FENWICK ELLIOTT

The construction & energy law specialists

Issue 28 - April 2020

International Quarterly

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

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Welcome to Issue 28

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When we started planning the current edition of IQ, the world was a very different place. It is interesting to see on the one hand how quickly things change, yet on the other from a personal point of view, looking out of my window in Greenwich, London, time is moving slowly and events of a week ago seem more like a month.

With the pace of change in mind, we have given first place in this edition IQ rightly and obviously to how we can help you and in our lead article Nicholas Gould addresses some of the key points that should be taken into consideration with regards to the uncertainty about the impact that Covid-19 is having and will have on current projects and businesses. That short article is followed by an article by me about force majeure with an eye on the FIDIC Form and MENA region.

That article is followed by one by Jon Miller again about the coronavirus and its possible impact on construction contracts. Although the article was originally written with the domestic UK market in mind the practical points it makes are relevant and worthy of thought in any jurisdiction. Jon has also been busy on the webinar front. On 26 March 2020, in association with Building he gave a webinar entitled: "Covid-19 and its impact on construction: the legal view." The webinar is available on-demand here: https://www.workcast.com/register?cpak=6463352161686209.

We will be producing more webinars and podcasts over the next few weeks, so please keep an eye open for details.

The second half of IQ takes a more traditional look at recent developments in the construction legal world. In February 2020, a rare event occurred, the release of a TCC judgment relating to a project (concerning a biomass energy plant in North Wales that was never built) using the FIDIC Form, here an amended 1999 Silver Book. I have written a short note about "unforeseeable ground conditions" whilst Jesse Way has written about termination. Finally Catherine Simpson has written about what happens when without prejudice documents appear in an adjudication, looking at the legal position in Scotland and the UAE.

Stay safe

Jeremy

CORONAVIRUS (COVID-19) STATEMENT

Fenwick Elliott is closely monitoring the outbreak of Coronavirus (COVID-19) and taking relevant guidance to ensure we respond as efficiently and effectively as possible.

Where possible, we intend to operate on the basis of 'business as usual', whilst ensuring the health and welfare of our staff, stakeholders, clients and their families remains our utmost priority in these unprecedented times. We are adopting government guidelines for staying at home, heightened hygiene and we will be adopting a number of measures to ensure our staff, clients and suppliers are kept safe.

These measures include a working from home policy for all partners and staff. Our London and Dubai offices are both currently closed. Meetings are taking place via video conferencing.

We are committed to delivering prompt, reliable and pragmatic legal advice to our clients throughout these difficult times, and such measures will help to ensure this.

We will continue to keep you updated with the company's plans and response to the spread of COVID-19, as it develops.

Many thanks, in advance, for your understanding during these most difficult of times.

Actions for Covid-19 on your construction project

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There is of course some uncertainty about the impact that Covid-19 is having and will have on current projects and businesses. From the frequent questions arising this week, consideration should be given to:

1. Site lockdown – what is the impact on your contracts, the workforce and the supply chain? What rights do you have for relief under the contracts, and who might be bringing claims against you?

2. Force majeure – is Covid-19 a force majeure event under your contract? Check the contract to see what needs to be proved. Gather evidence and notify within the contract timescales.

3. The impact of notifying – consider your contractual rights before notifying a force majeure event. There might be an initial right to suspend followed by limited relief (time but no money).

4. Notices – look at the contract to see what the notice needs to contain and the deadline for issuing it. Are multiple notices required, perhaps for the initial warning, then for details of the claim and evidence as well as regular updates?

5. Evidence – gather evidence as it becomes available and document the problems faced in correspondence and notices to the other party.

6. Extension of time and money – check the contract for your right to an extension of time and possible financial claims. Are separate notices required and, again, how long after the event do you have to serve the notice?

7. Health and safety – the health and safety of the workforce is paramount. Are there enough senior people on the site to manage the works, and adequate handwashing facilities?

8. Insurance – is there any existing cover for disruption to your business?

9. Frustration – it is unlikely to work in practice, but might be worth considering over the coming weeks.

10. Business as usual – it might seem a long way off, but consider with your contracting parties how you will plan for resuming work once the effects have subsided.

11. Much depends on the contract terms and the actual impact on your projects and business. If more help is needed let me know.

Covid-19, FIDIC and Construction Contracts

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One of the potential difficulties with international projects is that the contracts entered into are governed by laws which may be unfamiliar to one or other of the contracting parties. For example, there is a difference in the way that force majeure is treated in common and civil law jurisdictions. Whilst most civil codes make provisions for force majeure events, at common law, force majeure is not a term of art and its meaning is far from clear. No force majeure provision will be implied in the absence of specific contractual provisions, and the extent to which the parties deal with unforeseen events will be defined in the contract between them. Thus without a specific clause, there will not necessarily be relief for force majeure events. The current pandemic caused by Covid-19 has generated much discussion about force majeure and this article looks at the position under the FIDIC form of contract and in the UAE and Qatar.

Force Majeure under civil and common laws

Whatever your jurisdiction, the contract wording is, as always, crucial. In broad terms the intention of a force majeure clause is to provide for what happens where there is non-performance which is caused by events beyond the control of the party/parties. Most force majeure clauses usually suspend the obligation to perform the contract when a force majeure event has occurred, and the event must be beyond the control of the party relying on the clause. Force majeure excuses what would probably otherwise be a breach and effectively suspends temporarily an obligation to perform the Works, but it may not give rise to any compensation/ loss and expense unless provided for under the contract.

There is no established meaning under the common law of force majeure, so every force majeure clause turns on the words used. This also means that for force majeure to apply there must be a specific clause in your contract, whether it is called force majeure or something else. In civil jurisdictions force majeure is a recognised legal concept and most civil codes make provision for it, for example Article 273 of the UAE Civil Code. Generally, in the UAE force majeure is given a narrow definition with stress on the need for the event to make performance of the obligation impossible. Elsewhere in the Middle East, in the case of National Oil Corp v Libyan Sun Oil Co, a Tribunal held that US sanctions, in terms of the use of American personnel and technology, did not render performance impossible, since other companies were able to perform, through reliance on citizens from other countries and using non-US technology. The fact that the US sanctions made performance more difficult was not enough.

Force Majeure in the MENA Region
Force majeure is treated in a broadly similar way across MENA, although it is always important to check the provisions of the Civil Code for the jurisdictions where your contract is based.

Force majeure under UAE law
The usual position is that parties are free to agree the terms of their contract provided they do not conflict with the mandatory provisions of the UAE Civil Code. With construction contracts, it is only if your contract makes no provision for force majeure or exceptional events, then you must look to the civil code. Whilst, there is no specific definition of force majeure under UAE law, as noted above, Article 273(1) lays stress on performance being impossible:

"In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled".

If the force majeure event renders only part of an obligation impossible to perform, then only that only that part of the contract will be cancelled. The Abu Dhabi Court of Cassation case No. 13/2010 laid stress on it being "absolutely impossible" to perform the obligations of the contract by reason of the force majeure event. Impossible means

something different to that which makes performance merely "burdensome."

