FENWICK ELLIOTT

The construction & energy law specialists

Issue 33 - December 2022

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:

- ESG and Energy on the African Continent
- Inflation and Adjustment for Changes in Cost in FIDIC Red and Yellow Books
- Notify Now or Forever Hold Your Peace - Notices of Dissatisfaction under FIDIC and NEC
- The Importance of Choosing an Arbitral Seat for the Parties
- Thin Ice – Freezing assets across jurisdictions

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Welcome to Issue 33

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Welcome to our latest edition of IQ which highlights issues important to International Arbitration and projects.

In this issue of IQ we begin by looking at some of the major issues impacting the global construction industry. Ben Smith starts us off by looking at Environmental, Social and Governance (ESG) on the African Continent, in particular looking at current and upcoming initiatives, along with an examination of future challenges. ESG is an especially important issue for the construction industry given the industry's major impact on the environment, one that is only going to get more important.

Mark Pantry then discusses another pressing problem, managing the impact of price escalation and inflation on ongoing construction project. Mark takes us through the cost ratcheting provisions in the FIDIC suite, which we anticipate many contractors will be seeking to rely on in the coming months.

We then look at a range of issues through the life cycle of a construction dispute.

I look at notices of dissatisfaction under the NEC and FIDIC contract suites. Notices of dissatisfaction are a precondition to any dispute under these contracts and the English case of *The Metropolitan Borough Council of Sefton v Allenbuild Ltd* shows how severe the consequences of not serving a timely notice can be.

Another omission that can cause difficulties is the failure to nominate an arbitral seat. Natalie Mackay looks at what can happen when an arbitral seat is not specified, and the unintended consequences that can result. Parties may find themselves subject to laws which do not allow for the remedy they seek.

Finally, Sam Thyne examines what happens when you win an arbitration but struggle to recover the award. One of the tools a successful party can use to help recover amounts awarded by an arbitral tribunal is a freezing order. However in international arbitration, where parties' assets are located across jurisdictions this is no simple matter as the parties in the recent Australian case of *Viterra BV v Shandong Ruyi Technology Co Ltd* found out.

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

Jeremy

News and Events

Our international arbitration credentials

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

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

Events

On 1 December 2022, Partner Stacy Sinclair will be speaking at the United Nations Economic Commission for Europe's sixth session of the Working Party on Public-Private Partnerships. *'Digital transformation: How can the PPP lifecycle be improved to deliver PPP projects in support of the SDGs'.* *Click here* for more information.

On 1-3 March 2023, Partner Jeremy Glover will be spekaing at the DRBF Central and Eastern Europe Conference in Vienna. Futher details will be available soon.

Webinars

Fenwick Elliott host regular webinars that address key issues and topics affecting the construction industry.

At our next webinar on 12 January 2023 is *'2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform'.* Fenwick Elliott Partner Claire King and Lynne McCafferty KC will review the findings of the recent King's College London and Adjudication Society study on adjudication. *Click here* to register.

To find out details of other upcoming webinars please *click here* and select the 'webinar' drop down. To watch our previous webinars on demand, *click here.*

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

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

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

This publication

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

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ESG and Energy on the African Continent

Introduction

Environmental, Social and Governance (ESG) issues are high on the agenda for the majority of developers, investors and occupiers, including in Africa. Coupled with this, the African continent is quickly transforming. According to the African Development Bank, since 2005, 20 countries in Africa are now among the top 50 most-improved world economies in business regulatory efficiency. By 2050, the African population is projected to reach 2.4 billion, and by 2030, urban populations will increase by an additional 350 million people.[1] This rate of change poses both challenges and opportunities. One view (although not universally held) is that development should be linked with a move towards renewable resources due to the impact of climate change to which Africa is, generally, at greater risk.

