FENWICK ELLIOTT

The construction & energy law specialists

Issue 29 - July 2020

International Quarterly

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 29

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Our latest IQ features two cases from the UK courts which highlight issues important to International Arbitration and projects.

Lyndon Smith considers whether a claimant was entitled to recover costs following an arbitrator's withdrawal from a London Court of International Arbitration ("LCIA") case. Then, Jesse Way looks at the duties of experts. 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. The TCC had to decide whether to continue an interim injunction which had been obtained to prevent the expert firm from acting for the third party, saying that continuing to do so, would be a breach of the firm's fiduciary loyalty to the claimant.

We could not ignore the ongoing COVID-19 pandemic. Nicholas Gould and Sana Mahmud look at projects in India, whilst Sam Thyne reviews the situation in Singapore.

Finally, in the UK, at the beginning of June 2020, the UK BIM Framework published a new template Information Protocol which is designed to conform with the (relatively new) international standard BS EN ISO 19650-2 (which deals with the delivery phase of assets). This is potentially a very important development and I review some of the key features of the new Protocol.

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. We have advised on major projects located in the UK, Africa, Asia, India, CIS, Caribbean, Europe, the Middle East, South Africa and Turkey. As well as offering project support, contract and documentation, dispute avoidance and dispute resolution services, we have extensive experience in handling arbitration proceedings whatever the jurisdiction or region.

Reflecting the importance of the Middle East market for our firm, we opened our first office in the region in 2015, in Dubai, UAE, headed by Ahmed Ibrahim. The office continues to build on our many years' experience advising clients on construction and energy projects in the region. Fenwick Elliott lawyers are construction and energy law specialists and what sets us apart is the unique combination of extensive knowledge of local laws and court practices in Arab countries, together with our highly regarded international construction law expertise.

DRBF Board appointments

In May, Nicholas Gould was named President Elect of the DRBF Executive Board of Directors whilst Jeremy Glover, was elected President Elect of the DRBF Region 2 Board of Directors. The DRBF is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide through the use of Dispute Boards.

Webinars

Throughout the year Fenwick Elliott host a range of construction law focused seminars and conferences in London and Dubai. In light of Covid-19, we have adapted our seminar and conference programme into a virtual series of webinars covering a range of topics including: 'the differences in payment provisions and practices between the Middle East Civil Codes and the English common law', 'practical tips for putting claims together', 'virtual hearings and mediations: the future of dispute resolution' as well as a look at the new BIM information Protocol which is the subject of one of our articles in this Edition.

To find out more and register for an upcoming webinar click here. You can also watch a webinar that has already taken place— on-demand – by clicking here.

A number of our expert lawyers are also regularly invited to speak to external audiences about industry specific topics including FIDIC and BIM. On Wednesday 10 June, Ahmed Ibrahim moderated the panel at the Dubai International Arbitration Centre's (DIAC) webinar. The webinar focused on the impact Covid-19 has had on arbitration and the inevitable challenges faced by arbitration stakeholders and practical considerations to overcome the challenges.

On Tuesday 16 June Fenwick Elliott partners, Nicholas Gould and Jeremy Glover presented a mock NEC4 ECC adjudication workshop on day 2 of the NEC Users' Group Online Conference 2020. Delivered virtually, their session focused on the contractor's claim for additional payment, time and relief against liquidated damages.

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

An expert's fiduciary duty of loyalty to their client - A v B [2020] EWHC 809 (TCC)

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In this case, the claimant sought continuation of an injunction restraining the defendant from acting as experts for a third party in an ICC arbitration against the claimant. The case is important because it clarifies the duty owed by experts to their clients.

The claimant was a developer of a petrochemical plant ("the Project"). The claimant engaged the first defendant (in Asia) to provide expert services with respect to an arbitration commenced by a contractor known as "the Works Package Arbitration" relating to the Project. The first defendant's scope of works included identifying and analysing delay events and the root cause for the delays. In the Works Package Arbitration, the contractor claimed additional costs by reason of delays to its work, including the late release of Issued For Construction ("IFC") drawings. The IFC drawings were produced by the third party and the claimant's position was that to the extent it was liable to pay the contractor any sums due to the late release of IFC drawings, these costs would be passed on to the third party.

The first defendant (in Asia) started work on the Works Package Arbitration from June 2019.

In the summer of 2019, the third party (producer of the IFC drawings) commenced arbitration proceedings against the claimant, known as "the EPCM Arbitration", relating to the Project. In October 2019, the third party approached the defendants to provide quantum and delay expert services (outside Asia) in connection with the EPCM Arbitration (bearing in mind in the Works Package Arbitration the third party's release of the IFC was in issue).

In other words, the third party had approached the defendants to provide expert services (outside Asia) against the claimant in the EPCM Arbitration in circumstances where the defendants were already providing expert services (in Asia) for the claimant in the Works Package Arbitration.

A representative of the first defendant contacted solicitors for the claimant regarding the approach from the third party, stating there was no "strict" legal conflict on the basis that the third party's contract with the claimant was for EPCM works, the first defendant's engagement was in relation to evaluation of delays on the construction subcontract for non-process buildings, the work would be done in two separate offices, and the firm had the ability to set up physical and electronic separation between the teams. The claimant's solicitors disagreed during a telephone conversation, after which the representative of the first defendant sent an email stating "*We've had an internal discussion at length and do not consider it to be a true conflict. I can explain more on a phone call, if need be.*" There was no further discussion of the issue.

It later came to light that an expert of the defendants was acting for the third party in the EPCM Arbitration. After exchanges of correspondence between the parties, the claimants made an urgent *ex parte* application to the Court and an interim injunction restraining the defendants from acting for the third party in the EPCM Arbitration was granted. The Court then had to consider in this case whether the injunction should be continued.

The issues before the Court were:

- whether the Court had jurisdiction to deal with the application on its merits and, if so, whether it should exercise such jurisdiction;
- whether independent experts, who are engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to expert evidence, can owe a fiduciary duty of loyalty to their clients;
- whether, on the evidence before the Court, the claimant was entitled to a fiduciary obligation of loyalty from the first and/or second and/or third defendants;

- whether there has been, or may be, a breach of any duty of loyalty or confidence;

- if so, whether the Court should exercise its discretion and grant the injunction.

The Court was satisfied it had jurisdiction and determined it would exercise its jurisdiction to determine the application. Its reasons included the fact that the second defendant was domiciled in England and subject to the Courts of England and Wales, and that the claimant would obtain permission to serve proceedings on the other defendants under CPR 6.36 relying on grounds 2, 3 and 6(c) of paragraph 3.1 of Practice Direction 6B. The defendants challenged the exercise of jurisdiction, relying on the exclusive jurisdiction agreement in a confidentiality agreement between the parties which provided that the Courts of the Abu Dhabi Global Market would have exclusive jurisdiction. This was rejected on the basis that the claimant's claim for relief was based on rights arising not from the confidentiality agreement but from the contract of engagement.