The Civil Code provisions relating to Muqawala contracts (which include construction contracts), make similar provision. Article 893 provides that "when an excuse arises that prevents the execution of the contract, or the completion of its execution, any of the contracting parties may ask for its rescission or termination". Article 894 deals with compensation, noting that where a contractor has started the execution of the work and then became unable to carry it out "for a reason beyond his control, he shall be entitled to value of the completed work, in addition to the expenses disbursed for its execution to the extent of the benefit that the masters derives from such work".

Whilst the Civil Code makes no mention of giving notice, the underlying requirement to act in good faith (Article 246) would require that timely and clear notice is given explaining what has happened and also that steps are taken to reduce the impact of the event and reduce and losses.

Force majeure in the KSA

The Kingdom of Saudi Arabia's (KSA's") legal system is based on the principles of Sharia Law which, following the Hanabali school of Islamic interpretation, adopts a fundamentalist and literal interpretation of the teachings of the Qur'an. This means that the way in which Saudi courts regulate contractual relationships is therefore strikingly different from the common and civil law systems. Whilst Parties are free to contract with each other, the degree of freedom with which they can do so is governed by certain prohibitions in the Qur'an. If the provisions of your contract violate the fundamental principles of Sharia law then it is likely that they will not be enforced by the Saudi courts. Whilst in general the laws are not codified in the KSA, for public sector contracts, Article 51 of the 2006 Procurement Law provides for the extension of a contract period (and the waiver of any penalty for delay) "if the delay is due to unforeseen circumstances or for reasons beyond the contractor's control, provided that the period of delay is proportionate to these reasons". More generally, whilst the court do recognise force majeure provisions, the emphasis is on exceptional events which are impossible not merely more burdensome or expensive. Therefore potentially a contract can be voided provided a specific event took place which was unforeseeable and unavoidable as well as making the contract impossible to perform.

Force majeure under Qatari Law
If your contract makes no provision for force majeure or exceptional events, then you must look to the civil code. Again, as with the UAE, there is no definition under Qatari law for force majeure. Article 204 of the Civil Code provides that if a person can demonstrate that a loss has arisen due to an external cause not of their making, that party will not be liable for that unless there is agreement to the contrary. Article 258 permits agreement to the contrary allowing parties to allocate the risk for force majeure how they choose, usually to the contractor.

And again as throughout the MENA region, there is an emphasis on the event being impossible (and not merely more difficult) with Article 188 of the Qatari Civil Code stating that "if fulfillment of the obligation becomes impossible due to some external cause" then the contract may be rescinded.

Force Majeure and the FIDIC Form of Contract

The 1999 and 2017 editions of the FIDIC Form treat force majeure in slightly different ways. Clause 18 of the 2017 edition is now headed "Exceptional Events", replacing Clause 19 of the earlier edition which was headed ''Force Majeure''.

Definition

However, the scheme of both forms remains the same, with the party affected, usually the contractor, entitled to an extension of time and (with exceptions) additional cost where an "exceptional event" occurs. To constitute an exceptional event, the following needs to have occurred:

(i) There must be an event or circumstance;
(ii) The event/circumstance must be beyond the control of the party affected;
(iii) The party affected could not have foreseen or provided against the event/circumstance before entering into the contract nor avoided it once it had arisen;
(iv) The event/circumstance was not the fault of the other party; about which,
(v) Proper notice in accordance with the relevant sub-clause has been given.

Although both FIDIC editions list some exceptional events, these do not include specific reference to events such as "epidemic" or "pandemic", but the list is specifically stated to be examples only. The key is that the above conditions are satisfied.

Common Law/Civil Law

As noted above, in civil jurisdictions force majeure is a recognised legal concept and most civil codes make provisions for it. Therefore, the change to ''exceptional event'' should be treated with some care as it might cause confusion as to whether the term should be interpreted differently to force majeure or not. It is important to consider the wording of the clause carefully against the definition to be found in the relevant code. Does it simply duplicate what is usually provided for or does it enlarge the scope of the meaning and

application of force majeure? At common law, as described above, the confusion appears less likely to arise since ''force majeure'' is not a term of art. No force majeure provision is implied in the absence of specific contractual provisions and the extent to which the parties deal with unforeseen events will be defined in the contract between them. If there is no provision, there will be no relief.

Optional Termination

Both editions of the FIDIC Form provide for optional termination if the execution of "substantially all the Works" is prevented for a continuous period of 84 days (or multiple periods which total 140 days).

Notice

Inevitably with FIDIC, proper notice must be given. Under the 1999 edition notice must be given within 14 days after the date a party became aware of the circumstances. The same 14-day period can be found in the 2017 edition but if the Notice is received after the period of 14 days, the affected Party is excused performance only from the date on which the Notice is received.

Extension of Time

If the force majeure event has caused delay, then subject to a contractor using "all reasonable endeavors to minimize any delay in the performance of the Contract as a result of Force Majeure", the contractor should be entitled to an extension of time. However, the contractor may not be entitled to claim costs as a result of covid-19. Under the 1999 FIDIC Form, sub-clause 19.4 states that a contractor is only entitled Cost if the event is of the kind described in sub-paragraphs (i) to (iv) of sub-clause 19.1. These only include war and hostilities (whether war be declared or not), rebellion and terrorism, riot or strike and "munitions of war", not natural disaster or epidemics. A similar clause can be found at sub-clause 18.4 of the 2017 edition.

There is a potential alternative. Under sub-clause 8.5(d) of the 2017 Form and 8.4(d) of the 1999 Form, the contractor is entitled to an extension of time for "[u] nforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic..." As has already been demonstrated globally, most governments have extensive powers to deal with health emergencies which may lead to the shutdown of a project or factory supplying materials. That is provided the contractor has complied with the strict 28-day notice provisions. Any shortage of personnel or goods would have to be shortage of a nature unforeseen by the experienced contractor and that contractor must also be able to demonstrate both shortages in availability of personnel or goods and how this caused delay. Sub-clause 8.5 of the 1999 Red Book (or 8.6 of the 2017 edition) also refers to delays caused by authorities, noting that if the contractor has "diligently followed" the procedures laid down by the relevant legally constituted public authorities in the country where the project is being carried out, and those authorities delay or disrupt the contractor's work, and the delay or disruption

was unforeseeable, then "this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.4 [Extension of Time for Completion]".

Change to the Contract Price
Contractors may also want to check sub-clause 13.7. Has there been a change in the laws of the country which directly affected performance of the contract works and has led to an increase in the Contract Price? Frustration under the FIDIC form Sub-clause 19.7 of the FIDIC form is also of interest. Here, the parties will be released from performance (and the Contractor entitled to specific payment) if (i) any irresistible event (not limited to force majeure) makes it impossible or unlawful for the parties to fulfil their contractual obligations, or (ii) the governing law so provides. It acts as a fall-back provision for extreme events (i.e., events rendering contractual performance illegal or impossible) which do not fit within the strict definition of force majeure laid out under sub-clause 19.1. It also grants the party seeking exoneration the right to rely on any alternative relief-mechanism contained in the law governing the contract.

Practical steps and checks:

What does your contract say? And it might not use the words "force majeure"

- If there is a force majeure clause, what does it say? In what circumstances might performance be excused and with what result? Just because something costs more or is more difficult, that will not of itself be sufficient to rely on a force majeure, or similar clause.

- What is the governing law of the contract and what does that law say about force majeure?

- Check what the consequences of triggering the force majeure provision are. Is performance simply suspended? Some Civil Codes provide for termination. Often contracts include the right to terminate the contract after a certain period of time has elapsed.

