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International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue:

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Welcome to Issue 30

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Welcome to our latest edition of IQ which features another two cases from the UK courts which highlight issues important to International Arbitration and projects.

In the first, Olivia Liang reviews a case where the court had to consider the effect of a defendant's alleged failure to comply with certain preconditions to arbitration in a multi-tier dispute resolution clause. Was it a question of admissibility for the Tribunal to determine or a a question of jurisdiction for the Court?

Then Sam Thyne provides an update on a case that has been passing through the English Courts about the extent of an expert's duties to their client. A global expert firm had been instructed to provide advice to the claiming party in an ICC Arbitration about a dispute at a petrochemical plant. The disputes involved a third party who contacted another company within the same consultancy group of experts to provide expert services. Should the expert firm be prevented from acting for the third party or would continuing to do so, be a breach of the firm's fiduciary loyalty to the claimant?

Moving away from the UK, I review a case which has been making its way through the courts in Hong Kong about notices. The inevitable question is whether the clause in question was a strict condition precedent meaning that a failure to comply with it would lead to the claim falling away. Although the contract was not a FIDIC contract, the particular point, the need to identify the contractual or legal basis of the claim is now a requirement of the FIDIC 2017 FDIC Form. But what if you don't know the precise basis or that basis changes when it comes to arbitration? These were all issues for the Hong Kong courts.

Finally, Katherine Butler reviews project securities in the Covid-19 era, looking at recent developments in the UK concerning bonds, how Singapore has sought to manage the impact of Covid-19 on construction securities, and some points to note when following the UK Government's advice on responsible contract behaviour.

If there are any areas you would like us to feature in our next edition, please let me know.

Stay safe

Jeremy

News and Events

Our international arbitration credentials

With over thirty years of expertise, Fenwick Elliott has a well-deserved reputation for handling large, complex, high value construction and energy related international arbitrations. Our international arbitration practice is truly global and we have advised on major projects located in the UK, Africa, Asia, India, CIS, Caribbean, Europe, the Middle East, South Africa and Turkey.

Fenwick Elliott lawyers are widely acknowledged as specialists in their field. FIDIC experts Nicholas Gould, Partner and Jeremy Glover, Partner, both regularly speak and deliver training at events around the world in relation to the FIDIC suite of contracts. Whilst, in Dubai our office is headed up by Patrick Stone, Partner.

Events

On 11 May Jeremy Glover will be speaking at FIDIC's Covid-19 Webinar Series 2021 "*Dealing with change in uncertain times*". For more details and to register for this webinar, click here.

On 3 June Claire King and Beth McManus will be speaking on our Fenwick Elliott webinar series on *"The role of the Engineer in FIDIC"*. For more details and to register for this webinar, click here.

On 30 June - 2 July Jeremy Glover and Nicholas Gould will be speaking at the DRBF's 20th Annual International Conference and Workshop in Lisbon, Portugal. For more details and to register for this webinar, click here.

Nicholas becomes President of the DRBF at the beginning of May 2021.

Webinars

Fenwick Elliott host regular webinars that address key issues and topics affecting the construction industry, to find out details of upcoming webinars please click here and select the 'webinar' drop down, to watch our previous webinars on demand, click here.

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, and BIM.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact ldowney@fenwickelliott.com. We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

The English Court of Appeal redefines experts' relationships with their client

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In our last issue of *International Quarterly,* we discussed a recent TCC decision concerning the extent of an expert's duties to their client.[1] In January 2021, the Court of Appeal released its judgment on the appeal of that case.[2] While the outcome of the decision was consistent with the TCC, there were several differences in reasoning that warrant discussion, including importantly a rollback on the TCC's view that an expert owed a fiduciary duty of loyalty to its client.

The case first came before the courts when the developer of a large petrochemical plant in Asia (the Developer) sought an injunction restraining a delay and quantum expert (the Expert) from acting as an expert witness for a third party in an ICC arbitration against the Developer. The injunction was sought because the Expert was also acting as an expert witness for the Developer against a different party (a subcontractor on the project) in a dispute that had arisen under the same project with many overlapping issues. Adding a layer of nuance to the matter is the fact that the Expert is an international organisation, with different companies in the broader group providing the services to the different parties.

At the time that the Expert was approached by the third party the Developer was told of the proposed engagement and was advised by the Expert that they did not view it as a "'strict' legal conflict". Conversely, the Developer's lawyers indicated to the Expert that they believed there was a conflict. As summarised by the Court of Appeal:

> *"Unhappily, it appears that, not only did [one entity within the Expert group] continue to work on behalf of the respondent in connection with [the arbitration against the subcontractor], but that also, without any further reference back to the respondent or its solicitors, [another entity within the Expert group] began to do the same for the third party in [the third party's arbitration against the Developer]."*

The Court of Appeal tactfully describes this as "a risky decision".

