult to argue that clause 3.7 was intended to survive a termination under local law, such as for repudiation under English common law.

Other notable amendments

Whilst the changes to the definitions of “Claim” and “Dispute” are by far the most significant of the amendments, a number of others are worthy of note. We summarise them below:

- Clause 1.5 now requires that, in addition to “ambiguities” and “discrepancies”, “conflicts” within the contractual documents must also be notified to Engineer for the issuing of any necessary clarification or instruction.
- The final payment procedure in clause 14.13 has been modified so that the Engineer should now issue a further Interim Payment Certificate if the Contractor fails to submit a discharge – although this appears to be at odds with clause 14.12, which deems the discharge to have been submitted in such circumstances.
- It was an oddity of the Second Edition that the definition of an “Exceptional Event” in clause 18.1 did not require an event to be exceptional. This has now been rectified.
- FIDIC is now the default appointer of DAAB members and when it exercises this function it will also set the terms of the appointment and the fees (clause 21.2). FIDIC’s decision on these matters is to be “final and conclusive” and the parties are deemed to have signed a DAAB Agreement with the appointed member on the terms set by FIDIC.

- The independence criteria for DAAB members has been reduced so that a member must now only have not been employed as a consultant or otherwise by the parties or their personnel for 5 years instead of 10 (paragraph 4.1, DAAB General Conditions).

The Second Edition Guide

The updated Guide runs to 647 pages and for the most part provides a lengthier description of the contract provisions as they appear in the Second Edition books. We expand on two instances below where the commentary in the Guide may shed light on some peculiarities of the Second Edition drafting.

Clause 11.10

Liability for latent defects was thought to be preserved under the First Edition contracts by Clause 11.10 which noted that each Party was to *"remain liable for the fulfilment of any obligation which remains unperformed"* at the time of the Performance Certificate. Although this provision remains, it is qualified in the Second Editions by an express limitation period for Plant. This provides that the Contractor is *"not liable for any defects or damage occurring more than two years after the expiry of the [Defects Notification Period or "DNP"] for the Plant"* (unless prohibited by law or in the case of fraud, gross negligence, deliberate default or reckless misconduct).

The drafting of this qualification leaves ambiguity over whether the word "occurring" is intended to apply both to "defects" and "damage". On the one hand, it makes little sense to talk of defects "occurring" after the expiry of the DNP. Any defects will already be present by that stage. On the other hand, an exclusion of liability for *"any defects ... more than two years after the expiry of the DNP"* seems very broad. It would absolve the Contractor of all liability for defects in the Plant after the expiry of two years.

A similar ambiguity arises in relation to whether the word "more" is qualified by "occurring" i.e. whether the clause provides that there will be no liability after two years or rather that there will be no liability for events occurring after two years. The difference is significant because on the second reading the contractor would still remain liable until the end of the applicable limitation period (6 or 12 years under English law) for events occurring less than two years after the expiry of the DNP, whereas on the broader interpretation all liability would cease at the two year mark.

The Guide provides some light on this issue in the following passage:

"The last paragraph of this Sub-Clause addresses the potential issue where it would be unfair to the Contractor, as supplier of Plant, if his/her liability 'for any defects or damage' did not expire at a certain time after the expiry of the relevant DNP, regardless of when the Performance Certificate is issued. In particular, if the Contractor's liability was to continue indefinitely then problems would be likely to occur, particularly if the Plant has not been operated and/or maintained by the Employer in accordance with the manufacturers' instructions. Therefore, the last paragraph of this Sub-Clause puts a limit on the duration of the Contractor's liability of 'two years after expiry of the DNP for the Plant', except where this limit may be 'prohibited' by the applicable mandatory Laws."

The absence of any reference to the verb "occurring" within this passage suggests that the broader interpretation was, in fact, intended. This is also borne out by the reference to *"a limit on the duration of the Contractor's liability"*. However, precisely what is intended by such a broad interpretation remains highly uncertain. For example, it seems unlikely that liability would simply cease at the two year mark even if DAAB and/or arbitration proceedings were underway in relation to the defect or damage in question. If that extreme position is not accepted, the question arises as to what exactly is required to prevent liability from lapsing. Possible candidates include a simple written notification, a referral to the Engineer under clause 3.7, a referral to the DAAB, or the commencement of arbitration proceedings.

The Claims Procedure

As noted earlier, the Second Edition Claims procedure is highly regimented, moving from the making of a claim, through an Engineer's decision, onto a DAAB decision and finally to arbitration. Overall a maximum period of 238 days applies (claims of continuing effect aside) from an event or circumstance giving rise to a Claim before that Claim must be referred to the DAAB if not yet resolved.¹ A number of deeming provisions are included which potentially invalidate a claim if certain notices are not given in time and this is intended to drive the procedure forward. Despite this detailed process, it is possible for the procedure to stall around the giving of a "fully detailed Claim".

¹ This is comprised of 28 days for the Notice of Claim, a further 56 days for the fully detailed Claim, 84 days for the Engineer's determination, 28 days for an NOD and 42 days to refer the dispute to the DAAB.

A “fully detailed Claim” has four parts:

- a detailed description of the event or circumstance giving rise to the Claim;
- a statement of the contractual and/or other legal basis of the Claim (the “**Statement of Legal Basis**”);
- all contemporaneous records (which is a term now defined within clause 20) on which the claiming Party relies; and
- detailed supporting particulars of the amount/EOT claimed.

The fully detailed Claim is required within 84 days of when the claiming Party become aware (or should have become aware) of the event or circumstance giving rise to the Claim. A time-bar is included but only applies to the Statement of Legal Basis and not to the rest of the fully detailed Claim. It is conceivable, therefore, that a claiming Party could submit its Statement of Legal Basis within the 84 day period to avoid the time-bar, but defer the submission of its fully detailed Claim until a later date. As the Engineer’s obligation to seek to agree and/or determine the Claim only arises upon receipt of the fully detailed Claim, the procedure could effectively stall at that point. A claiming Party might also include the Statement of Legal Basis within its initial Notice of Claim. In an extension of time case, for example, this could be as simple as a reference to Clause 8.5 (the extension of time provision in the Second Editions).

The Guide shows that this operation of the process was in fact intended:

“... it should be noted that [the 84 day] time-bar only applies if the claiming Party fails to submit the ‘statement of’ contractual/legal basis ... It does not apply where the claiming Party fails to submit:

- *Any legal authorities or suchlike in support of the statement of contractual/legal basis; or*

- *Any of the other required information or documents require [for a fully detailed Claim].*

The reason for this is because of what is stated in the first paragraph of Sub-Clause 20.2.7 ... having received the Notice of Claim and pending the agreement/determination of the Claim, the Engineer ... is obliged to include ... ‘such amounts for any Claim as have been reasonable substantiated as due to the claiming Party’. If the Engineer/Employer is aware of the claiming Party’s contractual/legal basis of the Claim, it will be possible for the Engineer/Employer to come to a view as to what he/she might consider has been ‘reasonably substantiated’, and so this provision will apply. However, if the Engineer/Employer is not aware of the claiming Party’s contractual/legal basis of the Claim, then that would not be possible since the Engineer/Employer would have no option but to assume or guess what the claiming Party’s basis of Claim was supposed to be.”

The Guide does not address the clear potential for this to stall the claims process and allow parties to effectively save disputes up until the end of the project, something which the new claims procedure was intended to avoid.

References:

FIDIC Contracts Guide (Second Edition 2022).



The new FIDIC Green Book: a rival to the First Edition Red and Yellow Books?

FIDIC has recently published the Second Edition of its Short Form of Contract, the “Green Book”, as an update to the First Edition published in 1999. This release is important not only in terms of the revised or new provisions and format of the Green Book itself, but also the intended status of the form as an alternative to the Second Editions of the Red and Yellow Books. There will be a number of market players who will be looking at the 2021 edition of the Green Book as a viable option for their projects when they would not have previously considered using the First Edition of the Green Book.

While the Second Edition Red, Yellow and Silver Books have been widely welcomed by the international construction market, FIDIC and its users have acknowledged that the length and complexity of the forms necessitate far greater, and more skilled, contract and claims management than their First Edition predecessors, rendering them unsuitable for lower-value and relatively straightforward projects. It is perhaps notable that a number of development banks who have recently adopted the Second Editions in their standard bidding documents still include the First Editions of the Red and Yellow Books in their licence.²

The First Edition Green Book was well-suited to development banks’ “Small Works” projects with a capital value of less than \$10m, relatively straightforward and/or repetitive work, and short duration. However, as FIDIC explains in the Foreword to the 2021 Green Book, in recent years the form has become increasingly used for projects with a Time for Completion of longer than 2 years, and with a greater capital value. With seemingly a desire to move away from the First Edition suite altogether, FIDIC explains that this new edition of the Green Book can accommodate both Small Works projects as well as relatively larger projects that would nonetheless otherwise still have not been suitable for the Second Editions of the Red and Yellow Books.

The Second Edition Green Book is considerably longer than its predecessor (now 30 pages as opposed to the First Edition’s 10 pages), but still much shorter than the other Second Edition contracts released in 2017 (the Yellow Book runs to 109 pages³). The style (in terms of

layout and language) of the new Green Book reflects the other Second Editions, but without the same degree of complexity. This is achieved not only through condensed drafting and less detailed provisions (the Guidance Notes call for detailed provisions and secondary obligations to be included elsewhere, such as in the contract specifications), but also through simpler contractual concepts. For example, and as also featured in the First Edition Green Book, it provides for liquidated damages (in the form of percentages) in the event the Employer omits works to then be executed by another contractor, or in the event of termination, rather than the parties having to spend time and costs on consultants and legal fees to demonstrate and justify a loss and damage claim.

In terms of key features that are new to the form:

- The Forward contains a suitably long and helpful explanation of the salient features of the form and how it works, as well as a number of “Typical Sequence of Events” flow diagrams for processes such as variations, claims management and disputes.
- The form now contemplates having Particular Conditions. Included is a Contract Data proforma document that contains (among other things) a formula for calculating Prolongation Costs (for compensable delays), a table for Sectional Completion detailing Times for Completion for each section and related delay damages, and a number of options for pricing/valuing the works, such as lump sum price (single payment, stage payment, with bill of quantities), remeasurement, cost plus, and combinations of options.