There is no doubt that this will be a significant challenge at the same time as the continent grapples with other pressing issues, including food, health and economic insecurity, which is now exacerbated by the aftereffects of the Covid-19 pandemic, the impact of the war in Ukraine and the recent cost-of-living crisis. In this context, this article looks at the current progress, the future and the challenges for ESG and energy projects on the African continent.

What is happening now: an overview

Since the Paris Agreement was introduced in December 2015, only four countries have yet to ratify the Paris Agreement within the United Nations Framework Convention on Climate Change, two of these are African countries, Eritrea and Libya.[2] The Paris Agreement's aim is to reduce greenhouse gas emissions, and provide financing to developing countries to mitigate climate change.[3] To achieve this, it provides a pathway for developed nations to assist developing nations in their climate mitigation and adaptation efforts while creating a framework for the transparent monitoring and reporting of countries' climate goals. It seems likely that the growing momentum of African renewable energy has been driven, at least in part, by the Paris Agreement amid concerns about the impact of climate change. For example:

- Uganda introduced the GET FiT (Global Energy Transfer Feed-in Tariff) Uganda initiative in 2016 with the aim of increasing the installed capacity of renewable energy to Uganda's national grid via the establishment of feed-in tariffs. To date, Uganda has commissioned 17 small power plants; the final two are still under construction having faced delays due to COVID-19 and other issues. Three of the projects are small hydropower plants with a total installed capacity of 36 MWs.[4] However, while it is accepted that GET FiT is targeted at smaller projects, Uganda's investment in renewable energy has so far been limited. According to a June 2020 report by International Growth Centre, a UK research centre, solar power accounts for 4% of Uganda's energy production, just 1% of the country's 2040 goals.[5]
- The Zambian government adopted its own GET FiT Zambia in October 2017 with the aim of procuring 200 MWs of renewable energy projects over three years. As of 2022, the country had 3,456 megawatts (4,635,000 hp) of installed hydropower capacity against a peak national demand of 2,300 megawatts (3,100,000 hp), resulting in a surplus of 1000 MW which is exported to the Central and Southern African region.[6]
- In South Africa, independent power producers have commenced just under 100 renewable energy projects in 2021. A report by the South African National Energy Regulator indicates that these projects will have an achieved capacity of 3271.25 MWs once they are operational.[7]
- In Rwanda, the Green Building Minimum Compliance System, which aims to provide a rationale for "Green Building" by increasing the efficiency of resource use while reducing building impacts on human health and the

environment during the building life cycle, contains mandatory requirements for the construction of certain commercial buildings public administrative and institutional buildings, health facilities and educational buildings.[8]

- In Ethiopia, the main source of electricity is from hydropower. According to the Deloitte Africa Construction Trends Report 2021, two of the largest projects in East Africa were for Ethiopian hydropower plants with a combined value of over $4bn.[9] The Grand Ethiopian Renaissance Dam, which completed its third filling in August 2022, will be able to generate up to approximately 6,000 MWs.[10]

- The Batoka Gorge hydroelectric power project is a US$5.2 billion hydroelectric project on the Zambezi River, that borders Zambia and Zimbabwe. It is expected to generate 2,400 GWs of electricity, to be shared equally by both countries.[11] In Zimbabwe, the Kariba South power station (hydropower) expansion on the Zambezi River will add approximately 900 MWs to Zimbabwe's national grid.[12]

- In November 2021, at World Leaders Summit of COP26 at Glasgow, Scotland President Uhuru Kenyatta told the international community that Kenya is determined and on course to achieving full transition to clean energy by the year 2030 (known as Kenya Vision 2030). President Kenyatta noted that renewable energy currently accounts for 73% of Kenya's installed power generation capacity, while 90% of electricity in use is from green sources including geothermal, wind, solar and hydro-electric installations. While it is true that access to electricity has expanded substantially in Kenya and now reaches over three quarters of the population, and renewable sources of energy have grown, most of Kenya's energy comes from bioenergy (65%) and oil products (17%), wind and solar (15%) and, to a lesser extent, coal and hydropower (2%). President Kenyatta also signed the Finance Act 2021 into law which provides for VAT exemptions on renewable energy items, including but not limited to solar and wind power equipment as well as clean cooking solutions.[13]