The TCC granted the injunction sought by the Developer, concluding that:

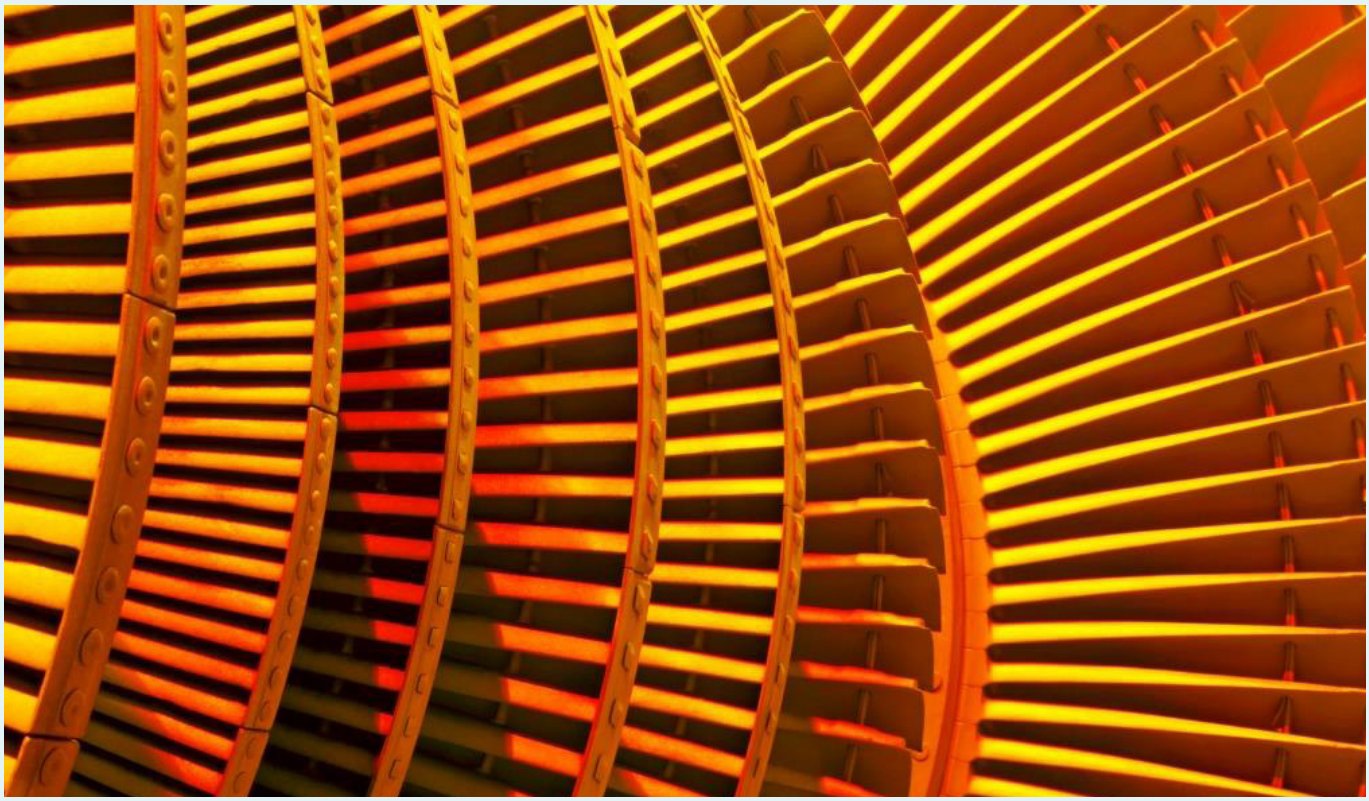
- the Expert owed a fiduciary duty of loyalty to the claimant arising out of its engagement to provide expert services in connection with the first arbitration it was instructed on; and
- the Expert was in breach of that fiduciary duty of loyalty by accepting instructions to provide expert services in connection with the second arbitration.

Accordingly, the Developer was entitled to a continuation of the interim injunction to restrain the Expert from providing expert services to the third party.

The Expert appealed the TCC decision, with the Court of Appeal being asked to determine:

- whether the entity within the Expert group advising the Developer owed a fiduciary duty of loyalty;
- if not, whether that same entity owed a contractual duty to the respondent to avoid conflicts of interest;
- if so, whether that duty extended to all companies within the Expert group; and
- if the duty extended, did that mean there was a conflict of interest in respect of the engagement of the Expert entity by the third party of the second arbitration.

In the spotlight was the TCC's finding that a fiduciary duty of loyalty was owed. Fiduciary duties are one of the most sacrosanct relationships under law, and are typically confined to pre-existing categories. One of the main characteristics of fiduciary relationships is that they exist where one party is in the vulnerable position of relying wholly on the other party and therefore an exceptional level of trust and confidence in that party is required, the most famous examples being the relationship between a lawyer and a client, or a trustee and a beneficiary. It is safe to say that, as Coulson LJ put it, *"the expression 'fiduciary' is freighted with a good deal of legal baggage..."*



The finding that there was a fiduciary duty was of course open for the TCC to make, on the basis that the exact definition of an expert's relationship to its client had not been determined by the courts previously. However, the Court of Appeal in this case ultimately concluded that it might be inapt to import the aforementioned legal baggage into the client/expert relationship.

One of the main arguments advanced by the Expert against the imposition of a fiduciary relationship between expert and client was that this duty would impinge on the expert's overriding duty to the tribunal. This argument was dismissed by the Court of Appeal as it was settled law that while an advocate owes duties to the court this does not prevent them from fulfilling their obligations to their client; the same is true for experts. The Court of Appeal went further to note that complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client.