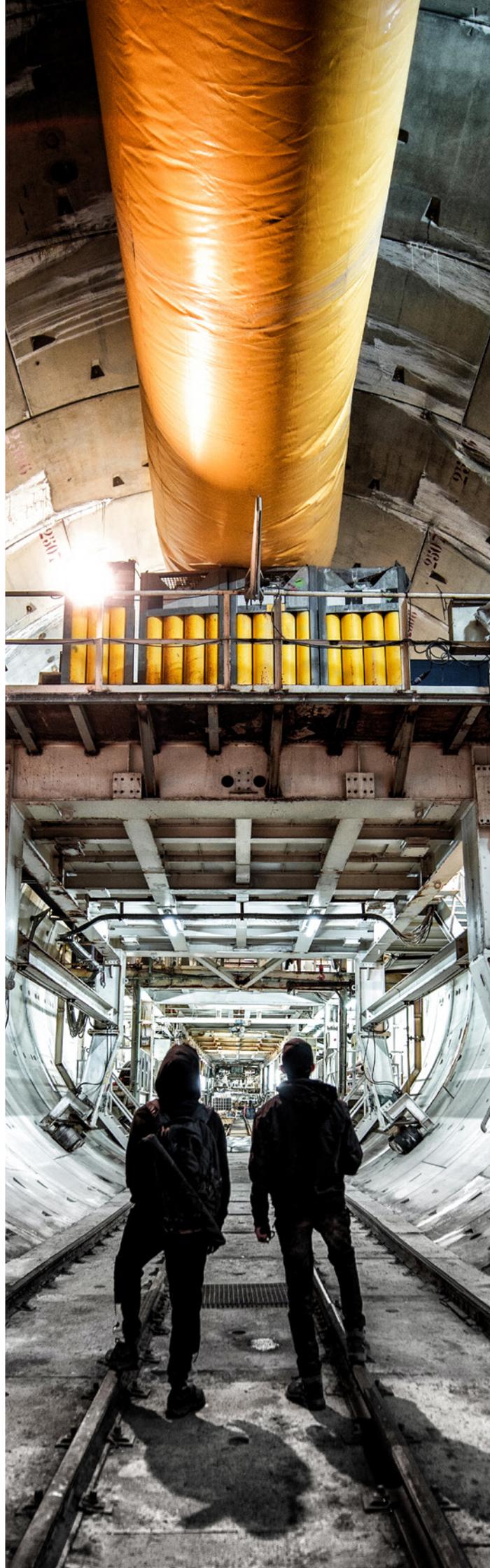
² For example: [African Development Bank signs five-year agreement to use International Federation of Consulting Engineer \(FIDIC\) standard contracts | African Development Bank - Building today, a better Africa tomorrow \(afdb.org\)](#)

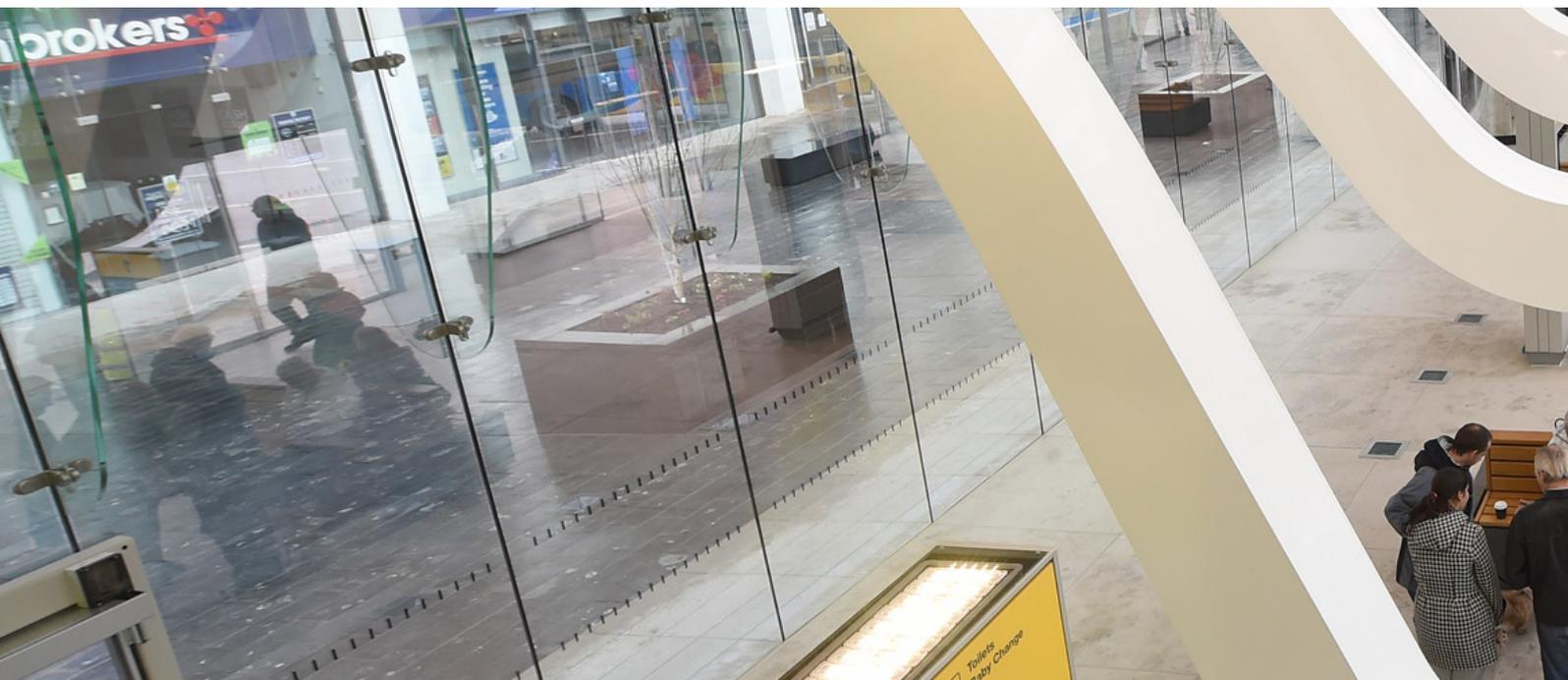
³ Page numbers refer to length of the General Conditions of each form

- There are more detailed provisions around Employer's Risks with compensable delay giving rise to EOT, Costs (including Prolongation Costs) or Costs plus Profit, and excusable delay to EOT only. The various Employer Risk Events and corresponding remedies are all set out in one table.
- There are two variation procedures: one instructed (where the Contractor is required to execute the variation and settle the time and cost impact separately) and one staged (the Contractor submits a proposal that can be accepted or rejected).
- The Second Edition introduces an Engineer to manage the project and determine claims, which brings the Green Book into line with the other main FIDIC forms. Claims must be notified within 28 days, and a fully detailed claim with supporting particulars produced within 56 days, but these are not expressed to be time-bars.
- As with the First Edition Green Book, disputes are to be determined in the first instance by an adjudicator, as a condition precedent to final determination by ICC arbitration. The procedure is somewhat different, however, with the adjudicator in the 2021 form being appointed from the outset (within 28 days of the contract coming into effect) and remaining in place throughout to provide informal assistance to the parties when issues or disagreements arise, and then determining any dispute referred to him in accordance with the adjudication rules.

Another new feature is the inclusion of 40 proforma notices and requests and other documents required to be submitted under the contract. The Green Book makes it clear that these do not form part of the contract and that FIDIC takes no responsibility for their adequacy; they will need to be adapted for each specific contract. Users will certainly find them helpful, and it will be interesting to see if FIDIC provides equivalent proformas for its other forms.

Overall, the Second Edition of the Green Book is a welcome addition to the FIDIC suite, modernising the FIDIC terms without the complexity of the other Second Edition Books released in 2017. As well as its stated use for simple and low value projects, FIDIC appears to be targeting this book at parties continuing to use the First Edition contracts so as to avoid the additional contract management burden found in the Second Edition Red and Yellow Books. Whether it will fully bridge the gap and render the First Edition Red and Yellow Books obsolete remains to be seen.





Concurrent delay update

A recent Technology and Construction Court decision has reignited the debate over concurrent delay under English law. The Court's approach in upholding a claim of concurrent delay is much broader than the "first-in-time" approach adopted in other recent English cases and reflected in the Second Edition of the SCL Delay and Disruption Protocol. We provide a snapshot of the current state of English law on this topic below. For an overview of this area of law in other jurisdictions please download our CMS Guide to Concurrent delay, covering 18 different jurisdictions, [here](#).

Concurrent delay: an overview

In its broadest sense, concurrent delay arises as an issue whenever claims for extension of time are met with an allegation that the contractor would have been unable to complete the works on time even if the event claimed for had not occurred due to its own delays or those for which it is contractually responsible.

The position with regard to concurrent delay in Scotland has largely been settled by the Inner House decision in *City Inn Ltd v Shepherd Construction Ltd* in 2010, which permits responsibility for concurrent delay to be apportioned between the parties. Apportionment has, however, been rejected by the English courts and the position in England is generally believed to be as stated in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*, that the contractor is entitled to an extension of time but not additional cost.

The primary area of debate under English law concerns the definition of concurrent delay for the purpose of the *Malmaison* principle. When are two delays sufficiently significant that they can both be said to have caused concurrent delay to completion? Is it sufficient merely that each would have caused delay to completion in the absence of the other? Or must they both be on the critical path or of roughly equal impact on the project? Broadly speaking, three schools of thought can be identified as to the causative connection required under English law:

- One traditionally popular view, sometimes referred to as the "consensus view" or dominant cause approach, requires two delaying events to be of "equal causative potency". A critical path analysis will typically be used to eliminate delaying events which have not impacted the critical path, but even events which both impact the critical path may not, on analysis, be shown to be of "equal causative potency". The question is one of common sense in all the circumstances.



Image: Blackburn with Darwen Borough Council.

- A broader test has recently been advocated by some commentators, described as a “reverse ‘but for’ test”. This approach asks simply whether the delaying event for which an extension of time is claimed would have delayed completion in the absence of the delay event(s) that the contractor is responsible for. In such circumstances, the delaying event claimed for is an “effective cause” of delay and there is no need to ask whether it is of “equal causative potency” with any contractor culpable delay events.
- A narrower test to the consensus view is sometimes advanced which focuses on the point in time at which delaying events occur. Where an existing event has caused delay to completion, subsequent delay events are treated as not being a cause of delay to completion at all unless and to the extent that they increase the delay already caused by the existing event. This is sometimes referred to as the “first-in-time” approach.

Support may be found to varying degrees for each of the above approaches in the cases, but recent English Commercial Court cases, as well as the Second Edition of the SCL Delay and Disruption Protocol, have favoured the “first-in-time” approach.

The “first in time” debate

Two recent English Commercial Court decisions, *Adyard Abu Dhabi v SD Marine Services* and *Saga Cruises BDF Ltd v Fincantieri SPA*, have drawn support for a “first-in-time” approach from the following passage of an earlier decision of the English Technology and Construction

Court in *Royal Brompton Hospital NHS Trust v Hammond (No. 7)* (per HHJ Seymour QC):

“It is ... necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event, ‘the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date.’