As to the fiduciary duty, it was the claimant's case that the engagement of the defendants to provide expert services gave rise to a fiduciary duty of loyalty and that the defendants were in breach of that duty by providing expert services to the third party where there was a conflict or potential conflict of interest. The defendants' position was that independent experts do not owe a fiduciary duty of loyalty to their clients as it is excluded by the expert's overriding duty to the tribunal. The Court referred to Bristol & West *Building Society v Mothew* [1998] Ch 1 (CA), where it was stated:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; … he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal …

A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other … This is sometimes described as 'the double employment rule'. Breach of the rule automatically constitutes a breach of fiduciary duty …"

The Court referred to other authorities and summarised the general principles to be taken from them, stating:

"i) In principle, an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party: Harmony Shipping.

ii) When providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a

way which does not advance the client's case: Jones v Kaney.

iii) Where no fiduciary relationship arises, having regard to the nature and circumstances of the expert's appointment, or where the expert's appointment has been terminated, the Bolkiah test based on an ongoing obligation to preserve confidential and privileged information does not necessarily apply to preclude an expert from acting or giving evidence for another party: Meat Traders; A Lloyd's Syndicate; Wimmera."

The Court said that none of the authorities cited by the defendant supported their proposition that an independent expert does not owe a fiduciary obligation of loyalty to his or her client. The Court also clarified the duty owed by independent experts, stating:

"As a matter of principle, the circumstances in which an expert is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. As explained by Lord Phillips in Jones v Kaney, the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court."

In this case, the Court found that there was a clear relationship of trust and confidence such as to give rise to a fiduciary duty of loyalty. This was because the first defendant was engaged to provide expert services in the Works Package Arbitration. This included an expert report, complying with the ClArb Expert Witness Protocol and, furthermore, providing extensive advice and support throughout the arbitration proceedings.

The Court confirmed that where a fiduciary duty of loyalty arises, it is not limited to the individual (i.e. the individual expert) but extends to the firm or company and the wider group. The Court accepted that in this case the duty of loyalty was owed by the whole of the defendant group because (1) the first and second defendants were wholly owned subsidiaries of P Inc; (2) P Inc and the third defendant were owned in part by individual shareholders and in part by Q LLC; (3) there was a common financial interest by Q LLC and the unnamed shareholders in the defendants; and (4) the defendant group was managed and marketed as one global firm.

The Court then turned to the issue of whether there was a breach of that duty of loyalty. Whilst the defendants focused on the separation of the defendants as commercial entities, as well as physical and ethical screens, the Court stated that:

"... that addresses the risk that confidential information might be shared inappropriately. As clarified in the hearing, the claimant's application is no longer based on the preservation of confidential information but on the obligation of loyalty. The fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and his interest may conflict." (emphasis added)

The first defendant had been advising the claimant in defending the contractor's claims in the Works Package Arbitration which included advising, analysing and giving opinions on the cause of the delays. In the EPCM Arbitration, the claimant sought to pass on to the third party any claims due to the late release of the IFC drawings. The arbitrations were concerned with the same delays and issues. In those circumstances the Court held there was clearly a conflict of interest for the defendants acting for the claimant in the Works Package Arbitration and against the claimant in the EPCM Arbitration.

The Court ultimately concluded that the injunction should be continued, stating:

"i) The defendant group owes a fiduciary duty of loyalty to the claimant arising out of its engagement to provide expert services in connection with the Works Package Arbitration.

ii) The defendant group is in breach of that fiduciary duty of loyalty by accepting instructions to provide expert services in connection with the EPCM Arbitration.

iii) Pending trial of this matter, the claimant is entitled to a continuation of the interim injunction to restrain the defendants from providing expert services to the third party in connection with the EPCM Arbitration."

The decision is very relevant to those in the construction industry. Major construction disputes often involve an international element and almost always involve the appointment of experts in quantum, delay and other disciplines. Given the globalised nature of expert services firms, the decision provides useful guidance as to when those firms can be appointed as experts on projects where they may be asked to provide expert services for parties involving multiple tiers of disputes.

A novel approach to addressing the novel Coronavirus – Singapore's approach to contracts under COVID-19

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When measures to combat the COVID-19 pandemic began to escalate across the world the sound of thousands of bottom drawers opening in unison could be heard as construction contracts were recovered from their hiding places and dusted off. The relief construction contracts can provide is dependent on many variables and can leave parties with a huge amount of uncertainty – and with uncertainty comes cost. In a novel step to mitigate this uncertainty, the Government of Singapore has passed legislation that temporarily grants relief to contracting parties impacted by the COVID-19 pandemic which, for the most part, makes parties' entitlement much clearer.

Many construction projects have been hit hard by the COVID-19 pandemic. Efforts to quell the spread of the virus have had the side-effects of disrupting supply chains, limiting working hours, lengthening programmes (by the need to account for social distancing requirements), along with myriad other issues great and small that have left contractors staring at completion dates they have little hope of meeting.

Uncertain relief under construction contracts

This has had contractors turning to their contracts to understand their entitlements to relief. In common law countries in particular, the contract is king. Contractors are therefore reliant on their contracts containing provisions granting relief for force majeure events. In some circumstances, contractors may even be able to claim for additional costs where a change of law can be demonstrated to have escalated construction costs.

However, relief under force majeure or change of law provisions is highly dependent on a number of factors:

- First, they must be included in the contract, as without a contractual entitlement, contractors operating within common law jurisdictions are left with far fewer options.

- Whether the COVID-19 pandemic amounts to a force majeure event will also depend on the exact contract wording. While many force majeure clauses broadly define force majeure as a set of circumstances, others provide a prescriptive list of events – as such it is not a given that the COVID-19 pandemic may be considered a force majeure under every contract.

