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Annual Review of English Construction Law Developments

An international perspective

June 2018

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

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Introduction

Welcome to the 2018 edition of our internationally focused *Annual Review of English Construction Law Developments*.

2017 has been another busy year for the development of English construction law. This year we lead with the newly released FIDIC Second Edition contracts (comprising new Yellow, Red and Silver books). The new editions mark a wholesale revision of the FIDIC form, increasing its length by more than half and redefining the way the contract is administered and claims are progressed. Overall the tendency is toward greater administration, with a large number of additional notice and time-bar requirements. It will be interesting to see how far these are adopted and utilised in practice over the coming years.

We also report on no less than three UK Supreme Court decisions of relevance to the international construction community. These cover important issues such as design responsibility, insurance clauses and on-demand bonds.

2017 also saw developments in relation to topics which more regularly appear on the pages of this Annual Review: concurrent delay, claims for delay and disruption, and the interpretation of express good faith and co-operation clauses.

Some other issues of international interest which are less commonly dealt with by tribunals also came before the UK courts last year. The first BIM-related injunction was

given by a UK court in relation to an energy project in the Falkland Islands. A dispute arising over contract splitting arrangements also made its way to the English courts, via a challenge to arbitration proceedings.

March this year also marked the first anniversary of the ICC's new Expedited Arbitration Procedure. We have included an analysis of the new procedure and its likely impact on the future of international construction dispute resolution.

We have also recently celebrated the first anniversary of our newly merged firm, CMS Cameron McKenna Nabarro Olswang LLP. The merger has been an outstanding success for the firm as a whole and our English law construction practice in particular. The practice is now ranked as Tier 1 in the legal directories and has attracted a number of other awards such as the Legal 500 Dispute Resolution Team of the Year.

As always, we hope you find this publication of use and welcome any comments or feedback you may have. Should you wish to receive more frequent updates throughout the coming year, please feel free to 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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The FIDIC 2017 suite

At the beginning of December 2017, FIDIC published its much-heralded and long-awaited new editions of the Red, Yellow and Silver Books. The new versions contain extensive amendments, increasing their page count by more than half, and are an attempt to modernise the FIDIC form 18 years after the First Editions were released in 1999.

In this article we provide an in-depth analysis of some of the more significant changes. The new design liability and insurance provisions are also considered in two other articles in this publication, in the light of two UK Supreme Court decisions on these topics in 2017. For a comprehensive summary of the changes, please see our CMS Guide to the FIDIC 2017 Suite [here](#).

Employer's financial arrangements

Clause 2.4 of the First and Second Editions of the FIDIC form concern the provision of evidence of the Employer's financial arrangements for the project. This clause has always been controversial and is disliked by many Employers. The provision featured in the well-known case of *NH International v National Insurance Property Development Company*, where it led to the termination of a large hospital project in Trinidad and Tobago (please click [here](#) for our Law-Now on this case). The clause has been retained in the 2017 edition albeit in an amended form.

The Employer's financial arrangements are now to be detailed in the Contract Data. This on the basis that the Contractor will see them and will not be prepared to enter into the contract unless satisfied that they are sufficient.

There are also additional provisions to the effect that if the Employer intends to make a material change to these arrangements it must give notice to the Contractor. Also, if the Contractor is instructed to carry out a Variation of a value in excess of 10% of the Accepted Contract Amount, or does not receive payment, or is aware of a material change in the Employer's financial arrangements, the Employer must upon request, and within 28 days provide reasonable evidence that financial arrangements are in place to enable the Employer to pay the remaining balance of the Contract Price. This is a fairly onerous requirement (as the *NH International* case referred to above shows), albeit what is adequate is now likely to be judged against what was included in the Contract Data (on the basis that what is included there was judged to be adequate evidence at the time the contract was entered into).

Where there has been a material change in the financial arrangements detailed in the Contract Data, the Contractor is only entitled to make such a request if it has not received a Notice from the Employer to that effect. However, the Employer's Notice need only provide '*detailed supporting particulars*' and is not expressly required to meet the reasonable evidence test. This potentially leaves a gap where the Employer's Notice, whilst providing detailed supporting particulars, sets out financial arrangements which the Contractor deems to be unsatisfactory. On the express wording of the clause, the Contractor would not appear to have the ability to make a request for reasonable evidence in such circumstances. Whether this textual gap can be overcome by giving the clause a broad interpretation (or through the implication of terms) will depend on the approach taken by the applicable law.

The provisions in Clauses 16.1 and 16.2 entitling the Contractor to suspend performance of the Works and then to terminate in relation to non-compliances under Clause 2.4 have been retained but apply only to a failure to provide reasonable evidence. On the face of it this therefore only applies if the Contractor is entitled to make a request for reasonable evidence pursuant to Clause 2.4.

Liability

A number of significant changes have been made to the liability regime effecting a general increase in the extent of liability imposed on the parties. This comes in five main areas:

- Increasing the number of carve-outs from the exclusion for loss of profit and indirect and consequential loss (from 2 to 7).
- The total cap on liability remains roughly the same, save that the Employer's indemnities are no longer excluded from the cap.
- There are two new indemnities.
- Gross negligence has been added to the list of items for which no limitation on liability applies.
- The Contractor's liability for Delay Damages is now unlimited in the case of fraud, gross negligence, deliberate default or reckless misconduct.

The main limitation on liability clause has now been moved from Clause 17.6 to Clause 1.15 (Silver Book Clause 1.14) – in part to indicate its importance and also to make it clear that it applies more generally and is not limited to the parties' indemnities.

The new carve-outs from the exclusion of liability for loss of profit and indirect and consequential loss include Delay Damages and claims under the intellectual property indemnities. A new carve out also exists for losses incurred following termination for convenience under what is now Clause 15.7, and also for losses incurred in respect of omissions of work to give it to third parties – although there is still no carve out for the Employer's termination losses following a default based termination (even though there is for the Contractor's termination losses).

A new Employer indemnity has been added in relation to property damage. This indemnity is excluded from the loss of profit and indirect and consequential loss exclusion but remains within the overall cap on liability. A new Contractor indemnity has been added in relation to fitness for purpose obligations. This indemnity is also excluded from the loss of profit, and indirect and consequential loss exclusion, but remains within the overall cap on liability.

The introduction of gross negligence alongside fraud, deliberate default and reckless misconduct as giving rise to unlimited liability is significant. The notion that an exclusion clause will not extend to cover gross negligence is common in civil law countries, but is not recognised by English law. As a result the precise limits of the concept of 'gross negligence' remain uncertain under English law. Those contracting under English law may therefore wish to delete this addition.

In a similar vein, the introduction of unlimited Delay Damages in relation to fraud, gross negligence, deliberate default or reckless misconduct is also significant. Save in relation to fraud (and the concept of fraudulent delay is probably not a coherent one), English law would ordinarily include all forms of delay, no matter how arising, within an agreed cap on Delay Damages. For contracts concluded on the basis of English law, this therefore represents a significant increase in potential liability which Contractors may well seek to delete.

Latent defects

Clause 11.9 has been retained in an expanded form. It continues to provide for the issue of a Performance Certificate stating the date on which the "*Contractor fulfilled [its] obligations under the Contract*". The provision deeming the Performance Certificate "*to constitute acceptance of the Works*" has also been retained.

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 has now been qualified 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 too broad. It would, for example, absolve the Contractor of all liability for defects in the Plant after the expiry of two years, even if arbitration proceedings were underway in relation to defects discovered prior to the end of the two year period. Such a broad reading may also make redundant the reference to "*damage occurring*" given that damage occurring after the two year period would already be excluded as being liability for a defect after the expiry of the two year period.

One solution is to read the word "*occurring*" as applicable to both "*defects*" and "*damage*" and to treat a defect as having "*occurred*" when it is first discovered. Damage must therefore have occurred, or defects discovered, prior to the end of the two year period if liability for Plant is to attach. Even on this interpretation, however, a number of difficulties emerge:

- In the event that a defect is discovered before damage occurs, one might assume that any subsequent damage could be avoided. However, where damage occurs first, it may be some months before the defect which caused the damage is identified. What happens if the damage precedes the expiry of the two year period, but the discovery of the defect does not?
- What level of detail is required in order to say that a defect has "*occurred*"? Is it sufficient to identify in a general way a problem in the functioning of the Plant, or must the cause of that problem be specifically identified as the Contractor's responsibility?
- What happens if a defect in the Plant occurring after the expiry of the two year period causes damage to the structure of the Works? Is liability for damage to the structure also excluded? Conversely, if a defect in the structure of the Works causes damage to the Plant after the expiry of the two year period, is liability for that damage excluded?



Finally, it is worth noting that this exclusion would not be effective to exclude decennial liability in relation to the Plant in many civil law countries.

Termination

A number of changes have been made in relation to termination.

Termination for Contractor default

As regards termination by the Employer for Contractor default:

- New termination triggers have been included:
 - Failure to comply with a final and binding Engineer's determination (subject to such failure amounting to a "material" breach of contract).
 - Failure to comply with a decision of the Dispute Avoidance and Adjudication Board (or "DAAB", the new name for the old Dispute Adjudication Board), whether final and binding or not (subject to the same materiality test referred to above).
 - If the Delay Damages cap (if one is specified) is exceeded. The Employer simply has to demonstrate that this is the case and does not have to have deducted or recovered Delay Damages up to the cap before this trigger comes into effect. This amendment was typically inserted by Employers into their Particular Conditions so they will no longer need to insert this change. However, it typically goes hand-in-hand with a trigger if the overall cap on liability is reached – that trigger has not been included so most Employers will continue to want to include this.
 - If the Contractor *"is found, based on reasonable evidence"* to have engaged in corrupt, fraudulent, collusive or coercive practices in relation to the Contract (this replaces the previous more limited termination trigger for bribery). It is unclear precisely what is intended by the wording just quoted. For example, whether the reference to *"found"* is intended to imply a decision of the DAAB or arbitral tribunal. And whether the reference to *"reasonable evidence"* means that a termination might still be valid if the Contractor were subsequently exonerated from the relevant allegations, but the Employer nonetheless acted on reasonable evidence at the time.
- The old trigger for a failure by the Contractor to comply with a Notice to Correct has been qualified by the materiality test referred to above.
- The list of events in respect of which immediate termination is possible (rather than requiring 14 days' notice) has now been extended to include a breach of the Contractor's assignment and sub-contracting obligations.

Termination for convenience

The Employer's right to terminate for convenience has been significantly modified by requiring it to pay loss of profit and other losses and damages suffered by the Contractor as a result of the termination. The Contractor's entitlement in this regard is also carved out of the indirect and consequential loss exclusion and could therefore represent a very significant exposure to the Employer. This contrasts with the position previously, where the Contractor was entitled only to its costs reasonably incurred in anticipation of completing the Works together with demobilisation costs and payments for Works already completed. This mirrored the Contractor's entitlement in relation to a termination under the old Force Majeure Clause (now referred to as "Exceptional Events").

These changes make the consequences to the Employer of termination for convenience largely indistinguishable from a termination for Employer default by the Contractor. We suspect this position will be unpalatable to many Employers.

Termination for Employer default

In a similar fashion to the new/altered triggers for termination by the Employer:

- A failure by the Employer to comply with a final and binding Engineer's determination and a failure to comply with any DAAB decision (whether final and binding or not) (subject to the same materiality test referred to above) have been included in the list of triggers for termination by the Contractor.
- The corrupt, fraudulent, collusive and coercive practices trigger also applies to the Employer.

An additional new trigger has also been included – such that if the Contractor does not receive a Notice of the Commencement Date within 84 days after receiving the Letter of Acceptance the Contractor has the right to terminate. This has been added to prevent a situation where a Contractor has committed to prices and timescales for the project but there is then a prolonged delay to the start. This provision gives the Contractor the option of walking away.

This new trigger, coupled with the changes to the termination for convenience provision, appears to be intended to provide protection to Contractors against the risk of projects being let (for political purposes for example) without there being any genuine will or ability to proceed on the part of the Employer. Some Employers may find these provisions unpalatable and seek to restore the position which existed under the First Edition terms. Contractors accepting such a situation should carry out sufficient due diligence to satisfy themselves that the Project is likely to proceed promptly and will not be cancelled.

Clause 1.16

A new Clause 1.16 (Silver Book Clause 1.15) has been included in the Second Editions. This provides that (unless any mandatory law provides otherwise) termination of the contract under a given clause requires no action of any party other than as set out in that clause. This is probably to be read as relating to the act of termination itself (i.e. to the extent possible, no additional formalities are to be required (unless mandatory under the governing law) in order to effect termination) rather than to the consequences of termination – although this is not entirely clear.

Claims and dispute resolution

The Second Edition contains heavily revised claims and dispute resolution provisions, including an increased number of deeming provisions and time-bar clauses. These changes will be of central importance to those engaged in international construction disputes.

The new provisions show a much greater emphasis on procedure with a view to having disputes arising during the course of a project resolved or determined promptly and not left to fester until the end of the Project. To achieve this, various time-limits and deeming provisions have been put in place to ensure that disputes are progressed without delay. It is only once a dispute has been determined by the DAAB that no time limit applies for the commencement of the next step of the dispute resolution process (i.e. arbitration).

This is, of course, not a new aim of the FIDIC form. The introduction of the original Dispute Adjudication Board was also designed to allow disputes to be dealt with swiftly during the course of a project rather than in large time-consuming arbitrations post-completion. The recent amendments are a step further in this direction.

The new process

The old Clause 20 has now been separated into two clauses. The new Clause 20 deals with the notification of claims and their determination by the Engineer (or the Employer's Representative under the Silver Book). Clause 21 deals with subsequent DAAB and arbitration proceedings. Overall, the process envisaged is as follows:

- Both the Employer and Contractor must notify Claims for additional payment or extensions of time to the Engineer within 28 days of becoming aware, or when they should have become aware, of the event or circumstance giving rise to the Claim (the **"Trigger Date"**). A failure to notify within this period renders the Claim liable to be barred and the receiving party discharged from any liability.
- If the Engineer (or the receiving Party under the Silver Book) believes that such a Claim has been notified

late and is barred, it must serve a notice to this effect (the **"First Barring Notice"**) within 14 days of receiving the Notice of Claim. In the absence of such a notice, the Notice of Claim is deemed to be valid.

- A fully detailed Claim is then required within 84 days of the Trigger Date. The fully detailed Claim should contain, in summary:
 - 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.
- Failure to provide the Statement of Legal Basis within the 84 day time period (but not any of the other items listed above) renders the Claim liable to be barred and the receiving Party discharged from liability.
- If the Engineer (or Employer's Representative under the Silver Book) believes that the Statement of Legal Basis has not been given in time, he or she must serve a notice to this effect (the **"Second Barring Notice"**) within 14 days of the expiry of the 84-day period. In the absence of such a notice, the Notice of Claim is deemed to be valid.
- Both the claiming Party and the receiving Party are given the ability to dispute the First or Second Barring Notice or the absence of those notices as the case may be (and similarly in relation to barring notices issued by the receiving Party or the Employer's Representative under the Silver Book). The Engineer/Employer's Representative must then include a review as to whether the Claim is barred in his determination of the Claim. The Engineer's/ Employer's Representative's review in this regard is not limited to matters of timing but may also consider whether a late submission is justified on broader grounds such as the absence of prejudice and prior knowledge of the Claim by the receiving Party.
- Once the fully detailed Claim has been submitted, the Engineer/Employer's Representative then has a period of 42 days to consult with both Parties and to encourage discussion in an endeavour to reach agreement.
- If no agreement is reached, the Engineer/Employer's Representative then has a further period of 42 days to make a fair determination of the Claim and notify the same to the Parties. If no determination is made at the end of this period, the Engineer/Employer's Representative is deemed to have rejected the Claim.



- The Parties then have a period of 28 days to issue a Notice of Dissatisfaction (the **"First NOD"**) in respect of the Engineer's/Employer's Representative's determination. If no First NOD is given by either Party, the Engineer's/Employer's Representative's determination becomes final and binding on the Parties.
- Once a First NOD is issued, the Claim must be referred to the DAAB within 42 days otherwise the First NOD lapses and the Engineer's/Employer's Representative's determination becomes final and binding.
- As is the case under the First Editions, the DAAB is then to give its decision within 84 days of the reference.
- If a party wishes to challenge a DAAB decision through arbitration proceedings, a further Notice of Dissatisfaction (the **"Second NOD"**) must be issued within 28 days of the DAAB decision, failing which the decision becomes final and binding on the Parties.
- After the Second NOD, the Parties are to attempt to settle the Claim amicably, but if no agreement can be reached within 28 days, arbitration proceedings may be commenced. There is no contractual time limit specified for the commencement of such proceedings (although the applicable law will usually impose a limitation period).
- Specific provision is made for claims involving events or circumstances which have a continuing effect. The fully detailed Claim required within 84 days of the Trigger Date is to be considered as interim and further fully detailed Claims are required at monthly intervals thereafter until a final fully detailed Claim can be submitted. The Engineer's/Employer's Representative's role is then triggered at two points. After the first interim fully detailed Claim, he or she is to proceed to seek agreement on and/or determine the legal basis of the Claim. After the final fully detailed Claim, he or she is to proceed to seek agreement on and/or determine the balance of the Claim.
- A simplified procedure applies to Claims other than for additional payment or an extension of time. Such claims must be notified as soon as practicable after the claiming Party becomes aware that the Claim is disputed or is deemed to have been disputed. The Engineer/Employer's Representative must then seek to agree and/or determine the Claim and the procedure is as set out above. Late notification of such claims would not appear to affect the claiming Party's entitlement.