The relevant event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of causes of the delay.”

This passage has, however, been doubted in other decisions, not referred to in the Commercial Court cases. For example, the Scottish appeal court (known as the Inner House) reached a contrary view in *City Inn Ltd v Shepherd Construction Ltd*, describing the “first-in-time” approach as “unnecessarily restrictive and one which would militate against the achievement of its obvious purpose of enabling the architect, or other tribunal, to make a judgment on the basis of fairness and a common-sense view of causation.” Detractors

therefore point out that causation at law is more a matter of common sense than strict logic and it cannot therefore be appropriate to exclude potential causes of delay merely because they happen to occur after other competing causes of delay. Similar criticisms have been leveled at the Second Edition of the SCL's Delay and Disruption Protocol, published in 2017, which appears to support a "first-in-time" approach.

A further criticism of the "first in time" approach comes from the "prevention principle" which recognises that a contractor should not be subject to liquidated damages for delay to completion for periods in which it had been prevented by its employer from completing the works. In *Saga Cruises*, for example, an employer variation had prevented completion of the works by the agreed date, but liquidated damages were still ordered because the delay caused by the variation was held to have started and finished within a contractor delay period.

The scope of the "prevention principle" is, however, also the subject of debate. In *Jerram Falkus Construction Ltd v Fenice Investments Inc* the English Technology and Construction Court held that the principle would not apply to cases of concurrent delay. This finding was contrary to position taken in the then current edition of Keating on Construction Contracts and has been subsequently criticised by a number of commentators including John Marrin QC. The Court of Appeal acknowledged this debate in *North Midland Building Ltd v Cyden Homes Ltd* and, without seeking to resolve it, noted that the "prevention principle has no obvious connection with the separate issues that may arise from concurrent delay".

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council

In this most recent case, Blackburn with Darwen Borough Council (the "Council") appointed Thomas Barnes to build a large central bus station in Blackburn on the terms of an amended JCT Standard Building Contract with Quantities, 2011 edition. Large delays occurred on the project, for which Thomas Barnes claimed extensions of time. Blackburn ultimately terminated the contract for delay and Thomas Barnes brought proceedings in the English Technology and Construction Court contesting the termination and seeking to establish its right to extensions of time and loss and expense.

The primary delay event supporting Thomas Barnes' extension of time claim was the deflection of certain steel supports which required investigation and remedial work. This issue prevented concrete topping from being poured, which in turn prevented the construction of a "hub" which was to provide office space. The construction of the hub was required before internal

finishes could be commenced, which was the last activity on the programme.

The deflection of the steel supports was not Thomas Barnes' responsibility and the Council accepted that an extension of time was to be given in respect of the delay caused by this issue. However, whilst the deflection issue was ongoing, Thomas Barnes had suffered delays to the roof works. Completion of the roof works to provide a watertight structure was required before the hub internal finishes could commence. However, the roof delays were resolved prior to the construction of the hub and did not add any independent delay to that caused by the deflection issue.

In these circumstances, the Court found that the roof delays were concurrent with the deflection delays, despite the former being subsumed by the later:

"In my judgment this is a case where these causes were concurrent over the period of delay caused by the roof coverings. That is because completion of the remedial works to the hub structural steelwork was essential to allow the concrete topping to be poured and the hub SFS to be installed, without which the hub finishes could not be meaningfully started, but completion of the roof coverings was also essential for the hub finishes to be meaningfully started as well. It is not enough for the claimant to say that the works to the roof coverings were irrelevant from a delay perspective because the specification and execution of the remedial works to the hub structural steelwork were continuing both before and after that period of delay. Conversely, it is not enough for the defendant to say that the remedial works to the hub structural steelwork were irrelevant from a delay perspective because the roof coverings were on the critical path. The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period."

The Council had sought to avoid this finding by relying on a prospective delay analysis to argue that during much of the roof delays, the concrete topping and hub works were still in float. It therefore argued that the critical path first ran through the roof delays and then switched to the hub works once the float had been used up. The Court rejected this approach:

"Whilst I am prepared to accept this evidence from a theoretical delay analysis viewpoint, comparing the as-planned programme with the position at various points in time, it does not seem to me to be a sufficient answer to the point on causation, which is that on the evidence the fact is that the delay to the remedial works to the hub structural steelwork and the delay to the roof coverings were both causes of delay over the period identified by Mr Gunton where

the roof coverings were delayed. Even if there had been no delay to the roof coverings the hub finishes, which it is agreed were on the critical path, could not have started earlier because of the delay to the remedial works to the hub structural steelwork."

In discussing the legal approach to concurrent delay claims the Court noted a concession by counsel that the law in this area "is settled" and relied on a passage in the current edition of *Keating on Construction Contracts* that a contractor would be entitled to an extension of time if the event claimed for was "an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible".

Despite upholding Thomas Barnes' claim to extension of time, the Court's finding of concurrent delay meant that much of its loss and expense claim failed because the losses claimed for would have been incurred in any event due to the roof delays.

Conclusions and implications

This is a significant case which is likely to provoke further debate as to the correct approach to concurrent delay claims under English law. Although not directly addressed in the judgment, the Court's reasoning as to concurrent delay appears contrary to the "first-in-time" approach favoured by recent English Commercial Court decisions and the Second Edition of the SCL Protocol. It is particularly of note that the Court refused to accept either of the critical path arguments presented by the competing delay experts and instead favoured a more pragmatic, common sense approach.

The Court's adoption of the "effective cause" test recorded in *Keating* reflects similar comments by Mr Justice Akenhead in *Walter Lilly & Company Ltd v Mckay*. However, the use of this phrase does little to clarify the precise circumstances in which delays in a complex construction project will be held to be concurrent for the purpose of extensions of time claim. The uncertainty in this area of the law was recently acknowledged by the Court of Appeal in the *Cyden Homes* case where "differences of view expressed in both the first instance cases and the textbooks" were noted, but left unresolved. The findings in the present case, coming against the tide of the recent Commercial Court decisions, are likely to add to this uncertainty and it is hoped that the Court of Appeal will soon have the opportunity to rule definitively on the topic.

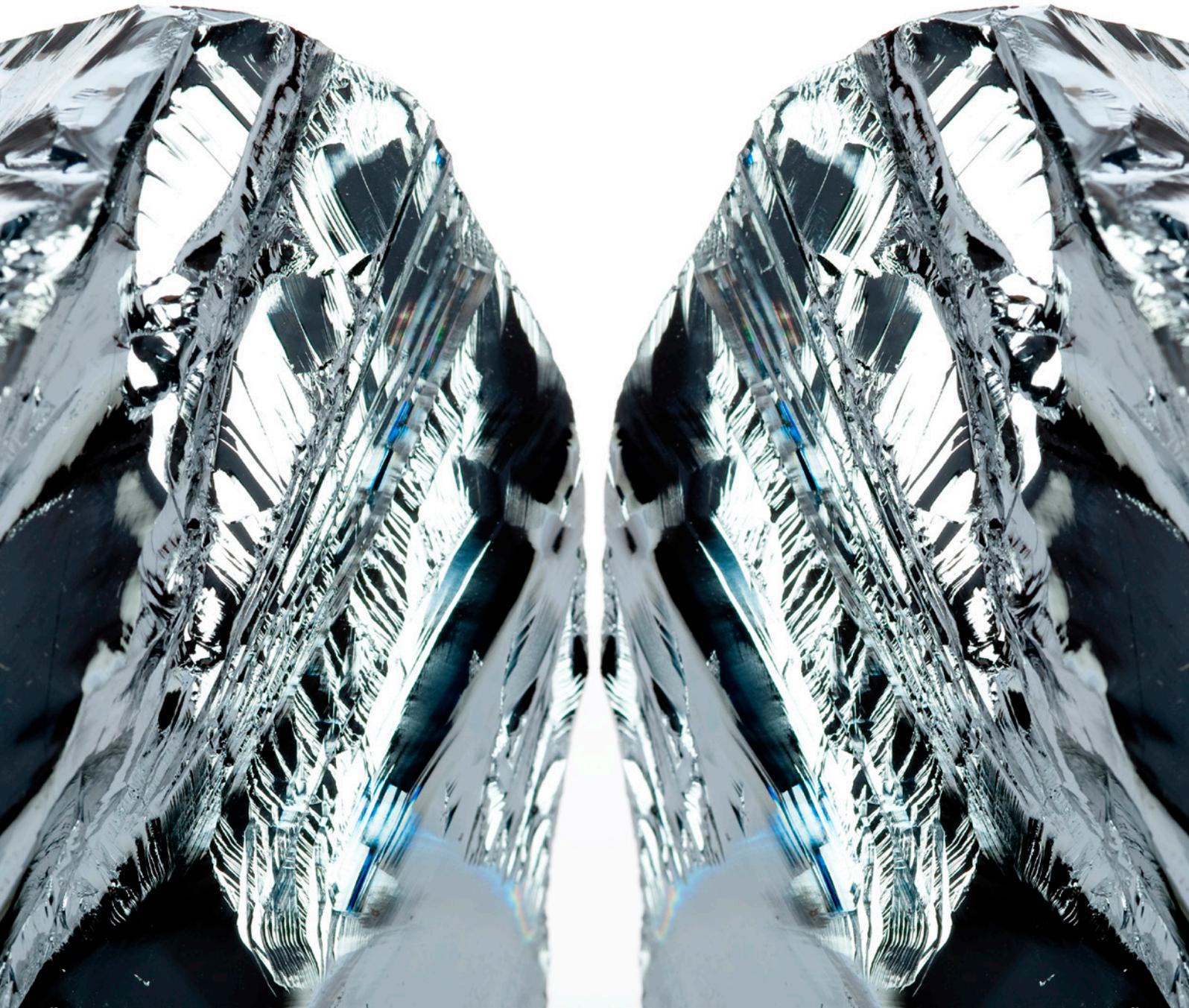
References:

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 33; *Royal Brompton Hospital NHS Trust v Hammond* (No. 7) (2001) 76 Con LR 148; *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68; *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848; *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] EWHC 1935; *Walter Lilly & Company Ltd v Mckay* [2012] EWHC 1773 (TCC); *Saga Cruises BDF Ltd & Anor v Fincantieri SPA* [2016] EWHC 1875; *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744; *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC).



Variations on a theme: the implications of differently worded extension of time clauses

As the previous article shows, large debates still exist under English law (as well as in many other jurisdictions) as to the proper approach to be taken to extension of time claims under construction contracts. The theoretical nature of these debates can sometimes divert attention from significant differences in the drafting of extension of time clauses and the important legal consequences which can flow from them. In this article we survey some of the differences in drafting present in internationally used forms of construction contract and consider the impact those differences can have on the assessment of extension of time claims.