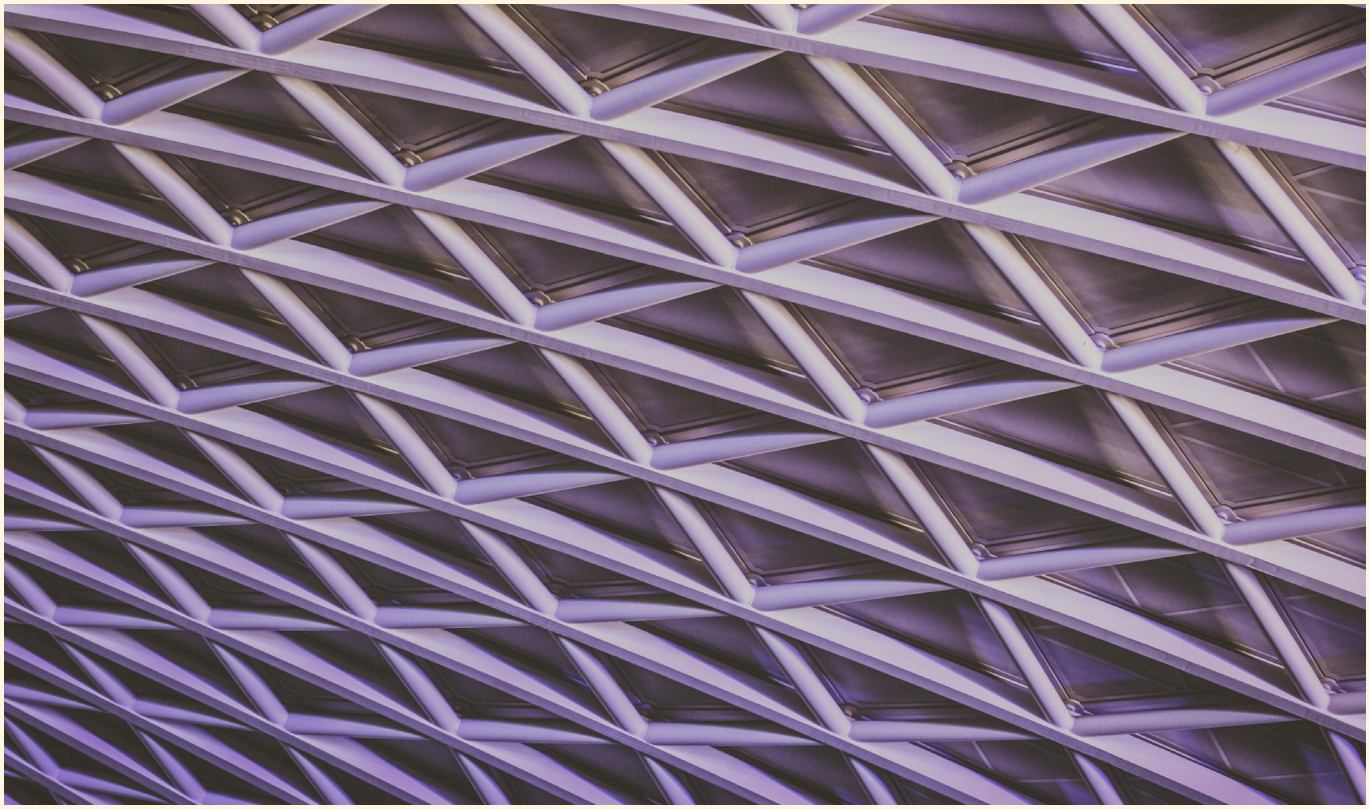
- Additionally, the exact wording of the contract, and the conduct of the government within a jurisdiction, will be relevant in ascertaining whether there is relief under the contract. For instance, there may be questions as to whether government "guidance" amounts to a change in law, which will depend heavily on the contract wording and how that "guidance" has been implemented.

The approach in Singapore

While many scrambled to determine whether their contract would grant relief, contractors in Singapore received a degree of comfort when the COVID-19 (Temporary Measures) Act 2020 (the "Act") was passed on 7 April 2020.

The Act is designed to provide temporary relief to contracting parties who, due to COVID-19, are unable to meet their contractual obligations. The Act applies where a party to a scheduled contract (which includes construction contracts) that is entered into or renewed before 25 March 2020, is unable to perform an obligation in a contract on or after 1 February 2020.

The inability to perform the obligations must be, to a material extent, caused by a COVID-19 event. A COVID-19 event is defined broadly as:



"the COVID-19 epidemic or pandemic; or

the operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19."

The definition includes issues that a party to a contract may encounter due to the laws of other countries, which would be very useful in circumstances where a party is delayed by suppliers or where personnel are unable to travel due to COVID-19 measures.

In order to get protection under the Act, a party must first serve a notice in accordance with the Act. Once this is done (despite anything at law or in the Contract), the other party must not take certain actions.

The prohibited actions include (but are not limited to):

- the commencement or continuation of court or arbitral action/proceedings against the party serving the notice or their guarantor or surety;
- the enforcement of any security over any immovable property or movable property used for the purpose of a trade, business or profession; and
- taking certain insolvency actions including an application to approve a creditors' compromise or arrangement, an application for judicial management, an application for winding up, an application for bankruptcy, and the appointment of a receiver or manager.

The Act also includes additional relief for construction and supply contracts specifically. There is a limitation on calling on performance bonds and, crucially, a moratorium on calculating liquidated damages in the prescribed period, where the delay is caused by a COVID-19 event. The prescribed period referred to is an initial six-month period that commences 20 April 2020.[1]

In respect of liquidated damages the Act provides that, despite anything in the contract, for the purposes of calculating the liquidated damages payable under the contract or assessing other damages in

respect of an inability to perform a contractual obligation due to a COVID-19 event, where the inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, any period for which the inability subsists and falls within that period is to be disregarded in determining the period of delay.

The Act further provides that a COVID-19 event will be a defence to any breach of contract claim if it is the reason for the inability to do something.

Assessor regime

One area of the Act which requires further scrutiny is the provisions relating to assessors. To accompany the request for relief, the Act includes a system where, if a notification for relief is served, a party may dispute the non-performing party's entitlement to relief.

The Act introduces an inbuilt dispute mechanism where the assessors determine whether a party does fall within section 5 of the Act – i.e. whether their non-performance was in fact due to a COVID-19 event.

Regulations have been issued that flesh out the assessment process including details of how notices are to be served, how hearings are to be conducted, and the qualifications required to be an assessor.[2] To be an assessor you must be a lawyer, public accountant, or chartered account with at least three years' experience, or have at least three years of working experience in or relating to law, accountancy, finance, business management, building and construction, or architecture.

At first glance the assessor's powers appear to be limited to determining this threshold question alone. However, the assessors are given wider-ranging powers pursuant to section 13(3) which states that:

"... the assessor may make further determinations in order to achieve an outcome that is just and equitable in the circumstances of the case, including (but not limited to) —

requiring a party to the contract to do anything or pay any sum of money to discharge any obligation under the contract ..."

While the Act generally appears to be directed at granting no-fault temporary relief of contractual obligations, it does contain an ability for assessors to grant wide-ranging relief including ordering the payment of money. What makes this unfettered ability more concerning is that there is no appeal against an assessor's determination.

To compound this problem, the Act provides that in proceedings before an assessor, no party may be represented by an advocate or solicitor, and that each party must bear their own costs for the proceedings.

In making its determination, the assessor may take into account the ability and financial capacity of the party concerned to perform the obligation that is the subject of the application, along with other prescribed factors, and must seek to achieve an outcome that is just and equitable in the circumstances of the case.

There are financial penalties for failing to comply with a determination, being a S$1,000 fine. Further, a determination can be enforced as a judgment in court.