- In June 2018, Gigawatt Global Cooperatief signed a deal with the 15-nation Economic Community of West African States to build US$1 billion worth of renewable energy projects, including installing 800 MWs of solar and wind farms in Burkina Faso, Senegal, Mali, Nigeria and the Gambia.[14]

- There has also been an increase in the number of mini-grids, particularly in Sierra Leone, Tanzania, Kenya and Nigeria, usually supported by solar power, as a way of electrifying rural areas which would otherwise be off-grid.

It is apparent that there is a significant amount of activity across Africa in relation to renewable energy. However, the progress in respect of social and governance considerations in the construction and energy sector is less widespread and often linked to individual non-governmental examples/projects. For example:

- In Kenya, BuildX Studio specialises in designing, engineering and building net zero carbon buildings.[15]

- In South Africa, mining company Royal Bafokeng Platinum provides affordable housing to its employees.[16]

At a corporate level, some governments are bringing in policies which require ESG disclosures, but these policies do not appear to be widespread. For example:

- The Nigerian Code of Corporate Governance 2018 (NCCG) and Nigerian Stock Exchange Sustainability Disclosure Guidelines 2019 require companies to disclose and report on ESG issues that are relevant and material to their businesses, as well as how they are managed.[17]

- The Nigerian Companies Act 2020 also introduced a provision which imposes an additional duty on directors to ensure that they act in the best interest of the company with due regard to the impact of the company's operations on the environment in the community where it carries on its business.[18]

Looking to the future

South Africa's action plans

On 25 July 2022, South Africa's President Cyril Ramaphosa announced a new action plan (as part of the wider Operation Vulindlela) aimed at ensuring energy security in South Africa by making improvements to Eskom, the country's state-owned public utility. The plan introduces measures including:

- Improving the performance of the existing generation plants and accelerating the procurement of new capacity by removing regulatory hurdles.

- Attracting private sector investment in generation of energy and improving Eskom's future financial sustainability.

- The development of a feed-in tariff for small-scale embedded generators.[19]

Green Building Councils

There are Green Building Councils (GBCs) across Africa – currently in Ghana, Kenya, Mauritius, Namibia, Rwanda, South Africa, Tanzania and Zambia.[20] The GBCs are playing an important role in supporting government to incorporate green building standards into national regulatory frameworks, promoting the use of locally sourced and green building materials and components, and increasing awareness and education of Net Zero. In particular, Mauritius' GBC has worked closely with the government to include sustainability as a key component of the revised Building Control Act 2012,

which resulted in the development of new regulations and codes for energy efficiency and conservation in buildings. Kenya's GBC is working with two counties – Nairobi and Kisii – to draft green building guidelines under the UN Building Efficiency Accelerator programme and is working with the national government to mainstream green building principles.

Agenda 2063: The Africa We Want

Agenda 2063 is Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development. Notably, the first aspiration is "*A Prosperous Africa, based on Inclusive Growth and Sustainable Development*", which references "*sustainable and inclusive economic growth*" and encompasses the goal of achieving "*environmentally sustainable and climate resilient economies and communities*" by focussing on:

- Sustainable natural resource management and biodiversity conservation.
- Sustainable consumption and production patterns.
- Water security.
- Climate resilience and natural disasters preparedness and prevention.
- Renewable energy.[21]

Funding and green / sustainability linked bonds

As reported in African Decisions,[22] the World Bank has estimated that US$43 billion per year of investment is required for infrastructure in the African power sector, while the African Development Bank estimates a need for US$230 to US$310 billion until 2025, with an additional US$190 to US$215 billion required for 2026 to 2030. The African Development Bank has recently approved further funding in the Metier Sustainable Capital International Fund II, which channels funds to renewable-energy and resource-efficient infrastructure projects across sub-Saharan Africa. The Green Climate Fund, created to support the efforts of developing countries in responding to the challenge of climate change, is also active in Africa. As of 20 July 2022, it had invested US$3.8 billion to 81 approved projects in Africa, 65 of which are under implementation.