Introduction

One important aspect of the drafting of an extension of time clause is whether it requires “delay to completion” or “delay beyond the date for completion”. An example of the former is the FIDIC form. Clause 8.5 of the Second Edition Yellow Book is an example and states that the Contractor shall be entitled to an Extension of Time:

*“if and to the extent that **completion ... is or will be delayed** by any of the following causes ...”*
[Emphasis added].

An example of the latter is the JCT form, used predominantly on English domestic projects. Clause 2.25.1 of the JCT Design and Build 2016 form reads as follows:

*“If ... (.1) any of the events which are stated to be a cause of delay is a Relevant event; and (.2) completion of the Works ... is **likely to be delayed thereby beyond the relevant Completion Date**, then ... the Employer shall give an extension of time ... as he then estimates to be fair and reasonable.*
[Emphasis added]”

A simpler approach is to state merely that if the contractor is delayed by certain specified events, it is entitled to an extension of time. An example is the Infrastructure Conditions of Contract which state that:

“The Engineer shall upon receipt of [an EOT claim] consider all the circumstances known to him at that time and make an assessment of the delay (if any) that has been suffered by the Contractor as a result of the alleged cause ...”

This simpler form of drafting has a long history in English law and can be observed in the case reports as far back as the 19th century (see, for example, *Roberts v Bury Improvement Commissioners*). Some modern forms seek to qualify such simplified drafting by introducing terms such as “fair”, “reasonable” or “appropriate”. The IChemE, LOGIC and ENAA forms adopt this approach. For example, clause 40.1 of the ENAA form states:

“The Time for Completion specified in Article 5.1 of the Agreement shall be extended if the Contractor shall be delayed or impeded in the performance of any of its obligations under the Contract by reason of any of the following:

[specified delay events]

by such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor.”

A number of questions arise as to how these subtle differences in wording affect the requirements for establishing an extension of time claim under English law. In this article we consider three such issues as follows:

- Whether any of these drafting approaches suggest that competing or concurrent delays for which the contractor is responsible are to be ignored when assessing an extension of time.
- Whether competing or concurrent delays for which the contractor is responsible may be apportioned against the contractor’s entitlement to an extension of time.
- Whether an extension of time may be claimed even where work is not delayed beyond the contractual completion date i.e. whether the contractor “owns” the float.

Can competing or concurrent contractor delays be ignored?

An argument to this effect appears to gather most force from the more simplified wording referred to above, due to its focus on the delay to the contractor by the specified events and the absence of any requirement for a delay to completion. Such an argument was accepted by English the Court of Appeal in *Wells v Army & Navy Co-Operative Society*. That case concerned an EOT clause which in respect of specified delay events provided that the employer would:

“adjudicate thereon and make due allowance therefore if necessary ... and then the contractors are to complete the works within such time as the [employer] shall consider to be reasonable”

The Court of Appeal did not consider the contractor’s own delays to be relevant. Lord Justice Vaughan Williams concluded that:

“whatever the builder might have done, the delay of the building owners and of their architect was such as to render the performance of the work within the contract time impossible. ... I wholly deny the proposition [the employer] put forward, which was this really in effect: ‘Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he too has been guilty of delay in the execution of the works.’”

Can competing or concurrent contractor delays be apportioned?

For similar reasons, those extension of time clauses with qualified versions of the simplified wording referred to above may also lend themselves more readily to apportionment arguments. The IChemE form, for example, requires the Project Manager to determine an “appropriate extension” where the contractor has been delayed by a specified event.

This issue arose under the ENAA form extension of time clause in an arbitration which came before the Singapore courts in 2021 (in *CAJ v CAI*). As quoted in the introduction, the ENNA clause merely requires the contractor to be delayed by a specified event, but qualifies this by requiring that the extension given for such delay is to be “fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor”.

The dispute in *CAJ v CAI* concerned the construction of a polycrystalline silicon plant which was delayed due to an issue with excessive vibration which required work to 6 compressors. The owner required remedial work to be carried out to no more than 2 compressors at a time, so as to maintain commercial operation. The owner subsequently claimed liquidated damages and the contractor claimed an extension of time in respect of the owner’s instruction.

The tribunal found a total delay beyond the date for completion of 99 days. It accepted the contractor’s argument that the instruction to repair only 2 compressors at a time had caused it additional delay, but no evidence had been submitted to allow the delay to be properly calculated. Nevertheless, the tribunal saw itself as being capable of fairly and reasonably determining the extension of time claim in accordance with clause 40 of the ENAA form. The tribunal took into account “all the evidence and its experience in these matters” and awarded an EOT of 25 days, which the tribunal considered to reflect the employer’s “culpability” of “around 25%”.

Although it may be questioned whether the tribunal was actually apportioning delay by this method, the Singapore Court of Appeal disagreed with such an approach:

“there was simply no legal basis for the Tribunal to apportion the length of the delay on account of the respective parties’ culpability. GC 40 clearly states that the period of extension shall be that which is fair and reasonable in all the circumstances and which fairly reflects the delay sustained ... This has nothing to do with the parties’ culpability per se. It was plainly wrong for

the Tribunal to rely on the phrase ‘fair and reasonable in all the circumstances’ in GC 40 to attribute 25% fault to the appellants.”

Who “owns” the float?

The simplified form of drafting was again in issue in an arbitration which came before the Singapore courts earlier this year on enforcement: *CWP v CWQ*. The project in question concerned dredging and land reclamation works. An English law subcontract was entered into for the dredging works. The subcontract required the subcontractor to deploy four vessels to carry out the dredging works. The work was to be completed within 90 days subject to a delay clause as follows:

“Stoppages of the dredging and/or reclamation works for any reason other than mechanical breakdown ... or any other reasons that are specified in the Contract as being attributed to the Contractor or any negligence or misconduct of the Contractor, shall entitle the Contractor to extension of time and to compensation on the basis of the standby rates ...”

The subcontractor sought EOTs and compensation for delays due to problems obtaining permits and temporary demobilisation to avoid a typhoon. The subcontractor ultimately completed the works only 2 days late and the contractor contended that that the delay clause did not apply to delays which did not cause any delay beyond the contractual completion date.

The contractor relied on the “prevention principle” to argue that, since the purpose of an extension of time clause is to relieve a contractor from liability for damages when there is a delay to completion, and thereby avoid the operation of the prevention principle, it must follow that the delay clause only applied to delays which went beyond the contractual completion date.

The contractor also relied on the Commercial Court case of *Adyard Abu Dhabi v SD Marine Services* to argue that actual delay beyond the date for completion was required and that theoretical delay was inadequate.

The tribunal split 2:1 on this issue, with the majority, relying on *Arnold v Britton*, emphasising the plain wording of the clause and rejecting the applicability of the prevention principle:

“The Majority does not consider the prevention principle to be relevant to the interpretation of Article 3.9 given that (i) neither Party appears to argue that the prevention principle applies in the circumstances; and (ii) the Majority has found above that if the Parties had intended Article 3.9 to contain

a causal requirement in relation to the EOT provision, the Parties would have included wording to express this subjective intention.”

The majority also rejected the contractor’s argument that commercial common sense weighed in favour of a different interpretation:

“While commercial common sense is an important factor to take into account when interpreting a contract, a court (or Tribunal) should be slow to reject the natural meaning of a provision as correct simply because it appears to be a ‘surprising’ term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. In any event, the Majority’s views on the correct interpretation of Article 3.9 remain the same applying a ‘business common sense’ approach. Even if the premise (judged at the time the Contract was entered into) was never that [the subcontractor] would suffer substantial losses if its vessels stopped working during the [project] ... the Parties’ chosen wording suggests otherwise. Article 3.9 demonstrates that the Parties objectively intended for [the subcontractor] to be entitled to an EOT and compensation at the standby rates, as a form of compensation for delay arising from Qualifying Stoppages.”

Conclusion

The cases discussed above show that not all extension of time clauses are created equally. The use of simplified drafting which merely requires a contractor to be delayed by specified events and makes no reference to a delay to completion or delays beyond the contractual completion date are most likely to give rise to arguments in relation to concurrency, apportionment or “ownership” of float. Such simplified forms of drafting, whilst not present in the FIDIC forms, are still widely found in international projects procured under the ENAA or LOGIC forms among others.

The arguments raised in the *CWP v CWQ* case, whilst directed at a clause with simplified drafting, might also have been made in relation to the FIDIC extension of time clause, which requires a delay to completion but not a delay beyond the Time for Completion. In this regard, the case would appear to provide helpful confirmation that the Contractor “owns” the float under the standard form FIDIC extension of time clause.

References:

Roberts v Bury Improvement Commissioners (1870) LR 5 CP 310; Wells v Army & Navy Co-Operative Society (1902) 86 LT 764; Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848; Arnold v Britton [2015] UKSC 36; CAJ v CAI [2021] SGCA 102; CWP v CWQ [2023] SGHC 61.





Termination under the FIDIC Second Edition: getting it right

In this article we consider the legal requirements for a valid termination notice under the FIDIC Second Edition, with particular focus on Employer termination. In addition to updated grounds for termination, the Second Edition contracts set out more detailed requirements for the service of Notices which deserve close consideration by any party contemplating the giving of a termination notice under the form. Three English cases last year have also considered wording with similarities to the FIDIC Second Edition clauses on these points and which may therefore throw light on the English law approach to be taken to these clauses.

Employer termination under the FIDIC Second Edition

The Employer's right to terminate for default has been amended in a number of ways in the Second Edition Books. Broadly speaking these amendments fall into three groups:

1. New termination triggers have been added, including a failure to comply with a final and binding Engineer's determination or any DAAB decision whether final and binding or not (provided such failures amount to a "material" breach of contract).
2. The old trigger for a failure by the Contractor to comply with a Notice to Correct has been qualified so that the failure must amount to a "material" breach of contract.
3. The list of events in respect of which immediate termination is possible (rather than requiring 14 days' notice) has now been extended to include breach of assignment and sub-contracting obligations.