- What alternative means of performance are there? How can you reduce any delay? Performance might still be possible, even if engaging alternative suppliers and means of delivery are more costly.

- Follow the notice provisions of the contract, to the letter. What are the timescales? Who should the notice be sent to? At what address? Can you deliver the notice bearing in mind any government restrictions that might be in place?

- You cannot sit back and do nothing after serving the notice. Think about how you can mitigate the impact of the force majeure event.

- It will be important to be able to prove the steps that have been taken to mitigate the impact, so both from the employer's and the contractor's perspective, keep clear records which will help resolve any potential areas of dispute.

- Keep proper records so you can show why performance was impossible, what steps did you take to find an alternative approach and what were the costs and delays incurred? Take photographs and make videos. Put a paper trail in place to record that it was unsafe or impossible to continue.

- Think about how you will judge when the event is over?

- Whilst always taking care to follow the contract requirements about notices, look to see if there are other routes available to deal with the issue. Talk to the other parties who are involved. Everyone has been affected to C-19. A negotiated way forward is always the preferable route. Far better to agree a way forward, if need be in a binding contract addendum.

- If you are entering into a new contract, how does that contract allocate risk arising from the pandemic?

- Everyone is talking about force majeure, but what other remedies may be available in the contract?

Ps It's not just about Force Majeure
Whilst everyone has been talking about force majeure, there are a number of other issues parties should be thinking about. Health & safety? Should sites close? The answer to this will depend on the relevant Government guidance but may also depend on the criticality of the projects in question as well as whether social distancing measures can be implemented at the same time as ensuring that working under the new methods and restrictions can be carried out safely.

You must keep your health and safely policies and procedures under regular review and also ensure that they are understood by everyone on site. You should also keep a careful eye on risk assessments. In particular, what is happening with the supply chain? Where are goods supposed be coming from?

Also, make use of technology, think about what can be carried out remotely. Think too about how you can keep in contact with people. Keeping lines of communication open and maintaining relationships is more important now than ever. And not just email, talking to people is key, keep in touch with your team, your contacts, with those working on your project. The key to collaboration is communication. We really are all in this together, and that won't change when the restrictions wherever you may be, are lifted.

Coronavirus and Construction Contracts

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Introduction

1. The impact of COVID 19 is changing daily and last week in England at least many sites closed whilst others continued working. This note seeks to set out the practical steps to be taken in light of recent developments, such as:-

   1.1 is force majeure likely to apply to the current situation?

   1.2 with some sites now forced to close, what needs to be done now?

   1.3 other sites remain open and some Contractors/Sub-Contractors believe that they are being forced to continue working – what can be done?

   1.4 steps to be taken now to try to protect your position if claims are to be made for additional time/money in the future?

   (Please bear in mind the principles underlying the interpretation of *force majeure* and other Contract terms as set out in my first note - https://www.fenwickelliott.com/research-insight/articles-papers/other/coronavirus-construction-contracts)

Has a Force Majeure Event occurred?

2. At the moment (i.e. the morning of 30 March 2020) in England the Government has not ordered building sites to shut down. Whether a *force majeure* event has occurred will always turn upon the wording of the *force majeure* clause in the Contract, and how COVID 19 has impacted the site in question. There is no guaranteed answer to this question but, bearing in mind:-

   2.1 we are facing a global pandemic which has had a significant effect on the economy, transport, etc;

   2.2 guidance whereby, when leaving their own household, people should remain 2 metres apart even on a building site. This would require changes to not only different methods of working at the work place, but also amendments to canteen arrangements, welfare and changing facilities. Also at least some over the counter trade merchants are closing;

   in my view under most *force majeure* clauses COVID-19 would probably now be seen as a *force majeure* event.

Site Closures and the Health & Safety at Work Act 1974 ("HASAWA")

3. There has also been a spate of site closures during the past week. Some Employers and Contractors have expressed an overriding concern to protect their workers which is consistent with the HASAWA which contains the well-known provision, *"It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his Employees"*[2].

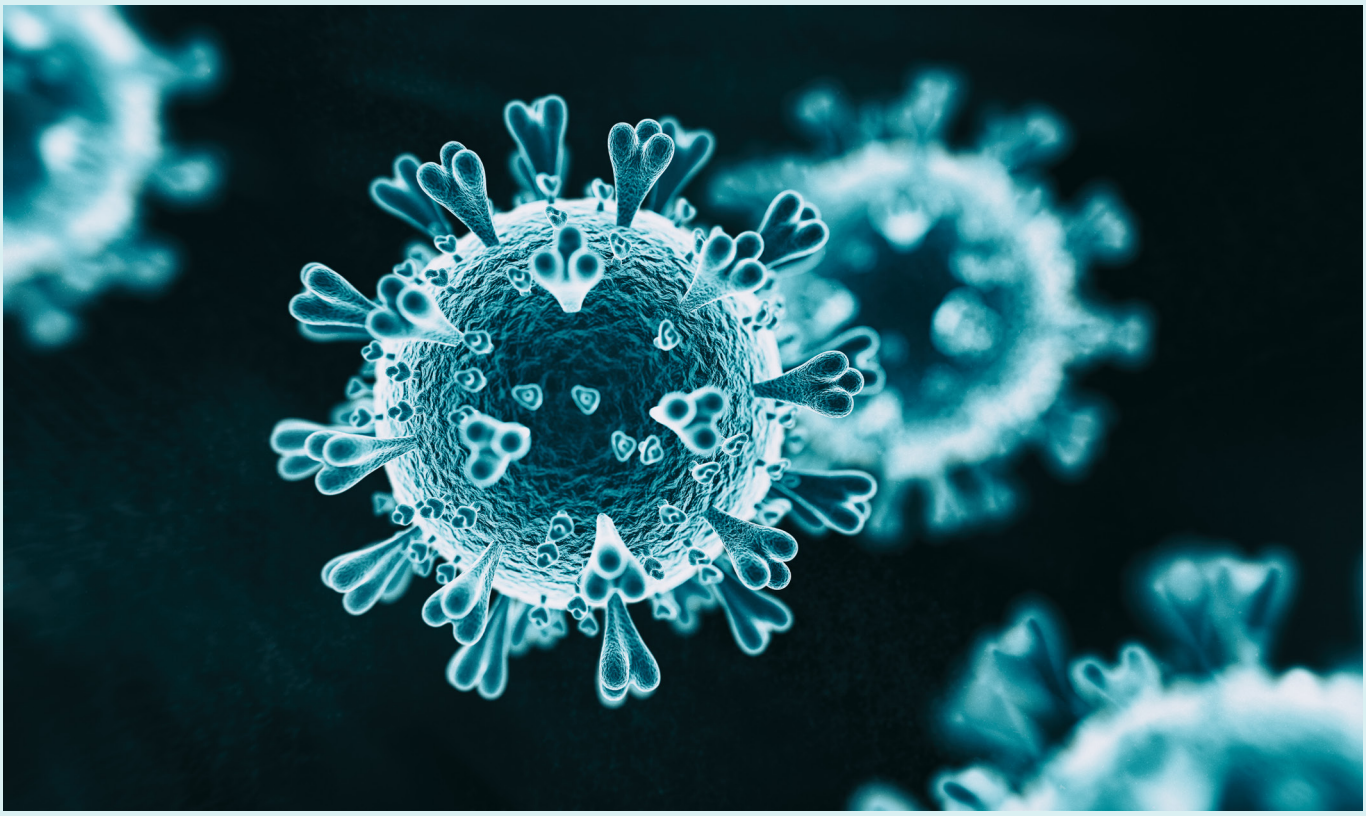
4. Further the Management of Health and Safety Act Work Regulations provides for risk assessments to be reviewed if *"...there has been a significant change in a matter to which it relates; and where as a result of any such review changes to an assessment are required, the... person concerned shall make them"*[3].