Ultimately, the conclusion of the Court of Appeal (expressed by Coulson LJ) was that in the present case, there was no purpose in designating the relationship as a fiduciary one, given that there was a contract in place between the parties with a conflict of interest provision that dealt with the matter at issue. Coulson LJ's parting observations on the matter leave the door somewhat ajar for future attempts to be made to have aspects of the relationship recognised as fiduciary in certain circumstances, noting that:

> *"Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other, may have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflicts of interest."*

Regarding the second and third issues of whether a contractual duty to avoid conflicts of interest was owed by the Expert (in its entirety), the Court concluded that under the retainer the Expert owed a clear contractual duty to avoid conflicts of interest for the duration of their retainer. The Court also had no difficulty in finding that the distinctions between entities in the broader Expert international group were immaterial. On the Expert's assertion that one entity was not bound by the conflicts policy of the other, both entities could conceivably act for different sides of the same dispute, a conclusion that the Court labelled as a commercially unrealistic position.

In considering the fourth issue, whether there was a conflict of issue in this case, the Court of Appeal first identified the scope of the different Expert entities' works and then assessed whether there was a conflict in both these services being provided. The Court of Appeal concluded there was for four reasons:

- First, the entity advising the Developer was advising them in relation to its commercial position as well as specifically supporting the arbitration; by assisting the third party in its case it would be giving advice opposing the Developer.
- Second, the Court observed that the third party was the Developer's project manager, or the Developer's "alter ego" on the project. Coulson LJ observed

that it was impossible to see how the same firm could act for the employer and simultaneously against the employer's representative/agent/alter ego in respect of the same or similar disputes on the same project.
- Third, the Developer had engaged the Expert to give advice about the design and construction of the project. If they were engaged by the third party they would be advising on the same subject matter.
- Fourth, the causes of delay are critical issues and the Expert was advising the Developer about these. If the Expert was then engaged by the third party, they too would be giving advice about the causes of the same delays to the third party, and the extent to which such matters were or were not the third party's responsibility.

In the Court's opinion the overlaps were all-pervasive and a conflict of interest existed. However, it was also observed that none of this should be taken as saying that the same expert cannot act both for and against the same client. It is inevitable that large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. A conflict of interest is a matter of degree and in this case the overlaps were too significant. The Court of Appeal accordingly dismissed the appeal.

In some respects, the Court of Appeal declining to uphold the TCC's finding that the relationship between expert and client as fiduciary will assist in parties understanding their obligations towards each other as they do not have to worry about the "legal baggage" of a fiduciary relationship. However, that is not to say that the relationship requires less onerous obligations. The Court of Appeal's focus on the contractual relationship between the parties will in most cases (particularly where sophisticated multinational companies with detailed and prescriptive terms of service are involved) mean the relationship between the parties is comprehensively defined. It behoves parties to be very familiar with these terms, particularly where conflicts of interest are concerned.

The case should also assist multinational experts to manage conflicts of interest, as the Court provided clear guidance on the factors it will look to in determining whether a conflict exists. Importantly, parties will not be able to rely solely on the fact that a different legal entity is carrying out the work. They will have to carefully scrutinise their terms to determine if there is an overlap in the services that will be a conflict. Another lesson from this case would be that, when it comes to conflicts of interest, if faced with a "risky decision" it may pay to err on the side of caution.

Footnotes

1. https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/expert-fiduciary-duty-loyalty-client
2. *Secretariat Consulting PTE Ltd & Ors v A Company [2021] EWCA Civ 6*

Notices: a cautionary tale from Hong Kong

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In *Maeda Corporation & Anr v Bauer Hong Kong Ltd* [2020] HKCA 830, the Hong Kong Court of Appeal had to consider whether Bauer had complied with the condition precedents to give notice under clauses 21.1 and 21.2 of the subcontract. At first instance, the court had allowed the Maeda JV's appeal against an arbitrator's decision, holding that Bauer in submitting notices of claim which failed to set out the contractual basis for their claim which they ultimately succeeded on in the arbitration, had failed to comply with the notice provisions of their subcontract.

The HKCA summarised the series of steps, notices, and submissions that Bauer had to make to comply with clause 21.1 in this way:

(i) The first notice was a notice of an intention to make a claim and was stated to be a "*condition precedent to Bauer's entitlement to any such claim*" under this provision. This had to be given within 14 days "*after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor*".

(ii) The second notice, again stated to be a "*condition precedent to any entitlement*", had to be given within 28 days after the first notice. This had to include details of the contractual basis of the claims, details of contemporary records that might support the claim and details of mitigation measures Bauer intended to adopt.

(iii) The clause also made provision for situations where an event had a continuing effect, providing for the submissions of 28-day updates. Again, this was expressly stated as "*condition precedent to any entitlement*".

(iv) Bauer had no right to any additional or extra payment, loss and expense, under any clause of the subcontract or at common law, unless clauses 21.1 and 21.2 had been strictly complied with.

Bauer had been employed as a subcontractor to carry out diaphragm wall works on the Guangzhou Express Rail Link tunnel in Hong Kong. Following the discovery of unforeseen ground conditions, Bauer sent the following letters to Maeda:

(i) 1 August 2011:

"We confirm the issuance of said design information/founding levels are causing a substantial increase in the quantity and quality of rock we are required to excavate compared to what was allowed for in our Sub-Contract. Please be advised that these additional quantities and change in quality represent variations to our Sub-Contract Works under Clause 17.1 of our Sub-Contract Agreement which shall be valued under Clause 19 and for which we are entitled to and will claim an extension of time in accordance with Clause 14.3.3 and additional costs as provided for under Clause 21.1.6."