In tandem with these amendments, the notification provisions of the Second Edition have been strengthened. There is a new definition of "Notice" as *"a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]."*

Clause 1.3 has also been expanded as set out below (save for minor amendments, the new text included in the Second Editions has been underlined):

"Wherever these Conditions provide for the giving of a Notice ... or ... another type of communication ..., the Notice or other communication shall be in writing and:

(a) shall be:

(i) a paper-original signed by the Contractor's Representative, the Engineer, or the authorised representative of the Employer (as the case may be);
or

(ii) an electronic original generated from any of the systems of electronic transmission stated in the Contract Data (if not stated, system(s) acceptable to the Engineer), where the electronic original is transmitted by the electronic address uniquely assigned to each of such authorised representatives,

or both, as stated in these Conditions; and

(b) if it is a Notice, it shall be identified as a Notice. If it is another form of communication, it shall be identified as such and include reference to the provision(s) of the Contract under which it is issued where appropriate;

(c) delivered by hand (against receipt), or sent by mail or courier (against receipt), or transmitted using any of the systems of electronic transmission under sub-paragraph (a)(ii) above; and

(d) delivered, sent or transmitted to the address for the recipient's communications as stated in the Contract Data. However, if the recipient gives a Notice of another address, all Notices and other communications shall be delivered accordingly after the sender receives such Notice.

Where these Conditions state that a Notice or NOD or other communication is to be delivered, given, issued, provided, sent, submitted or transmitted, it shall have effect when it is received (or deemed to have been received) at the recipient's current address under sub-paragraph (d) above. An electronically transmitted Notice or other communication is deemed to have been received on the day after transmission, provided no non-delivery notification was received by the sender."

These provisions give rise to five new requirements for the giving of a valid Notice:

- The document must state that it is a Notice.
- It must also include a reference to the clause under which it is issued.
- Unless electronic transmission is used, a paper original must be given, signed by a specified person.
- If electronic transmission is used, the system of electronic transmission must be specified in the Contract Data or otherwise accepted by the Engineer.
- An electronic transmission must also be transmitted by the electronic address assigned to one of the specified persons.

These new requirements raise the very real prospect that a Notice to Correct or subsequent Notice of termination may not be served correctly. This may in turn call into question the validity of the termination and lead to counterclaims for wrongful termination.

Such an issue arose under the less stringent requirements of the First Edition Yellow Book in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*. In that case, a notice of termination had been served on the Contractor's site office in Gibraltar instead of its contractual address in Madrid. The notice was nevertheless held to be valid, with the English Technology and Construction Court finding that the requirements of clause 1.3 in the First Edition were not conditions precedent to the giving of a valid notice. Mr Justice Akenhead summarised the applicable principles as follows:

"(a) Termination of the parties' relationship under the terms of such contracts is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.

(b) Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.

(c) It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective. That interpretation needs to be tempered by reference to commercial common sense.

(d) In the Contract in this case, neither Clause 1.3 nor Clause 15.2 use words such as would give rise to any condition precedent or making the giving of notice served only at OHL's Madrid office a precondition to an effective termination. Of course, key elements of the notice procedure involve securing that OHL is actually served with a written notice and receives the notice and it being clear and unambiguous that the notice is one being served under Clause 15.2, namely that 14 days notice of termination is being given by GOG to OHL, such as to enable it to expel the Contractor from the Site.

(e) The primary purpose of Clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are effectively dispatched to and received by OHL. The primary purpose of a Clause 15.2 termination notice is to ensure that OHL is made aware that its continued employment on the project is to be at an end.

(f) In my judgment, the service of a Clause 15.2 notice at the Madrid office of OHL as such is not an indispensable requirement either of Clause 15.2 or Clause 1.3. Provided that service of a written Clause 15.2 notice is actually effected on OHL personnel at a sufficiently senior level, then that would be sufficient service to be effective."

Three English cases in 2022 have considered similar issues arising under the domestic JCT contract form. This contract contains comparable termination provisions to the FIDIC Second Edition Books, in that an initial notice to correct is required, followed by a notice of termination, and specific requirements apply as to the service of a notice of termination and the specific representatives empowered to give such notices. These cases may therefore be suggestive of the approach to be adopted under a Second Edition FIDIC Contract subject to English law.

Where and how should termination notices be served?

Clause 1.7 of the JCT form considered in these recent cases sets out requirements for service of notices. In particular, this clause specifies that notices should be in writing (clause 1.7.1) and unless clause 1.7.4 of the contract is stated to apply, may be served by any

effective means and shall be duly served if delivered by hand or pre-paid post to the recipient's address in the Contract Particulars, or their registered or principal business address if the address specified in the Contract Particulars is not current (clause 1.7.3). Clause 1.7.4 is said to apply for termination notices (among other things) and states that:

"Any notice ... shall be delivered by hand or sent by Recorded Signed for or Special Delivery post. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting."

In *Thomas Barnes & Sons Plc v Blackburn with Darwen BC* the English Technology and Construction Court found that nothing less than strict compliance with the requirements of clause 1.7.4 would suffice for the purposes of a termination notice. Despite the clause not having been expressly drafted as a condition precedent, the Court emphasised the contractual intention for more specific requirements to apply to such notices:

"The fact that clause 1.7.4 contains specific and more onerous requirements which only apply where the contract expressly requires that they should must mean, in my judgment, that any non-trivial departure should invalidate the notice."

The Employer in *Thomas Barnes* had (among other means) attempted service of a termination notice by hand on site, as a known address where the Contractor was based. Based on the Court's findings as to clause 1.7.4, this was deemed to be invalid service as the Contractor had not expressly notified the Employer that notices could be sent to that address.

The Court's decision is consistent with the decision in the *Obrascon* case noted above, in that the special treatment given to certain notices under clause 1.7.4 was sufficient to take them outside the usual rule, applied in *Obrascon*, that the requirements of a notice clause will not usually amount to a condition precedent.

Where the Second Edition sits in references to these cases is a difficult question. Although the requirements of clause 1.3 have been enlarged, the operative language is still that a Notice "shall" comply with the requirements of the clause. Language expressly imposing a condition precedent is therefore lacking. On the other hand, the introduction of a definition of "Notice" might be said to have this effect. As quoted above, the definition states that a "Notice" as defined is only one which is "issued in accordance with Sub-Clause 1.3". The termination rights provided by the Second Edition Books can only be exercised by the giving of a "Notice". If the purported notice which is sent does not comply with clause 1.3, it may be argued that it is not a

"Notice" as defined and that any right of termination has not been validly exercised.

A further point in favour of a stricter reading is that clause 1.3 differentiates between "Notices" as defined and "other communications". Unless there was to be a difference between these two categories, there would be no need to address them separately; clause 1.3 could merely have referred to them both as "communications". Their separate treatment reinforces the above point that the inclusion of a definition was intended to make the requirements of clause 1.3 conditions precedent for Notices but not for other communications. This conclusion also reflects the similar conclusion reached in *Thomas Barnes* where the different treatment of notices under clause 1.7.4 was found to have intended a condition precedent.

Who should serve the notice?

As noted above, clause 1.3 in the Second Edition Books stipulates certain persons who are required to sign or, for electronic transmission, send Notices under the Contract. If these requirements are conditions precedent for the reasons stated in the previous section, the signing or sending of a termination Notice by other persons on behalf of the Employer may not be valid.

In addition to this requirement, the Second Edition Yellow and Red Books state specifically that the Engineer is to give the Notice to Correct under clause 15.1. Similarly drafted termination provisions were considered by the English Technology and Construction Court in *Struthers v Davies*. The contract in that case required a "Contract Administrator" to serve an initial notice of default, which if not remedied could lead to a notice of termination served by the employer. The Court found that termination clauses should be construed strictly and that whilst the language surrounding who serves the notice was not cast in mandatory terms or expressed as a condition precedent, there were "sound reasons for requiring the initial notice to come from the Contract Administrator rather than the client." As the initial notice had instead come from the Employer directly, both it and the subsequent attempt to terminate in reliance on the initial notice were invalid.

When should the required notices be served?

Also of importance is the new wording in clause 1.3 of the Second Edition Books as to the time at which Notices are to take effect. This is deemed to be the following day for electronic transmissions and the time of actual receipt for other modes of delivery. Where a Notice of termination is being served, it is important that no action be taken in reliance on the Notice (such as removing the Contractor from the Site) until it has taken effect.

The JCT contract considered in the *Thomas Barnes* case had similar provisions which deemed service on the second business day after posting. In addition to delivering the notice by hand to the contractor on site, the employer in that case sent a copy of the notice by email and by post. The employer then removed the contractor from site on the same day the notices were sent. Having determined that service by hand was ineffective, the court also found that the email notice was ineffective (email not being an effective method of service). The notice sent by post was found to be effective but, in accordance with the deemed service provisions in clause 1.7.4, only took effect two business days after posting, being two business days after the employer had in fact removed the contractor from site.

A further example of premature termination is provided by *Manor Co-Living Limited v RY Construction Limited*, which also came before the English Technology and Construction Court in 2022. In this case, the employer sought prematurely (i.e. before the expiry of an initial 14 day notice to correct) to serve a notice terminating the contract and proceeded to lock the contractor out of the site. The employer's termination notice was therefore ineffective.

What are the consequences of the Employer getting it wrong?

As noted in the current edition of *Keating on Construction Contracts*, "a wrongful termination by the employer or its agent normally amounts to repudiation on the part of the employer", allowing the contractor to terminate the contract itself and claim damages from the employer. This was the position reached in *Manor Co-Living v RY*, where the employer's act in barring the contractor from site after its ineffective termination notice was found by the adjudicator in that case to be repudiatory.

In some circumstances, however, an invalid termination may not amount to a repudiation. In *Thomas Barnes*, the court found that the employer's premature removal of the contractor from site did not constitute a repudiation. The court took into account a number of factors including that the contractor had already ceased meaningful activity on site, that the contractor was not in a position to carry out further work in any event and that there was no adverse effect on the contractor having to leave site two days early, particularly when the contractor already knew that the employer intended to terminate.

An employer might also seek to salvage an ineffective termination notice by claiming that it amounted to an acceptance of a repudiation by the contractor at common law. In both *Thomas Barnes* and *Struthers v Davies* the contractor was found to be in such serious and significant breach of contract at the time the failed contractual notice was served as to be in repudiatory breach and therefore, although the contractual termination failed, the notice could still constitute acceptance by the employer of the contractor's repudiation at common law.

This finding was assisted in *Thomas Barnes* by the employer having expressly stated in its failed contractual termination notice that it was entitled to and did accept the contractor's repudiatory breach in the alternative to its contractual termination. In the absence of such drafting, the court in *Struthers v Davies* accepted that the ineffective termination notice could operate as an acceptance of a repudiatory breach. However, the opposite conclusion was reached by the adjudicator in *Manor Co-Living v RY*.

Conclusions and implications

The English cases reported above highlight the care which is needed when seeking to administer the process of terminating a construction contract, particularly where more than one notice is required. The contractual process must be adhered to for each of the notices required, ensuring that service requirements, timings and the required notifying entity are all complied with. The consequences of failing to meet these requirements can be uncertain at best and nothing short of disastrous at worst.