5. In the light of Government Guidance and HASAWA etc virtually every site will have to review and probably change the way it is working. Some sites have closed temporarily to review working practices.

What if my site has not closed (and it should)?

6. Some Contractors/Sub-Contractors have complained of being forced to continue to work without any change in working practices to reflect Government Guidance. My suggestion would be:-

   6.1 write immediately pointing out the dangers and risks on site and asking the person responsible for Health & Safety what they intend to do to



change working practices; 6.2 the welfare of employees, Sub Contractors etc should be the prime consideration. If a Contractor/Sub-Contractor is being asked to work in a dangerous situation and refuses to do so, this could amount to an "*impediment, prevention or default, whether by act or omission*"[4] or "*[a] breach of contract…*"[5]. Again this would turn upon who is responsible for Health & Safety matters, the terms of the Construction Contract and what is (or is not) happening on site. An "*impediment, prevention or default, whether by act or omission*" typically gives rise to additional time and money.

7. Bear in mind that refusing to work when instructed to do so is very risky commercially speaking – it can amount to a repudiation of the Construction Contract giving rise to claims for damages for breach.

Evidence

8. If a Contractor/Sub-Contractor is to argue they were justified in refusing to return to a site where there was no social distancing, not only at the workface but with welfare facilities etc, it is imperative that the Contractor/Sub-Contractor's not only writes to the person responsible for Health& Safety on site highlighting the unsafe working practices and asks how they are going to change, but gathers evidence of what the situation on site was really like. In months to come there may be arguments as to what was happening on site – the Contractor/Sub Contractor concerned will have to establish why it was unsafe to return.

9. Proof can be gathered from sources such as:-

   9.1 employees;

   9.2 other tradesmen and the professional team on site – make a note of who they are as they may prove useful in the future;

   9.3 photographs showing what the true situation was.

What can be recovered?

Other Routes of Recovery

10. The reality which many Contractors, Sub-Contractor etc are facing is that even if a force majeure clause applies, under most but not all standard forms of Construction Contract only an extension of time is granted – there is little/no prospect of recovering the loss and expense incurred as a result of a shutdown[6].

11. However many Construction Contracts contain other clauses in addition to a force majeure clause which may not only give rise to an extension of time, but loss and expense/compensation as well:-

    11.1 compliance with an instruction/direction shutting down the site can potentially give rise to a claim for an extension of time and loss and expense[7]. Indeed an instruction to stop work will probably also count as an act of prevention – this too could give rise to claims for time and money[8];

11.2 often forgotten is that some standard forms contain a provision allowing the Employer/Project Manager etc to postpone all or part of the works[9] - exercising this power will also normally give rise to an extension of time and loss and expense[10];

11.3 not providing safe working practices on site can amount to prevention, hindrance or even a breach of Contract – see the point made above.

Notices

12. The protection offered by a Construction Contract means little unless invoked, almost always by the issue of a notice. According to most JCT forms a notice requiring an extension of time is to be issued when *"... the progress of the Works... is being or is likely to be delayed"*[11], whilst most NEC forms require notice to be given within 8 weeks of becoming aware of an event which could change the Prices, the Completion Date or a Key Date[12].

    Under these standard forms, the time for giving notice has almost certainly already started to run.

13. Giving a notice raises a number of issues including:-

    13.1 all Contracts have different deadlines for when a notice is to be given. Frequently the time limits for giving notices are amended in standard form Contracts to make them shorter;

    13.2 the Contract may require the notice to be given in a particular manner and to a particular person – an email to the Employer may not be enough;

    13.3 Contracts normally set out what the notice is to contain. For example under the NEC4 a notice is to contain the notice itself and nothing else - any other points that need to be raised should be in a separate communication[13];

    13.4 separate notices are often required in respect of an extension of time and claims for money, each of which may have different requirements as to what they should contain[14]; some forms of Contract require one notice[15].

14. Failure to give a notice in the form required by the Contract, using the correct method of delivery, or given after the deadline may result in not only any compensations/loss and expense not being payable, but amount to a justifiable reason to refuse to grant an extension of time. This in turn can result in liquidated and ascertained damages being payable.

Confrontational Notices?

15. Aggressive and confrontational attitudes in construction are not that rare[16]. A notice need not be given in aggressive terms - it only needs to comply with the underlying Construction Contract.

16. It is acceptable for a notice to explain, *"We are making our work safe and acting in accordance with your instruction whereby we expect to leave the site at 5pm today. Under the terms of our Contract we are obliged to give you notice of..."*.

Proving your Claim and what needs to be done now

Delays

17. Only delays to the Completion Date can give rise to an extension of time. Programming information is crucial. The burden is on the party making the claim to show why the COVID-19 shutdown delayed the Completion Date.

18. Some sites may be able to continue working safely. We are aware of a site where working practices have been changed whereby there is no more than one operative in each room, operatives start at different times and ensure they maintain a distance of 2 metres throughout.

    But even then this will give rise to delays to the progress of the Works – i.e. changing working arrangements which slow progress may still give rise to an extension of time if they delay the Completion Date (and additional recoverable costs if the Construction Contract allows it).

19. How many people were supposed to be on site? Who was self-isolating/ill/had a pre-existing condition? What trade(s) were they and where were they supposed to work?

20. Was there a lack of supplies/ materials? If so when were they to be delivered (and eventually when did delivery take place)?

21. Nearly all Construction Contracts impose a need to mitigate/use best endeavours to reduce delays[17]. Record all attempts to try and find alternative labour and get new delivery dates – i.e. keep emails.

Costs

22. Record separately all costs related with stopping on site or any slowdown e.g.:-

    22.1 demobilisation and remobilisation costs;

    22.2 the costs of making the site safe;

    22.3 materials - what was originally allowed for in the Contract Price, and what did it increase to?

    22.4 retaining labour/non-productive payments are often difficult to recover. Ask the Employer/Contractor what they want to do?

Costs – the big mistake

23. A common mistake people make is that the additional costs incurred are not clearly attribute to the relevant delay/shutdown due to matters such as COVID-19. For example demobilisation and re mobilisation costs should be recorded separately. Suppliers invoices should not simply cover all the materials delivered to site before and after a shutdown – get clear what materials increased as a result of the shutdown and why.

    Particularly infuriating are timesheets with 7 (or more) hours for every day without any explanation of what was being done, or where the operatives were working.

Further Action

24. No doubt there are other actions which need to be taken which will depend on the site etc but:-

    24.1 works should be made safe;

    24.2 if you are insuring the Works, your insurer should be told.

    Finally I stress again please read your Contract. The rights and obligations you have will largely depend on its terms.