The processes of having claims determined by assessors raises many questions, most concerning of which being the ability to order the payment of sums to discharge obligations under the contract. While we do not think the intention of the Act is to allow an assessor to make substantive determinations on the merits of a complex construction dispute, the wording of the Act appears to allow for this.

The Act is a novel way of addressing the commercial ramifications of the COVID-19 pandemic. There are sure to be many contractors grateful that there is an avenue to relief from liquidated damages, particularly those who did not have provisions in their contract that would grant it. Conversely, others may see this as a step too far in interfering in the contractual obligations between parties, which are typically seen as sacrosanct.

Regardless of philosophical stance, the Act goes a long way in providing certainty, something desperately sought in the current tumult. With certainty, transaction costs associated with arguing over whether a contract provides relief can be mitigated and parties can focus their attention on moving forward.

Footnotes

1. COVID-19 (Temporary Measures) (Prescribed Period) Order 2020

2. COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020.

The impact of COVID-19 on projects in India: a FIDIC perspective

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Measure imposed by the Indian Covernment

India recorded its first case of COVID-19 on 30 January 2020. On the same day, the WHO declared COVID-19 an international public health emergency[1].

The Indian government imposed nationwide lockdown measures from 22 March 2020, initially for 21 days under section 6(2)(i) of the Disaster Management Act 2005. Local state authorities were given powers under Section 2 of the Epidemic Diseases Act 1897 to enforce temporary restrictions on the movement of people and non-essential businesses to prevent the spread of COVID-19. Air, road and rail transport systems were also suspended. On 24 March 2020, the Ministry of Home Affairs issued an order setting out guidelines for the lockdown and restrictions on movement of people and the closure of non-essential businesses[2].

Lockdown measures were extended on 14 April 2020 and again on 18 May 2020, but India has since seen a gradual relaxation of restrictions across national districts. Construction activity has been permitted since 20 April 2020[3], although with some important qualifications. Government guidelines state that all construction activities in rural areas can resume, however, projects within the limits of a municipal area can resume only if labour is readily available on site. Workers cannot be brought in from elsewhere. The movement of materials by road is allowed, however, local authorities may still impose restrictions.

Claims for extensions of time and cost under FIDIC Contracts

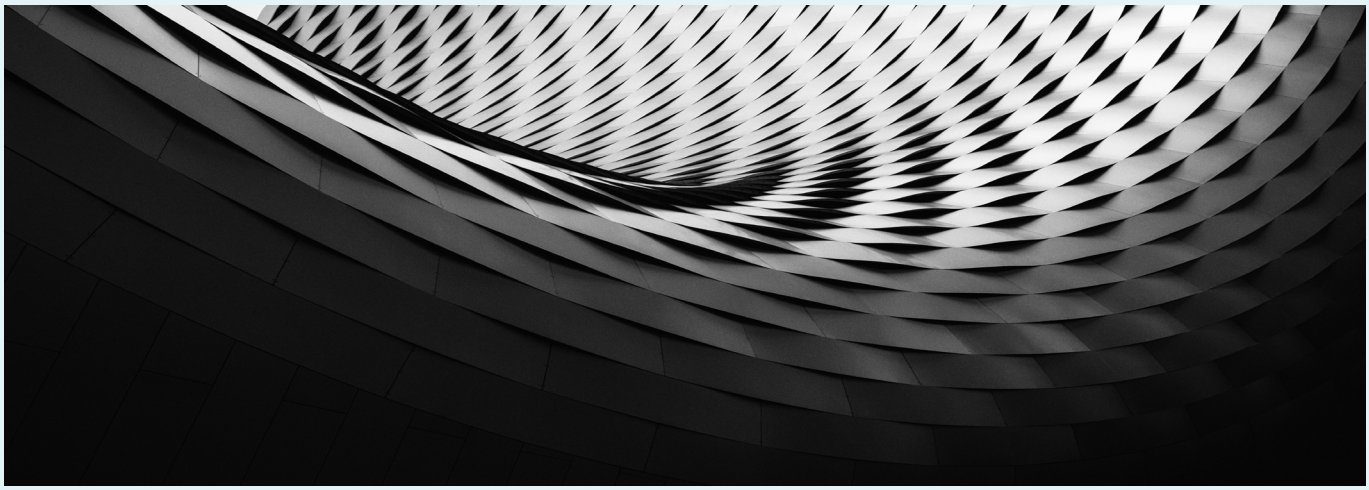
As a result of COVID-19 related restrictions imposed by national and local governments, projects in India, as elsewhere, have faced issues such as labour, materials and plant unavailability, disruption of international supply chains and severe financial pressure. Parties will eventually need to resolve disputes arising out of these issues under the terms of their contracts. The focus for contractors will be on claims for extensions of time and additional costs.

Does COVID-19 qualify as Force Majeure or an Exceptional Event?

The 2017 edition of the FIDIC Rainbow Suite replaced the term "force majeure" with "exceptional event". A "Force Majeure" event under the previous Clause 19 or "Exceptional Event" under the new Clause 18 must be an event or circumstance which:

- is beyond a Party's control;
- the Party could not reasonably have provided against before entering into the Contract;
- having arisen, such Party could not reasonably have avoided or overcome; and
- is not substantially attributable to the other Party.

The FIDIC Conditions of Contract set out a non-exhaustive list of events or circumstances which may be classed as force majeure. Pandemics or epidemics are not specifically included, however, COVID-19 is likely to be classed as a force majeure or exceptional event because it arguably still falls into the above four criteria.



A contractor may be able to claim relief under the Exceptional Event / Force Majeure provisions for as long as it can show that measures put in place by the Indian government made it impossible for it to carry out the works. This would be the case for as long as there was a ban on construction activities. It will be harder to argue that carrying out the works is impossible after restrictions were eased to allow work to continue with certain caveats. Maintaining an uninterrupted Exceptional Event or Force Majeure claim after 20 April 2020 might be problematic because whilst the caveats make carrying out work more difficult, it may not be impossible.

How can a contractor claim its costs?

A successful claim under the above provisions allows for the suspension of both parties' obligations for as long as the force majeure or exceptional event persists. Provided a contractor has used all reasonable endeavours to mitigate any delay caused by the impact of COVID-19 and complied with relevant notice obligations, it will be entitled to an extension of time. Entitlement to additional cost, however, is less straightforward. Under both the 1999 and 2017 forms, a contractor can only claim costs for man-made events such as war and hostilities, rebellion and terrorism, riot or strike and "munitions of war", and not for natural disaster or epidemics.

However, alternatively, 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 unforeseeable shortages in the availability of personnel or goods caused by an epidemic. India's COVID-19 measures led to the shutdown of construction sites and even where measures have now been eased, restrictions on labour remain. A contractor must be able to prove that the shortages were unforeseen and that they caused delay. There is no allowance for cost directly under these sub-clauses either, but it would be prudent for a contractor to submit a claim for prolongation costs at the same time as submitting its EOT claim under Sub-Clause 20.1.