Such cautionary tales are particularly apt to the revised notice and termination provisions of the FIDIC Second Edition contracts. No less than five new requirements for the giving of notices have been introduced in to clause 1.3. The introduction of a new definition of "Notice" may also have the effect of making these requirements conditions precedent to a valid Notice – with the attendant risk of undermining any termination notice given in breach of the new requirements.

References:

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC); *Keating on Construction Contracts* (11th Edition); *Struthers v Davies (t/a Alastair Davies Building)* [2022] EWHC 333 (TCC); *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC); *Manor Co-Living Ltd v RY Construction Ltd* [2022] EWHC 2715 (TCC).



Do unenforceable liquidated damages provisions operate as a cap on general damages for delay?

An English Technology and Construction Court decision in 2022 has considered whether liquidated damages provisions which are held to be unenforceable may nonetheless still operate as a cap on the amount of general damages for delay recoverable by an employer. The Court in this case also considered whether liquidated damages provisions were void for uncertainty due to significant ambiguities arising from the scheduling of a tender document to the contract.

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd

Peel engaged Buckingham to design and build parts of a plant for the manufacture of corrugated cardboard in Merseyside. The parties entered into an amended JCT Design and Build Contract 2016 with bespoke amendments. The Date for Completion stipulated in the contract was 1 October 2018 and a regime for the payment of liquidated damages for delay was set out in Schedule 10 to the contract.

The contract works were heavily delayed and Peel claimed liquidated damages from Buckingham under Schedule 10. The schedule set out dates for the completion of certain milestones, including for “Practical Completion”. The schedule stipulated a weekly amount of liquidated damages for delays to each of these milestone dates as well as an overall cap on liquidated damages. The schedule was not drafted specifically for the contract, but came from a tender document which had been included in the contract in an unedited form. This resulted in a number of ambiguities:

- The schedule had two columns setting out different liquidated damages amounts without any express indication of which was to apply. The first column was headed “LADs as Per Tender Schedule 10” and the second column was headed “[Buckingham] LADs Proposal ref BAFO Ltr 13.9.17”.
- The date in Schedule 10 for “Practical Completion” differed from the “Date for Completion” stated in the Contract Particulars by approximately 2 months.
- Schedule 10 showed weekly damages amounts as being calculated by reference to a percentage of the overall Contract Sum, however the Contract Sum used in Schedule 10 was different from that actually agreed and stipulated in the Articles of Agreement.

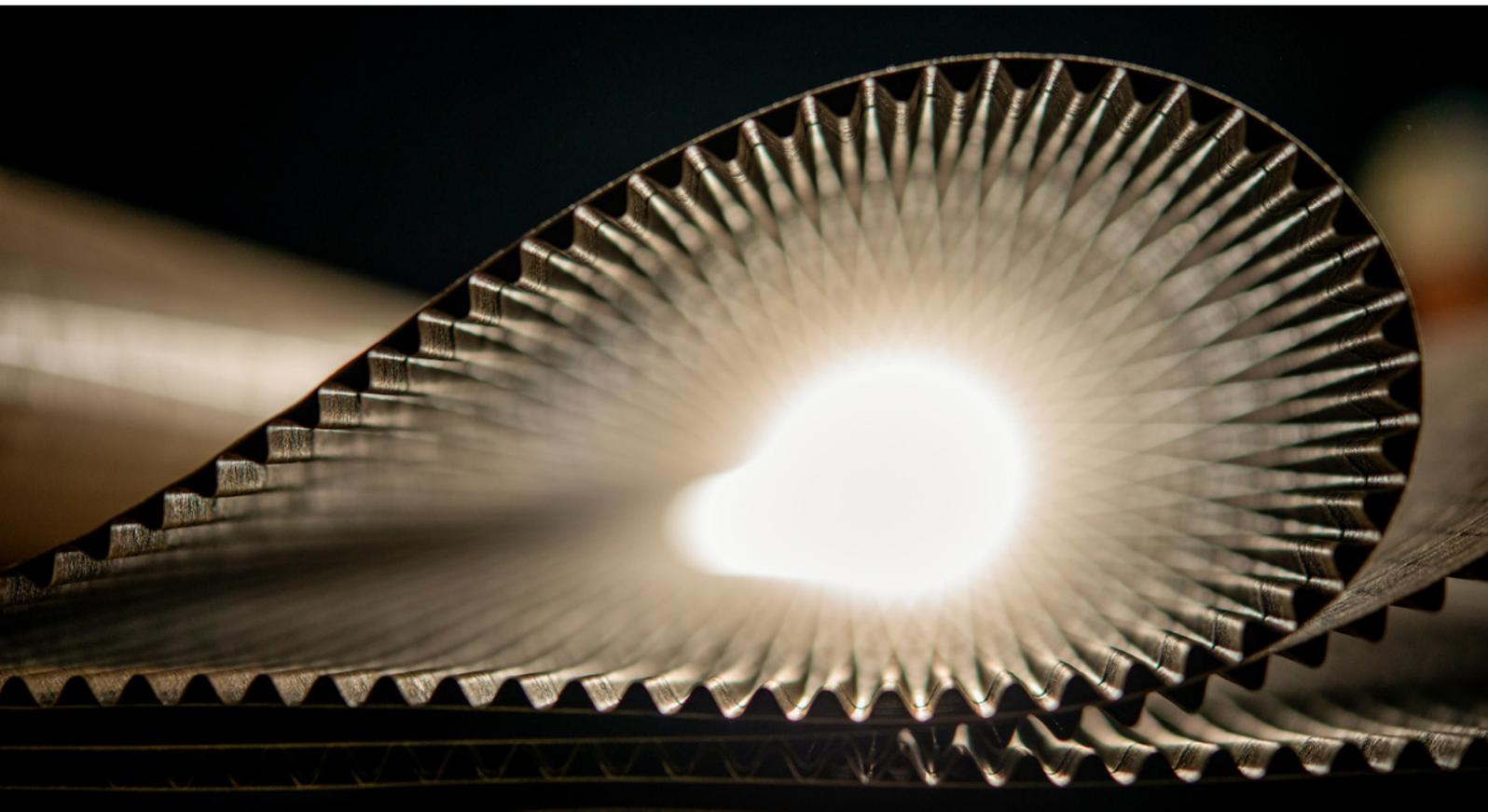
Birmingham relied on these matters, among others, to contend that the liquidated damages regime was void for uncertainty and unenforceable. It also claimed that the cap on liquidated damages nonetheless persisted to limit any claim Peel may make for general damages. Buckingham sought declarations from the English Technology and Construction Court as to these matters.

Sufficiently certain

The Court noted the high bar which exists for striking down contractual provisions on grounds of uncertainty and found that Schedule 10 was sufficiently certain to be enforced. The Court took cognisance of the fact that Schedule 10 was an unedited copy of a tender document and used this to ascertain a clear contractual intention. The second column was to prevail as it represented Buckingham’s BAFO or “Best and Final Offer” which came after its tender offer. The Practical Completion date on the schedule could be used for the accrual of liquidated damages, whilst the (different) Date for Completion could remain operative for other purposes. The Contract Sum differences were of no great consequence and meant only that the parties had agreed on liquidated damages amounts which had not been updated to reflect the finally agreed Contract Sum.

Would the cap still have applied?

The Court also rejected Buckingham’s claim that, had the liquidated damages regime been void for uncertainty, the cap on liquidated damages would have operated as a cap on general delay damages. Buckingham relied on an earlier decision of the English Technology and Construction Court in *Eco World v Dobler* where such a conclusion was reached on an obiter basis. In the Court’s judgment, the question was one of interpretation and whether “the language of the provision was broad enough to encompass any alternative liability that could arise in respect of general



damages.” Schedule 10 expressed the cap as being “on Maximum LADs” and there was no warrant for reading this term more generally to cover general delay damages. This was supported by the fact that the cap was situated within a schedule to the contract dealing exclusively with liquidated damages.

Conclusion and implications

The Court’s decision in relation to the applicability of the cap on liquidated damages provides an interesting counter-point to the *Eco World* decision. The cap in that case was contained in a section of the contract particulars dealing with liquidated damages and stated simply that liquidated damages were to apply “up to an aggregate maximum of 7%”. It is difficult, therefore, to see any great difference in substance to account for the different conclusion reached in that case as to the applicability of the cap to a general claim for damages were the liquidated damages provisions to have been found to be invalid.

Also of note is a decision of the Singaporean High Court in *Crescendas Bionics v Jurong Primewide* decided in 2021. That case concerned the invalidity of a liquidated damages regime due to an act of prevention by the employer which had set time at large. The court in that case held that the liquidated damages amounts would not continue to operate as a cap on general damages

for delay, emphasising the different nature of the two types of claims:

*“In my view, general damages and liquidated damages are underpinned by different considerations. General damages are intended to compensate the innocent party for the **actual** losses suffered as a result of the breach. In contrast, liquidated damages are intended to be a genuine pre-estimate of the **likely** losses that would be suffered in the event of a breach ...”*

The *Buckingham* case also provides another example of the perils of appending correspondence or pre-contractual documentation to a construction contract by way of appendices or schedules. Whilst the validity of Schedule 10 was upheld, the interpretation given to it by the Court was driven by the need to make the contract work if at all possible and may not have reflected how the parties would have expressed themselves had the schedule been freshly drafted.

References:

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC); *Eco World - Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC); *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189.



The use of “without prejudice” privilege on international construction projects

A recent decision of the Privy Council, made up of members of the UK’s highest court, has considered the application of “without prejudice” privilege to final account negotiations under a large construction contract. The meaning and operation of “without prejudice” privilege is often a point of confusion among those in the construction industry and the clarity provided by this decision is to be welcomed. In this article we also consider how claims to such English law privileges are dealt with in international disputes where the home jurisdictions of each party as well as the jurisdiction in which the works are situated may deal with questions of privilege and evidence in different ways.

What is “without prejudice” privilege?

The purpose of the “without prejudice” rule under English law is to prevent any written or oral statement made in a genuine attempt to settle an existing dispute from later being put before a court or other tribunal as evidence against the party that made the statement. The rule is an exception to the general position that statements made against your own interests (i.e. admissions) are admissible in evidence. The rule therefore allows parties to speak and write openly without fear that this may be later used against them. Where the rule applies those communications will be considered privileged and will remain confidential (unless that privilege is waived). The rule is designed to encourage parties to settle their disputes amicably.

The use of the phrase “without prejudice” is not required for the rule to apply. Provided the communications in question represent a genuine attempt to settle an existing dispute, they will be privileged even if this phrase has not been used. Conversely, merely heading an email or other communication as “without prejudice” will not usually attract the privilege where the content of the communication does not contain a genuine attempt at settlement. An exception to this is where both parties have used the “without prejudice” tag in the same chain of communications with a view to attracting privilege. In such a case, “without prejudice” privilege will apply as a matter of agreement even where there is no genuine attempt at settlement.