(ii) 2 August 2011:

"As notified in the above correspondence and meetings held with your goodselves the quantity and quality of rock excavation we have been instructed to excavate below rockhead level have increased substantially from those provided under the Sub-Contract and these amount to a variation of our Sub-Contract Works ...

In accordance with the Sub-Contract Agreement we are entitled to claim additional costs under Clause 21.1.6 in respect of the instructed variations and resultant extension of time to our Sub-Contract Works which is a course we will follow ..."

However, the Arbitrator did not consider that Bauer was entitled to a Variation simply because there was a change in the conditions which could have been foreseen and that this had an effect on the work. An essential part of the variation mechanism was that there had to be an instruction by the Engineer and/or by the Employer. While, in carrying out the diaphragm wall work, Bauer had encountered unanticipated ground conditions,

it was still obliged to carry out the same work in terms of the volume of material which had to be excavated and there was no change to the scope of the work. In the absence of an instruction, the changed ground conditions did not, in themselves, give rise to payment as a Variation or Sub-Contract Variation. However, the Arbitrator did consider that Bauer had established the right to claim for additional rock excavation caused by the inclination of the rock and by instructions to deepen founding levels.

As part of their claim in the arbitration, Bauer had included an alternative basis of claim, what was termed a "like rights" claim pursuant to clause by claiming that the unanticipated ground conditions also entitled the JV to additional payment and loss and expense under the Main Contract. The problem for Bauer was that the right to make such a claim arose under sub-clause 21.1.1 not 21.1.6. Having encountered difficulties with the ground conditions, Bauer did not obtain an instruction but proceeded with the extra work required. Strictly, no notice had been given. The Arbitrator said this:

> *"I consider that both as a matter of sympathy and as a matter of construction, the contractual basis of the claim stated in the Clause 21.2 notice does not have to be the contractual basis on which the party in the end succeeds in an arbitration. First, to expect a party to finalize its legal case within the relatively short period and be tied to that case through to the end of an arbitration is unrealistic. Secondly, what is important from the point of view of the Contractor is to know the factual basis for the claim so that it can assess it and decide what to do."*

At first instance, the Hon. Mimmie Chan J disagreed. Clause 21.2 expressly provided that "*as a condition precedent to any entitlement*", if Bauer *wanted to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, it "shall"* within 28 days after giving the first notice submit in writing: *"the contractual basis together with full and detailed particulars and the evaluation of the claim"*.. The Judge said that:

> *"there can be no dispute, and no ambiguity, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to in Clause 21.1 and 21.2 are conditions precedent, must be 'strictly' complied with, and failure to comply with these conditions will have the effect that the Defendant will have 'no entitlement' and 'no right' to any additional or extra payment, loss and expense."*

In their August letters Bauer had simply given notice of the ground conditions encountered at the site, and the additional quantities and quality of the rock that needed to be excavated. The subcontract referred to the submission not only of the detailed factual particulars, but "the contractual basis" together with the full detailed particulars. What was required was the basis upon which Bauer claimed to be entitled under the subcontract to maintain and pursue its claim.

The Arbitrator had found there was compliance by Bauer with most of the requirements in clause 21 of its heads of claim based on rock excavation. The only outstanding requirement that had to be met as

a condition precedent was to state "the contractual basis" of the claim within 28 days after giving of the first notice. At first instance, the Judge was clear that:

> *"however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language such as 'if practicable', or 'in so far as the sub-contractor is able'".*

Before the HKCA, Bauer said that this was not a case where Bauer had failed to state any contractual basis in the notices. Bauer had submitted a timely notice stating the contractual basis, as well as full and detailed particulars and the evaluation of the claim. The issue was whether the notice complied with the requirements of clause 21.2. Bauer said that the provision did not require Bauer to identify the contractual basis upon which its claim for additional payment or loss and expense ultimately succeeded in the arbitration. Had this been the intention, then it would have to have been expressed clearly to have that effect. Further, the provision did not expressly state that Bauer was prevented from amending or substituting a contractual basis or that the effect of doing so would nullify Bauer's entitlement to additional payment. A party should not be prevented from advancing a claim after the expiry of a time bar merely because it placed a different legal label in the notice submitted when the factual substance was presented in time. The important commercial purpose of clause 21.2 was whether the receiving party was able to make a proper evaluation of the claim as presented, not whether all the relevant boxes had been ticked.

The HKCA disagreed:

> *"The wording of clause 21.2.1 is clear and unambiguous. Within the stipulated time, the Sub-Contractor is required to give notice of the contractual basis, not any possible contractual basis which may turn out not to be the correct basis."*

The HKCA held that there were three commercial purposes for identifying the contractual basis within the stipulated period:

> (i) Providing the factual basis for the claim so that the Contractor can make timely investigations.
>
> (ii) Achieving finality, which would not be achieved by allowing a Party the right to advance a claim on a different contractual basis in an arbitration which may be years down the line.
>
> (iii) In a chain contract situation, a Contractor would wish to know whether the Subcontractor's claim would need to be passed up the line. This meant that the precise contractual basis did matter. The Arbitrator's interpretation may have prejudicially affected this.

