UNITED KINGDOM

International Construction Law

Nicholas Gould
Fenwick Elliott LLP
London

Since the last edition of this guide, there have been numerous developments of interest in the field of international construction law. Some of those developments which are of particular interest to me are highlighted below. All of them demonstrate the need for using legal experts with international expertise for contract, claims, and dispute resolution construction law.

FIDIC Guidance on DAB Decisions Published

The FIDIC Contracts Committee issued a guidance memorandum in relation to the users of the 1999 Conditions of Contract on 1 April 2013 dealing with the issue as to how a DAB Decision which is binding, but not final and binding, should be dealt with where there has been a failure to comply with the decision. The guidance memorandum is designed to make explicit the intentions of FIDIC. These are namely:

"*the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [Arbitration], without Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference.*"

The guidance memorandum recommends the insertion of a number of new clauses for this purpose into the 1999 FIDIC Conditions of Contract. These include a new power for the DAB to require the payee to provide security for the payment, inclusion of a DAB award in the amount due to or from a contractor and within the next interim payment certificate and the express provision for a failure to abide by a DAB decision to be referred straight to arbitration "*for summary or other expedited relief*".

Provided the changes are made by parties using the relevant FIDIC contracts these amendments should avoid the problems that were highlighted by the Singapore case of CRW v PT Perusahaan in which an arbitration award, which was in itself enforcing a DAB decision, was not enforced because the arbitral tribunal had acted outside its jurisdiction.

This case, and the amendments suggested within the guidance memorandum, is a timely reminder for practitioners of the need for clarity and certainty within tiered dispute resolution provisions in both standard and bespoke construction contracts. The consequences of dispute resolution provisions that are not fit for purpose are not only frustrating but expensive.

THE CONSEQUENCES OF DISPUTE RESOLUTION PROVISIONS THAT ARE NOT FIT FOR PURPOSE ARE NOT ONLY FRUSTRATING BUT EXPENSIVE

Building Information Modelling ("BIM")

BIM is a concept originating in the United States and its increasing use within the United Kingdom is being driven by government policy. The UK government's 2011 construction strategy, announced the government's intention to require collaborative 3D BIM on all its projects by 2011.

A BIM system uses a computer-generated model to collect and manage information about the design, construction, and operation of a project centrally. It is especially useful where many parties, such as different sub-contractors, provide input on the same project. Any changes to the design of a project made during its construction are automatically applied to the model.

There is a spectrum of BIM maturity levels ranging from projects using paper drawings to those with a fully-integrated web-based system (Level 3). Level 3 BIM will, it is generally considered, require relatively widespread changes to building contracts and professional appointments. Important legal issues include those relating to the transfer of risk and liability (for example, who is liable for mistakes in the BIM model), the associated issue of whether the insurance provisions work as a result of its introduction, the scope of project services and project protocols and who owns the copyright and intellectual property rights to name but a few.

Within the UK only the Chartered Institute of Building's contract for use with Complex Projects published in April 2013 includes detailed provisions for a BIM-enabled project. As such software becomes more common, international standard forms will need to be adapted to

take BIM-related issues into account and parties considering the use of BIM on their projects need to be aware of these issues so that they can amend their project documentation as required.

Bonds and Guarantees

In the current economic climate it is perhaps unsurprising that the number of cases relating to project securities has increased exponentially. All too often the question raised is whether the security in question is an on-demand bond (which are very common in international projects) or in fact a guarantee.

The difference is crucial. An on-demand bond is a primary obligation where the bondsman promises to pay a certain amount on receipt of a written demand immediately (absent very limited challenges particularly if subject to English Law). In contrast, a guarantee is a secondary liability where the guarantor's liability is dependant on there being a breach by the contractor of the underlying construction contract.

Given the importance of this distinction, the Court of Appeal case *Wuhan Guoyu Logistics Group Co Limited & Others v Emporiki Bank of Greece SA* and its endorsement of the guidance in the 11th edition of Paget's Law of Banking is particularly useful for practitioners. Perhaps the key point to underline is that there will be a strong presumption that a security is an on-demand bond if the obligation to pay is expressed to be "*on-demand*". This is the case even if the title of the document itself is "*Payment Guarantee*". Careful drafting is, as ever, essential.

Concurrent Delay

Finally, the issue of concurrent delay and how it should be interpreted is one that is crucial in most extension of time claims. In the recent case of *Walter Lilly and Company Limited v Giles Patrick Cyril Mackay (And Another)* the English Courts confirmed that where a delay is caused by 2 or more effective causes, one of which is a "*relevant event*" the contractor will be entitled to an extension of time. The apportionment approach that has been adopted in other jurisdictions was rejected.

The case serves as a reminder that it is important to determine not only what a contract's extension of time provisions say but also what the approach to concurrency is under the governing law of the contract in question.