Potential for delay and fragmentation

The evident intention of the new Claims process is to ensure that claims are progressed. Tallying up the various time periods gives a maximum period of 266 days (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 (i.e. 28 days for the Notice of Claim, 84 days for the fully detailed Claim, 84 days for the Engineer's determination, 28 days for the First NOD, 42 days to refer the dispute to the DAAB). Despite this detailed procedure, there would still appear to be a route by which a claiming Party might seek to postpone the determination of a Claim by the Engineer/Employer's Representative and the DAAB.

A claiming Party must submit its Statement of Legal Basis within 84 days, otherwise the Claim is liable to become barred. It need not submit its fully detailed Claim within this period, however. The Statement of Legal Basis is only one of four requirements for the fully detailed Claim, which is also to include all contemporary records on which the claiming Party relies as well as a detailed quantum submission. 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).

It is unclear whether this result was intended by the drafters of the Second Editions. The intention appears to have been to adopt the position which had applied in the First Edition of the Gold Book. The Gold Book Claims provision requires a *"fully detailed claim which includes full supporting particulars of the contractual or other basis of the claim"*. The claim is to be barred if the Contractor fails to *"provide the contractual or other basis of the claim within the said 42 days"*. This contrasts with the First Edition of the Yellow, Red and Silver books which simply require a *"fully detailed claim which includes full supporting particulars of the basis of the claim"* and include no time-bar.

The Gold Book reference to “*full supporting particulars of the contractual or other basis of the claim*” might be thought to refer to something similar to a fully detailed claim (i.e. either because “other basis” could include factual matters or because full supporting particulars of the contractual basis would require a statement of facts). Such an interpretation is not possible for the new Second Editions because there is now a list of four separate requirements for a fully detailed Claim, one of which is described as the “*contractual and/or other legal basis of the Claim*”. This is the only element to which the time bar attaches and refers only to the “legal” basis of the Claim.

Another means by which Parties may seek to delay the submission of a fully detailed Claim and postpone the strict time periods which follow thereafter is by utilising the provisions for Claims of continuing effect. The new provisions do not spell out when events or circumstances are to be considered as having a continuing effect. A broad interpretation might suggest that all but the most straight-forward extension of time and prolongation claims have a continuing effect in that the delays in question will continue to impact on the Works and the costs incurred by the Parties up until completion.

One consequence of the use of the Claims of continuing effect procedure is that the Engineer/Employer’s Representative’s role is triggered at two separate points. Unless agreement is reached, such Claims will therefore be the subject to two decisions from the Engineer/Employer’s Representative, one with regard to the contractual and/or other legal basis of the Claim and another with regard to the remainder of the Claim. Each of these decisions is subject to the Notice of Dissatisfaction procedure and the 42 day limitation period for DAAB proceedings. Regular use of the Claims of continuing effect procedure is likely therefore to result in the fragmentation of DAAB proceedings with an additional time and cost burden for the parties.

New DAAB and Arbitration provisions

Aside from the new 42 day period within which DAAB proceedings are to be commenced after the First NOD, a number of other changes have been made to the DAAB and Arbitration provisions (now contained within a separate Clause 21):

- A standing DAAB is now to apply in all three of the contracts. Previously a standing DAB was only stipulated in the Red Book, with ad-hoc DAB provided in the Yellow and Silver Books.

- The DAAB has been given a new dispute avoidance role (hence the change in name) whereby it can provide “informal assistance” to the parties. The Parties must both agree before the DAAB provides such assistance and any views or advice given by the DAAB are said not to bind it in formal DAAB proceedings arising subsequently. Natural justice issues may however arise in certain circumstances if a DAAB is seen to adopt previous informal advice without question when deciding subsequent DAAB proceedings.
- The DAAB Procedural Rules have been significantly expanded, increasing from 2 to 7 pages in length. They also now contain a requirement for the DAAB to regularly meet with the Parties and/or visit the Site outside the context of any formal proceedings. Ordinarily, such meetings or Site visits are to be held at intervals of between 70 and 140 days.
- Where a DAAB decision requires the payment of an amount by one Party to another, the DAAB is now empowered to require that the receiving party provide appropriate security for repayment of that amount in the event that the DAAB decision is reversed in arbitration proceedings.
- The reference of a Dispute to the DAAB is now said to “interrupt the running of any applicable statute of limitation or prescription period”. It is unclear when, if at all, the running such a period would recommence, given that a party is not permitted to commence arbitration immediately after a DAAB decision (i.e. it must first await the outcome of the 28 day Amicable Settlement period).
- The equivalent of the old Clause 20.7 has been amended to make clear that DAAB decisions which have not become final and binding may nonetheless be enforced by separate arbitration proceedings. The amendments broadly follow the drafting proposed in a FIDIC Guidance Memorandum for users of the 1999 Red Book issued on 1 April 2013.¹
- The arbitration clause has been amended to provide for “one or three arbitrators” appointed in accordance with the ICC Rules, whereas previously three arbitrators had been stipulated. There is no corresponding entry in the Contract Data for the Parties to identify whether one or three arbitrators are required. The intention appears to be that the ICC Court will decide the number of arbitrators. This may have been thought necessary to avoid jurisdictional issues which can arise where the ICC Expedited Procedure applies, which requires the appointment of a sole arbitrator even where an

¹ This had noted that a substantial number of arbitral tribunals had found the position under the First Edition contracts in this regard to be unclear. A well known example of the effect of this uncertainty is the *Persero* litigation in Singapore (click [here](#) for our Law-Now on the final Court of Appeal decision in that litigation).



arbitration clause stipulates three arbitrators. The Expedited Procedure is relatively new (having only been applicable from March this year), but challenges to similar procedures under other rules have led to inconsistent results (with at least one being upheld in China, and one being rejected in Singapore). For a more detailed overview of the Expedited Procedure and its effect on the international construction disputes, see page 59 of this publication.

Conclusion

The new Second Editions contain a full scale revision of the claims and dispute resolution procedure for three of the most commonly used FIDIC Contracts. The increased emphasis on time-bars and deeming provisions to control the claims procedure is likely to give rise to “satellite disputes” over whether particular claims are barred or whether an Engineer, Employer’s Representative or DAAB decision is final and binding.

If the new provisions succeed in ensuring that claims are progressed quickly, a greater number of DAAB proceedings appears to be inevitable, given the strict 42 day limitation period which now applies to the commencement of such proceedings after an Engineer’s/Employer’s Representative’s decision is disputed. Overall, parties who adopt the Second Edition will need to be well prepared and adequately resourced to manage the new provisions. Those who are not may find that entitlements have been unwittingly lost.

References: *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)* [2015] UKPC 37; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30.



Contract splitting in international construction projects

A decision of the English High Court in 2017 has considered a dispute regarding the splitting of an energy project into offshore and onshore contracts for tax purposes. Such structures rarely come before the courts and this case provides useful insights into the complex drafting issues which can arise when seeking to implement them.

An introduction to contract splitting

Contract splitting is frequently used to generate tax efficiencies in international construction and energy projects. This usually involves splitting the project into offshore and onshore elements. The offshore elements will usually comprise design and manufacturing works to be performed outside the local jurisdiction in which the project is to be delivered. The onshore elements comprise the balance of the work, including delivery of the project inside the local jurisdiction. Separate contracts are entered into for the offshore and onshore elements, usually with separate onshore and offshore contracting entities (although the procuring entity will usually stay the same).

Through this means, exposure to local taxation laws in relation to the offshore elements is sought to be reduced. In particular, the lack of a taxable nexus in the local jurisdiction may mean that the income or profits arising from fees paid under the offshore contract are not subject to corporate or income taxes in that jurisdiction. Supplies made under the offshore contract may also not fall within the scope of value added tax, sales taxes or other indirect taxes in the local jurisdiction, potentially creating a saving for the procuring entity (to whom these may otherwise represent a final cost).

A “bridge” or “umbrella” agreement is also usually agreed to deal with interface issues and to ensure that the procuring entity is not prejudiced by the splitting arrangements. This agreement may be between the procuring entity and both the offshore and onshore contracting entities, or may be between the procuring entity and a guarantor entity. The precise structure of the split contracts and any umbrella agreement will depend on the tax treatment likely to be obtained within the local jurisdiction in which the project will be delivered.

Petroleum Co of Trinidad and Tobago Limited v Samsung Engineering Trinidad Co Limited

The Petroleum Co of Trinidad and Tobago Limited (“Petrotrin”) entered into construction contracts with Samsung for the construction of a new CCR Platformer Complex and Substation at one of its refineries in Trinidad. The contractual arrangements were split into two contracts, an onshore contract with a local Samsung subsidiary (“Samsung Trinidad”) and an offshore contract with Samsung’s principal Korean contracting entity (“Samsung Korea”).

The splitting of the works in this way was purely to provide a tax advantage to Samsung. In addition to the offshore and onshore contracts, both Samsung Trinidad and Samsung Korea entered into an umbrella agreement with Petrotrin which was intended to ensure that the splitting arrangements did not cause any disadvantage to Petrotrin (referred to by the parties as a “Linkage Agreement”).

Samsung Trinidad commenced arbitration proceedings against Petrotrin under the onshore contract. Petrotrin counterclaimed for delay liquidated damages. An issue arose as to the applicable cap for delay liquidated damages. The onshore agreement limited these to 10% of the contract price stated in the onshore agreement. The offshore agreement had similar wording. However, the Linkage Agreement provided that, *“the maximum liquidated damages under each Contract [i.e. the offshore and onshore contracts] and this Agreement shall be an amount equal to ten percent (10%) of the Total Agreement Amount.”* The Total Agreement Amount was defined as the aggregate of the contract prices payable under the offshore and onshore contracts.



Which cap applied?

The arbitral tribunal rejected Petrotrin's case that the aggregate cap from the Linkage Agreement should apply to its counter-claim. The tribunal noted that the arbitration had been commenced under the onshore contract and the issue before it was therefore the proper interpretation of the cap in the onshore contract. The tribunal disagreed that the Linkage Agreement was to be taken as conflicting with and/or amending the cap in the onshore contract. In the tribunal's view, the aggregate cap in the Linkage Agreement was to be read as a *"long-stop limit which sits above the lower cap applicable under a single agreement"*. The tribunal acknowledged Petrotrin's argument that this

interpretation meant that the cap under the Linkage Agreement could never apply (i.e. it added nothing to the two caps under the onshore and offshore agreement), but considered that there was nothing unusual in such provisions being added as a precaution.

Petrotrin subsequently challenged the tribunal's award before the English High Court under section 67 of the Arbitration Act 1996 dealing with jurisdictional challenges. The challenge was rejected on the basis that the issue was one of contractual interpretation rather than jurisdiction and that, in any event, the tribunal's conclusions as to jurisdiction were correct.



Conclusion

This case demonstrates the importance of careful drafting when seeking to implement a split contractual structure. The commercial intention - behind the Linkage Agreement at least - appears to have been to allow Petrotrin to recover delay liquidated damages up to 10% of the total of the contract sums payable under both the offshore and onshore contracts from either of the Samsung entities. That would have been the position had both elements of the works been contained in a single contract, and had that intention been achieved Petrotrin would not have been put at a disadvantage by the splitting of the contracts (which was the very purpose of the Linkage Agreement). However, a combination of limited arbitration provisions and inconsistent drafting around the liquidated damages cap led to a finding that separate and distinct caps applied to each of the Samsung entities.

Had broader arbitration provisions been included in the three contracts, it may have been open to Petrotrin to make its counterclaim directly under the Linkage Agreement rather than seeking to rely on that agreement indirectly to influence the interpretation of the onshore agreement.

Splitting contracts introduces a considerable amount of additional legal complexity in comparison to single contract structures. Aside from liability caps and arbitration provisions, the list of other issues to consider includes scope gaps, cross-contract claims and defences (e.g. onshore contractor relying on delays by the offshore contractor), testing and completion under the separate contracts, termination, defects liability and joint notification provisions. While the tax benefits are potentially large, and may enable a procuring entity to have a project delivered at a reduced price, the parties should ensure that proper advice and attention is given to these contractual issues to ensure that no unintended consequences arise as a result of the split structure.

References: *Petroleum Company of Trinidad and Tobago Ltd v Samsung Engineering Trinidad Co Ltd* [2017] EWHC 3055 (TCC).



The interpretation of design obligations under international construction contracts

In 2017 the Supreme Court (the UK's highest court) handed down judgment in a long running dispute over the responsibility for widespread design defects in a large windfarm off the coast of England (known as "Robin Rigg"). The Supreme Court's decision raises a number of legal issues of general application, including the interpretation of design obligations imposed on contractors, the meaning of "design life" and "service life" obligations, the proper interpretation of technical schedules and the use of exclusive remedies clauses. We consider the decision in detail below.

Classification of design obligations

Where a contractor accepts design responsibility, broadly two types of obligation can arise: an obligation to use "reasonable skill and care" or a stricter duty to accomplish a certain outcome (often referred to as a "fitness for purpose" obligation). It is well established that these obligations can exist side by side and are not mutually incompatible.

Reasonable skill and care

Reasonable skill and care is considered the default position and is generally described as the criterion of the ordinary, competent professional. In *Keating on Construction Contracts*, the following explanation is given:

"[T]he contractor must do the work with all proper skill and care. It is suggested that this is a continuing duty during construction and not only upon completion. In deciding what degree of skill is required the court will, it is submitted, consider all the circumstances of the contract including the degree of skill expressly or impliedly professed by the contractor."

To establish whether a "professional man" meets the reasonable skill and care threshold, his work has to comply with the common law test as set out in *Bolam v Friern Hospital Management Committee*: "a man need not possess the highest expert skill ... it is sufficient if he exercised the ordinary skill of an ordinary competent man exercising that particular art." Further guidance as to the level of knowledge and skill required was given by the English Court of Appeal in *Eckersley v Binnie & Partners*:

"He must bring to any professional task he undertakes no less expertise, skill and care than any other ordinarily competent members of profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."

As such an employer is required to prove negligence by addressing the fact that the works or design do not match the level expected of a competent professional. This will usually require determination on the basis of expert evidence.

Fitness for purpose

Parties are free to opt for a higher standard regarding the execution of the works or design by requiring that a specific outcome or performance level be achieved. Such an obligation is often generically referred to as a "fitness for purpose" obligation, although this term is not strictly apt to describe a requirement to comply with specific technical requirements. For example, a requirement to comply with a certain technical standard imposes a strict obligation on the contractor but says nothing about whether compliance with the standard will be sufficient to achieve the purpose for which the works are required. On the other hand, a true "fitness for purpose" obligation requires the contractor to determine the standards of design which will enable the purpose of the works to be met.

Liability for these higher obligations is strict and does not require any form of negligence by the contractor; liability occurs simply if the works or design do not satisfy the given specifications or achieve the required purpose.

Overlapping and conflicting provisions

As noted above, absolute fitness for purpose type obligations (demanding execution of the works to a certain level) often co-exist with the common law standard of reasonable skill and care. One often also finds different types of fitness for purpose type obligations incorporated within the same contract. For example, the two different types of obligation noted in the previous section may be coupled together so that a contractor is required to provide works which will be fit for purpose **and** in accordance with a certain technical standard. An issue which may arise in such circumstances is whether the obligation to comply with the technical standard qualifies the fitness for purpose obligation, or whether the technical standard is a minimum obligation which the fitness for purpose obligation may improve upon. The technical standard, as was the case in the Robin Rigg project, might not be sufficient to allow the works to be fit for their desired purpose.

The usual position in such circumstances is that the contractor will need to improve its design to meet the fitness for purpose obligation. As noted in *Hudson's Building and Engineering Contracts*:

"So a contractor will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty. Such undertakings will, however, be construed in cases of doubt in the light of the degree of reliance being placed in the contractor's skill and judgment, as in the case of the implied obligation."