In short:

> *"It is not permissible to interpret clause 21.2.1 in such a manner as to re-write the plain language of the provision."*

Conclusion

The effect of the HKCA's decision certainly seems harsh, particularly as Bauer had continued to carry out the works when the unforeseen ground conditions were encountered. One might question whether or not Maeda would have acted any differently if the August letters had also made reference to sub-clause 21.1.6. However, the Judge noted that there was *"commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified"*. As such the case represents another example of the courts emphasising the importance of complying strictly with notice provisions.

Although the wording of the subcontract was similar in intent to the FIDIC Form, the clause here specified that it was a condition precedent and specified that it was to be "strictly" complied with, wording you do not find under the 1999 FIDIC Form. The key issue under consideration here concerned the requirement to specify the "contractual basis" of the claim. Whilst you do not find that requirement under the 1999 Form, under sub-clause 20.2.4(b) of the 2017 FIDIC Form, a claiming party must submit a statement of the contractual and/or other legal basis of the claim within a specified time limit. A failure to do so will mean that the original Notice of Claim shall be deemed to have lapsed. So as always, it is important to understand the language used in your contract when it comes to the service of notices.

English High Court rules that preconditions to arbitration are matters of admissibility, not jurisdiction

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In the recent case of *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), the English High Court dismissed a challenge to an arbitral tribunal's jurisdiction under section 67 of the English Arbitration Act 1996 (the "Act").

The Court declined to set aside a partial award handed down by the tribunal, despite the defendant's alleged failure to comply with certain preconditions to arbitration in a multi-tier dispute resolution clause. In doing so, the Court found that the defendant's alleged non-compliance was a question of admissibility for the tribunal to determine, rather than a question of jurisdiction for the Court under section 67.

The decision is the first time the distinction between jurisdiction and admissibility has received detailed consideration in a challenge under section 67 of the Act.

Background

The underlying arbitration related to a dispute over the Republic of Sierra Leone's ("Sierra Leone") decision to suspend and subsequently cancel a large-scale mining licence ("MLA") granted to SL Mining Ltd ("SL Mining").

The MLA contained a multi-tier dispute resolution provision which required the parties "*in good faith endeavour to reach an amicable settlement*" prior to referring any dispute or difference to arbitration. Specifically, the MLA provided that:

> *"[i]n the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators"* [in accordance with the ICC Rules]. (Emphasis added)

After Sierra Leone purported to cancel the MLA, SL Mining issued a formal notice of dispute on 14 July 2019. Around halfway into the 3-month negotiation period, SL Mining commenced an Emergency Arbitration and obtained emergency relief. SL Mining then proceeded to serve its Request for Arbitration on 30 August 2019, approximately 6 weeks before the 3-month negotiation period would have expired.

The arbitral tribunal concluded, by way of a partial final award on jurisdiction, that it had jurisdiction in respect of SL Mining's claims.

Sierra Leone applied to set aside the award under section 67 of the Act, which provides that an application can be made to challenge an award on the grounds that the tribunal lacked "*substantive jurisdiction*".

Substantive jurisdiction is defined in sections 82(1) and 30(1) of the Act as "*(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement*".

Sierra Leone relied on section 30(1)(c) of the Act, arguing that the dispute had not been submitted to arbitration in accordance with the parties' arbitration agreement because SL Mining had commenced arbitration proceedings prematurely – that is to say, before the 3-month window for negotiations contained in the multi-tier dispute resolution clause had expired.

The Court was asked to determine whether Sierra Leone's challenge to alleged prematurity of the arbitration proceedings was a challenge to the substantive jurisdiction of the tribunal (and therefore whether the challenge could properly be brought under section 67 of the Act).

Decision on admissibility versus jurisdiction

The Court found that the question of whether SL Mining's claim was

premature was one of admissibility, rather than jurisdiction.

It was common ground between the parties that there was a distinction "*between a challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction)*". Only jurisdictional challenges can be brought under section 67 of the Act.

The Court found that the views of leading academic writers are all "*one way*". Among other commentary, the Court cited Gary Born's view in *International Commercial Arbitration* (3rd edn, 2021) that, absent contrary evidence, it should be assumed that pre-arbitration procedural requirements are not "*jurisdictional*", and that:

> *"As a consequence, in most legal systems, these requirements would presumptively be both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court) for their initial decision."*

The Court also referenced decisions by national courts in other major international arbitration venues. In particular, the Court referred to the US Supreme Court's finding in *BG Group v Republic of Argentina* 134 S.Ct.1198 that disputes about procedural condition precedents to arbitration should be resolved by arbitral tribunals, and the Singapore Court of Appeal's conclusions in *BBA v BAZ* [2020] 2 SLR 453 and *BTN v BTP* [2020] SGCA 10 that objections regarding preconditions to arbitration are matters of admissibility, not jurisdiction.

The Court held that, as a matter of English law, the key question is whether the alleged prematurity of SL Mining's claim goes to the substantive jurisdiction of the arbitral tribunal per section 30(1)(c) of the Act. The Court rejected Sierra Leone's suggestion that this would depend on the precise wording of the multi-tier dispute resolution clause. There was no difference between a clause which provided that "*No arbitration shall be brought unless X*" and a clause which provided that "*In the event of X the parties may arbitrate*"; in both instances, the question of prematurity would still go to admissibility rather than jurisdiction.