In a construction context, the “without prejudice” designation is often misunderstood and deployed in an entirely different sense. Parties commonly use the term merely to effect a reservation of rights in the sense that the position advanced in a given piece of

correspondence is “without prejudice” to the party’s right to take a different position in the future. This often leads to arguments as to whether a particular email or letter is properly subject to “without prejudice” privilege or not. Similar arguments were recently considered by the Privy Council in a construction case on appeal from Trinidad and Tobago.

A & A v Petroleum Company of Trinidad and Tobago

A&A, a construction company working in the energy sector, was contracted by PCTT, a state-owned petroleum company, to provide steel works relating to the strengthening of a platform and block station in an oilfield owned by PCTT. The contract between the parties was for a fixed price but allowed variations to be instructed by PCTT. Clause 7 of the contract stipulated that the value of such variations “*shall in all cases be agreed between [PCTT] and [A&A] and the amount thereof shall be added to or deducted from the Contract price as appropriate.*”

After completion of work under the contract, the parties were unable to reach agreement over the value of the variation account. A&A filed a claim in the Trinidad and Tobago High Court and relied on a letter from PCTT dated June 2008 which recorded agreements between the parties (and their outstanding differences) reached during a meeting in May 2008 regarding the value of certain variations. The June 2008 letter was not marked “without prejudice” but a subsequent letter by PCTT in the same chain of correspondence was marked “without prejudice”.

PCTT objected to the June 2008 letter being admitted in evidence claiming it formed part of “without

prejudice” negotiations. The High Court disagreed and gave judgment in A&A’s favour based on the agreements recorded in the June 2008 letter. PCTT appealed and the Trinidad and Tobago Court of Appeal set aside the judgment, finding that the June 2008 letter was a “without prejudice” communication and therefore inadmissible. A&A appealed to the Privy Council.

The Privy Council

The Privy Council agreed with the judge at first instance and concluded that the June 2008 letter was admissible. It reached its decision on the basis that the agreement made at the meeting in May 2008, as recorded in the June 2008 letter, formed part of a process under the contract for arriving at a value for the work. As the contract intended that this process should be open the letter was therefore admissible.

The court noted that clause 7 of the contract (dealing with variations) imposed an obligation on the parties to set out their respective positions in order to seek to agree any variations and their value. It interpreted this as providing for an ongoing process which was wholly distinct from negotiations between parties who in contemplation of litigation were seeking to settle. It also saw no policy reason why this contractual process should be conducted on a “without prejudice” basis. In a scenario where the court had to later determine any variation and its value it would be assisted by knowing the earlier position adopted by the parties. On an objective assessment, the parties did not intend any of the correspondence forming part of that process to be “without prejudice” (including PCTT’s subsequent letter headed “without prejudice”).

These findings did not mean there couldn’t be separate “without prejudice” negotiations whereby one of the parties had made an offer to compromise the position it had adopted in open correspondence. However, in the context of these communications and circumstances, a reasonable person would have understood the parties’ joint intention to be that the process of reaching agreement on variations should be an open process.

The Privy Council noted that even if its view was incorrect and the June 2008 letter was protected by “without prejudice” privilege, the exception which allows “without prejudice” material to be relied upon to prove agreements reached between the parties would have applied. It was not necessary for the exception to apply that agreement be reached across the whole account, as PCTT had contended.

This case provides helpful judicial guidance at a senior appellate level as to the application of the “without prejudice” rule to final account type negotiations which are an everyday feature of the construction industry in

the UK and internationally. The case shows that where the “without prejudice” designation is not used, the contractual framework against which the negotiations take place is likely to point against the application of “without prejudice” privilege in most cases. Merely marking a communication “without prejudice” is also unlikely to provide protection where the contract explicitly provides for a regime or process in which those communications are intended to be open and therefore admissible.

Parties wishing to allow themselves greater freedom in such negotiations would be well advised to state in more fulsome language that “without prejudice” privilege is intended to apply. For example, a communication might be stated to be, “Subject to ‘without prejudice’ privilege for the purpose of genuine attempts at settlement”. Such parties may also wish to mark such communications as “subject to contract” – meaning that even if “without prejudice” privilege were not to apply, any agreements or concessions made in such correspondence ought not to be binding pending the execution of a formal contract.

English law privilege in an international context

The above proceedings arose in a common law country where the English doctrine of “without prejudice” privilege applied. More difficult issues of local and private international law can arise where English law privileges are sought to be asserted in foreign jurisdictions without similar concepts or in international arbitration proceedings. Where arbitration proceedings are concerned, the law of the seat of the arbitration may be different to the law of the contract, which may be different again from the location of the works or each of the parties’ relevant place of business. Parties may seek to assert privileges arising under the laws of each of these locations, leaving an arbitral tribunal with the difficult task of attempting to identify which, if any, ought to be upheld.

The tribunal’s power to decide such matters will flow from the procedural law applicable to the arbitration, usually the seat of the arbitration unless otherwise stated by the parties. Such procedural laws often confer a wide discretion upon the arbitral tribunal to decide upon issues surrounding the disclosure of documents and the extent to which it will accept claims to privilege arising under laws foreign to the seat of the arbitration. More restrictive procedural laws may sometimes be found, however, which limit the tribunal’s powers to the specific rules of evidence adopted under the law of the seat.

To complicate matters further, both local laws as to privilege and local conflict of law rules as to foreign

privileges vary considerably from country to country. In England, for example, legal advice privilege and litigation privilege will apply to advice given by foreign lawyers in a foreign country or in relation to foreign proceedings, even if no privilege applies in those foreign countries (*In re Duncan*). English “without prejudice” privilege (which protects against the disclosure of genuine settlement negotiations) also applies to protect settlement negotiations held in a foreign country, however, unlike legal advice and litigation privilege, an English court will not restrain the use of without prejudice material in a foreign country unless the parties have expressly agreed that negotiations are to be privileged (*Prudential Insurance Co of America v Prudential Assurance Company Ltd*). The “without prejudice” rule is a local or “procedural” rule of English law whereas legal advice and litigation privilege are “substantive” rights which English law will protect extraterritorially.

These difficulties can mean that a simple analysis of privilege flowing from the law of the seat of the arbitration is unattractive, as it may result in the violation of privileges specifically protected by jurisdictions closely connected with the arbitration. For example, the legal advice and litigation privileges granted by civil law jurisdictions are usually more restrictive than under English law. An arbitrator sitting in a civil law country and applying only the law of the seat to determine questions of disclosure might therefore order the production of documents which would otherwise be privileged under the laws of a common law country such as England. As such documentary privileges are often based upon public policy considerations, such an approach could potentially prejudice the enforcement of any award in those countries. Under English law, for example, the wrongful admission of privileged material in an arbitration can result in allegations that any award is or will be tainted by bias on the basis that the arbitrator has wrongly seen material which has or will make a fair hearing impossible (see *Brown v CBS (Contractors)* and *Francis James v Griffin Shopfitters*).

These considerations usually lead (where the procedural law of the arbitration allows it) to the more pragmatic outcome noted in *Russell on Arbitration*:

‘In practice a combination of wishing to preserve the privilege of a party who under the rules of his own jurisdiction had a legitimate expectation of it, and not wishing to treat the parties differently, means that in most cases both parties will be able to claim privilege in accordance with whichever applicable rules are most restrictive about the requirement to disclose.’

This broad approach is also reflected in the IBA Rules on the Taking of Evidence in International Arbitration 2020. Paragraph 9.4 permits a tribunal when considering privilege claims to take into account the following matters (subject to any mandatory rules determined to be applicable):

‘(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; ... (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.’

This broad approach to privilege reinforces the point made above that parties should give careful thought as to how best to claim privilege over advice received during the course of a project and in any negotiations over claims. Particular consideration should be given to appointing local lawyers and/or entering into express “without prejudice” agreements with counterparties to settlement negotiations. Provided the appropriate persons are involved and the appropriate rules are followed, parties can be confident that their legitimate expectations as to privilege will be given weight in any subsequent arbitration.

References:

In re Duncan [1968] P 306; *Brown v CBS (Contractors)* [1987] 1 Lloyd’s LR 279; *Francis James v Griffin Shopfitters Ltd*, 8 March 1991, unreported; *Prudential Insurance Co of America v Prudential Assurance Company Ltd* [2003] EWCA Civ 1154; *Russell on Arbitration* (23rd Edition, 2007); *A & A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago (Trinidad and Tobago)* [2022] UKPC 39.



Multi-tiered dispute resolution clauses and jurisdictional challenges

A Court of Appeal decision last year from Hong Kong has provided valuable appellate guidance on the approach to be taken to jurisdictional challenges due to non-compliance with pre-arbitral conditions in multi-tiered dispute resolution clauses. The decision reviews authorities from a number of other jurisdictions and supports the growing consensus around the general applicability of a distinction between questions of admissibility and jurisdiction in relation to pre-arbitral conditions.

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 Second 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 give 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 any 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.

Such arguments have generally been given short shrift in various jurisdictions across the globe, as well as in academic writings on arbitration law. There has, however, been little consideration of the issue by appellate courts. A decision of the Hong Kong Court of Appeal on the issue in 2022 is therefore of significance.

C v D

C and D were both satellite operators and entered into an agreement for the development, building and deployment of a satellite capable of broadcasting into the People's Republic of China (the "PRC") and Thailand. Broadcasts were to be made by 28 transponders on the satellite, half of which were to be for the exclusive use of C and the other half for D. A dispute arose over D's use of its transponders to broadcast video content into the PRC, which C contended required the approval of the relevant PRC authorities. The agreement between the parties contained the following multi-tiered dispute resolution clause:

"[14.2] Dispute Resolution. The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such dispute by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.

[14.3] Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre ... in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration ..."

Following letters between the solicitors for each party, D wrote to C "in a final effort to resolve this issue and avoid further legal proceedings". D's letter noted that a dispute had arisen and expressed willingness to refer the dispute to the parties' respective senior management teams in accordance with clause 14.2 "if necessary".

No senior management meeting was held and D subsequently referred the dispute to arbitration approximately four months later. C objected to the jurisdiction of the tribunal on the grounds that D had not requested a senior management meeting under clause 14.2 and the 60 day period in clause 14.3 had not therefore begun. The tribunal rejected C's objection finding that:

1. whilst the obligation to negotiate the dispute in good faith under clause 14.2 was mandatory, reference of the dispute to a senior management meeting was optional; and
2. the 60 day period in clause 14.3 begun from the request for good faith negotiations referred to in the first sentence of clause 14.2, not the request for a senior management meeting, and had therefore been triggered by D's letter.