The Robin Rigg project

Contractor MT Højgaard ("MTH") had been employed by E.ON to design, fabricate and install 60 wind turbine foundations on the Robin Rigg project based on the international standard DNV-OS-J101 ("J101"). These particular foundations had a transition piece fitted over the top of the monopile, with the gap between the transition piece and the pile filled with grout, and the tower fitted onto the transition piece. In contrast, some other wind farms were built with so-called shear keys in the grouted connections. MTH installed the foundations between December 2007 and February 2009.

Shortly after completion, another offshore wind farm at Egmond aan Zee (Netherlands) was experiencing serious problems, as the transition pieces started to slip down the monopiles. Similar to "Robin Rigg", the turbines on that project were built without shear keys and according to the same J101 standard. A flaw was subsequently discovered in the international standard which accounted for these failings. On Robin Rigg, the grouted connections started to fail in April 2010 and remedial works were commenced in 2014. E.ON brought High Court proceedings against MTH in England to recover the cost of the remedial works.

The contract between MTH and E.ON contained a mix of different design obligations situated in different parts of the contract. The primary issue in dispute between the parties was whether MTH had satisfied its design obligations by designing in accordance with J101 or whether the contract required it to guarantee a service life of 20 years for the foundations.

The Supreme Court agreed with the Court of Appeal's characterisation of the contract as being comprised of documents of *"multiple authorship"*, which contained *"much loose wording"*. The various parts of the contract were listed in an order of precedence clause which stated that the Conditions of Contract (Parts C and D) were to take precedence over the Employer's Requirements and Technical Requirements schedules (Parts G, H, I, J and K).

"Fit for Purpose" was defined as *"fitness for purpose in accordance with, and as can properly be inferred from, the Employer's Requirements."* *"Employer's Requirements"* was stated to include the Technical Requirements schedule (the "TR"). And *"Good Industry Practice"* meant *"those standards, practices, methods and procedures conforming to all Legal Requirements to be performed with the exercise of skill, diligence, prudence and foresight that can ordinarily and reasonably be expected from a fully skilled contractor who is engaged in a similar type of undertaking or task in similar circumstances in a manner consistent with recognised international standards."*

Clause 8.1. of the Conditions of Contract at Part D required MTH *"in accordance with this Agreement, [to] design, manufacture, test, deliver and install and complete the Works"* in accordance with a number of requirements, including:

"(iv) in a professional manner in accordance with modern commercial and engineering, design, project management and supervisory principles and practices and in accordance with internationally recognised standards and Good Industry Practice; ...

(viii) so that the Works, when completed, comply with the requirements of this Agreement (...);

(ix) so that [MTH] shall comply at all times with all Legal Requirements and the standards of Good Industry Practice;

(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification [i.e. the TR] using Good Industry Practice; ...

(xv) so that the design of the Works and the Works when Completed by [MTH] shall be wholly in accordance with this Agreement and shall satisfy any performance specifications or requirements of the Employer as set out in this Agreement."

The above requirements therefore contained a mix of obligations, some of which equated to a reasonable skill and care obligation and others which could be said to impose fitness for purpose obligations.

Relevant provisions of the TR were as follows:

- Section 1 of the TR set out the "General Description of Works and Scope of Supply". Part 1.6 set out "Key Functional Requirements", which included:

"The Works, together with the interfaces detailed in Section 8, shall be designed to withstand the full range of operational and environmental conditions with minimal maintenance.

The Works elements shall be designed for a minimum site specific "design life" of twenty (20) years without major retrofits or refurbishments; all elements shall be designed to operate safely and reliably in the environmental conditions that exist on the site for at least this lifetime."

- Section 3 of the TR was concerned with the "Design Basis (Wind Turbine Foundations)". Part 3.1 was entitled "Introduction", and included the following (divided into sub-paragraphs for reference):

"(i) It is stressed that the requirements contained in this section and the environmental conditions given are the MINIMUM requirements of [E.ON] to be taken into account in the design.

(ii) It shall be the responsibility of [MTH] to identify any areas where the works need to be designed to any additional or more rigorous requirements or parameters."



- Paragraph 3.2.2.2 was of central importance. Paragraph 3.2.2.2(i) required MTH to prepare the detailed design of the foundations in accordance with document J101. Paragraph 3.2.2.2(ii) went on to state that:

"The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."

- Paragraphs 3.2.3.2 and 3.2.5 of the TR contained further references requiring MTH to design in accordance with J101.
- Paragraphs 3.2.6 and 3b.5.6 stated that *"[a]ll parts of the Works, except wear parts and consumables, shall be designed for a minimum service life 20 years."*
- Paragraph 3b.5.1 of the TR stated:

"The design of the structures addressed by this Design Basis shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."

- Finally, document J101 itself included a statement that its *"objectives"* included the provision of *"an internationally acceptable level of safety by defining minimum requirements for structures and structural components"*. Paragraph K104 provided: *"The design fatigue life for structural components should be based on the specified service life of the structure. If a service life is not specified, 20 years should be used."*

The TR therefore contained a similar mix of design obligations, with some parts referring to the J101 standard and an obligation simply to design for a 20 year service and others appearing to place strict obligation for the design to *"ensure a lifetime of 20 years"*. Clause 30 of the Conditions of Contract was headed *"Defects after taking over"*. Clause 30.2 provided that MTH *"shall be responsible for making good any defect (...) or damage"* arising from *"defective materials, workmanship or design"*, *"any breach by [MTH] of his obligations under this Agreement"* or *"Works not being Fit for Purpose"*, *"which may appear or occur before or during the Defects Liability Period"*. That period was defined in clause 30.1 as being a period of 24 months from the date E.ON took over the Works from MTH. Clause 30.3 required E.ON to give notice *"forthwith"* of any such defects to MTH. Clause 30.4 extended that Period in certain limited circumstances. Clause 30.10 required E.ON to produce a Defects Liability Certificate once the Defects Liability Period had expired and MTH had satisfied all its obligations under Clause 30.

By virtue of Clause 42.3, these entitlements appeared to be E.ON's exclusive remedy for defects. That clause stated that:

"[E.ON] and [MTH] intend that their respective rights, obligations and liabilities as provided for in this Agreement shall alone govern their rights under this Agreement."

Accordingly, the remedies provided under this Agreement in respect of or in consequence of:

- (a) any breach of contract; or*
- (b) any negligent act or omission; or*
- (c) death or personal injury; or*
- (d) loss or damage to any property,*

are, save in the case of ... misconduct, to be to the exclusion of any other remedy that either may have against the other under the law governing this Agreement or otherwise."

The Court of Appeal decision

As noted above, the central issue before the court was whether the contract required MTH to go beyond J101 in designing the foundations and required it to produce a design which achieved a certain service life for the foundations. It was common ground between the parties that MTH had satisfied its duty to exercise reasonable skill and care by complying with J101. At the time the design was prepared, it was unknown that J101 contained the error which ultimately led to the failure of the foundations.

In pursuing its case, E.ON relied on paragraphs 3.2.2.2(ii) and 3b.5.1 of the TR, which referred to a design which ensured a life for the foundations (and the Works) of 20 years without planned replacement. The Court of Appeal considered that the meaning of these two paragraphs, considered on their own, was that MTH warranted that the foundations would function for 20 years (come what may). However, the Court of Appeal contrasted these two clauses with other parts of the TR quoted above which referred to a *"design life"* of 20 years. A *"design life"* of 20 years required MTH to exercise reasonable skill and care to design the foundations for service life of 20 years. It did not mean *"that inevitably it will function for 20 years, although it probably will."*

Interpreting the contract as a whole, the Court of Appeal felt unable to give paragraphs 3.2.2.2(ii) and 3b.5.1 of the TR their literal meaning:

"A reasonable person in the position of E.ON and MTH would know that the normal standard required in the construction of offshore wind farms was compliance with J101 and that such compliance was expected, but not absolutely guaranteed, to produce a life of 20 years. If one adopts an iterative approach to the construction

of TR paragraphs 3.2.2.2 (2) and 3b.5.1, it does not make sense to regard them as overriding all other provisions of the contract and converting it to one with a guarantee of 20 years life. Put another way, there is an inconsistency between TR paragraphs 3.2.2.2 (2) and 3b.5.1 on the one hand and all the other contractual provisions on the other hand. The court must not be led astray by that inconsistency."

The Court of Appeal was fortified in this decision by the fact that the express fitness for purpose obligation in Clause 8.1 of the Conditions of Contract was qualified by the words *"using Good Industry Practice"* which in turn referred back to the exercise of reasonable skill and care. The court noted that if an absolute guarantee of 20 years was intended, one would have expected it to have been referred to in Clause 8.1 not *"tucked away"* in the technical schedules. Overall, the Court of Appeal held that paragraphs 3.2.2.2(ii) and 3b.5.1 of the TR were *"too slender a thread"* to support a fitness for purpose obligation.

The Supreme Court decision

The Supreme Court considered the Court of Appeal's reasoning in two parts: (i) whether paragraphs 3.2.2.2(ii) and 3b.5.1 of the TR were inconsistent with the rest of the contract and (ii) whether they were too slender a thread to support E.ON's case.

Inconsistency

The court disagreed with the Court of Appeal's conclusion as to inconsistency. Instead of relying on a broad reading of the contract and its commercial background, the court emphasised the usual position which applies where multiple design obligations of an absolute nature are included within a contract (as explained above). Lord Neuberger confirmed:

"While each case must turn on its own facts, the message from decisions and observations of judges in the United Kingdom and Canada is that the courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer or employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed to work to a design which would render the item incapable of meeting the criteria to which he has agreed."

Accordingly, Lord Neuberger concluded that there was no inconsistency between para 3.2.2.2(i), which imposes an obligation to comply with J101, and 3.2.2.2(ii), which imposes an obligation to ensure a life for the foundations (and the Works) of 20 years. Support for this conclusion was also to be found in paragraph 3.1 of the TC which made clear that the requirements of the

TC were minimum requirements which may need to be improved upon. As Lord Neuberger noted:

"[T]he correct analysis by virtue of para 3.1(i) is that the more rigorous or demanding of the two standards or requirements must prevail, as the less rigorous can properly be treated as a minimum requirement. Further, if there is an inconsistency between a design requirement and the required criteria, it appears to me that the effect of para 3.1(ii) would be to make it clear that, although it may have complied with the design requirement, MTH would be liable for the failure to comply with the required criteria, as it was MTH's duty to identify the need to improve on the design accordingly."

Addressing the broader contextual arguments and commercial common sense, Lord Neuberger concluded that:

"[P]ara 3.2.2.2(ii) is clear in its terms in that it appears to impose a duty on MTH which involves the foundations having a lifetime of 20 years ... I do not see why that can be said to be an "improbable [or] unbusinesslike" interpretation, especially as it is the natural meaning of the words used and is unsurprising in the light of the references in the TR to the design life of the Works being 20 years, and the stipulation that the requirements of the TR are "minimum"."

Too slender a thread?

The Supreme Court also specifically addressed the question whether the presence of paragraphs 3.2.2.2(ii) and 3b.5.1 *"tucked away"* in a technical schedule ought to have influenced their interpretation. Was it necessary for such a significant obligation to have been given greater prominence in the contract?

As noted above, this was a submission which had won support in the Court of Appeal. It failed to impress before the Supreme Court:

"MTH argues that it is surprising that such an onerous obligation is found only in a part of a paragraph of the TR, essentially a technical document, rather than spelled out in the Contract. Given that it is clear from the terms of the Contract that the provisions of the TR are intended to be of contractual effect, I am not impressed with that point."

MTH [also] suggests that, given the other obligations with regard to design, manufacture, testing, delivery, installation and completion expressly included, or impliedly incorporated, in clause 8.1 of the Contract, it is unlikely that an additional further and onerous obligation was intended to have been included in the TR. The trouble with that argument

is that it involves saying that para 3.2.2.2(ii) adds nothing to other provisions of the TR or the contract. I accept that redundancy is not normally a powerful reason for declining to give a contractual provision its natural meaning especially in a diffuse and multi-authored contract ... However, it is very different, and much more difficult, to argue that a contractual provision should not be given its natural meaning, and should instead be given no meaning or a meaning which renders it redundant."

There was no reason, therefore, why paragraphs 3.2.2.2(ii) and 3b.5.1 should not be given their natural meaning as imposing an additional absolute design warranty for 20 years.

Exclusive remedies clauses and the meaning of "design life"

The Supreme Court also considered the effect of paragraph 3.2.2.2(ii) in light of Clause 42.3 of the Contract, which made clear that the provisions of Clause 30 were intended to operate as an exclusive regime, which in turn only allowed for a 24 month Defects Liability or "warranty" period.

MTH argued that it was unlikely that the parties could have intended "a warranty that the foundations will function for 20 years" (the Court of Appeal's interpretation) in circumstances where no remedy for breach of that warranty would exist after 2 years. In summary:

"(i) the effect of clause 30 was that, subject to some relatively limited exceptions in clause 30.4, MTH was obliged to rectify any defect in the Works which occurred within 24 months of the Works being handed over, (ii) the effect of clause 42.3 was that any claim by E.ON in respect of a defect appearing thereafter was barred, and (iii) the notion that there was no room for claims outside the 24-month period was reinforced by clauses 33.9 and 33.10."

Notably, the court accepted that there was "no answer to that analysis so far as it is directed to the effect of clauses 30, 33 and 42 of the Contract". In other words, the exclusive remedies clause resulted in a limited 2 year period for MTH to make claims in relation to defects. However, the presence of such a limitation was not sufficient to undermine the conclusion that a 20-year warranty had been intended. Lord Neuberger noted that:

"[I]t is by no means improbable that MTH could have agreed to a 20-year warranty provided that it could have the benefit of a two-year limitation period, save where misconduct was involved. It would simply mean that the rights given to E.ON by paras 3.2.2.2(ii) were significantly less valuable than at first sight they may appear, because any claim based on an alleged failure in the foundations which only became apparent more than two years after the handover of the Works would normally be barred by clause 42.3."

Nevertheless, the presence of the two year limitation did give cause for reconsidering how paragraph 3.2.2.2(ii) had been interpreted by the Court of Appeal. The Court of Appeal had read the clause as providing for an absolute warranty that the foundations would last for 20 years (and found that that was inconsistent with the rest of the contract). However, Lord Neuberger considered that:

"[T]here is a powerful case for saying that, rather than warranting that the foundations would have a lifetime of 20 years, para 3.2.2.2(ii) amounted to an agreement that the design of the foundations was such that they would have a lifetime of 20 years. In other words, read together with clauses 30 and 42.3 of the Contract, para 3.2.2.2(ii) did not guarantee that the foundations would last 20 years without replacement, but that they had been designed to last for 20 years without replacement. That interpretation explains the reference in para 3.2.2.2(ii) to design, and it obviates any tension between the terms of para 3.2.2.2(ii) and the terms of clauses 30 and 42.3. Rather than the 20-year warranty being cut off after 24 months, E.ON had 24 months to discover that the foundations were not, in fact, designed to last for 20 years."

That interpretation raised the question as to what was meant by the phrase "ensuring a lifetime of 20 years," bearing in mind that the forces of nature, especially at sea, are such that a lifetime of 20 years (or any other period) could never in practice be guaranteed. He considered that:

"The answer is to be found in J101. As explained in para 7 above, J101 requires the annual probability of failure to be in the range of one in 10,000 to one in 100,000, and specifically provides that, if a service life is not specified in a contract "20 years should be used", which ties in with the proposition, agreed between the parties, that an offshore wind farm is typically designed for a 20-year lifetime ...

[T]he simple point is that J101, while concerned with making recommendations and requirements linked to the intended life of a structure to which it applies, makes it clear that there is a risk, which it quantifies, of that life being shortened. That risk is, in my view, the risk which should be treated as incorporated in para 3.2.2.2(ii) - if it is indeed concerned with the designed life of the Works."

This passage raises an interesting question as to the meaning of the term "design life", a term frequently used in technical documentation incorporated within construction contracts. The term could mean that the works are to be designed for the specified lifespan using reasonable skill and care (i.e. the overall position contended for by MTH in this case). Alternatively, it could indicate an absolute obligation that the Works would be designed to last 20 years (i.e. as explained by Lord Neuberger above, allowing for a small rate of probabilistic failure). Whether the use of the simple phrase "design life" will result in either of these interpretations will be dependent on the contractual context.

Conclusion

This decision has significant ramifications for the interpretation of large construction contracts, which routinely incorporate schedules and technical documentation, often with less than complete harmonisation as to intended legal standards of design and workmanship. The Supreme Court found no reason not to give effect to the natural meaning of the relevant paragraphs in the Technical Requirements, which imposed a more onerous fitness for purpose type obligation over and above MTH's other obligations to exercise reasonable skill and care and to follow the J101 standard.