Footnotes

1. There is obviously a difference between the two, both terms are used here in the colloquial sense.
2. Section 2(1).
3. Regulation 3(3)(b).
4. JCT 2016 D&B Clause 2.26.6 and 4.21.5.
5. NEC4 Clause 60.1(18).
6. The NEC is probably a notable exception as it will probably allow compensation to be paid in these circumstances.
7. e.g. JCT D&B 2016 Clause 2.26.2 & 4.21.1 and NEC4 Clause 60.1(4).
8. e.g. JCT D&B 2016 Clause 2.26.6 & 4.21.5 and NEC4 Clause 60.1(2).
9. e.g. NEC4 Clause 60.1(4) and JCT D&B 2016 Clause 3.10.
10. e.g. JCT D&B 2016 Clause 2.26.2.2 & 4.21.2.1 and NEC4 Clause 60.1(4).
11. e.g. JCT D&B 2016 Clause 2.24.1.
12. e.g. NEC4 Clause 61.3.
13. Clause 13.7.
14. e.g. JCT D&B 2016 Clause 2.24 & 4.20.1.
15. e.g. NEC4 Clause 61.3.
16. To put it politely.
17. e.g. JCT 2016 D&B Clause 2.25.6.1.

Getting termination right: PBS Energo A.S. v Bester Generacion UK Limited & Anor [2020] EWHC 223 (TCC) and the FIDIC Silver Book

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Introduction

PBS Energo A.S. v Bester Generacion UK Limited is a case with a raft of issues which commonly arise on construction projects. However, the parties' entitlement to terminate was the central issue before the Court and will be the focus of this article. Terminating a contract is a risky business and, if it is not done correctly, it can have disastrous financial implications. This article will consider the PBS decision and discuss the 2017 FIDIC Silver Book ("Silver Book") provisions for termination by a Contractor for a failure to receive payment.

The project concerned was a biomass energy plant to be built in the north of Wales. Ultimately, the plant was never constructed and the case was concerned with the circumstances in which that happened. PBS, a company incorporated in the Czech Republic, specialises in the design and manufacture of power plant equipment. Bester, a UK subsidiary of a Spanish company, specialises in the provision of renewable energy projects. Unsurprisingly, the parties fell out and ended up in Court. PBS, the Contractor, claimed it was entitled to terminate because Bester, the Employer, failed to pay the fifth Milestone payment by the date required and substantially failed to fulfil its contractual obligations. Bester claimed it could terminate the contract because PBS had failed to comply with a Notice to Correct and PBS had abandoned the works or evinced an intention not to perform the contract.

In the end, the Court determined that PBS's basis for terminating the contract was without foundation. The Court held that Bester was entitled to terminate the contract and its reasons for reaching that finding are explained in more detail below.

Facts

On 29 April 2016, Bester contracted with Equitix ESI CHP (Wrexham) Limited ("Equitix") to design, construct, install and commission a biomass-fired energy generating plant and associated works, and later (by a separate contract) to operate the plant ("the Equitix Contract").

On 10 May 2016, PBS and Bester entered into a subcontract ("the Contract") for the engineering, procurement, construction and commissioning of a biomass-fired energy generating plant and associated works at Wrexham ("the Works"). The Contract price was approximately £14 million and the Contract was based on an amended form of the FIDIC Silver Book Conditions of Contract for EPC/Turnkey Projects.

The project commenced in May 2016 but the key programme dates were not met. Disputes arose and, by April 2017, contractors performing civil works had stopped work.

On 24 May 2017, PBS gave notice of its intention to terminate the Contract on the basis that Bester failed to make payment for Milestone 5 by the Final Date for Payment and for substantial failures to fulfil its contractual obligations. The substantial failures alleged by PBS were essentially a failure to determine PBS's extension of time ("EOT") claims. PBS's EOT claims related to:

- unforeseeable detection of underground sewage/drainage system;
- detection of asbestos at the site;
- delay in provision of ROC and permits;
- additional payment for a variation in respect of an electrical connection; and
- BT cable lines.

On 14 June 2017, PBS sent a further letter to terminate the Contract on and from the date of the letter.

Bester then sent a series of letters in which Bester sought to affirm the Contract and requested PBS retract

the termination but PBS did not do so.

On 12 July 2017, Bester served a notice of termination on the basis that:

- PBS failed to comply with Bester's Notice to Correct of 7 November 2016 (relating to delays in PBS's submissions of civil work designs, procurement of documents, failure to progress the works, and failure to provide collateral warranties and subcontracts from PBS's subcontractors);
- ongoing delay by PBS, failure to proceed diligently, and unlawful suspensions;
- PBS failed to provide permits and assistance to Bester; and
- PBS abandoned the works and/or intended not to perform its obligations under the Contract.

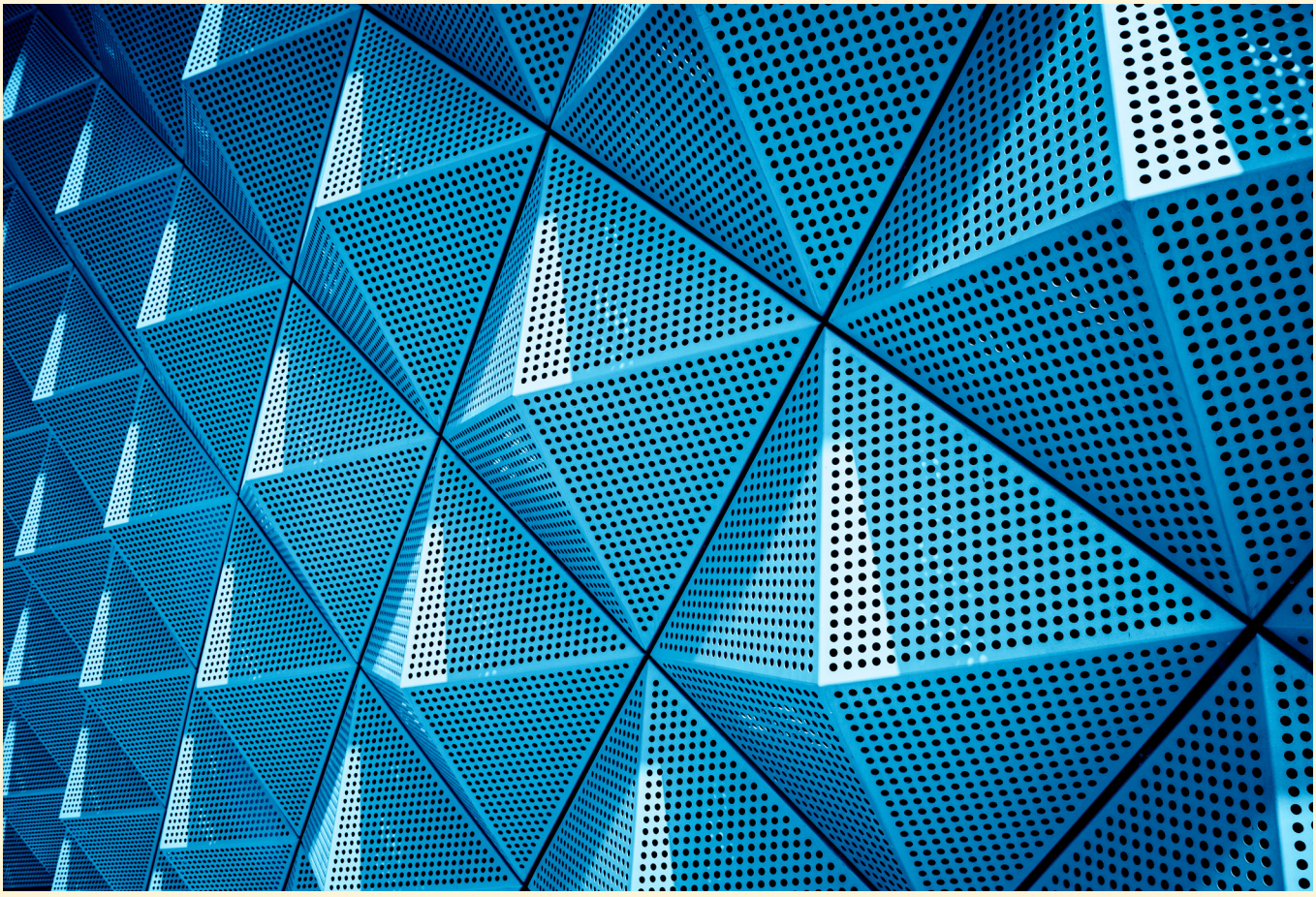
On 7 August 2017, Bester confirmed its termination of the Contract. Whilst the above was happening, Equitix issued a notice of intention to terminate the Equitix Contract on 3 July 2017 and did terminate that contract on 17 July 2017.