The Court concluded that:

> *"if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the tribunal decision is final and s 30 (1) (c) does not apply."*

In the course of reaching this conclusion, the Court distinguished its previous decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) ("*Emirates Trading*"), where it was assumed that a failure to comply with the timing requirements in a multi-tier dispute resolution clause would be open to challenge under section 67 of the Act. The Court noted that the distinction between jurisdiction and admissibility was not specifically considered in Emirates Trading, and it was simply assumed that the matter went to jurisdiction. On that basis, the Court concluded that *Emirates Trading* was not binding.

Decision on whether non-compliance with preconditions was an absolute bar to commencing arbitration proceedings

The Court concluded that Sierra Leone's section 67 challenge would, in any event, have been dismissed for two other reasons.

The first reason was that Sierra Leone had in fact consented to (or waived its right to object to) the filing of the Request for Arbitration, by insisting that SL Mining file within 10 days of commencing the Emergency Arbitrator procedure (as required by the ICC Rules).

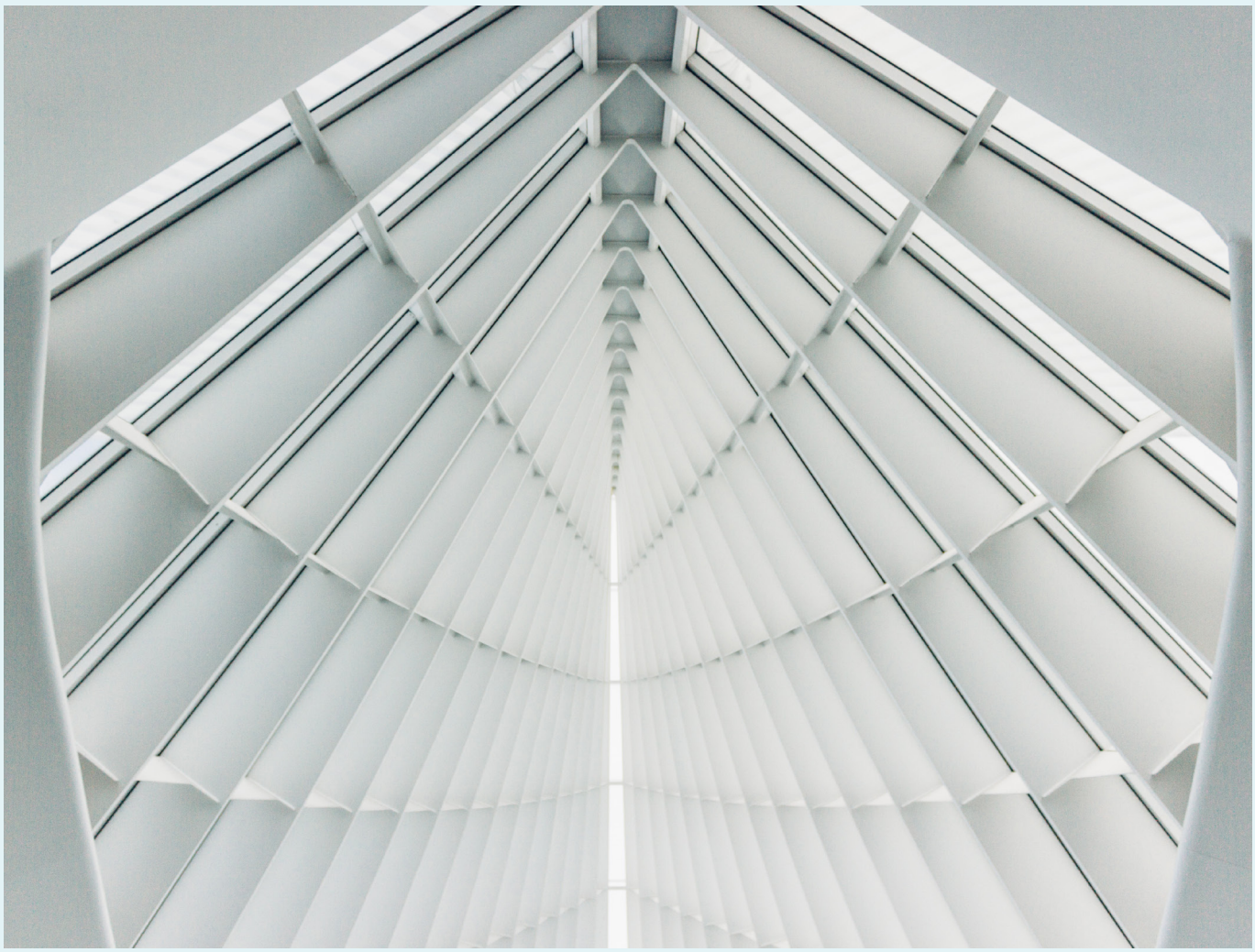
The second reason was that, on the wording of the multi-tier dispute resolution clause, the negotiation period was not an "*absolute bar*" to commencing arbitration before the expiry of 3 months. Rather, the negotiation period (although mandatory) provided a window during which the parties could explore settlement but always subject to "*earlier proceedings if the objective of amicable settlement could not be achieved*". In this regard, the Court noted that it was significant that the 3-month period (set out in sub-clause (c) of the dispute resolution clause) was "*subsidiary*" to, and followed after, the obligation to attempt an amicable settlement (which was set out in sub-clause (b)).

As to whether the parties could have settled the dispute amicably within the 3-month negotiation period, the Court stated that this was best decided by the arbitral tribunal. The Court did, however, note that based on the evidence "*there was not a cat's chance in hell of an amicable settlement*" by the expiry of the 3-month negotiation period.