The decision may be seen as a further example of a return in emphasis to the literal meaning of contract provisions observed by many commentators since the Supreme Court's recent decisions in *Arnold v Britton* and *Wood v Capita*. Although no overall change in the approach to interpretation has occurred, arguments which depend upon a reading down of particular parts of a contract because of their commercial implications or because they are less prominent than might be expected will face an uphill battle. More than ever, parties will be taken to mean what they say in their contracts.

In light of this decision, parties should consider making clear in their general contract conditions whether and how technical schedules are to affect overall obligations as to design and workmanship. Contractors may wish, for example, to include paramountcy provisions which state that nothing in any of the schedules to the contract is to impose a design obligation of a greater standard than reasonable skill and care. Employers wishing to impose fitness for purpose type obligations in combination with obligations to adhere to certain standards or designs should make clear that those standards or designs represent minimum obligations as found by the court in this case.

The design provisions of the new FIDIC Second Editions are worth mentioning in this regard. The general fitness for purpose obligation at Clause 4.1 of the Yellow and Silver Books has been retained, but is now described as fitness for the purposes for which the Works are intended "*as defined and described in the Employer's Requirements*". Careful attention will therefore need to be given to any performance or lifespan statements in the Employer's Requirements as these are likely to give rise to fitness for purpose obligations. There is now also an express indemnity at Clause 17.4 of the Yellow and Silver Books in respect of any breach of fitness for purpose obligations by the Contractor.

The Supreme Court's decision suggests that parties should also consider very carefully how terms such as "design life" and "service life" are used in their contract and any technical schedules. The term "design life" in particular may in certain circumstances impose an absolute obligation that the works be designed for a certain lifespan, rather than the lesser obligation to use reasonable skill and care in designing for a certain lifespan.

References: *Keating on Construction Contracts* (9th edn, Sweet & Maxwell 2012); *Hudson's Building and Engineering Contracts*, (13th edn, Sweet & Maxwell 2015); *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Eckersley v Binnie & Partners* [1988] 18 Con LR 1; *Arnold v Britton* [2015] AC 1619; *Wood v Capita Insurance Services* [2017] UKSC 24; *MT Hojgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407; [2017] UKSC 59.



On-demand bonds vs guarantees - telling the difference

An English Commercial Court decision in 2017 provides a reminder as to the importance of clarity when drafting guarantees and performance bonds for large international infrastructure projects. In this case, the employer and contractor on the Panama Canal expansion project disagreed over whether advance payment guarantees securing a total of US\$288 million were to be interpreted as truly “on-demand” instruments or merely “see to it” guarantees.

Introduction

The difference between guarantees and on-demand bonds can be difficult to determine. Both are used to guard against the possibility of non-performance of a contractual obligation. However, the protection afforded by each is different.

A guarantee usually creates a secondary obligation, under which the guarantor guarantees the performance of a primary obligation under the underlying contract (this is sometimes referred to as a “see to it” guarantee). The liability of the guarantor is therefore dependent on the performance of the primary obligation. Whilst “primary obligor” wording in such guarantees can result in the guarantor undertaking primary obligations, the guarantor’s liability will remain dependent on whether or not there has been a breach of the underlying contract.

By contrast, a truly “on-demand” bond imposes a primary obligation on the guarantor to pay the beneficiary of the bond immediately upon receipt of a demand for payment. Payment by the guarantor is not contingent on performance of the underlying contract or proof of loss. Typically, a simple statement detailing that an obligation in the underlying contract has been breached and that loss has been suffered by the beneficiary is sufficient to trigger payment. There is no need to prove either breach or loss.

Autoridad Del Canal De Panamá v Sacyr SA

In 2009, the Claimant (“ACP”) entered into a contract with four of the Defendants (the “Consortium”) for the design and construction of the Third Set of Locks project for the expansion of the Panama Canal. In 2010, the contract was assigned to a Panamanian-incorporated company (“GUPC”), with the Consortium

entering into a Joint and Several Guarantee of GUPC’s obligations (the “JSG”). The JSG was subject to Panamanian law and provided for ICC arbitration in Miami, Florida.

By mid-2012, GUPC started to experience cash flow problems and requested ACP to make further advance payments to allow the works to proceed. Between 2012 to 2016 ACP agreed to make various advance payments and to extend the repayment date of existing advance payments. Each of these advance payments and extensions were supported by specific advance payment guarantees (“APGs”) from the Consortium. APGs given in 2012 and 2014 were similar to the JSG in providing for Panamanian law and ICC arbitration in Miami; however, APGs given in 2015 and 2016 provided for English law and the exclusive jurisdiction of the English courts. In addition to the APGs, the JSG was also confirmed by the parties as remaining applicable to all of GUPC’s obligations under the contract and therefore included GUPC’s obligations to repay the additional advance payments made by ACP.

After the repayment of the advance payments had fallen due, but was not made, ACP notified GUPC that it was in breach of its obligations. Simultaneously, ACP sent demands to the Consortium for payment under the APGs. In English proceedings before the Commercial Court, ACP then sought summary judgment for repayment of the outstanding advance payment sums, totaling US\$288 million. In the meantime, the Consortium had commenced ICC arbitration proceedings claiming that repayment of the advance payments was not due or payable under Panamanian law.

In support of its summary judgment application, ACP argued that the English law APGs were to be interpreted as on-demand bonds, requiring the Consortium to make repayment immediately upon demand and without being able to contest GUPC’s liability to make repayment of the advance payments to ACP.



ACP stressed the importance of paragraph 2.1 of the English law APGs which provided that each of the guarantors contracted jointly and severally “as *primary obligor and not as surety*”. ACP also relied on paragraph 4.2 of the APGs which provided that:

“Determinations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error...”.

ACP submitted that these paragraphs indicated that the obligation of the Consortium was to pay on demand. Amongst other arguments, ACP placed particular reliance on the plural word “amounts” in paragraph 4.2 and argued that it was a reference both to the amount due under the guarantee and the amount of interest thereon.

The decision

The court rejected ACP’s position and held that the English law APGs were ordinary guarantees requiring proof that repayment of the advance payments was overdue as between ACP and GUPC. The court placed emphasis on the fact that the APGs were expressed to guarantee the repayment of the advance payments “as

and when due pursuant to the Contract”. Also significant was the fact that the guarantee required the Consortium, on demand, to perform the obligations which GUPC was in breach of “*in the same manner that [GUPC] is required to perform such obligations according to the terms of the [underlying] Contract*”.

While the court accepted ACP’s argument that the Consortium’s liability under the APGs was primary, not secondary (due to the “primary obligor” language), ACP was required to go a step further and show that the Consortium’s liability was triggered purely by a demand and was not contingent on proof of GUPC’s liability to ACP for repayment of the advance payment. The court also dismissed ACP’s argument in relation to clause 4.2 (quoted above): the clause was intended to apply to interest only and the use of the plural word “amounts” was insufficient to change the whole nature of the instrument to an on-demand bond.

The court drew support for its conclusion from the “*Marubeni presumption*”, coming from the English Court of Appeal decision in *Marubeni Hong Kong & South China Ltd v Ministry of Finance of Mongolia*. This is a rule of thumb against construing an instrument as an on-demand bond/guarantee when the party providing the instrument is not a financial institution.



As the Court in that case noted:

“Turning to the [guarantee letter], the starting-point in my view is that it is not a banking instrument, and it is not described, either on its face or in the supporting Legal Opinion letter, in terms appropriate to a demand bond or something having similar legal effect. The Legal Opinion describes it as a guarantee. The terminology is not of course conclusive. However, I agree with Cresswell J that, if MHK had wanted the additional security of a demand bond, one would have expected them to have insisted on appropriate language to describe it, in both the instrument itself, and in the Legal Opinion. The absence of such language, in a transaction outside the banking context, creates in my view a strong presumption against MHK’s interpretation.”

Conclusion

This decision highlights the importance of careful drafting when dealing with guarantees. Reliance on pro forma documents and the need for specialist language can sometimes result in guarantees which are a combination of different drafting, without any clear indication as to whether an ordinary “see to it” guarantee or an on-demand instrument was intended. Clarity in this regard is particularly important when dealing with non-financial institutions, given the strong presumption against on-demand instruments which applies in such circumstances.

References: *Keating on Construction Contracts* (9th edn, Sweet & Maxwell 2012); *Marubeni Hong Kong & South China Ltd v Ministry of Finance of Mongolia* [2005] EWCA Civ 395; *Autoridad Del Canal De Panamá v Sacyr S.A.* [2017] EWHC 2228 (Comm).



On demand bonds: execution formalities

Many English law construction and engineering contracts, and related contracts such as collateral warranties, are entered into as deeds. The primary advantage of doing so is to secure the benefit of a longer limitation period (sometimes referred to as “prescription” in other jurisdictions) than if the contract were not a deed (12 years instead of 6). Rights under deeds therefore last longer.

Deeds also perform a special role when it comes to on-demand performance bonds. Such bonds are usually issued unilaterally by a bank or financial institution in favour of parties with whom it will have no direct commercial relationship and from whom it will receive nothing in return (known as “consideration” under English law). Ordinarily an agreement made without consideration will not be effective under English law unless executed as a deed. A UK Supreme Court decision last year lends growing support to the potential for an exception to this rule to apply in the case of letters of credit and on-demand bonds.

The first reported English case on this issue dates from 1875 (*Morgan and Gooch v Larivière*), where the House of Lords (the UK’s highest court, now called the Supreme Court) in relation to a banker’s letter of credit considered there to be “*great doubt whether there would have been held to be a sufficient consideration to support a promise at law*”. Subsequent cases dealing with letters of credit have been more accommodating. They have held that consideration arises either by the beneficiary relying upon the letter to proceed with the project in question (*Urquhart Lindsay v Eastern Bank and Dexters Ltd v Schenker & Co*) or by the presentation of a compliant demand under the letter (*Elder Dempster Lines v Ionic Shipping Agency*). A recent application of this approach is *RZB v China Marine*, decided in 2006. This case concerned an “irrevocable payment undertaking” given by a commercial party (China Marine) to a bank without any explicit consideration. The court held that:

“In a commercial transaction the courts will be loath to find that an agreement which gives every impression of being a contractual undertaking fails for want of consideration. There are a number of ways of approaching the issue of consideration. One way is to say that the offer was an offer by China Marine to the bank that, if presentation of the documents were made, the payment would be made by China Marine and that, effectively, the consideration was provided by RZB’s presentation of the documents. Alternatively, the consideration may be said to be provided by the recognised financial role of the bank in the transaction in making funds available.”

Other letter of credit cases have simply stated that such credits give rise to a contract between the bank and the beneficiary without analysing the difficulties of consideration mentioned above (e.g. *Hamzeh Malas & Sons v British Imex Industries*). These cases emphasise the widespread usage and importance of letters of credit and might be said to support a specific exception to the doctrine of consideration based on mercantile usage.

A recent affirmation of this line of cases comes from a UK Supreme Court decision last year in *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*. That case involved a letter of credit which, unusually, set out promises both in favour of the beneficiary and the local confirming bank. It was said that no consideration had been given by the confirming bank. This was rejected by the court, with one judge noting: “*There is not, and could not consistently with important and well-established principles governing letters of credit be, any suggestion that these arrangements were not supported by consideration or that they are not binding according to their terms, as between all these three parties.*”

The majority of these cases concern contracts for the supply of goods where a letter of credit is given to support payment for the supply. Arguments might be made to distinguish this position from that which applies to on-demand bonds given in support of construction contracts. The underlying factual circumstances are different, and such bonds do not have the same lengthy history of banking practice as do letters of credit. Having said that, there is an established

banking practice as to on-demand bonds, reflected in the ICC's Uniform Rules of Demand Guarantees or "URDG", and statements exist in English cases to the effect that letters of credit and on-demand bonds are to be treated the same way.

Ultimately, therefore, whilst the law in this area may be moving toward a position where execution as a deed is unnecessary, arguments in relation to on-demand bonds may persist until an authoritative determination of the issue by an English court. Until that point, parties are best advised to ensure that on-demand bonds are executed as a deed to avoid argument.

It is sometimes said that the formalities of execution are less important when dealing with large, well-known financial institutions, as they are less likely to rely on legal technicalities to avoid their obligations.

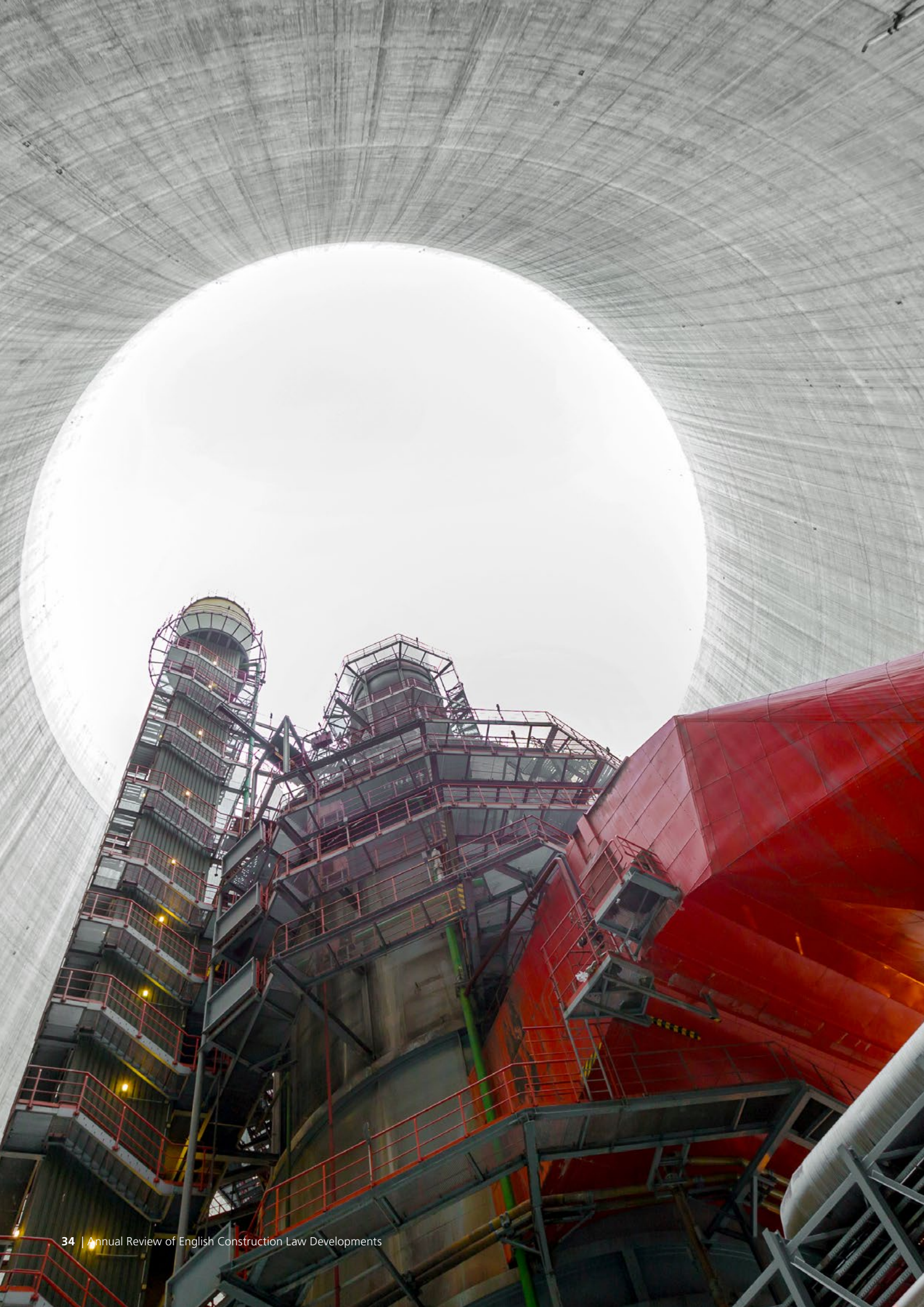
Such comments overlook the fact that an institution's willingness to pay out on a bond may be tied to the confidence it has in being able to recover the sums paid from its client and/or under the applicable cross-indemnities. No bank will willingly pay out on a performance bond if it will be left out of pocket. In such circumstances, any defect in the formalities of execution may enable the procuring party (i.e. the bank's client and usually, but not always, the provider of the counter-indemnities) to place pressure on the bank to refuse payment of the bond. The procuring party may, for example, threaten to rely upon the invalidity of the bond as precluding any recovery under its cross-indemnity to the bank. If the bond is invalid, then payment could potentially be viewed as voluntary and outside the scope of the cross-indemnity.