PBS's termination

The Court considered PBS's EOT claims and determined they were without basis or not pursued by PBS at trial. An examination of each of the EOT claims and the Court's reasoning in respect of each is beyond the scope of this article. The second basis upon which PBS sought to terminate the Contract was that Bester failed to make payment of Milestone 5 by the date for payment. The Contract contained a number of Milestones but the issue was whether Milestones 3–5 were achieved. In relation to Milestone 5, if it was achieved, the issue was whether the notice served in relation to it was valid so as to trigger an entitlement to payment.
The Court held that Milestones 3 and 4 were never achieved, albeit they were paid on a without prejudice or commercial basis. As Milestones 3 and 4 had not been achieved, it followed that payment for Milestone 5 could never have become due for payment. This was because completion of the preceding Milestones was a prerequisite to payment (i.e. Milestones 1–4 had to be achieved before payment for Milestone 5 could be achieved). Accordingly, PBS's termination failed.

Bester's termination

The Court held that Bester was entitled to terminate. This was on the basis that PBS had abandoned the works and failed to comply with the Notice to Correct. PBS had argued that it was unable to comply with the Notice to Correct because Equitix had terminated Bester's contract



and locked up the site. However, the Court found that on the evidence it was in fact PBS who had locked up the site and abandoned it long before termination of the Equitix Contract. The Court found that Bester's contract was terminated because of PBS's failure to perform. PBS tried to rely on the prevention principle; however, the Court was not persuaded the prevention principle applied here. As an aside, the Court noted Coulson LJ in Cyden v North Midland [2018] EWCA Civ 1744 where he reiterated the warning that the prevention principle is not a broad and overarching principle or general backstop to an EOT regime, but a principle of narrow application. Accordingly, as Bester was entitled to terminate, the Court held that Bester's counterclaim succeeded, which was approximately £16 million (and the consequence of PBS's failed termination).

2017 FIDIC Silver Book – termination by a Contractor

Sub-Clause 16.2 of the Silver Book sets out how a Contractor can terminate the contract. In this article, only termination for a failure to receive payment will be considered.

Sub-Clause 16.2.1 and 16.2.2 relevantly state:

"16.2.1 Notice

The Contractor shall be entitled to give a Notice (which shall state that it is given under this Sub-Clause 16.2.1) to the Employer of the Contractor's intention to terminate the Contract ... if:

...

(b) the Contractor does not receive a payment under Sub-Clause 14.7 [Payment] within 42 days after the expiry of the relevant period for payment stated in Sub-Clause 14.7;

...

16.2.2 Termination

Unless the Employer remedies the matter described in a Notice given under Sub-Clause 16.2.1 [Notice] within 14 days of receiving the Notice, the Contractor may by giving a second Notice to the Employer immediately terminate the Contract. The date of termination shall then be the date the Employer receives the second Notice." There are a number of elements to the above clauses which are commonly overlooked or misinterpreted by Contractors (not only in FIDIC contracts but in standard forms as well).

One of the most common pitfalls is the issue of a Notice of termination (the Notice contemplated in Sub-Clause 16.2.2) before, and without, issuing the initial Notice (the Notice contemplated in Sub-Clause 16.2.1). However, as is clear from the clauses, the first step is to issue Notice of the Contractor's intention to terminate the Contract. This is an important point. The reason for such a Notice is because the consequences of termination, as can be seen from the PBS decision, are significant and also to allow the Employer an opportunity to remedy the default.

A Notice is a defined term in the Silver Book and the requirements for it must be followed, including how and to whom it is to be issued (see Sub-Clauses 1.1.48 and 1.3). The Notice must also state that it is given under Sub-Clause 16.2.1. Whilst this may seem insignificant, the purpose is to draw the Employer's attention to the fact that it is a Notice of intention to terminate.

The Contractor can only proceed to terminate if the Employer does not remedy the matter described in the Notice under Sub-Clause 16.2.1 within 14 days of receiving the Notice. Once again, the Contractor must comply with the requirements for a Notice as described above. However, termination can only occur if the Employer has not remedied the matter in the initial Notice "within 14 days of receiving the Notice". It is not within 14 days of the Contractor sending the Notice. It is important to note the distinction because the Silver Book sets out when Notices are deemed to be received.

Once the Notice to terminate is given, it takes effect immediately and there are further steps required to be taken by the Contract under the later clauses regarding termination. However, it is clear from the above that there are a number of steps to be followed to correctly terminate a contract subject to the Silver Book conditions and they must be complied with.

Of course, in the example above, it is all predicated on the basis that the Contractor has in fact not received a payment under Sub-Clause 14.7 and that the payment application process has been complied with by the Contractor. A common way for an Employer to impeach a termination by a Contractor on the basis of a failure to receive payment is that the Contractor was never entitled to payment because the Contractor failed to follow the payment application process. This is similar to what occurred in PBS because the Court held that PBS had no entitlement to payment for Milestone 5 because completion of Milestones 3 and 4 was a prerequisite for an entitlement to payment for Milestone 5. As PBS did not complete Milestones 3 and 4, entitlement to payment for Milestone 5 could not arise.

Conclusion

Termination is a common issue that arises on construction projects. The PBS case serves as a good example of the importance of getting termination right as there is often a competing termination and the consequences of an incorrect termination are significant. To terminate a contract effectively it is imperative that the terms of the contract are followed and it is clear from the Silver Book conditions that there are many requirements which can easily be overlooked. The bottom line? Check twice before terminating (and then again!).

Unforeseeable ground conditions and the FIDIC Silver Book

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My colleague Jesse Way has written separately about the termination issues that arose in the case of *PBS Energo AS v Bester Generacion UK Ltd & Anr;*[1] the case also considered the meaning of "unforeseeable ground conditions" and the judgment includes a useful summary of the position making reference to previous caselaw such as the *Obrascon* decision.