Another option under the Red Book may be a claim under Sub-Clause 8.5 of the 1999 form or Sub-Clause 8.6 of the 2017 version. A contractor can claim an extension of time for delays caused by public authorities. It is arguable that the temporary restrictions imposed by local and national authorities in India will have caused delay or disruption. A contractor must have diligently followed any procedures laid down and show that the delay or disruption was unforeseeable.

Finally, under Sub-Clause 13.6 of the 2017 forms and 13.7 of the 1999 forms, a contractor can seek an adjustment of the Contract Price if there has been a change of law which has affected the performance of the works and led to an increase in the Contract Price. As noted above, the Indian government has enacted specific legislation and local authorities have issued official guidance in response to COVID-19. The definition of a change in law in these sub-clauses is a wide one and would likely encompass statutes and official guidance. These provisions may also allow a contractor to claim costs after the easing of restrictions if the applicable legislation or guidance still contained caveats that directly affected a contractor's ability to carry out its works.

Conclusion

The recent easing of restrictions in India has unfortunately led to a spike in cases, which has meant the reintroduction of lockdown measures in certain states. Going forward, it is likely that national and local governments in India will continue to reimpose restrictions in areas where infections rise and that consequently, contractors will continue to face uncertainty for the foreseeable future. In these difficult times, it is of paramount importance that contractors continue to submit relevant notices and claims on time and in accordance with their contracts.

Footnotes

1. https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19
2. Ministry of Home Affairs Order No.40-3/2020-D dated 24 March 2020
3. https://www.bloombergquint.com/coronavirus-outbreak/government-allows-construction-sector-to-resume-work-with-caveats

The possibility of costs awards against arbitrators: a claimant's application to recover costs following an arbitrator's withdrawal

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The recent case of C *Ltd v D and X* [2020] EWHC 1283 (Comm) (21 May 2020) considered whether the Claimant ("C") was entitled to recover costs following an arbitrator's withdrawal from a London Court of International Arbitration ("LCIA").

C argued that in reaching a decision on its application for interim relief, the arbitrator and second defendant ("X") failed to treat C fairly and impartially. C highlighted X's lack of experience in sitting as an arbitrator; something which C believed was not clear from X's curriculum vitae ("CV").

C applied to have X removed under section 24 of the Arbitration Act 1996 (Power of a Court to remove an Arbitrator). C also made a complaint to the Solicitor's Regulatory Authority ("SRA"). This ultimately led to X resigning on the basis that X's position had become untenable.

Following on from this, C was of the view that it should not be liable for the costs of the application and therefore made an application to the Court for X and the First Defendant ("D") to pay the costs of C's section 24 application. (note: X was the Second Defendant).

Background

C and D are both companies which carry out activities with philanthropic aims. C designs software and has created a mobile software application and database for use by refugees to help them identify and locate support services. D is a non-profit organisation which seeks to find and protect lost, abducted and displaced children.

C and D entered into a licence agreement on 29 August 2017 whereby C licensed a platform to D for it to be adjusted so as to make it more user-friendly to children. D secured a large grant (around €1.3m) to pursue the configuration. However, shortly after the release of the modified application, D sought to terminate the licence agreement for reasons that C maintained were unjustified. Following failed attempts to mediate, C commenced an arbitration in which it sought (i) the balance of the fee under the licence agreement (€51,061.81), (ii) damages (in the region of €115,000) and (iii) a declaration that the intellectual property of the modified application belonged to C.

C applied to the LCIA to appoint an arbitrator on an expedited basis. The LCIA appointed X on 29 November 2018 and X's CV was provided to the parties with the Notice of Appointment.

X had 35 years of experience as counsel, solicitor and mediator in commercial disputes, including LCIA proceedings. It was common ground that the LCIA was aware that X had not been appointed as an arbitrator in an LCIA arbitration prior to this appointment and it was X's position that the appointment had been accepted because of X's considerable expertise as a mediator and familiarity with the specialist subject matter of the claim.

X's CV set-out, what were termed: "*Examples of cases X has been involved with either as counsel or Arbitrator include...*"

Neither party to the arbitration challenged X's appointment at the time, nor were they involved in X's selection or appointment.

C made an application for interim measures and a hearing took place on 8 March 2019 but the application was dismissed by X.

C had concerns about X's treatment of its submissions and filed a challenge ("the first challenge") with the LCIA Court, complaining that X had failed to treat the parties fairly and impartially and that this might have arisen due to X's lack of experience as an arbitrator.

X responded refuting the claims and refused to resign. X refuted the allegations of bias or impartiality and pointed out experience in LCIA arbitrations as counsel, and

concluded by referring to the fact that their CV had been provided to the parties on appointment and there were no objections made at that stage.

C was surprised that X's response did not mention any experience as an arbitrator other than referring back to their CV and after enquiring with the LCIA, it was confirmed to C that X had not been appointed as an arbitrator in other LCIA arbitrations.

C filed a further challenge ("the Second Challenge") with the LCIA Court on 7 May 2019 alleging that X's response to the First Challenge gave rise to justifiable doubts as to their independence and impartiality and, further, that X had made an allegedly false or misleading statement regarding their experience on their CV.