An example from Australia illustrates this risk well. In *Segboer v AJ Richardson Properties* a contractor arranged for a bank to issue an on-demand performance bond in favour of a developer as security for the contractor's obligations under its building contract with the developer. The performance bond was issued by the bank as a deed, however, following a call on the bond by the developer, the contractor contended that the bond had not been properly "delivered" as a deed and was therefore invalid. The "delivery" of a deed is a formal requirement of English law and will ordinarily take place upon execution unless circumstances suggest that some later time for delivery was intended (which was the argument made by the contractor in *Segboer*).

The contractor's argument did not succeed and the performance bond was ultimately held to be enforceable. It is notable, however, that once the contractor had made its objection, the bank refused to pay under the bond. This necessitated court proceedings by the developer, in which the bank claimed against the contractor under its cross-indemnity (that being the only route by which the bank could be assured of recovering against the contractor if it paid out under the bond). Accordingly, even though the contractor's argument was unsuccessful, it still resulted in considerable delay and expense in enforcing what was intended to be a cash-equivalent security.

References: *Morgan and Gooch v Larivière* (1874-75) LR 7 HL 423; *Urquhart Lindsay v Eastern Bank* [1922] 1 KB 318; *Dexters Ltd v Schenker & Co* (1923) 14 Lloyd's Rep 586; *Elder Dempster Lines v Ionic Shipping Agency* [1968] 1 Lloyd's Rep 529; *RZB v China Marine*; *Hamzeh Malas & Sons v British Imex Industries* [1958] 2 QB 127; *Segboer v A J Richardson Properties Pty Ltd* [2012] NSWCA 253; *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64.





The rise of BIM and its implications for international construction projects

Building Information Modelling (BIM) is a technological solution intended to facilitate the sharing of design information in real time amongst a project team by means of a common software platform (sometimes referred to as the Common Data Environment). BIM also allows intelligent 3D modelling of a construction project to be carried out in advance, making the design process more efficient and reducing the number of design clashes requiring resolution during the course of construction. The use of BIM is now mandatory on all UK government projects and is also becoming much more prevalent on international construction projects. For example, BIM was used on the Third Set of Locks project for the expansion of the Panama Canal referred to earlier in this publication and on the world's largest underground high-speed rail station, the West Kowloon Terminus in Hong Kong.

Whilst bringing undoubted benefits to the procurement of construction projects, the legal implications of BIM are yet to be fully explored. One recent case before the English High Court in 2017 saw a lead consultant denying access to a BIM platform being used on a power plant project in the Falkland Islands. The move was made as part of an ongoing dispute over unpaid fees and effectively brought the project to a standstill, resulting in urgent legal proceedings by the contractor to restore access.

Trant Engineering v Mott MacDonald

Trant was employed by the local Ministry of Defence to construct a £55 million power station at the Mount Pleasant Complex in the Falkland Islands. Trant employed Mott MacDonald Ltd ("MML") to provide design consultancy and principal designer services, including the implementation and use of a BIM platform called ProjectWise to enable the design team to manage, share and distribute design data.

A dispute over payment and scope emerged between the parties, as well as an argument over which terms of contract had been agreed between them (if any). MML applied for a payment of £475,000, and when payment was not made, threatened to suspend its services. Three days later MML denied Trant access to the ProjectWise platform.

Trant applied to the English High Court for a mandatory interim injunction requiring MML to restore its access on the basis that it would otherwise suffer substantial losses on the project. Without access to ProjectWise Trant would need to start again from scratch, having lost a year of progress. MML claimed that there was no contract between the parties and that Trant had no contractual right to access ProjectWise in those circumstances or at least in the absence of payment.

Injunction granted

Applying established principles under English law, the court considered whether there was a serious question to be tried as to Trant's entitlement to access the design data on ProjectWise, whether damages would be an adequate remedy if the injunction wasn't granted, and finally whether the balance of convenience favoured the granting of an injunction. These considerations are designed to assist the court in assessing the risks posed by the granting of an injunction (or its refusal) if when the matter is finally heard the claimant is shown not to have been entitled to the injunction (or vice versa in the case of its refusal). It is the course which poses the least risk of injustice which the court will adopt.

In the present case, there was a serious issue between the parties as to whether, and on what terms, a contract between them had come into existence. This was sufficient for Trant to clear the first hurdle.

The contract Trant argued for contained a limitation on MML's liability of £1 million. Trant argued, and the court agreed, that damages would not be an adequate remedy if an injunction were granted because the losses it would suffer by not having access to ProjectWise would far exceed this sum. Not only would it be required to redesign the project from scratch, the delay

would have a knock on effect for the population of the Falkland Islands whom the project was intended to benefit. As a claim for damages under its contract with MMR, if established, would be limited to £1 million, damages would not be an adequate remedy.

The court also accepted to some degree MMR's counter argument that this was balanced by the fact that MML would lose considerable bargaining power if it were forced to restore access to ProjectWise immediately - if MML were successful in showing that Trant had no entitlement to access ProjectWise it would be able to ask for a premium price to reinstate access to ProjectWise. This would be difficult to value and meant that MML also had an argument that damages would not be an adequate remedy (i.e. if the injunction were granted).

Despite the loss in bargaining power that MML might suffer, the court found that the balance of convenience lay in favour of Trant. The injunction would merely require MML to restore access to ProjectWise, whereas without the injunction Trant would be required to spend a year re-designing the project to the point that had already been reached by MML. The balance of convenience also favoured Trant because, whatever the position in relation to a contract, the court had a high degree of assurance that Trant would be entitled, by some means, to the design data contained on ProjectWise. Even if there was no contract between the parties, MML had already accepted payment on account in respect of some of the work it had carried out. In those circumstances, the court considered it unlikely that in the final outcome Trant would be denied access to the data in its entirety.

Conclusion

This case provides food for thought as to how BIM platforms are managed. It is not uncommon for consultants to include provisions within their appointments making the use of intellectual property contingent on the payment of fees, and giving a right to suspend services for non-payment of fees due. In the BIM context, this case highlights the tension that exists between the wish for open data sharing amongst parties and the interests of the creators of the data in protecting both their ownership rights and other legal entitlements.

There are other issues concerning use of data on BIM projects including the need to contract for who is entitled to use, update and alter data and where liability for this sits, bearing in mind that the data is envisaged as being used throughout the lifecycle of the building. There may need to be an ability to transfer rights from party to party. Issues also arise as to the scope of data required long-term to facilitate the operation, maintenance, refurbishment or alteration of the building where too much data may be as bad as too little.

Future proofing of data also requires to be considered - storage methods becoming obsolete (remember floppy discs?), where will data be stored, who is responsible for maintaining and paying for this, what if data is lost or corrupted?

None of these issues arose in this case but parties would be well advised to consider them when negotiating construction contracts for BIM enabled projects.

References: *Trant Engineering Limited v Mott MacDonald Ltd* [2017] EWHC 2061 (TCC) (unreported).





Insurance clauses in construction contracts

Construction contracts, both domestic and international, will usually contain clauses requiring one or both of the parties to insure against damage or liability arising in relation to the contract works. Such clauses can in certain circumstances relieve the parties of liability for matters falling within the scope of the clause (whether or not insurance has in fact been obtained). In such cases, the parties are often deemed to have intended an insurance-based solution for losses falling within the agreed scope of insurance, rather than one based on contractual liability.

A Supreme Court decision in 2017 has decided in favour of a more liberal approach to determining whether insurance clauses are to have this effect. The implications of clauses being classified in this way are considerable. If the required insurance has not been taken out or is successfully avoided by insurers, the parties may have no recourse to each other under the terms of the contract, even where losses have been caused through a breach of contract by one of the parties.

Although there are no English court decisions directly considering the insurance provisions of the FIDIC form, the Supreme Court's comments provide helpful guidance as to how those provisions are likely to be interpreted by English courts and English law tribunals in the future. We consider the operation of the insurance provisions of the new FIDIC Second Edition contracts in more detail below.

Gard Marine & Energy v China National Chartering ("Sinochart")

This case revolved around various charterparty contracts. The owner of a vessel had demise chartered it to a sister company who had then time chartered it to Sinochart who in turn sub-chartered it to another company, Daiichi Chuo Kisen Kaisha. The vessel ran aground in a port in Japan and, after paying out under the insurance policy, one of the insurers, Gard Marine, sought to bring a subrogated claim against Sinochart (i.e. standing in the shoes of the vessel's owner and its sister company) which Sinochart sought to pass on to Daiichi.

All the charterparties in question included a safe port warranty, breach of which was said to have caused the vessel to run aground. One of the issues that came before the courts was whether the insurance provisions of the demise charterparty should be interpreted as excluding the charterer's liability for breach of the safe port warranty. The form of charterparty used contained two alternative insurance clauses. The clause chosen by the parties did not expressly state that rights of subrogation would be waived, whereas the deleted clause did.

The Court of Appeal held that the parties had impliedly waived their rights to seek compensation from one another in respect of matters covered by the insurance clause. The court noted that:

"The prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other. That will be all the more so if it is agreed that the insurance is to be in joint names for the parties' joint interest ..."

The Court of Appeal's judgement also commented unfavourably on a previous Court of Appeal decision, *Tyco Fire v Rolls Royce*, where an insurance clause in a construction contract was not held to exclude liability between the parties. In that case, the Court had sought to apply the general rule under English law that clear words are needed to exclude liability for negligence. Accordingly, it considered that insurance clauses should not ordinarily exclude liability between the parties for negligent acts purely by implication. In the present case, however, the Court of Appeal counselled against too cautious an approach to such a principle. Rather, the Court emphasised that one of the main reasons why parties take out insurance is to be covered for the consequences of their own negligence.

The Supreme Court

By a narrow majority of three judges to two, the Supreme Court upheld the Court of Appeal's decision on this point. The reasoning of the majority largely reflects that of the Court of Appeal, with Lord Mance noting that, *"under a co-insurance scheme like the present, it is understood implicitly that there will be no such claim [between owners and charterers]"*. This implication was found to persist despite the express safe port warranty included in the charterparty.

The minority, in a similar way to the court in *Tyco Fire*, emphasised the express words of the safe port warranty, which was a specific amendment to the standard form adopted by the parties. They also relied on fact that the alternative insurance clause not selected by the parties contained an express waiver of subrogation whereas the clause selected by the parties did not.

It is interesting to note that the minority's view was not that the charterer should remain liable to the ship owner (and its insurers) in respect of the claim, but rather that the charterer's liability to the owner should be considered to have been discharged as a result of the insurance recoveries. This results in a similar position as between the owner and the charterer (i.e. the charterer has no liability to the owner), but would allow the insurers to bring a subrogated claim on the charterer's behalf against the sub-charterers.

This is a new distinction not previously advanced in the English cases. Its justification lies in English law's treatment of insurance recoveries under the law of damages. Ordinarily, damages claims are not reduced on account of insurance recoveries available to a claimant. As between the defendant and claimant they are not treated as making good the claimant's loss. As far as the defendant is concerned, the insurance recoveries are *res inter alios acta* or "none of his business". This rule is crucial to the ability of an insurer to pursue a subrogated claim, whereby it stands in the shoes of a claimant to recover sums from a defendant paid out under the policy.

This general rule doesn't apply where insurance is agreed to be taken out for the benefit of both parties to a contract or where they are co-insureds. In that case, the insurance is an important part of the contractual relationship between the parties and is very much each other's business. In such cases, it is well established in English law that no claim can be brought between the parties in respect of insured losses. This principle is thought to rest on an implied term, given the absurdity of an insurer bringing a subrogated claim by one party against the other, which it would then be obliged to pay out to the other party as a result of the other party being co-insured.

All of this was uncontroversial in the present case: there was no question as to a claim directly between the ship owner and the charterer. However, insofar as the subrogated claim against the sub-charterer was concerned, it was important to know precisely why a claim could not be brought between the ship owner and the charterer.

As one of the minority judgments explained:

"As between a co-insured (or his insurer) and a third party wrongdoer, a different question arises which none of the existing English authorities purports to answer. The question is this: when we say that one co-insured cannot claim damages against another for an insured loss, is that because the liability to pay damages is excluded by the terms of the contract, or is it because as between the co-insureds the insurer's payment makes good any loss and thereby satisfies any liability to pay damages? The significance of this question may be illustrated by a hypothetical case. Suppose that A and B are engaged in some contractual venture, involving the use of A's property. The property is insured in their joint names. It is damaged in breach of some contractual duty owed to A by B, but the cause of the damage is some act of B's agent, X. If the effect of the co-insurance is that B's liability to pay damages to A is excluded, then B never had a relevant liability and has suffered no loss which he can claim over against X. But if its effect is that payment by the insurer makes good A's loss as between A and B and thereby satisfies any liability of B, the result is different. The effect is to exclude the collateral payments exception, so as between A and B the receipt of the insurance proceeds must be taken into account. However, the fact that the insurer's payment has made good the loss as between A and B does not mean that it has done so as between B and the stranger, X. As between B and X the insurance is res inter alios acta. Indeed, its normal consequence is that the claim will survive to be pursued by the subrogated insurers. Either analysis will achieve the object of the implication, namely to prevent claims between co-insureds. But they have radically different consequences for claims against third parties. Which is the correct analysis must depend on the particular terms of the particular contract. The answer will not necessarily be the same in every case."

Implications for construction contracts generally

One of the Supreme Court judges noted that, *"[t]he business context in which this [issue] has most commonly arisen is the co-insurance of employer, contractor and subcontractors under standard forms of*

building contract." The implications of this decision for construction contracts are therefore significant:

- The broader approach to insurance clauses upheld by the Supreme Court is likely to be applicable whenever insurance is agreed to be procured for the joint benefit of the parties regardless of whether it is required to be obtained in joint names.
- The practical result of such an approach is that, in the absence of contrary drafting, parties agreeing to such insurance clauses will be limited to sums recoverable under the relevant insurance policy even where losses would otherwise be recoverable due to a breach of contract.
- The court's comments apply regardless of whether there is a successful insurance recovery. An employer, for example, who is obliged to insure the works and existing structures under a construction contract may not therefore have any right of recourse against a negligent contractor in the event that it fails to obtain insurance or the insurer avoids the policy or becomes insolvent.
- Whilst the safe port warranty in the present case was held to be insufficient to overcome the implication arising from the insurance clause, it remains unclear to what extent express indemnities may do so. Such an indemnity was upheld over a joint names insurance clause in the *Tyco Fire* case, but the reservations about that case expressed by the Court of Appeal make the position uncertain.
- Where the drafting of an insurance clause expressly states that the parties' other rights and obligations under the contract are to remain unaffected, this is likely to be suggestive of the alternative analysis favoured by the minority i.e. that insurance recoveries are to be taken as discharging one party's liability to another under the contract.

FIDIC Second Edition

The insurance provisions of the FIDIC Second Edition contracts have been heavily amended. The default position remains that the Contractor will obtain insurance cover in joint names in respect of the Works, injury to persons and damage to property. However, the Contractor's obligation to do so is provided for in the following terms (in Clause 19.1):

"Without limiting either Party's obligations or responsibilities under the Contract, the Contractor shall effect and maintain all insurances for which the Contractor is responsible with insurers and in terms, both of which shall be subject to consent by the Employer."

The concluding paragraph to Clause 19.1 addresses the position as to non-recoverable losses:

"Where there is a shared liability the loss shall be borne by each Party in proportion to each Party's liability, provided the non-recovery from insurers has not been caused by a breach of this Clause by the Contractor or the Employer. In the event that non-recovery from insurers has been caused by such a breach, the defaulting Party shall bear the loss suffered."

This paragraph poses some difficulties of interpretation. The term "shared liability" does not appear anywhere else in the contract (although Clause 17.6 deals with "Shared Indemnities"). It may be that the intention was to refer to "uninsured" liability. On that basis this paragraph would support the text at the start of the clause preserving the parties' obligations and responsibilities arising under the Contract. The parties would remain liable to each other for any uninsured losses, either under the general terms of the Contract or because of any lack of cover caused by one party's breach of its insurance obligations (i.e. a failure to procure insurance or a failure to abide by any applicable terms and conditions).

On this interpretation, the intended effect of the insurance provisions would appear to be aligned with the minority analysis in the *Gard Marine* case outlined above. The insurance recoveries are, as between contractor and employer, to be taken as satisfying (in part or in full) any liability for damages. However, the parties remain liable to each other under the terms of the Contract and will be required to account for any shortfall in the insurance recoveries. This structure has certain implications for contractors in particular:

- Depending on the levels of cover provided by the project insurances, real risks of uninsured liabilities may arise. These will need to be adequately covered under the contractor's annual policy.
- As the *Gard Marine* case shows, this structure allows for subrogated claims to be brought by insurers against sub-contractors. Such a claim can cause disruption to the contractor's supply chain with knock-on effects for the progress of the works. The easiest way to avoid such claims is for the contractor to ensure that sub-contractors of any tier are included as insured parties within the joint names insurances required by the Contract. The terms of the sub-contracts should also reflect this, otherwise sub-contractors may not be covered. For example, a recent decision from the English Technology and Construction Court earlier this year has held that provisions requiring a sub-contractor to take out its own insurances excluded the sub-contractor from cover under the project insurances (*Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd*).