In short, the overall dispute concerned a biomass energy plant in North Wales that was never built. The contract was an amended version of the FIDIC Silver Book 1999 for EPC or turnkey projects and one of the many disagreements related to who was responsible for the risk of the asbestos which was found under the surface and which had to be removed to get planning permission finalised.

Sub-clause 4.10 of the contract provided that:

"4.10 Site data

Subject to Clauses 4.18 (Protection of the Environment) and 4.25 (Lease), the Parties acknowledge and agree that the Employer has made available to the Contractor for his information, prior to the date of execution of this Contract, all relevant data in the Employer's possession on subsurface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the date of execution of this Contract. The Contractor shall be responsible for interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data.

The condition of the Site (including Sub-Surface Conditions) shall be the sole responsibility of the Contractor and the Contractor is deemed to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may affect the Works, the remedying of Defects and the selection of technology and (save where otherwise set out in this Contract) the Contractor accepts entire responsibility for investigating and ascertaining the conditions of the Site including, without limitation, ground, load-bearing and other structural parts, suitability of the utilities and incoming services, hydrological climatic, access, environmental, weather and other general conditions and the form and nature of the Site including both natural and man-made conditions."

Whilst sub-clause 4.12 provided that:

"Except for Unforeseeable Difficulties and except as otherwise stated in the Contract:

(a) the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works;

(b) by signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works; and

(c) and subject to Clause 13 (Variations and Adjustments), the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs."

There was a disagreement between the parties about how the contract operated to transfer the risks associated with obtaining planning permission, but this article concentrates on the risk of the ground conditions and the discovery of asbestos, strictly, the second discovery of asbestos. The first discovery of asbestos by PBS was not due to any error or incompleteness in the reports and had not in fact caused critical delay.

As Mrs Justice Cockerill noted, the difficulty for PBS was that it had quite a lot of information prior to the contract as to the presence of asbestos. For example, it knew that there was asbestos disclosed by testing in just a few limited areas; and it knew from the trial pit results that this asbestos included bits which were deeper than 0.1 metres. PBS would need to say that the extent of the deeper asbestos was unforeseeable, even though the presence of some deeper asbestos was known about.

Helpfully, the Judge referred to previous decisions, in particular

the decision of Mr Justice Coulson in *Van Oord UK Ltd v Allseas UK Ltd*[2] and the Court of Appeal decision in *Obrascon Huarte Laine SA v Her Majesty's Attorney General for Gibraltar*[3] where Mr Justice Akenhead had refused a claim based on allegedly unforeseen ground conditions, saying that:

"I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise. In so doing not only do I accept the approach adumbrated by Mr Hall [the defendant's geotechnical expert] in evidence but also I adopt what seems to me to be simple common sense by any contractor in this field."

The Court of Appeal agreed:

"Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall."

This was exactly what had happened here. A contractor cannot rely on an argument claiming that the ground investigations were 100% accurate. In *Obrascon* there was fuller documentation than here indicating that contaminants had been identified which raised "a large flag" to an incoming contractor. However, Mrs Justice Cockerill said that in *Van Oord*, Mr Justice Coulson made a more general point that what matters is the information itself. Is the information such as to put a contractor on inquiry: "such that he can then only complain if what emerges is unforeseeable – in the light of what he does have".

Therefore it was not enough for PBS to point to the discovery of asbestos in more granular detail than previous reports had suggested. It had to show that the asbestos discovered was unforeseeable. This was something it could not do, even though a Geotechnics Report which referred to the discovery of asbestos was only disclosed after the contract was concluded. That report did not "come out of the blue". Pre-contract, PBS were informed about trial pit results. The Judge noted that the trial pit results were important, even though they represented a detailed investigation of ground conditions at various places across the site. This led to a clear analogy to *Obrascon: "this was not a case of asbestos being a possibility – it was clear that asbestos contamination was a reality, and potentially at some depth in some places, though the extent of the problem was not clearly delineated."*

Since ground conditions were at PBS's risk, it was for PBS to satisfy itself as to the state of play as regards asbestos. If there were public documents available these should have been taken account of. PBS had a good picture of the situation as regards the presence of asbestos on the site.

PBS further either chose not to, or were unable to, call evidence which, in the words of the Judge, "grappled with the detail of what was found". For example, there was no evidence as to what would, in accordance with "*Good Industry Practice*", have been foreseeable from the baseline of knowledge which PBS had. The asbestos discovered was not a new discovery, or different from what had been indicated by the previous findings, but simply a more detailed manifestation of what was shown by the earlier materials. It followed, therefore, that PBS had either actual or constructive knowledge of the asbestos prior to the Contract. It was not unforeseeable.

Under sub-cause 1.1.77 of the 2017 FIDIC Silver Book, unforeseeable is defined as meaning:

"not reasonably foreseeable by an experienced contractor by the Base Date".

There are a number of references to the "experienced" contractor in the 2017 Form, but there is no contractual definition of this phrase. It is therefore a question of fact. What would or should an experienced contractor have done in the particular circumstances. When it comes to tender documentation, the experienced contractor cannot simply rely on the information provided by others. In the *Obrascon* case, the English Court of Appeal, when considering the 1999 Yellow Book, noted that when assessing tender data:

> *"an experienced contractor would make its own assessment of all available data ... Clauses 1.1 and 4.12 of the FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information. The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable."*

Words any contractor in any jurisdiction should take on board.

Footnotes

1. [2020] EWHC 223 (TCC) (07 February 2020).
2. [2015] EWHC 3071 (TCC).
3. [2015] EWHC 3071 (TCC).

Prejudice without prejudice?

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Different jurisdictions apply different meanings to the words "without prejudice". A recent Scottish case, *Transform Schools (North Lanarkshire) Limited v Balfour Beatty Construction Limited*[1] and Balfour Beatty Kilpatrick Limited, provides a useful reminder of some key issues that often arise in the course of construction disputes, in particular in the context of enforcement of adjudicator's decisions arising from breach of natural justice. In this case, the focus was the admissibility or otherwise of without prejudice documents.

What was the case about?

Transform Schools (North Lanarkshire) Limited ("Transform") had engaged Balfour Beatty Construction Limited and Balfour Beatty Kilpatrick Limited ("Balfour Beatty") to perform construction work at various schools in North Lanarkshire, Scotland.

A dispute arose between the parties in relation to latent defects at one of the schools. The dispute was submitted for adjudication and found in favour of Transform. In the adjudication, Balfour Beatty's argument that the claim had prescribed (or that it was time barred under the principle equivalent to limitation, for those unfamiliar with the Scottish jargon) was rejected. The adjudicator concluded, with reference to a chain of letters between Balfour Beatty and Transform's solicitors, that the prescriptive period had been extended. Transform subsequently raised an action for enforcement of the adjudicator's decision, after Balfour Beatty refused to pay the award of approximately £4,000,000.

What were the parties' arguments?

Balfour Beatty opposed enforcement on the basis that the adjudicator had referred to certain letters which had been marked "without prejudice". Their argument was, broadly, that: (1) without prejudice correspondence was protected against use in the adjudication; (2) the adjudicator had relied upon the protected correspondence to a material extent in determining prescription; (3) the adjudicator's approach "offended against the public policy" underpinning without prejudice privilege (they argued that if parties could not enter into without prejudice settlement discussions without the risk of these being relied on in an adjudication, the process of adjudication would be "damaged"); (4) the adjudicator was guilty of a material error in admitting, considering and relying on the correspondence; and (5) the adjudicator's error amounted to a material breach of natural justice and/or the adjudicator's reliance on the without prejudice correspondence gave rise to apparent bias.