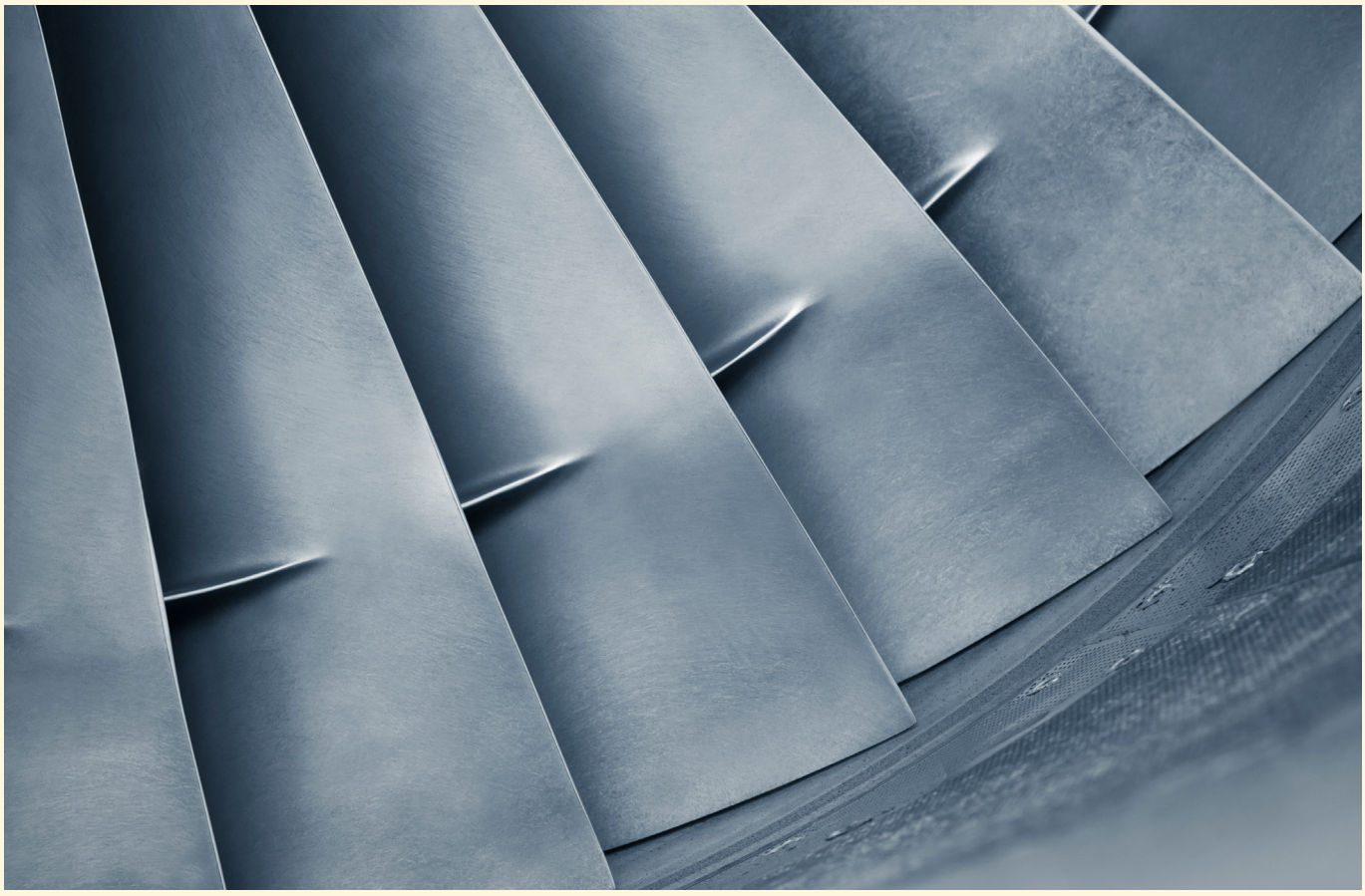
On 27 June 2019, the former Vice-President of the LCIA Court, Professor John Uff QC, considered and rejected the First and Second Challenges. He concluded that C was already on notice of X's lack of experience from the date of X's appointment or shortly thereafter and the question of whether X had ever sat in a non-LCIA arbitration was one which had occurred to or should have occurred to C. The challenge was therefore out of time. It was also inexplicable why the matter was not pursued as soon as X was appointed and, finally, the appointment of arbitrators was a matter for the LCIA Court who can be expected to investigate the arbitrator's general experience and specific experience in arbitration matters.

Undeterred, C issued a claim on 12 July 2019 for an order under section 24 of the Arbitration Act 1996 to remove X from the arbitration proceedings and requested that X should not be entitled to be paid any fees. C also sought an order against D for the costs of the application and of the arbitration proceedings.

X and D indicated their intention to contest the claim.

In October 2019 D agreed to X being removed as arbitrator but on the condition that no order be made as to costs and that the resignation should not affect or provide a basis for challenging the decisions X had made to date or procedural steps already performed.

C declined to accept D's offer that there should be no order as to costs of the section 24 application and made a counter-offer to settle the entire arbitration.



In January 2020, C's solicitors made a report to the SRA in respect of the same matters arising out of the section 24 application. This led to X's resignation on the basis that their position as arbitrator was no longer tenable.

In April 2020, C made an application that X and D pay the costs of the section 24 application.

Applicable principles

Costs when matters are resolved prior to trial

Under Rule 44 of the Civil Procedure Rules ("CPR"), the costs payable by one party to another are at the discretion of the Court, with the general rule being that the unsuccessful party will be ordered to pay the costs of the successful party, although the Court may make a different order.

In deciding the decision regarding what order, if any, is made about costs, CPR 44.2(4) provides that the Court must have regard to all the circumstances including conduct of the parties and whether a party was partly successful.

R (Boxall) v London Borough of Waltham Forest [2001] 44 CCLR 258 (cited by Sedley LJ at paragraph 23 in *Members v London Borough of Southwark* [2009] EWCA Civ 594) provides the following additional guidance by stating that Courts have the "*power to make a costs order when the substantive proceedings have been resolved without a trial ..... there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion ..... in the absence of a good reason to make any other order the fall back is to make no order as to costs*".

Lord Neuberger in *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607 made the point that when parties settle all issues in a dispute except for costs, "*the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs*" (paragraph 47). However, Lord Neuberger then went on to refer to three different categories of cases relating to costs where proceedings were resolved without trial, as set-out by Chadwick LJ in *BCT Software Solution Ltd v C Brewer & Sons Ltd* [2004] FSR 9, and that with regard to the third category, there was a powerful argument that the default position should be no order for costs although in some cases it may well be sensible to look at the underlying claims and consider who would have won if the matter had not settled.

This approach has since been followed in *Emezie v Secretary of State for the Home Department* [2013] 5 Costs L.R. 685 in which Sir Stanley Burnton said, referring to *R (M) v Croydon, "The starting point now is whether the claimant has achieved what he sought in his claim"* (paragraph 4).

Costs awards against arbitrators

Section 29(1) of the Arbitration Act 1996 provides that, absent a finding of bad faith, "*an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions*".

In *Cofely v Bingham* [2016] EWHC 240 (Comm), the Court removed Mr Anthony Bingham as arbitrator after he had responded inappropriately to enquiries about his connections with a party's solicitor. The Court exercised its discretion by ordering that both defendants (including Mr Bingham as arbitrator) should be liable for Cofely's costs, other than the cost of the application notice and the supporting witness statement.

Therefore, in principle, it is correct that section 29 does not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application that has been opposed. Nonetheless, costs awards against arbitrators are extremely rare. *Cofely* itself is an exceptional case where the Court found the arbitrator to have been accepting repeat instructions from a party, amounting to a significant proportion of his business, and that his response to the claimant's attempts to establish the facts as to his relationship with that party were aggressive and hostile.

Discussion

Successful party

C argued that it was the successful party in the proceedings against both X and D. It submitted, among other things, that:

- given the resignation of X, C had secured the outcome it had sought;
- D was an unsuccessful defendant. It contested the Second Challenge that was made to the LCIA Court and filed an Acknowledgement of Service indicating an intention to contest the section 24 application and then fought on until X conceded their position;
- the Court should not look behind the stark result of X's resignation and cannot hope to know the details of X's motivations for resignation; the result speaks for itself;
- the SRA referral was no barrier to the Court resolving the section 24 application and there was no need for X to resign before the section 24 hearing took place.