References: *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286; *Gard Marine and Energy Limited v China National Chartering Company Limited* [2017] UKSC 35; *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC).



The interpretation of express good faith and co-operation clauses

Express good faith clauses, in varying shades of language, are increasingly found in English law construction contracts. Although not found in the standard FIDIC forms, a clause of this nature is included in the NEC suite of engineering contracts, the second most used form of construction contract in the UK and gaining popularity in Hong Kong, Australasia and Africa.

The legal effect of such clauses under English law remains uncertain. Many commentators have suggested that they add little to the other express terms of a contract. A decision of the English Technology and Construction Court last year has considered this issue head-on in the context of the standard NEC clause requiring parties to act in a “spirit of mutual trust and co-operation”.

Costain limited v Tarmac Holding Limited

Costain engaged Tarmac to supply concrete for a safety barrier on the M1 motorway. The sub-contract entered into by the parties (the “Sub-contract”) incorporated the NEC3 Supply Short Contract conditions which included, at clause 10.1, a requirement that the parties “act as stated in this contract and in a spirit of mutual trust and cooperation”.

The Sub-contract contained a tiered dispute resolution process, requiring the parties first to refer the dispute to adjudication, followed by arbitration proceedings. Adjudication was required to be commenced within 28 days of a dispute arising. Clause 93.3 of the Sub-contract then provided that: “If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the [Arbitral] tribunal.”

A dispute arose between the parties as to defects identified in the concrete supplied by Tarmac. Despite the fact that the Sub-contract called for arbitration proceedings, Costain’s solicitor wrote to Tarmac’s solicitor a formal “Pre-action Protocol” Letter of Claim, which is only required where a party intends to commence court proceedings in England. The Protocol in question requires a Letter of Response to be given followed by a “without prejudice” meeting.

Prior to Tarmac’s Letter of Response under the Protocol, Costain’s solicitor wrote again noting that the parties were following the Protocol and asking whether Tarmac would agree “to refer the dispute to the Technology and

Construction Court notwithstanding that the [Sub-contract] calls for disputes to be resolved by arbitration or adjudication?” Ten days before Tarmac’s Letter of Response was sent, its solicitor responded noting Costain’s request and stating that he would take instructions from Tarmac.

Costain’s solicitor had mistakenly considered that the 28 day time period for commencing adjudication did not apply to the dispute with Tarmac. Tarmac’s Letter of Response raised this issue directly and claimed that any claim by Costain was now barred by clause 93.3. In a subsequent adjudication between the parties, the adjudicator determined that the 28 day period for commencing adjudication had expired ten days before Tarmac’s Letter of Response, on the same day that Tarmac’s solicitors had written to indicate that they were taking instructions on Costain’s invitation to proceed via court proceedings rather than adjudication or arbitration.

Costain subsequently commenced court proceedings in the TCC claiming that the arbitration agreement in clause 93 of the Sub-contract was not effective. In the course of the proceedings the court was required to determine whether the mutual trust and co-operation provision at clause 10.1 of the Sub-contract had required Tarmac to highlight to Costain the existence of the time-bar provision at clause 93.3. Costain had argued that Tarmac had misled it into believing that clause 93 would not be relied upon by Tarmac, but that case was rejected by the court. Focus then turned to whether Tarmac ought to have been aware that Costain was mistakenly unaware of the time-bar and to have corrected that mistake.



In interpreting the mutual trust and co-operation clause the court drew parallels from cases dealing with express good faith clauses. Drawing support from Australian and English authorities, Mr Justice Coulson noted that such provisions did not go as far as requiring a party to act against its own self-interest but agreed that they could prevent one party from “improperly exploiting” the other. Good faith clauses required “the obliger to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting.” However, he rejected a suggestion that such clauses required parties to act “fairly” noting that the concept was too subjective.

In terms of the facts of the present case, the court found that “at its highest” the obligation imposed by clause 10.1 meant that:

“in the present case, the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case.

For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied upon.”

On the facts of the case, the court found that Tarmac had no reason to believe that Costain was acting under a false assumption with respect to the operation and effect of clause 93. The fact that Costain’s solicitor had expressly requested agreement to court proceedings instead of the adjudication and arbitration procedure provided for by clause 93 suggested that Costain was aware of the requirements of clause 93. There was therefore no reason for Tarmac to believe that Costain had made a false assumption



Conclusion

The last time the TCC considered the mutual trust and co-operation clause of the NEC form of contract was in 2015 in *Mears v Shoreline Housing Partnership*. In that case the court was not satisfied that “*the obligation to act in a spirit of mutual trust and cooperation or even in a ‘partnering way’ would prevent either party from relying on any express terms of the contract freely entered into by each party*”. This tended to support a view that such clauses added little if anything to the other clauses of the contract.

This latest decision confirms that, even at its highest, the obligation to act in a “*spirit of mutual trust and cooperation*” does not require a party to act against its own self-interest. However, it does suggest (albeit in equivocal language) that express good faith and trust and co-operation clauses may not be entirely devoid of meaning under English law and that parties subject to such clauses should not seek to “*improperly exploit*” the other party or take advantage of another’s false assumption for their own benefit.

The reasoning of the court in this case suggests that, if it had been clear to Tarmac that Costain was unaware of the time-bar in clause 93.3, mutual trust and co-operation may have required it to correct that mistake. That is a significant finding, particularly in light of the new FIDIC Second Edition contracts which incorporate a number of new time bars (as discussed in detail in the opening article on page 5 above). Parties should therefore think very carefully before agreeing to include good faith or mutual trust and co-operation clauses within the Second Edition contracts, at least where they are to be governed by English law. Doing so could well deprive the new time bar regime of force or create significant uncertainty as to whether a party can rely on a time bar in any given circumstances. Disputes would be likely to arise, based on the reasoning in this case, as to the extent to which the party seeking to rely on the time bar knew the other party would not comply with it or had overlooked it.

References: *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC); *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC).



Concurrent delay clauses and the prevention principle

An English Technology and Construction Court decision last year is the first time an English court has considered the enforceability of a concurrent delay exclusion in a construction contract. These are provisions which seek to exclude a contractor's entitlement to extensions of time in circumstances of concurrent delay. The decision upholds the enforceability of such clauses and therefore provides a helpful precedent for those employers wishing to incorporate such exclusions into their contracts. The decision is particularly relevant now that the FIDIC Second Edition contracts provide specifically for the parties to address concurrent delay in the Special Provisions.

North Midland Building Ltd v Cyden Homes Ltd

North Midland entered into a JCT Design and Build contract with Cyden for the construction of a large domestic residence. The contract set out a number of "Relevant Events" for which an EOT would be given. The contract amended the standard JCT extension of time wording to include a concurrent delay exclusion as follows: *"any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account"*.

The works were delayed and North Midland applied for extensions of time based on a variety of different Relevant Events. Cyden's response accepted that the Relevant Events relied upon could in theory entitle North Midland to an extension of time, but rejected the majority of the extension applied for on the basis of the concurrent delay exclusion. Save for a small amount of delay attributable to weather, North Midland's own delays were said to have consumed the delays arising from Relevant Events.

North Midland brought TCC proceedings for a declaration that the concurrent delay exclusion had resulted in time being set at large under the contract. North Midland argued that, by agreeing that Relevant Events (including employer acts of prevention) were *"not to be taken into account"* where concurrent delays exist for which North Midland was responsible, the parties had not provided an adequate extension of time mechanism, thereby engaging the prevention principle.

Under English law, the prevention principle applies where parties to a construction contract have failed to provide an entitlement to extensions of time for acts of prevention by the employer. In such circumstances, employer acts of prevention can cause the contractual date for completion and any liquidated damages connected with it to be replaced with an obligation to complete within a reasonable period and an entitlement to unliquidated damages for delay.

Concurrent delay exclusion upheld

The court rejected North Midland's case, finding that the concurrent delay exclusion was effective to exclude North Midland's entitlement to extensions of time whilst concurrent delays for which it was responsible were operative. The prevention principle applied only where the parties had failed to provide for extensions of time in respect of acts of prevention. It had no application where such extensions had been expressly excluded by the parties.

The court also noted that the prevention principle did not, in any event, apply in circumstances of concurrent delay. Adopting the reasoning of Mr Justice Coulson (as he then was) in *Jerram Falkus Construction Ltd v Fenice Investments Inc (No.4)*, the court found that the prevention principle would not apply where the contractor had not actually been prevented by an employer's actions because an earlier completion date would not have been achieved in any event due to the contractor's own concurrent delay.



Conclusion

As noted above, this decision appears to be the first time an English court has considered the effect of a concurrent delay exclusion in a construction contract. The court's findings will provide comfort to employers looking to rely on such exclusions and provides a helpful precedent as to how they might be drafted. In this regard, it is worth noting that Clause 8.5 of the FIDIC Second Edition contracts provides for the question of concurrent delay to be specifically addressed by the parties in the Special Provisions.

The *Jerram Falkus* decision referred to by the court has been the subject of criticism by a number of respected English lawyers (including John Marrin QC). The court's support for that decision is likely to encourage further debate as to the scope of the prevention principle and its impact on the position as to concurrent delay claims generally under English law.

References: *Jerram Falkus Construction Ltd v Fenice Investments Inc (No.4)* [2011] EWHC 1935 (TCC); John Marrin QC, 'Concurrent Delay Revisited', SCL paper 179 (February 2013); *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC).

Contractor claims for delay and disruption against third parties

Delay and disruption to construction projects comes in many different forms. Neutral events such as bad weather or the discovery of unexpected ground conditions may arise. Or project participants themselves may interfere with one another. Still another source of potential interference is third parties, such as protesters, adjoining landowners, government bodies or utility providers. The actions of these third parties have the potential to cause considerable financial loss to a project.

A construction contract will usually indicate who is to bear the risk of interference by third parties. It is not uncommon for the contractor to agree to bear some of these risks even though the contractor will not, of course, have any contractual relationship with these parties. In such circumstances, a question may arise as to whether the contractor has sufficient standing to sue third parties who have caused disruption to the project for which the contractor is contractually responsible as against the employer. We consider this question further below, in light of a recent Scottish decision which is the first to consider the issue in a construction context under English or Scottish law in 30 years.

Tortious claims for interference with property

Under English law, claims may be made against third parties under the general law of “tort” for damage to or interference with property. Such claims may include any consequential financial losses arising from the damage or interference. English law does not, however, generally recognize tortious claims (i.e. claims under the general law in the absence of a contract) in respect of actions which have caused pure economic loss, not involving damage or interference to property. Accordingly, the extent to which a claimant has an interest in the property the subject of the interference is of central importance.

The extent of the interest required was summarised by the English House of Lords in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd*:

“there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.”

The line of authority referred to begins with a construction case, *Cattle v Stockton Waterworks Co*, decided in 1875. In that case, the owner of land on both sides of a highway contracted for a tunnel to be built beneath the highway connecting both sides. The water authority had a right to keep and maintain a mains water pipe beneath the highway. Upon the commencement of excavation it was discovered by the contractor that the mains water pipe was defective and leaking. The works were suspended until the leak was repaired by the water authority. The contractor was responsible for this delay under its contract with the landowner and claimed over against the water authority for the additional expense caused by the delays. On the assumption that the landowner could have maintained a claim had it suffered the loss, the contractor’s claim was rejected. Its interest in the land was purely contractual and could not provide a basis for a tortious claim against the water authority.

The position in relation to construction works was next considered in 1987 by a Scottish appeal court (in *Nacap Limited v Moffat Plant Limited*). That case involved a contract with British Gas for the laying of a pipeline under the then ICE Conditions of Contract. The contractor was granted a right of possession to the site as needed for the laying of the pipeline. The contractor was also granted possession of the materials required for the pipeline (including the pipes) which were supplied to it by British Gas. The contractor accepted full responsibility for the care of the works and was required to rectify any damage to them occurring whilst in its care. During the course of



the works the pipeline was damaged by plant hirers, whom the contractor sued to recover the costs of repairing the pipeline and associated losses.

The Scottish appeal court rejected the contractor's claim. The rule set out from *Leigh and Silavan* quoted above was said to distinguish between ownership "or a right of possession similar to that of an owner on the one hand and, on the other hand, mere contractual rights to have the use or services of the [property] for certain limited purposes". As the contract made clear that the contractor had only been granted possession for the specific purpose of laying the pipeline, it could not be said to have had a right of possession similar to that of an owner. It therefore had no title to sue the plant hirers.

Commenting on the unfairness of such a situation, the court noted that the rule was grounded in public policy and the practical need for the law to restrict the potential class of claimants to which a wrongdoer might be held responsible. Otherwise, a wrongdoer might be exposed to vast number of claims from an indeterminate range of persons. The court noted, however, that the contractor might have been able to procure a right of action by obtaining an assignment from British Gas of its cause of action against the plant hirers.

The suggestion of an assignment remains untested in a construction context and may well offend the principle that an assignee cannot recover a greater or different loss than that which the assignee could have recovered. For example, in *Dawson v Great Northern and City Railways Company*, a freeholder had assigned to its tenant a right of action to claim against a railway company for damage caused to the premises in question by tunneling operations. The assignee tenant, a draper, claimed for damage to her trade stock, but this claim was rejected on the basis that the freeholder could have made no such claim (i.e. because it did not operate a business from the premises).

Cruden Building & Renewals Limited v Scottish Water

A Scottish decision last year has given further consideration to the possessory right necessary for a contractor to bring claims against third parties. A housing association entered into a Development and Licence Agreement with Cruden Holdings (West) Limited as developer and Cruden as contractor for the construction of a residential housing development. Cruden suffered large delays when foul water escaped from a sewer owned by Scottish Water onto the development site. Cruden sued Scottish Water in delict (the equivalent of "tort" in Scottish law) for economic loss arising from the delay. Scottish Water objected on the basis that Cruden did not have a sufficient property interest in the site in order to bring such a claim.

The building contract provided Cruden with a "right under licence (but not an exclusive right of occupation) to enter upon the part of the Site on which the relevant Phase is to be constructed for the sole purpose of carrying out the ... works, and for no other purpose whatsoever." Furthermore, it provided that "[Cruden] shall not...be entitled to any tenancy or other estate right, title or interest in the Site...".

Applying the *Nacap* decision referred to above, the Scottish court held that these provisions only gave Cruden use of the site for certain limited purposes and that this did not equate to a proprietary right or a right of possession similar to that of an owner of the site. All Cruden had was a contractual right to use the site in order to complete the development and (hopefully) make a profit.

The court noted that the rights given to Cruden under the building contract were, "a far cry from the possessory title as contemplated in *Nacap*, namely: a right of possession similar to an owner. The right given to the pursuers in terms of the contract is of a wholly different character, nature and extent. It is a very limited and circumscribed right which has none of the elements necessary to make it similar to a right of ownership." By contrast with another non-construction case, the court indicated that a "wide and unfettered degree of possession" was required if were to fall within the rule.

As such, Cruden had no title to sue and no remedy against Scottish Water. Neither could the housing association sue, as in the absence of Cruden having an entitlement to an extension of time or loss and expense under the building contract, it had suffered no loss.

Practical implications

It has been clear for many years that (even without the specific terms present in the above case) the right given to a contractor to access or to take possession of a site in order to carry out work is a contractual rather than a proprietary right. The *Cruden* decision provides important clarification that such contractual rights will ordinarily be insufficient to provide title to sue third parties who cause delay and disruption to the works by causing damage to or interfering with the site. It is notable in this regard that the court rejected a submission that, given the rule was based on public policy and pragmatism, it should be loosened for construction contract cases such as this where the contractor could be left without a remedy and the wrongdoer absolved from liability. The court rejected this invitation, affirming that the purpose of the rule was to impose a policy limitation on liability for tortious acts, meaning that there will inevitably be cases where wrongdoers escaped liability while those aggrieved are left without a remedy. That is the point of the rule. This therefore left the wrongdoer in this case, Scottish



Water, without any liability for extensive interference with the land on which the development was being built.

What is at first blush surprising is that the contractor chose to bring a claim against Scottish Water rather than against the housing association. However, it seems that the contractor had no grounds for bringing such a claim. That may not be the case under more standard forms of contract. Under contracts which require the employer to grant possession (as opposed to mere access) of the site to the contractor, for example, in circumstances where the contractor was effectively excluded from site as a result of the foul water escape the contractor would perhaps have argued that the employer had breached that requirement and the contractor was entitled to an extension of time and payment as a result. Alternatively, under contracts which entitle the contractor to claim additional time to complete and additional payment in the event of force majeure or unforeseeable site conditions, the contractor might have chosen to submit a claim on the basis that the foul water escape triggered these provisions.