C subsequently brought proceedings before the Hong Kong High Court seeking a declaration that the arbitral tribunal did not have jurisdiction. Declarations were refused and C appealed to the Hong Kong Court of Appeal.

The Court of Appeal reviewed a number of cases in other jurisdictions including the UK, Singapore, Australia and the United States, as well as academic writings. These authorities were unanimously in favour of a general distinction between the "admissibility" of claims as opposed to matters of jurisdiction. As noted by the English Commercial Court in *Sierra Leone v SL Mining Ltd*:

"The international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction ... I consider that, to accord with the views of Paulsson, ... 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.

Such a conclusion accords with the guidance given by the Chartered Institute of Arbitrators in its International Arbitration Practice Guideline: Jurisdictional Challenges, last revised in November 2016, and still in force, as setting out 'the current best practice in international commercial arbitration for handling jurisdictional challenges'. It reads as follows, in material part, at p 3:

'6. When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, ie whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge for the arbitrators' jurisdiction to decide the claim itself.'"

The Court also approved the following comments of the English Commercial Court in *NWA & FSA v NVF*:

"To give an arbitration clause such as this a commercial construction so that pre-arbitration procedural requirements are not jurisdictional is appropriate because, in most cases, if a dispute is not settled in the pre-arbitration procedure, it remains the same dispute, so non-compliance with the pre-arbitration procedure does not affect whether it is a dispute of the kind which the parties agreed to submit to arbitration"

The Court rejected C's argument that the distinction between jurisdiction and admissibility should not be adopted because it is not referred to in the relevant provision (section 81) of the Hong Kong Arbitration Ordinance (Cap 609) which in turn incorporated Article 34 of the UNCITRAL Model Law on Arbitration. In the Court's judgment, the distinction was a "concept rooted in the nature of arbitration itself" and could be properly taken into account when interpreting section 81 and Article 34:

*"There is, we consider, much to be said for recognising the distinction between admissibility and jurisdiction for the purpose of Art 34 ... Such an approach would (i) likely give effect to the agreement of the parties who, "as rational businessmen, are likely to have intended any dispute arising out of their relationship ... to be decided by the same tribunal" (per Lord Hoffmann in *Fiona Trust Corp v Privalov* ... (ii) be in line with the general trend of minimizing the permissible scope of judicial interference in arbitral procedures and awards, (iii) further the object of the Ordinance as stated in s 3 thereof, ie "to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses", and (iv) ensure that Hong Kong does not fall out of line with major international arbitration centres like London or Singapore. In our view, while the distinction between jurisdiction and admissibility cannot be written directly into Art 34 ..., it can be given proper recognition though the route of statutory construction, namely, that a dispute which goes to*

the admissibility of a claim rather than the jurisdiction of the tribunal should be regarded as a dispute "falling within the terms of the submissions to arbitration" under Art 34 ..."

C also argued that, in the event the distinction between jurisdiction and admissibility were to be adopted, the Court should find that any condition precedent to arbitration within an arbitration clause should go to jurisdiction rather than admissibility. C relied on older English case law in construction disputes dealing with arbitration clauses which only permitted arbitration after the completion of the works. In those circumstances, the English Court of Appeal had held that the question of whether the works had been completed before the commencement of the arbitration was outside the jurisdiction of the arbitrator and if the arbitration had been commenced prematurely, the arbitral tribunal had no jurisdiction to make an award: *Smith v Martin*.

The Court considered this to be too rigid an approach to the interpretation of an arbitration agreement in modern times:

"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 ... In our view, just as it is open to parties to decide that all substantive disputes arising out of an agreement may be referred to arbitration, it is equally open to them to decide that any dispute on whether a pre-arbitration procedural requirement has been fulfilled should be resolved by arbitration as well. There is no reason in either principle or logic why such a dispute must necessarily be outside the scope of the arbitration agreement, or be regarded as jurisdictional in nature. The answer to the question depends, ultimately, on the parties' intention, to be ascertained as a matter of true construction of their agreement."

Conclusion and implications

This is a significant decision at an appellate level confirming the prevailing approach under English law and elsewhere to jurisdictional objections based on non-compliance with pre-arbitral conditions in multi-tier dispute resolution provisions. This approach provides comfort to parties subject to such provisions that the advantages they provide cannot readily be pressed into the service of cynical point-taking by uncooperative counterparties.

The approach confirmed by this decision does not rule out the ability for jurisdictional points to arise in relation to pre-arbitral conditions, but it is likely that such points will need strong support from the wording of the applicable dispute resolution provisions if they are to succeed.

References:

Smith v Martin [1925] 1 KB 745; *NWA & FSA v NVF* [2021] EWHC 2666 (Comm); *Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm); *C v D* [2022] HKCA 729.



The recoverability of litigation funding costs in arbitration proceedings

The recoverability of litigation funding costs in arbitrations under the English Arbitration Act has received support from a recent decision of the English Commercial Court. The availability of such orders provides a significant advantage to claimants involved in such arbitrations and is well worth considering when considering the choice of seat for an arbitration clause and also during the course of any dispute subject to arbitration.



Cost awards under the Arbitration Act

Section 61 of the English Arbitration Act 1996 (the “Act”) provides that:

“The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.”

Section 59 of the Act clarifies that:

“the costs of the arbitration are ... (a) the arbitrators’ fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties.”

Whilst the recoverability of ordinary legal costs connected with an arbitration is uncontroversial, whether “other costs of the parties” can extend to the costs of litigation funding is a question which has been the subject of debate since the decision in 2016 of the English Commercial Court in *Essar Oilfields Services v. Norscot Rig Management*.

In *Essar*, the tribunal found that Essar, a large company which employed Norscot, a small service-provider, had set out to “cripple” Norscot and to exert pressure on it before and during the arbitration. Essar had made “unjustified personal attacks and allegations of fraud and dishonesty” against Norscot, which had had no

choice but to enter into a funding agreement at a cost of 300% of the funding advanced, or 35% of the sum recovered. The tribunal found in Norscot’s favour and awarded it the costs of the litigation funding on top of its legal costs.

The tribunal’s costs award was upheld by the Commercial Court, but has since been the subject of mixed opinions. Some commentators have doubted whether litigation funding costs can properly be characterised as “costs of the arbitration” under sections 59 and 61 of the Act. Others point out the disparity with the irrecoverability of litigation funding costs in commercial disputes heard before the English courts, a disparity only made worse by the fact that no power exists, as there does in court proceedings, for a tribunal to make costs orders against non-parties who have supported the prosecution of a failed arbitration.

These criticisms have now been put to the test in a recent English Commercial Court decision challenging another award of litigation funding costs under section 61.

Tenke Fungurume Mining SA v Katanga Contracting Services SAS

Tenke Fungurume Mining (“TFM”) operated a mine in the Democratic Republic of the Congo and entered into a number of construction contracts with Katanga Contracting Services (“KCS”). Disputes arose between the parties and KCS commenced two arbitrations against TFM which were later consolidated. The contracts and the arbitration clauses were subject to English law, with arbitrations governed by the ICC Rules and seated in London.

KCS was successful in the arbitrations and was awarded legal and expert costs of just under US\$1.4m, plus US\$1.5m for litigation funding; plus compound interest at 9% which at the time of the award had already accrued to approximately US\$2m. The litigation funding was procured from a company owned by one of KCS’s shareholders. The litigation funding amount was made up of a fixed fee, payable in the event of a successful outcome, of 100% of the amount of the funding (i.e. US\$1.3m) plus a variable fee of US\$214,317.

TFM brought a challenge to the award under section 68 of the Act alleging “serious irregularity”. Whilst relying on various other grounds in support of its challenge, TFM claimed that the award of litigation funding costs amounted to an excess of power under section 61 of the Act. TFM argued that the words “costs of the arbitration” limited the reference in section 59 to “other costs of the parties” such that litigation funding costs were not within the tribunal’s power to award. TFM argued that *Essar Oilfields* had been wrongly decided on this point and sought to compare the consequences of the KCS award with that made in *Essar Oilfields* in the following terms:

“This is not a case where litigation funding was provided by a regulated third party funder. This is a case where the funding came from a related company owned by one of KCS’s shareholders. There was no finding that KCS needed the funding in order to pursue the arbitration – in the loan agreement it warranted its solvency (which must have included its ability to pay the legal fees already accrued). If this Award is permitted to stand, it will encourage claimants to take out shareholder loans, so that shareholders can try to recover further ‘fees’, safe in the knowledge that, unlike third party funders in the world of litigation, they are beyond the reach of the arbitral tribunal and the Courts if they fund arbitrations which fail.”

The English Commercial Court rejected these challenges. The Court noted that it was not sufficient for TFM to show that the correct interpretation of section 59 did not extend to litigation funding – that would be a matter of law on which no appeal was available under

the terms of the arbitration agreements between the parties. To establish a serious irregularity under section 68, TFM was required to show that the tribunal had exceeded its power to award costs under section 61. In the Court’s view, whether or not litigation funding costs fell within the section 61 could only amount to an error of law and not an excess of power. In other words, the tribunal may have exercised its power wrongly, but it did not exceed the power given to it by section 61. An example given in *Essar Oilfields* as to what would amount to an excess of power in the context of section 61 is the award of compensation for emotional or inconvenience “cost”. That would have involved an excess of power because such items are not “costs” but “damages”.

The Court declined to comment on whether the tribunal had committed an error of law by finding that litigation funding costs were recoverable as “other costs of the parties” under section 59. However, the Court did note, without any express disapproval, the *obiter* comments made in *Essar Oilfields* that such costs were within the section.

Conclusions and implications

This decision provides confirmation that litigation funding costs are likely to be recoverable in arbitrations under the English Arbitration Act 1996. Arbitrators are likely to follow the *obiter* comments in *Essar Oilfields* in finding that such costs fall within section 59 and will now be fortified by the knowledge that such a finding will not be an excess of power, but at most an error of law which is unlikely to be capable of appeal.

The ability of parties to recover litigation funding costs in accordance with these decisions marks a significant advantage of arbitration over litigation. It may allow poorly resourced parties to pursue claims which they may otherwise have been unable to. It is also likely to encourage the growth of a secondary market in claims factoring and assignment, particularly where claimants are close to insolvency. Claimant parties may also seek to use litigation funding arrangements as a way of increasing pressure on respondents, for example by threatening respondents with the prospect of having to pay large success fees under the terms of litigation funding arrangements if they are found liable in an arbitration.

References:

Essar Oilfields Services v. Norscot Rig Management [2016] EWHC 2361 (Comm); *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm)



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