Transform submitted, with reference to the accepted principles that are applied in adjudication enforcement proceedings, that only in the plainest of cases would a challenge on the basis of breach of natural justice be successful, and even if the adjudicator had erred on law, there was no breach of natural justice in this case (as both parties had been given the opportunity to make representations in relation to the without prejudice material).

What was decided?

The court emphasised that it was only concerned with whether the adjudicator's decision should be enforced. The question of whether the without prejudice letters were actually admissible was a matter for the court to decide on final determination of the dispute.

The fact that the admissibility of the correspondence had been a central issue, and the way in which the adjudicator had dealt with it, led Lord Ericht to conclude that there had been no breach of natural justice by the adjudicator in considering and relying on the correspondence. The court enforced the adjudicator's decision.

The reasoning behind this was that the adjudicator had to decide whether or not Transform's claim had prescribed and, in order to do that, he had to decide whether or not the without prejudice letters were admissible. Only as a consequence of his decision that they were admissible, did he take them into account in deciding that the prescriptive period had

been extended. The adjudicator's approach had been to look at the correspondence as a whole, and greater weight had been given to letters which were not marked "without prejudice". Accordingly, the court confirmed that the adjudicator had been entitled to decide on the admissibility of the without prejudice correspondence.

Although the court did not consider whether the adjudicator had been right to conclude that the correspondence was admissible, it did confirm that if the adjudicator had been wrong, that would have been an error of law, and an error of law on the part of the adjudicator would not be grounds to refuse to enforce the decision. The court would be justified in refusing to enforce the decision if there had been a serious breach of natural justice. However, this was not the case. The question of admissibility was one which had to be decided as a central issue in the adjudication. The adjudicator had given both parties an opportunity to make submissions, on which he had made a reasoned decision. Lord Ericht concluded: "It cannot be said that the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias."

What can we learn from this case?

Well this will vary according to the jurisdiction. Scottish judgements are referred to in the English courts, so they have a persuasive authority:

- An adjudicator can rule on admissibility where the material is alleged to be without prejudice.
- The court will consider factors such as whether the admissibility of without prejudice documents was a central issue in the adjudication and the manner in which the adjudicator handled the issue when determining whether or not there has been a breach of natural justice or bias.
- The case also helpfully summarises the following established case law –
    - *Carillion Construction Limited v Devonport Royal Dockyard Limited*[2] on the principles to be applied in considering whether to enforce an adjudicator's decision;
    - *Rush and Tompkins Limited v GLC*[3] on the without prejudice rule governing the admissibility of evidence;
    - *Costain Limited v Strathclyde Builders Limited*[4] on the application of the principles of natural justice in the context of an adjudication;
    - *Ellis Building Contractors Limited v Goldstein*[5] on the relationship between without prejudice documents and the rules of natural justice.

England: what does the English case law say?

There have been various cases in the courts of England and Wales where it has similarly been argued that an adjudicator was biased because they were provided with without prejudice material and/or that their decision should not be enforced due to

breach of natural justice (requiring that every party has the right to a fair hearing by an impartial tribunal). However, an adjudicator's decision will not necessarily be biased or in breach of natural justice just because they saw or were made aware of without prejudice material.

In *Specialist Ceiling Services Northern Ltd v ZVI Construction (UK) Ltd*[6] the judge noted that the adjudicator was "unfazed by the knowledge that there had been without prejudice negotiations, because he not only expected them to occur, but in his experience offers were often made on a purely commercial basis in an effort to obviate the need for an adjudication". It follows that adjudicators will generally know that offers may be made for sound commercial reasons and do not necessarily indicate liability. Provided the adjudicator can remain uninfluenced and in effect put the without prejudice material out of his mind when reaching a decision, he should be able to proceed with the adjudication unbiased.

All the same, it is clear from *Ellis Building Contractors Ltd v Goldstein*[7] that the improper submission of without prejudice material might give rise to apparent bias and/or could render the adjudicator's decision unenforceable on the grounds of breach of natural justice. In this case, the TCC said bias must be assessed objectively and the test was whether "the material facts give rise to a legitimate fear that the adjudicator may not have been impartial". The court also sought to discourage parties from using without prejudice material in adjudications – it was clear on the facts that it was improper for without prejudice evidence to be put before the adjudicator, and, in the words of Akenhead J, "it is a practice that should be discouraged".

So whilst parties should not disclose without prejudice material to an adjudicator, they need not assume that doing so will automatically result in the decision being biased. The test is as set out in *Ellis* – there will be an objective appraisal of the material facts to assess whether there is a legitimate fear of adjudicator bias. It is also highly probable that the other party will simply ask the adjudicator to ignore the material if inadvertently submitted. The fact that adjudicators are commercially minded should mean that they are able to remain impartial. *Transform Schools* is persuasive authority (like many before it) that courts will look to see how the adjudicator handled the matter in determining whether there has been a breach of natural justice or bias.

The UAE: what if the without prejudice rule does not exist?

The concept of without prejudice is not recognised in certain jurisdictions, meaning material marked "without prejudice" which has been exchanged in an effort to settle could be used as evidence of admissions against the interest of the party that made them. The UAE is one such jurisdiction.

Adjudication has not been introduced by local legislation in the UAE, the main barrier to its acceptance as a method of dispute resolution being the lack of a statutory framework and recognised enforcement mechanism. However, dispute adjudication boards or DABs (tribunals of one or three qualified persons established under a contract to resolve disputes) are sometimes used in the region through the use of the FIDIC suite of contracts. These contain provision for disputes to be resolved by DAB prior to commencing arbitration proceedings.

The agreement between the parties and the adjudicator(s) will usually incorporate the General Conditions of the Dispute Adjudication Agreement contained in the Appendix to the FIDIC General Conditions, with such amendments as are agreed between the parties. The form in the Appendix provides that the agreement be governed by the law of whichever jurisdiction is selected. In the UK, this would mean that the dispute board would be bound to follow the rules of natural justice, and the concept of without prejudice would apply. In the UAE, however, the without prejudice rule would not apply, which poses difficulties if one or more party does not want the content of settlement negotiations to be disclosed. They would not be able to argue that the adjudicator's decision was tainted by bias as a result of them having seen the statements made in an attempt to settle.

This begs the question: what can parties operating under UAE law do to ensure that any without prejudice material is not relied upon in an adjudication? First, it would be wise not to document any settlement negotiations in writing. It may also be preferable for the parties to enter into a formal agreement before the project starts, which provides that they cannot later refer to without prejudice material (or material marked as "confidential" as confidentiality is an accepted principle in the UAE) in the event of a dispute, without the consent of the other side.

Footnotes

1. [2020] CSOH 19.
2. [2006] BLR 15.
3. [1988] UKHL 7.
4. 2004 SLT 102.
5. [2011] EWHC 269 (TCC).
6. [2004] BLR 403.
7. [2011] EWHC 269 (TCC).

International Quarterly is produced quarterly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. International Quarterly is a newsletter and does not provide legal advice.

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