The circumstances in which the present rule will be relevant are therefore likely to be limited to cases where contractors have accepted a significant degree of site risk without recourse to the employer. Contractors who are prepared to accept such risks may wish to consider how best to preserve rights of action against third parties to avoid the difficulties faced by Cruden in the present case. As noted above, a simple assignment of an employer's rights against such persons is likely to be problematic. One solution, could be for the employer to grant the contractor a limited right to recover under the construction contract to the extent that the employer is entitled to recover from third parties causing disruption to the works in such circumstances. This could be

coupled with an obligation on the contractor to pursue such claims in the name of the employer while indemnifying the employer for the costs of the same. Such a mechanism is similar to the "Equivalent Project Relief" provisions included in many PFI or PPP projects.

One further scenario involving these issues might arise where a contractor's rights to claim under the construction contract in respect of third party interference with the works have been lost due to non-compliance with time-bar provisions. Although untested under English law, it seems possible that a contractor could argue that such non-compliance should not be taken into account in relation to any claim against the third party wrongdoers. The difficulty of showing a sufficient proprietary interest would remain, however.

International construction contracts

The majority of international construction contracts will contain rights of possession similar to those considered above. For example, the 2nd Edition of the FIDIC Yellow Book provides for a non-exclusive right of access to and possession of the designated site within such times (unless otherwise stated) as may be required to enable the contractor to proceed in accordance with the Programme. As in the Cruden case this is a far cry from a right of possession similar to ownership.

Nevertheless, it is worth noting that local law will govern the ability of the contractor to pursue claims against third parties (even where English law is stipulated as governing the contractual and non-contractual obligations between the parties under the construction contract). As noted above, this is an area of



law which is dependent on policy considerations and on which the laws of different countries are likely to differ. It may well be possible for a contractor to make such claims against third parties causing disruption to the works in other countries.

The standard FIDIC wording will of course provide some protection to the contractor though entitlements in relation to Unforeseen physical conditions (Clause 4.12 in the Second Edition contracts) or Force Majeure events (now referred to as “Exceptional Events” and found in Clause 18 of the Second Edition contracts). However, an investigation into the local law position is likely to be worthwhile in the two scenarios noted above i.e. where a contractor has agreed to accept a significant degree of site risk or where entitlements may have been lost through non-compliance with time-bar provisions.

Conclusions and implications

The *Cruden* decision provides helpful clarification that the contractual rights of access or possession given to contractors in respect of the sites on which they carry out work do not, under Scottish or English law at least, provide sufficient title to bring a claim against third parties causing damage or interference to the site with delays and additional costs incurred in consequence. The position in other countries is likely to differ depending on the policy adopted by the local law in question. Contractors are largely insulated from the need to bring such claims by the standard wording of the FIDIC form and other standard forms of contract, but should give consideration to preserving rights of action against third parties where they plan to accept a significant degree of site risk without recourse to the employer.

References: *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Dawson v. Great Northern and City Railways Company* [1905] 1 KB 260 at 272-274; *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] 2 WLR 902; *Nacap Limited v Moffat Plant Limited* (1987) SLT 221; *Cruden Building & Renewals Limited v Scottish Water* [2017] CSOH 98.



Representative defect claims

Large scale construction projects often involve repetitive work such as welding. Difficult issues of proof can arise where an employer discovers examples of such work not having been performed in accordance with the relevant contract. The sheer number of the items involved can make it impractical for each and every instance to be investigated. Instead a claim may be brought on the basis of statistical evidence, in an attempt to prove that all or the majority of instances have been performed defectively.

An English Technology and Construction Court decision last year has provided guidance on the bringing of such claims based on sample evidence and expert statistical analysis. This appears to be the first time the TCC has considered the use of statistical evidence to support such claims.

Amey LG Limited v Cumbria County Council

Amey was contracted by Cumbria to provide highways maintenance and associated services for a term of 7 years. The relationship between the parties subsequently deteriorated and, following the expiration of the contract, Amey commenced proceedings to recover sums deducted by Cumbria from Amey's final monthly payment application. In response, Cumbria advanced a number of counter-claims, including a claim for the cost of remedial works to repair a proportion of patching and surfacing works carried out by Amey, which Cumbria claimed to be defective. Cumbria advanced this claim on the basis that it had examined a sample number of patching and surfacing works undertaken by Amey, and that its conclusions as to the defective nature of those samples could be extrapolated to the entirety of the works of that nature undertaken by Amey over the contract period.

The extrapolation of Cumbria's claims meant that the financial value of the losses claimed was much greater than those connected specifically to the samples examined by Cumbria. For one claim, the cost of remedial works for the sampled items was approximately £22,000 but would rise to approximately £1.69 million when extrapolated to the rest of the works.

The key questions for the court to determine in relation to extrapolation were:

1. Whether Cumbria was entitled to advance its case based on a sample of evidence.
2. Whether the method of sampling used by Cumbria was acceptable to advance its extrapolation case.

3. If the method was acceptable, whether the statistical evidence in relation to the sample set was sufficient to discharge the legal burden of proof in relation to its claim.

Decision

The court accepted that the substantial quantities of patching and surfacing works carried out by Amey under the contract made it impractical for Cumbria to have inspected every item of work and to have pleaded and proved its case in relation to each allegedly defective item separately. Cumbria was therefore entitled to advance its case on the basis of sampling. It is unclear from the court's decision whether it would still have been permissible for Cumbria to rely on sampling if it was not impractical, but simply more expensive or time-consuming, to prove each item of defective work separately.

With regard to the second issue, the court rejected Cumbria's initial position that its sample evidence could be extrapolated with a 95% confidence rate across the whole of the works. The court noted that it was well understood by statisticians that this level of confidence could only be demonstrated mathematically if the sample evidence was obtained by a genuinely random sampling process. Cumbria ultimately accepted that its sample was not sufficiently random and, whilst this ruled out proof of a 95% rate of confidence, the court found that there was no principle of law or statistical theory to suggest that such a claim could only be established by statistically random sampling. Cumbria was therefore entitled to rely upon its sample evidence but was required to demonstrate that, whilst it may not be statistically random, it was still sufficiently representative of the whole of the works.



Cumbria failed in this regard to show that its sample evidence was sufficiently representative:

- The sample was initially obtained to ascertain the presence or absence of defects and not a general sample of the works carried out by Amey. Accordingly, the sample was not being used for the intended purpose of its collection.
- The sampling process had been extended over a lengthy period of time.
- Patches from the sample which could not be located on a GPS were excluded from the statistical analysis, thereby excluding samples from works carried out earlier in the project before GPS was being used.
- The sample excluded patches classified as “pre-surface dressing patches” which had subsequently been covered by surfacing.

The court held that each of these matters demonstrated an opportunity for the sample to be infected with bias. Cumbria was also found to have failed to have proper processes for collection of the sample and did not take suitable steps to mitigate and/or avoid the possibility of bias. In these circumstances, it was held that it would be unsafe to extrapolate the sample evidence relied upon by Cumbria.

Conclusion

This case provides important guidance for the bringing of representative defects claims under construction contracts. The need for such claims is more likely to arise on large construction projects involving repetitive work, such as welding, bricklaying, glazing or road repairs as in the present case.

Although it will always be preferable for a claimant to prove each item of defective work, the present case shows that where this is impractical or impossible, evidencing a claim by reference to a statistically random or sufficiently representative sample will be permissible. The difficulties involved in doing so should not be underestimated, however. Care is needed from the outset to ensure any sample evidence collected is genuinely random and/or sufficiently representative and that all possible steps are taken to avoid the sample being affected by bias.

References: *Amey LG Limited v Cumbria County Council* [2016] EWCH 2856 (TCC).

Claims for costs saved in breach of contract

An English Technology and Construction Court decision last year has accepted the ability of an employer to claim the costs saved by a contractor in connection with defective work, irrespective of the need for remedial work. One not uncommon circumstance where such claims arise is where proprietary materials or systems specified by an employer have been substituted with cheaper equivalents. This appears to be the first time an English court has directly considered the making of such claims in a construction context.

Amey LG Limited v Cumbria County Council

The previous article in this publication considered Cumbria's claim against Amey for defective road repairs based on statistical evidence and extrapolation. Part of Cumbria's claim related to work which it alleged was not carried out by Amey, including alleged failures to apply certain seals to road patch repairs and less than required patching thickness. It appears that Cumbria was unable to show that these alleged failings would, as a practical matter, necessitate any remedial work. It therefore claimed by reference to the costs saved by Amey in allegedly failing to carry out these works and/or the proportion of the contract price paid to Amey for work which had allegedly not been provided.

Cumbria had initially advanced its claim based on restitutionary principles but later sought to claim on the basis of diminution in value arising from the alleged breaches of contract. It was said that the diminution in value arising from the alleged breaches could be evidenced either by the cost saved by Amey or the proportion of the contract price which related to the allegedly unperformed or partially performed work.

The court was prepared to accept both formulations of Cumbria's claim. With regard to diminution in value, the court found that such a claim was permissible *"even in circumstances where the employer cannot point to any specific consequential loss suffered by him as a result of the non-performance in terms, for example, of there being a reasonable need to undertake remedial works."* In appropriate circumstances, *"the process of*

ascertaining the diminution in value may involve using either the cost of providing the works or the contract price as the best evidence of that value".

The court also held that there was no good reason why restitutionary damages should not be awarded in cases where it is submitted that there is a delivery of some but not the entire contract works, which were in substance claims for *"short delivery"*.

Conclusion

This appears to be the first time the TCC has considered a claim for the costs saved by a contractor in connection with defective work without the need for remedial works. The court's judgment draws on developments in non-construction cases in recent years and it remains to be seen how the law will develop in future cases, both in the construction and non-construction spheres.

For the time being, the present case would appear to permit employers to make claims for defective work in certain circumstances even where a defect has no practical impact on the performance of the work in question. Although the facts of the present case related to work alleged to have not been carried out or only partially performed, the court's reasoning might also be argued to extend to cases where cheaper or non-proprietary materials are used contrary to those specified but where proof of any meaningful difference in performance is difficult to obtain.

References: *Amey LG Limited v Cumbria County Council* [2016] EWCH 2856 (TCC)



The ICC Expedited procedure and the future of international construction disputes

International arbitration has become the preferred means of resolving disputes on major projects in the construction industry involving parties from more than just the local jurisdiction. However, there have been growing complaints that the process has come to resemble common law litigation, with interim applications, extensive disclosure and lengthy witness examination, resulting in a lack of speed and disproportionate costs. To address such criticisms, many arbitral institutions have introduced expedited procedures in recent years.

In March 2017, the International Chamber of Commerce (“ICC”), the most popular arbitral institution for international construction disputes, introduced an expedited procedure (the “ICC Expedited Procedure”). In doing so, the ICC joined other institutions with similar procedures including: the International Centre for Dispute Resolution, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, the Stockholm Chamber of Commerce, the Australian Centre for International Commercial Arbitration, the German Institution of Arbitration, the Swiss Chambers’ Arbitration Institution and the Istanbul Arbitration Centre.

This article outlines the ICC Expedited Procedure, addresses some recent criticisms and considers the future use of expedited proceedings in international construction disputes.

The ICC Expedited Procedure

The ICC’s Expedited Procedure applies automatically to arbitration agreements concluded after 1 March 2017 if the amount in dispute is less than US\$2 million and the parties have not expressly opted out of it or the ICC Court decides it is inappropriate in the circumstances to apply it. The parties can also elect voluntarily for the ICC Expedited Procedure to apply.

The ICC Expedited Procedure introduces a range of new measures. Firstly, the ICC Court will be able to appoint a sole arbitrator, even if the arbitration agreement specifies otherwise. Secondly, the requirement to agree Terms of Reference has been dispensed with. Thirdly, the case management conference (“CMC”) must now be held within 15 days of the file being transmitted to the tribunal and the final award must be rendered within 6 months of the CMC.¹ Fourthly, the tribunal will have the discretion to adopt such procedural measures as it considers appropriate, including the ability to decide that document production is not required or that written submissions and evidence should be limited in length and scope. The tribunal also has the express power, after consultation with the parties, to decide the

dispute solely on the basis of the documents, or may decide that any merits hearing should be held by video conference or telephone. Finally, the fees for the ICC Expedited Procedure will be calculated on a new scale.

These changes are all designed to result in a quicker and cheaper process. However, the precise degree of expedition provided by the new rules deserves closer analysis. The 6 month period for rendering a final award is the same as that which now applies to ordinary arbitrations under Article 31 of the ICC Rules, save that the period in expedited proceedings runs from the date of the CMC rather than the agreement of the Terms of Reference. Under the ordinary procedure, Terms of Reference are required to be agreed within 30 days of the file being transmitted to the tribunal,² whereas under the ICC Expedited Procedure, the CMC is to be held within 15 days of the file being transmitted. In both procedures, the need for a Request, Answer, Counterclaim (if any) and Reply (if any) remains prior to the file being transmitted. On paper, therefore, the ICC Expedited Procedure would appear only to save 15 days (being the difference in start date for the 6 month period for rendering a final award).

* A copy of this article has been published in the International Construction Law Review earlier this year, Volume 35(2) at pages 251 to 260.

¹ In non-expedited cases, the award is due within 6 months of the Terms of Reference being agreed.

² This period was 60 days in the version of the ICC Rules applicable prior to March 2017.

In practice, however, the degree of expedition provided by the new rules is likely to be greater:

- The requirement that a sole arbitrator is appointed even if the parties have stipulated a three arbitrator tribunal in their arbitration clause is likely to save time, both in the appointment of the tribunal and in the subsequent conduct of the arbitration.³
- Dispensing with Terms of Reference is also likely to save considerable time in practice. Whilst the period for agreement of the Terms of Reference is now 30 days from transmittal of the file, this was previously 2 months and tends to be longer in practice.⁴
- The six month period for rendering a final award in ordinary arbitrations is subject to the proviso that the ICC Court may fix a different time limit based on the procedural timetable established at the CMC and/or may extend the six month time limit pursuant to a reasoned request from the tribunal. In practice, such extensions are commonly given.⁵ By contrast, the ICC's guidance notes on the ICC Expedited Procedure state that extensions will be granted only in "*limited and justified circumstances*". The notes also state that the ICC Court considers compliance with the six month time limit to be "of the essence under the Expedited Procedure Provisions". So it seems that six months is likely to mean six months as far as the ICC Expedited Procedure is concerned.
- Overall therefore, parties using the ICC Expedited Procedure might expect to receive an award within about 9 months from commencement of an arbitration (i.e. allowing 2 to 3 months to get to the CMC and six months for the award). This contrasts with a likely period of 18 months to 2 years or more for the ordinary procedure.⁶

The ICC Court President Alex Mourre stated that the rules provide "*an entirely new offer to our users. Disputes will now be resolved on [sic] a very expeditious and cost-effective manner, providing an effective answer to the legitimate concerns of the business community as to time and costs.*"⁷ However, there have been a number of concerns expressed about the ICC's Expedited Procedure.

Criticism of the ICC expedited procedure

One of the main criticisms of the ICC's Expedited Procedure is its automatic application to disputes under USD 2m, unless the parties opt out or the ICC Court considers it should not apply. In a recent survey, whilst 92% of respondents favoured the introduction of simplified procedures in institutional rules, only 33% wanted them as a mandatory feature.⁸ Underpinning this reluctance are two principal concerns centred around: (1) party autonomy and (2) the link between the value of a dispute and its suitability for expedited proceedings (i.e. low value disputes are not always simpler and vice versa).

Party autonomy

One of the most strident measures introduced in the ICC Expedited Procedure is the ICC Court's discretion to appoint a sole arbitrator under Appendix VI Article 2. This differs from the position adopted by some other arbitral institutions. For example, the expedited rules under the Japan Commercial Arbitration Association are not applicable if the parties have agreed on more than one arbitrator.⁹ Under the Arbitration Rules of the Hong Kong Arbitration Centre and the Swiss Rules on International Arbitration, the parties are invited to refer their case to a sole arbitrator, but if they do not agree, the dispute is decided by three arbitrators.

One of the principal advantages of arbitration over litigation is ability of the parties to define the process for the constitution of the arbitral tribunal and to appoint their own arbitrator where a three person tribunal has been agreed:

*"Once a decision to refer a dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of the arbitral process (...). It is, above all, the quality of the tribunal that makes or breaks the arbitration (...)"*¹⁰

The power vested in the ICC Court under the ICC Expedited Procedure to appoint a sole arbitrator, even when the parties have agreed otherwise, seems to run counter to the consensual spirit of arbitration. Arguments can be made that by incorporating arbitration rules with

³ Often the arbitral timetable is driven by the availability of the arbitrators, rather than the needs and wishes of the parties, which in itself can result in higher costs.