Comment

The decision helpfully clarifies that compliance with a multi-tier dispute resolution clause is not an issue of substantive jurisdiction that can be challenged under section 67 of the Act. It is, rather, a question of admissibility which will be left for arbitral tribunals to determine.

The Court's conclusion on this issue provides welcome assurance to arbitration users that any disputes regarding compliance with a multi-tier dispute resolution clause will be resolved in a single forum – that is to say, by an arbitral tribunal, without intervention by English courts. In this regard, the decision brings England in line with other major venues for international arbitration (being the US and Singapore).



The decision also endorses a commercial approach to the construction of multi-tier dispute resolution clauses. In this instance, the Court's finding that the 3-month negotiation window was not an absolute time bar to commencing arbitration was based on the wording of the clause. It is, however, consistent with commercial common sense – parties are unlikely to have intended a negotiation period to act as a complete bar to arbitration in circumstances where there is no realistic prospect of reaching an amicable settlement.

That said, parties to disputes should not regard the decision as providing permission to ignore escalation requirements in multi-tier dispute resolution clauses. The Court did not suggest that these requirements will never be an absolute bar in all situations where settlement appears to be a remote prospect. Indeed, obligations to negotiate in dispute resolution clauses will usually be enforceable under English law, provided they are sufficiently certain.

The consequences of any failure to comply with multi-tier dispute resolution clauses could be costly, in terms of both time and money. An arbitral tribunal could stay proceedings for the duration of the negotiation window and/or impose cost sanctions. In addition, if it concludes that a mandated negotiation period is an absolute bar to proceedings, the tribunal could determine that a premature claim is not admissible. The parties might then be required to appoint a new tribunal after properly complying with the escalation requirements in the dispute resolution clause.

In light of the decision, parties who have signed up to multi-tier dispute resolution clauses should:

1. seek to comply with any escalation requirements;
2. carefully evaluate whether any negotiation or cooling-off periods would act as an absolute bar to proceedings; and
3. in the context of any potential challenge under section 67 of the Act, consider whether the question is one of admissibility or jurisdiction.

Managing bonds and securities in the time of Covid-19

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The construction industry is no stranger to the impacts of cyclical market shifts. However, the economic climate in the post-Covid era may feel more like a cliff edge than a downturn. Contractors (and Employers) the world over are feeling the pinch and, as a result, project security is becoming a much more prominent issue.

This article will look at recent developments in the UK concerning bonds, how Singapore has sought to manage the impact of Covid-19 on construction securities, and finally some points to note when following the UK Government's advice on responsible contract behaviour.

Bonds in the UK

In summary, bonds are forms of security which are separate from the underlying contract (say, the construction contract) to which they relate. Surety contracts are agreed between three parties – the Contractor (aka the Principal), the Employer (aka the Beneficiary) and the Bondsman (aka the Surety). Under these contracts, the Bondsman promises to pay a specified sum to the Employer upon the happening of a specified event related to the Contractor's performance of the underlying contract.

Bonds, in the UK market, generally fall into two main categories – performance (or conditional) ("PBs") and on demand ("ODBs"), with the former being much more common on domestic projects. These instruments are materially different from each other and when/how an Employer can get this money will depend on what type of bond it has:

- ODBs have been described as equivalent to a discount on the overall contract price.[1] This is because Employers can simply 'demand' the sum so long as it complies with the terms of the bond itself.
- By contrast, PBs operate as guarantees of the underlying contract and will generally only be triggered where the Contractor is in breach of its obligations thereunder. This means that an Employer must demonstrate its losses arising from a breach of the main contract before the bond will answer. The wording of PBs is often based on the Association of British Insurers ("ABI") model form of guarantee bond which requires losses to be "*established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Contractor*".

A successful call on a bond can have serious consequences for the Contractor in terms of both cash flow and its creditworthiness for getting bonds in the future. Notwithstanding, recent trends in the English courts indicate that resisting payment under a bond is becoming more difficult.

In respect of ODBs, the 2015 decision in *MW High Tech Projects UK Ltd v Biffa Waste Services Ltd*[2] details that payment will only (generally speaking) be resisted where the bank or bondsman has notice of clear fraud.[3] This is a high threshold test and therefore occasions when payment under an ODB is restrained will be limited - Link to IQ Issue 14

Until recently, the position as to when PBs should pay out was a lot less clear cut. Specifically, there was very little guidance offered by the courts as to how an Employer should "*establish and ascertain*" its losses in respect of bonds using the ABI wording. This changed in February 2020 with the decision in *Yuanda (UK) Company Limited v Multiplex Construction Europe Limited and ANZ Bank*.[4] Here, Mr Justice Fraser focused on the requirement for sums to be "*established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract*" (emphasis added). His Lordship went on to determine that sums properly due under the contract

would satisfy the requirements of being 'established and ascertained'. This specifically included sums determined as due by adjudication awards and/or independent certification.

In relation to the specific facts in the case, if Multiplex obtained an adjudicator's award in its favour, then the bond should respond. This judgment ends the speculation as to whether a party calling the bond had to wait until the overall balancing of the final account had taken place to 'establish and ascertain' the sums payable. Likewise, having the matter finally determined by the courts before the bondsman should pay out was also deemed to be unnecessary.