Notwithstanding this submission, the Judge did not accept C's submission that it was the successful party. The mere fact that X retired as arbitrator clearly cannot of itself mean that C should be treated as the successful party as against X and D for costs purposes. Some regard, therefore, had to be given to the reasons for retirement and the evidence indicated that X retired in the light of C's referral to the SRA and not because of the section 24 application or its perceived merits. Prior to that, X had opposed the

section 24 application. The position only changed after C's referral to the SRA in January 2020. This represented a significant escalation of the matter. An SRA investigation could reasonably be expected to take a year or more to resolve and be demanding and stressful during this time. There was no assurance that the Court's decision on the section 24 application would resolve the matter and sitting as an arbitrator during an ongoing SRA investigation could also have created a reasonable perception of bias.

The Judge was also of the view that the tone of C's referral to the SRA was more that of a direct attack on X rather than a neutral report. It was therefore entirely unsurprising that X came to the conclusion that it would be inappropriate to continue as arbitrator in light of C's evident approach towards X and the potential of a burdensome and long-running SRA process in parallel with the arbitration.

For these reasons, the Judge concluded that C was not to be regarded as the "*successful party*" for costs purposes as against either X or D. Also, D played no part in X's resignation and therefore could not be regarded as having conceded the claim.

Merits of the section 24 application

This case came closest to the third category referred to by Lord Neuberger in *R (M) v Croydon* (paragraph 60) where the natural starting point was that there should be no order for costs, unless it was clear who would have won the case had gone to trial. Here the Judge considered that it was likely C would have lost the section 24 application.

In considering C's section 24(1)(a) claims about doubts as to X's impartiality, the Judge made reference to case law on the test for bias.

The facts were that X had told the LCIA at the outset that they had no prior experience sitting as an arbitrator, and with regard to X's CV, C could not have been misled for the simple reason that following the expedited appointment of a tribunal, at C's request, X's lack of experience as an arbitrator would not have provided any ground on which C could have challenged X's appointment.

The Judge therefore concluded that any cause for complaint on C's part about X's CV and background (i) would not have provided any justifiable doubts about X's impartiality and (ii) would not have amounted to a failure by X "*properly to conduct the proceedings*" and, in any event, would not have caused substantial injustice to C.

For these reasons, the Judge concluded that it could not be tolerably clear that C's section 24 challenge would have succeeded. Indeed, it was far more likely to have failed.

Attempts made to settle the case

With regard to the settlement offers made by both D and X, to settle with parties bearing their own costs, the Judge found these to be reasonable offers which, at least given the outcome of the section 24 application, could now be seen to be offers that ought to have been accepted.

It was unfortunate that C pursued the application, incurring ever-increasing costs.

Conclusions

For the reasons set out above, C's application for costs failed. C was not the "*successful party*" as against either D or X and it was not clear that C would have succeeded in its section 24 application. Rather, it was likely to have failed.

With regard to the question of whether C should be ordered to pay the defendants' costs of the application, the Judge noted that both D and X were represented on a *pro bono* basis, apart from junior counsel for X, meaning that any costs award in the defendants' favour, over and above junior counsel's fees, would be paid to charities.

Nonetheless, even though it was probable that C would have failed in its section 24 application, C thought it appropriate to take into account the fact that C operated in the philanthropic sector and therefore the Judge was not attracted by the idea of a substantial costs award requiring a large payment from one philanthropic enterprise (C) to others.

In the circumstances, the Judge concluded that justice was best served by making an order that C pay the costs of X's junior counsel (who was not provided on a *pro bono* basis) in respect of the section 24 application but otherwise there be no order as to costs.

Takeaway

The key takeaway from this case is that section 29 of the Arbitration Act 1996 does not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application that has been opposed. However, costs awards against arbitrators are extremely rare. The case of *Cofely* is the obvious exception where the Court found the arbitrator to have been accepting repeat instructions from a party, amounting to a significant proportion of his business.

The new [BIM] Information Protocol

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In Issue 27, I wrote about the application of BIM under the FIDIC Form of Contract. I noted that I thought it likely that any "BIM definitions" that are adopted by FIDIC will be based on international standards, preferably ISO 19650. There is no further news from FIDIC but in the UK, at the beginning of June 2020, the UK BIM Framework[1] published a new template Information Protocol which is designed to conform with the (relatively new) international standard *BS EN ISO 19650-2* (which deals with the delivery phase of assets).

The essential idea behind any (BIM) protocol is that it defines a code of conduct, more specifically a code of contractual conduct, which deals with risk allocation, setting out the rights, roles and responsibilities of the parties including for example data or model delivery timetables. Until June, the closest to a standard protocol in the UK was the CIC BIM Protocol, the second version of which came out in April 2018. This second edition was drafted to align with the then prevalent standard, PAS 1192-2. This meant that it does not align with the new international standard for information management, BS EN ISO 19650, which was published in January 2019.

The first obvious difference between the two protocols is the name. The word "BIM" has been dropped. Does this mean the end of the use of the word? It is so ingrained in general use now. However, the word "BIM" was dropped (from the title at least[2]) for an important reason. Every project is different and will have different requirements in relation to the use of information and data. These requirements should be properly defined. That does not mean, for example, saying: the project shall be compliant with BIM Level 2. As the Winfield Rock Report demonstrated, everyone has their own interpretation of what BIM Level 2 means.[3] Dropping the word "BIM" has been done to encourage those putting the contract documentation together to concentrate on the exact requirements of the project in question.

At the launch of ISO 19650 Jøns Sjøgren, Chair of the ISO technical subcommittee, said:

> *"Taking this to an international level not only means more effective collaboration on global projects, but allows designers and contractors working on all kinds of building works to have clearer and more efficient information management."*[4]

This was a message echoed by May Winfield, commenting on the launch of the Information Protocol:

> *"The BS EN ISO 19650 is a game changer in seeking to progress, and comprehensively align, BIM and information management practices across the industry, and worldwide."*[5]

The Key Features of the new Information Protocol

It is of course early days in the adoption of BS 19650, but the new Information Protocol is an important step forward in encouraging use. As a starting point, always remember that any protocol only has contractual effect when it has been incorporated into your contract and the new Information Protocol includes a suggested incorporation clause. It also suggests that the new Information Protocol should take priority over the various contract documents.[6] One reason for this is to ensure consistency across the various appointment documents. Design information comes from many sources and the Introduction to the Information Protocol notes that to conform to BS 19650-2 the Information Protocol should be incorporated across all project appointments, including the client, contractor, consultants and suppliers. This is common sense, as you want to ensure that all the contract documents are aligned, i.e. that everyone is required to use the same standards and data.