⁴ See for example Schafer E., Verbist H. and Imhoos C., ICC Arbitration in Practice (The Hague, 2005) at page 92. The ICC Court also has the power to extend this period under Article 23(2) of the ICC Rules.

⁵ See, for example, Craig W., Park W., and Paulsson J., International Chamber of Commerce Arbitration, (3rd Edition, 2000, New York) at page 356: "... the six month time limit for rendering of the final award is seldom adequate in major arbitrations. The Court therefore readily extends the time limit."

⁶ There are no official statistics as to the average length of ICC arbitrations, but in the authors' experience 18 months is comparatively fast for a typical international construction dispute, with 2 years or greater being more common. Craig, Park and Paulsson (n 5 above) suggest that the average ICC arbitration takes between 1 to 2 years (page 14), but this is not construction specific.

⁷ ICC Press Release, "ICC Court amends its Rules to enhance transparency and efficiency", (4 November 2016) <<https://iccwbo.org/media-wall/news-speeches/icc-court-amends-its-rules-to-enhance-transparency-and-efficiency/>>.

⁸ Queen Mary University of London, "The 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", <<http://www.arbitration.qmul.ac.uk/research/2015/>>. Cost was regarded the worst feature of international arbitration followed by the lack of speed.

⁹ The expedited procedures automatically apply where the amount of the claimant's claim(s) is below ¥20m (Chapter VI Expedited Procedures Rule 75. Scope 2.) Chapter VI Expedited Procedures Rule 75. Scope 2 (2) provides that the expedited procedures will not apply if "a party notifies the JCAA in writing of an agreement by the Parties that there will be more than one arbitrator."

¹⁰ Blackaby N., Partasides C., Redfern A., Hunter M., Redfern & Hunter on International Arbitration, (6th Edition, Oxford, 2015), p. 233.

provisions for the appointment of a sole arbitrator in certain circumstances, the parties should be taken to have intended an exception to any general provision in the arbitration clause for more than one arbitrator. Equally, however, it could be said that by expressly referring to such rules, the parties must be taken to have been aware of the sole arbitrator provisions and to have intended to reject them by their stipulation for more than one arbitrator.

The difficulties which arise in this regard are illustrated by two recent cases, both concerning Singapore International Arbitration Centre ("SIAC") arbitrations, one enforcing an expedited arbitration award and another refusing enforcement. In *AQZ v ARA*,¹¹ the Singapore High Court considered an objection to the enforcement of an award given under the expedited procedure provided for by the 2010 SIAC Rules. The award was rendered by a sole arbitrator and a challenge was brought on grounds (among others) that the tribunal had not been constituted in accordance with the terms of the arbitration agreement, which called for the nomination of three arbitrators. The position was particularly stark because the SIAC expedited procedure was not in existence at the time the contract and arbitration agreement had been entered into. Despite these objections, the Singapore High Court refused to set aside the award. References to rules in an arbitration clause were to be taken as references to such rules as apply at the date of the commencement of arbitration (not the date of the contract). The SIAC 2010 Rules were, therefore, incorporated by reference, including the SIAC expedited procedure. Having been incorporated, the expedited procedure was to override the parties' stipulation for a three person tribunal. In the court's view a "*commercially sensible*" interpretation of the arbitration agreement required recognition of the ability of SIAC to appoint a sole arbitrator where the expedited procedure applied.

By contrast, a Chinese court has recently refused enforcement of an award rendered under the SIAC Expedited Procedure in similar circumstances.¹² This time the contract in question was entered into in 2014, well after the introduction of the SIAC expedited procedure. The arbitration clause provided for three arbitrators and again a sole arbitrator was appointed under the expedited procedure. Enforcement was refused under Article V(1)(d) of the New York Convention on the basis that the composition of the tribunal was not in

accordance with the agreement of the parties. The court appears to have placed weight on the fact that the SIAC Rules did not exclude a three person tribunal under the expedited procedure and nor did it specifically empower SIAC to require the parties to accept a sole arbitrator despite their agreement to the contrary. Although only a decision of the Shanghai No. 1 Intermediate Court, in accordance with Chinese arbitration law, the decision was reviewed by the High People's Court and reported to the Supreme People's Court. The decision is therefore likely to be authoritative in China.

Since 2013, the SIAC Rules have been amended to make clear that the SIAC expedited procedure and the power to appoint a sole arbitrator in expedited proceedings, "shall apply even in cases where the arbitration agreement contains contrary terms".¹³ This would appear to address one of the grounds relied upon by the Shanghai No. 1 Intermediate Court, but does not change the fact that the rules still theoretically permit a three person tribunal to be appointed under the procedure. The new ICC Expedited Procedure achieves a similar position. Article 2(1) provides that the ICC Court may (but is not required to) appoint a sole arbitrator under the ICC Expedited Procedure, "*notwithstanding any contrary provision of the arbitration agreement*".

Link between the value of a dispute and its suitability for expedited proceedings

The complexity of a dispute is not a function of the amount in dispute. High value disputes may be straight forward, while low value disputes may be complex. The imposition of a fixed monetary threshold in the ICC's Expedited Procedure has therefore provoked concerns that complex low value disputes may be dealt with in an inappropriately short time frame, preventing the parties from having a full opportunity to present their case.

These concerns are borne out by a recent survey recording that 94% of respondents thought disputes exceeding US\$1 million should be exempt from simplified arbitration procedures. More than half of the respondents felt that the threshold value should be US\$500,000 or lower.¹⁴ Despite this research, the ICC's decision to fix the threshold at US\$2 million was based on their own statistics, showing that 32% of cases filed in 2015 had an amount in dispute below US\$2 million, a stable figure since 2009.¹⁵

¹¹ [2015] SGHC 49. A copy of the judgment can be accessed at <<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15914-aqz-v-ara-2015-sghc-49>>.

¹² No formal case report yet exists, but a summary of the judgment can be accessed on Lexology: Liu J., Tang M. and Zhu Y., "Case Alert: Chinese Court Refused Recognition and Enforcement of a SIAC Award", 25 August 2017, <<https://www.lexology.com/library/detail.aspx?g=412f18a5-f910-4fbc-8055eb421d1de522>>.

¹³ Article 5.3 of the 2016 SIAC Rules.

¹⁴ The 2015 International Arbitration Survey (n 8).

¹⁵ Hughes-Jennett J. and Berthet A., "New ICC expedited rules: big change for small claims?", Practical Law, 2 March 2017, <New ICC expedited rules: big change for small claims? Practical Law>.



These concerns are ameliorated to some extent by the ICC Court's power to disapply the ICC Expedited Procedure if circumstances so require. It remains to be seen how readily this power will be applied in practice. The automatic application of expedited procedures to lower value disputes has also been validated by other institutions. For example, the Swiss Chambers' Arbitration Institution introduced a similar opt-out model for disputes below CHF 1m. In 2015, 43% of all new arbitrations filed with the Swiss Chambers were conducted under the expedited procedures.¹⁶

The use of a fixed monetary threshold may also help to emphasise the need for proportionality in dispute resolution. Whilst low value disputes may still be complex, commercial parties generally expect the cost of their resolution to be less (in keeping with their lesser commercial significance). In this regard, the shorter timeframe and curtailed features of the ICC Expedited Procedure may help parties focus their minds on the real issues in dispute from the outset. As Welser and Llauegger point out, in fast track proceedings, the parties must limit themselves to what is really important – a feature increasingly overlooked in ordinary arbitration proceedings.¹⁷

The future use of the ICC expedited procedure in international construction disputes

The ICC is the most popular arbitral institution for the resolution of construction and engineering disputes. Construction and engineering disputes represent the largest proportion of cases submitted to ICC arbitration and in 2016 accounted for 193 new cases.¹⁸ By comparison, 55 construction and engineering cases were submitted to SIAC and 49 to the London Court of International Arbitration in the same time period.¹⁹

The volume of construction and engineering cases sent to ICC arbitration means that significantly more construction and engineering arbitrations will be exposed to expedited procedures this year than previously. Of the 966 new ICC cases in 2016, 393 were for values below US\$2 million. 20% of new cases were construction and engineering related, suggesting that approximately 80 of the construction and engineering cases submitted to the ICC in 2016 would now be subject to the ICC Expedited Procedure.

¹⁶ Dr. Schütt P., "The ICC Expedited Procedure - New Demands for the Drafting of ICC Arbitration Agreements as from March 1, 2017", Lexology, 20 February 2017, <<http://www.lexology.com/library/detail.aspx?l=5000000>>.

¹⁷ N Welser I. and Klauegger C., "Fast Track Arbitration: just fast or something different?", Austrian Arbitration Yearbook, 2009, <http://www.chsh.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2009.pdf>.

¹⁸ 2016 ICC Dispute Resolution Statistics.

¹⁹ 2016 SIAC Annual Report (<http://siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf?bcsi_scan_3a9fd5b29d5605d3=0&bcsi_scan_filename=SIAC_AR_2016_24pp_WEBversion_edited.pdf>) and LCIA Facts and Figures - 2016: A Robust Caseload (<<http://www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx>>).

Time will tell whether the added exposure to expedited procedures brought about by the ICC's new rules will encourage a greater voluntary take-up of expedited arbitration procedures beyond the existing monetary thresholds in the construction and engineering sector. However, the popularity of statutory adjudication in a number of jurisdictions across the globe may suggest that initial concerns about the complexity of construction disputes being ill-suited to expedited arbitration procedures will fade over time.

For example, in the United Kingdom the initial take up of statutory adjudication was slow, with 187 cases being referred in its first year of operation.²⁰ In its second year, however, the number of adjudications rose by 700% to just over 1300. This figure would exceed 2000 over the next three years settling at an average of around 1400 per year. On average, 90% of adjudications commenced in the first 12 years after the introduction of statutory adjudication were completed within 28 or 42 days from the date of being referred (despite the parties having the right to extend this timeframe by agreement). In only 10% of cases was additional time agreed beyond 42 days.

In recent years, a greater number of higher value disputes have been referred to statutory adjudication in the UK. Between 2001 and 2008, 3% of percent of disputes referred to adjudication were for a value of above £1m, doubling to more than 6% between 2010 and 2015. In addition, very few adjudications decisions in the UK are challenged on their merits through court proceedings.²¹

Similar outcomes for statutory adjudication apply in other jurisdictions, suggesting that many complex construction disputes are satisfactorily resolved through statutory adjudication within a considerably shorter period than the total 8-9 month period applicable to the ICC Expedited Procedure.

The benefits of the ICC Expedited Procedure are also likely to be quickly appreciated. Party costs should be significantly lower than they would be in an ordinary full length ICC arbitration. The procedure should also result

in a final award capable of immediate enforcement in a timeframe not much longer than that needed for a Dispute Adjudication Board ("DAB") decision under the standard FIDIC procedure.

In this respect, it is worth considering the ICC Expedited Procedure in light of the current dispute resolution provisions of the FIDIC contracts in more detail.²² These require a referral to a DAB followed by ICC arbitration in the event of disagreement over the DAB's decision. The period allowed for the DAB's decision is 84 days. If the DAB members have not yet been appointed or agreed between the parties an additional month at least is likely to be required to constitute the DAB prior to the referral of a dispute.²³

Once the DAB's decision has been published, either party may give a Notice of Dissatisfaction within 28 days, after which a 28 day period for amicable settlement applies before ICC arbitration proceedings can be commenced.²⁴ A total period of 5 to 6 months is required, therefore, before arbitration proceedings may be commenced. If arbitration proceedings were then to follow the ICC Expedited Procedure a further 8 to 9 months could be expected before a final award (as described above) giving a total minimum period for DAB and arbitration proceedings of 13 to 15 months. An ordinary ICC arbitration after a DAB decision would of course give a much longer total period of around 2 to 3 years.

The above timings assume that arbitral proceedings are commenced to contest the DAB's decision. However, arbitral proceedings might also follow to enforce the DAB's decision, whether on a final or temporarily binding basis depending on whether a Notice of Dissatisfaction has been given. The Second Edition contracts include a new clause dealing with the enforcement of DAB decisions. It provides that any failure to comply with a DAB decision may be referred immediately to arbitration and the tribunal shall *"have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision."*

²⁰ The statistics quoted in this and the following paragraphs come from: Mr Helps article quoted above, Dr Trushell J., "The Adjudication Reporting Centre: Twelve Years in Retrospect" <<http://www.gcu.ac.uk/ebe/media/gcalwebv2/ebe/Twelve%20Years%20in%20Retrospect.pdf>>, and Milligan J. and Cattanach L., "Report No. 14: Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs) and from a sample of Adjudicators", April 2016, <<https://www.adjudication.org/sites/default/files/Report%2014%20April%202016%202.pdf>>.

²¹ An adjudication decision is temporarily binding subject to any final determination by the court. While jurisdiction and enforceability issues in relation to adjudication decisions are regularly before the courts, once the enforceability of a decision has been confirmed parties have in the vast majority of cases been content to accept the result. See, for example, Kennedy P., Milligan J., Cattanach L. and McCluskey E., "The development of Statutory Adjudication in the UK and its relationship with construction workload", School of the Built and Natural Environment, Glasgow Caledonian University (2010) <<http://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf>>: "The relatively few adjudication cases that get referred to courts also bares [sic] witness to its success." (Quoting Mark Enwhistle, the Chair of the Association of Independent Construction Adjudicators).

²² The Second Edition contracts have been used for the purpose of this analysis.

²³ In the authors' experience, this often takes longer.

²⁴ Previously 56 days under the FIDIC First Edition contracts.

This clause appears to have been introduced to clarify the process for enforcing DAB decisions in light of the difficulties highlighted by the *Persero* litigation in Singapore among others²⁵

Two attempts were made at arbitration proceedings to enforce a DAB decision in that case, the first by way of a final award taking 9 months, and a second by way of an interim award taking more than a year. One might therefore expect a total period of between 12 to 14 months to obtain a DAB decision under the FIDIC procedure and a subsequent arbitration award to enforce the decision (whether the arbitration is under the ICC Expedited Procedure or not).²⁶

Against this background, a number of considerations arise which may favour the parties agreeing to voluntarily use the ICC Expedited Procedure beyond the present £2 million threshold:

- As mentioned above, the ICC Expedited Procedure is considerably longer than the periods applicable to statutory adjudication regimes across the world which have no monetary limit and which often deal with complex “full blown” construction disputes. Under the FIDIC procedure, however, the parties will also have had the benefit of a three month DAB procedure, followed by 1 month of amicable discussions. As noted above, the combined period for a DAB decision followed by the ICC Expedited Procedure is likely to be between 14 to 16 months. Viewed in this light, parties may be more comfortable under the FIDIC form at least in agreeing to apply the ICC Expedited Procedure beyond the present US\$2 million threshold.
- Alternatively, the ICC Expedited Procedure may pose a viable alternative to DAB proceedings altogether. The need for subsequent arbitration proceedings can make the enforcement of DAB decisions cumbersome and less swift than intended. It remains to be seen whether the amendments in the Second Edition will cure all of the enforcement issues which arise with DAB decisions, but in the absence of a final and binding decision, arguments are likely to persist for some time yet as to the validity of enforcement under local arbitration laws and/or the New York Convention. Viewed in this light, those parties wishing for a swifter process with greater certainty of enforcement may well be tempted to apply the ICC Expedited Procedure to disputes beyond US\$2 million.
- The advantages of speed, finality and lower cost might also encourage parties to develop their own bespoke criteria for when the ICC Expedited Procedure is to apply. They could, for example, adopt an approach similar to that taken with statutory adjudication in New South Wales, by removing the monetary threshold but limiting the procedure to interim payment disputes only.

A great deal is likely to depend on initial reactions to the use of the ICC Expedited Procedure in its first year and the developing jurisprudence over the enforcement of DAB decisions and the use of sole arbitrators in expedited proceedings where the relevant arbitration clause provides for more than one arbitrator. However, if the experience of statutory adjudication is anything to go by, it may not be too long before expedited arbitration procedures become the new norm in international construction dispute resolution. Users of international arbitration will no doubt be attracted by anything that offers a viable alternative to spending many years embroiled in a traditional international construction arbitration.

²⁵ The litigation is summarised in the final Court of Appeal decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30; 161 Con LR 173. The clause which now appears in the Second Edition was first proposed in slightly modified form in a FIDIC Guidance Memorandum for users of the 1999 Red Book issued on 1 April 2013 noting that a substantial number of arbitral tribunals had found the existing Clause 20 provisions to be unclear.

²⁶ 4 to 5 months for the DAB decision (as the amicable settlement period would not apply) and a further 8 to 9 months for the arbitration. An enforcement award via arbitration earlier than 8 months might be possible if no defence was raised by the Respondent (which might include objections to the validity of the DAB decision or objections to the enforcement procedure under local arbitration law similar to those raised in the *Persero* case).

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