The decision in *Yuanda* offers clarity, but not necessarily comfort, as to when a PB can properly be called. Adjudication is recognised as a necessarily 'rough and ready' process, which is why awards are binding but not final. Given this, and particularly considering the consequences that calling a bond has for the Contractor, the decision has the potential to cause unfairness. However, the judgment is evidently influenced by the commercial realities of project security and the need for PBs to actually offer benefit to their holders. In this case, the fact that the PB in question was very close to expiring may have swayed his Lordship's decision towards immediacy. On this basis, we anticipate future arguments that this decision rests on its facts and is not of general application. Overall, to be continued...

Temporary Measures in Singapore

In Singapore, the Government enacted the COVID-19 (Temporary Measures) Act 2020 (the "Act") in April last year. This legislation, and numerous subsidiary regulations, provides 'relief' in respect of performance obligations and/or other measures (e.g. restrictions on domestic court proceedings and/or issuing bankruptcy petitions) for identified types of contract (the "Scheduled Contracts")[5]. Scheduled Contracts include construction contracts and any PBs granted under them. Under section 6 of the Act, the beneficiary of a construction contract PB is prevented from making a call unless the bond is within 7 days of expiring. This provision also offers automatic extensions to a bond's expiry date, until 7 days after the end of the 'Prescribed Period'[6] provided the PB in question expires more than 7 days from the date of application.

As is indicated in the Act's full title, these measures are temporary and the original Prescribed Period was due to last six months from commencement. This period has since been extended twice and, at the time of writing, is due to expire on 31 March 2021. It will then remain to be seen whether bondsmen are inundated with calls on PBs thereafter. However, on the basis that the Act also provides relief from performance, including a statutory entitlement to significant extensions of time, it may be more difficult for Employers to establish damages.

'Responsible Contractual Behaviour' in the UK

The Act offers a significant relief package which aims to stave off the worst effects of the pandemic for both Contractors and Employers. In giving such relief a statutory footing, Singapore has arguably taken one of the most robust approaches globally. Meanwhile in the UK, no similar measures have been enacted. Instead, on 7 May 2020, the Cabinet Office issued a note entitled *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency.*[7] In this note, the UK Government urges parties to act "*responsibly and fairly in the national interest*" in their contractual dealings during the pandemic. The guidance asks parties to be "*reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party*".[8] Further, such reasonableness applies to "*exercising remedies in respect of impaired performance, including enforcement of security, forfeiture or repossession of property, calling of bonds or guarantees...*"[9]

Whilst the messaging is that everyone should 'play nicely' in these challenging times, there is no moratorium or other formal restriction imposed on parties enforcing performance or commencing disputes. Nevertheless, many in the construction industry are taking a sensible approach and are mindful that relying on their strict legal rights could lead to everyone losing out. One such approach is to vary construction contracts to establish new rules, which reflect the new normal, that will be most beneficial/least devastating to all involved. Taking such a reasonable step can, however, have significant consequences when it comes to project security.

As detailed above, PBs involve three parties – the Principal, the Beneficiary and the Surety. In the event that the Principal and the Beneficiary agree to alter the terms of the underlying contract without involving the Surety, its obligation to pay out on the bond may be discharged. This is known as the rule in *Holme v Brunskill*[10] and it has been the law for nearly 150 years. Here, the Court of Appeal established that if the parties to the underlying contract wish to amend that contract, they need to consult with and obtain the consent of the Surety. This is unless it is "*evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety*".[11] Insofar as there is no consent and the alterations cannot be shown to be patently 'unsubstantial', the Surety is discharged and the security falls away.

Parties with the benefit of a PB should therefore be very careful to ensure that the right consents are obtained before any amendments, even ones considered to be trivial, are agreed. Saving which, the security may survive provided that the bond includes sufficiently broad 'indulgence' provisions which allow for variations/amendments of the underlying contract, without needing to refer to the Surety. Either way, this could be an easy trap for the unwary, particularly in the current circumstances where parties are eager to try and make the best of potentially very bad situations.

Conclusion

Whilst legally enforceable relief may be available in other jurisdictions, no such protection is offered in respect of bonds that are subject to English law. Those with the benefit of such security should be alert to the potential ways in which they may, albeit inadvertently, lose it. Likewise, Contractors should note that attempts to resist payment under the securities they have provided may prove fruitless.

Overall, and not just as a result of Covid, there has been a tightening of the bonds market more generally in recent years. With fewer reinsurers operating and parties needing to satisfy much more stringent requirements, options to obtain bonds are narrowing and protecting creditworthiness has become a key concern. It does, however, remain to be seen whether the trend seen in the *Yuanda and MW High Tech* cases survives into the post-Covid era. Alternatively, the courts may take a softer approach in line with the Government's advice to play nicely.

Footnotes

1. Per Lord Denning in Edward Owen Engineering Limited v Barclays Bank International Limited [1978] Q.B. 159.
2. [2015] EWHC 949 (TCC).
3. Following the judgment in Edward Owen.
4. [2020] EWHC 468 (TCC).
5. As detailed in the First Schedule to the Act.
6. Being the period within which the relief measures are available.
7. Published 7 May 2020. Available at https://www.gov.uk/government/publications
8. Ibid. paragraph 14.
9. Ibid. paragraph 15(g).
10. (1878) 3 QBD 495.
11. Ibid., per Cotton LJ at page 505.

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