One of the key parts of the Information Protocol is the front page, which sets out a number of Information Particulars which must be filled in. These include details of the parties, here described as "Appointor", "Appointee" etc., following the terminology of ISO 19650. They also include (at least by reference to a specific document) details of the Level of Information

Needs, BIM Execution Plan, Delivery and Security Management Plans and Information Standards. There is considerable sense in requiring all this information to be together in one place, but of course the amount of information listed on the front page does tend to mean that a failure to fill in the Information Particulars in full might diminish the effect of the Information Protocol.

The idea is to ensure that the Information Protocol sets out in as clear a way as possible, the parties' obligations to deliver information and information management as set out in the Protocol itself. In this way, the parties will still be acting in accordance with BS-19650, as the Information Protocol has been drafted to comply with the standard. This is something that is far more effective than simply requiring the parties to comply with the standard. It is better to reduce in any contract as far as possible the potential for uncertainty and/or ambiguity.

The definitions come at the end of the Information Protocol in clause 13 and are followed by a short glossary of terms taken from ISO 19650. The terminology as you would expect follows that used in ISO 19650. "Required Standard" is stated to mean the level of skill and care applicable to the Party's equivalent obligation under the Appointment. The reference back to the contract between the Parties is intended to ensure consistency. This is helpful bearing in mind the need for consistency with any warranty or professional indemnity requirements.

Parties should of course always take care to ensure that their contract documents are consistent in terms of defining the standard of care required for design, fitness for purpose or reasonable skill and care. This is particularly the case when parties on BIM-enabled projects are required to work to certain standards. Depending on what those standards are, that might introduce the concept of fitness for purpose, when it may not have been intended or realised.

Sub-clause 3.1 says that the Information Particulars should be reviewed and updated (if necessary) during the course of the Works. This seems sensible. However, if there is an update that attracts more time and/or more money for the Appointee, this will be assessed in accordance with what the Appointment says.

The Parties' obligations are set out at Clause 4. The Parties are required to comply with the Information Particulars when "*preparing, sharing and/or publishing information*" at the times stated. This is, however, subject to sub-clause 4.6 which acknowledges that this is subject to any circumstances which may entitle the Parties to an extension of time or additional cost under their Appointment. Sub-clause 4.7 is reinforced by a positive obligation to provide such information and assistance as the Information Particulars require them to provide. An example of why it is important to ensure that the front page is fully and carefully filled out.

The security obligations are dealt with at sub-clause 4.8 and clause 11. These will have been drafted to comply with the forthcoming BS-EN ISO 19650-5, which is currently due to be published in July 2020. Again, a key requirement is to comply with the Security Management Plan, details of which are to be found in the Information Particulars.

In contrast with the CIC Protocol, there is no defined or identified "BIM Manager" or "Information Manager." This does not mean that you do not have to have one, or indeed that you do not need one. There is just no express obligation. As a general view, whoever is coordinating the design generally, will have an

element of responsibility for this in any event.

Clause 5 deals with CDE Solution and Workflow which is defined in sub-clause 13.6 as meaning the "*common data environment*", the processes to be used as part of the *common data environment* and the technology to support those processes. By comparison with the CIC Protocol, the increased obligations regarding the establishment, exchange and storage of electronic data reflect the increased importance generally being given to this issue.

It might be, in part, that this is because of the widespread reporting of the one, to date, UK BIM case, of *Trant Engineering Ltd v Mott MacDonald Ltd*,[7] which was really not about BIM, but about who had control over access to the project electronic data and how that control could be exercised. Here sub-clause 5.5 takes the *Trant* case into account, seeking to avoid the problems raised in that case by setting out when parties should have access to the information in the CDE Solution and Workflow. In short, here, the Appointor is required to arrange for the Appointee to have reasonable access to the information in the CDE Solution and Workflow (again as provided for in the Information Particulars) insofar as necessary for the Appointee to perform its obligations under the Information.

As noted above, the word "BIM" has been dropped from the title. For similar reasons clause 7, which deals with Levels of the Information Need, makes no reference to BIM Level 2 or any other level. Clause 7 is a short clause which merely makes clear that the methods for determining Levels of Information Need are to be agreed and detailed in the Information Particulars. Another example of the general approach of looking for specificity and not general references to complying with standards and other similar items. In this way, the clause is a good example of the way in which the Information Protocol is designed to encourage the parties to stop and consider, at an early stage before the contract is entered into, what type of information and what standards are actually going to be required.

As you would expect, the Information Protocol includes, at sub-clause 8.1, a requirement that the parties observe their GDPR obligations, with the remainder of clause 8 dealing with copyright issues, again in more detail than in the CIC Protocol.

Clause 10 deals with liability and makes it clear that neither party has liability to the other, if the other party changes or modifies the model or related work for any other contractually defined purpose.

Conclusion

The new Information Protocol can be downloaded here: https://ukbimframework.org/wp-content/uploads/2020/06/Information-Protocol-to-support-BS-EN-ISO19650-2.pdf

It is an important step forward because it is the only protocol to date which is compliant with the BS-19650. However, it is perhaps too early for any formal conclusions, as it is only through the use and adoption of the Information Protocol that lessons can be learnt.

That said, the new Protocol does require project participants to stop and think about their information requirements up front, at an early stage. There are a number of step-by-step processes and documents that need to be agreed before the Protocol can be finalised. This can only be a good thing, because it should ensure greater clarity generally about what parties are required to do, and by when; something which goes a long way to avoiding disputes.

PS

If you want to find out more about the international standard BS 19650, it is well worth visiting the BIM Framework Website: https://ukbimframework.org/ which, as the homepage explains, sets out the "overarching approach to implementing BIM in the UK" in conjunction with the UK BIM Alliance (https://www.ukbimalliance.org/), BSI and CDBB (Centre for Digital Built Britain: https://www.cdbb.cam.ac.uk/). These organisations provide a wealth of information about the Protocol and other related BIM and digital design issues which have a universal impact. Although these organisations have a UK focus, BS 19650 is intended to be an international standard and it will be interesting to see the impact and rate of adoption of the Information Protocol generally, and not just in the UK.

Footnotes

1. See paragraph headed "PS" below.
2. References to the BIM Execution Plan remain.
3. The authors (in)famously asked 42 professionals for their definition: each gave a different answer. Overcoming the Legal and Contractual Barriers of BIM, February 2018.
4. Comment made as part of the launch of ISO 19650 in January 2019. See https://www.iso.org/news/ref2364.html [Accessed 19 June 2020]
5. https://www.bimplus.co.uk/news/gamechanger-information-protocol-published-replace/ [Accessed 19 June 2020]
6. This does not mean that the Information Protocol should always take priority in every regard. The position will depend on that stated in the appointment documents.
7. Trant Engineering Ltd v Mott MacDonald Ltd [2017] EWHC 2061 (TCC). See for example: https://www.fenwickelliott.com/research-insight/annual-review/2017/uk-bim-trant-mott-macdonald , [Accessed 20 June 2020] for further details.

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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