African governments have been making a number of changes to regulations and political frameworks in order to attract financing for projects, such as:

- The Angolan government introduced reforms in 2017 to improve the business environment in order to make Angola more attractive for funding from the IMF and other investment institutions.[23]
- Senegal has pursued an ambitious development program, the Plan Senegal Emergent, to improve infrastructure, achieve economic reforms, increase investment from private national and foreign investors in strategic sectors, and strengthen private sector competitiveness.[24] Senegal introduced a new electricity code, including a new policy for rural electrification, and new regulations and tax incentives for renewable energy.
- Gabon has introduced legislative reforms such as a new hydrocarbon code and developing current codes to promote clean and renewable energy in its water and electricity sectors. In 2021, it also introduced legislation aimed at curbing emissions and promoting carbon credit trading.[25]

In South Africa, Nigeria and Kenya green bonds are playing a growing role. In particular, the South African market has seen a significant increase in the issuance of green bonds in the last two years. Recently, there have been issuances by institutions at various levels, ranging from development finance institutions to municipals, banks and corporates.[26] For example, Nedbank launched an innovative United Nations Sustainable Development Goals-linked bond in 2020, which represented South Africa's first "green" tier-two capital instrument. The proceeds of this bond go towards funding high-potential solar and wind renewable energy projects.[27]

New regulations in Europe and their potential impact in Africa

New regulations will also make ESG issues more pressing for companies and investors in Europe, who have supply chains and investments on the African continent. In 2017, France introduced the Duty of Vigilance Act, and last year, the German parliament passed the Supply Chain Act, which will come into effect in January 2023 and apply to companies with more than 3,000 employees. This legislation requires companies to undertake due diligence in respect of human rights and environmental issues across their subsidiaries and throughout their supply chain.

In a similar vein, in February 2022, the European Commission published a proposal for a directive on corporate sustainability due diligence to tackle human rights and environmental impacts across global value chains. The proposed directive would require companies to carry out specific human rights and environmental due diligence in their operations and supply chains.

The impact this type of legislation can have is illustrated by two of the three final bidders for Unilever's tea division pulling out due to difficult questions over human rights and fair pay at its tea plantations in east Africa. The tea division, which includes the PG Tips and Lipton brands, was later sold to CVC Capital Partners for €4.5bn.[28]

Future challenges

In spite of the above, regional economies in Africa are often heavily reliant on fossil fuels. For example, although the current South African integrated resource plan of 2019 contemplates an energy mix comprising coal, nuclear power, renewable energy and natural gas, South Africa's energy supply currently relies heavily on coal, and Eskom supplies power to surrounding countries, including Eswatini, Lesotho, Zimbabwe and Botswana.

Comment

There is no "one size fits all" approach to ESG issues; however, what is clear is the continent of Africa continues to move (albeit perhaps slowly) towards adopting sustainable and renewable energy practices.

The progress in respect of social and governance aspects in the energy sector and the wider construction industry is much more limited and, at the moment, is largely reliant on non-governmental actors.

The political resolve to continue to pursue these policies and make new ones to promote ESG, in particular on much larger scale projects, however, will be tested post the Covid 19 pandemic and against the backdrop of the war in Ukraine and the cost-of-living crisis.

Footnotes

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Inflation and Adjustment for Changes in Cost in FIDIC Red and Yellow Books

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Very high levels of inflation caused by COVID-19 and the war in Ukraine have led to construction price increases across the world. Pressures on the manufacturing sector are expected to increase as price volatility in the energy market is exacerbated during the winter months with industries which require high levels of energy in their manufacturing processes, such as glass, scale back their production as energy costs increase. As a result, it is expected that inflation will persist for the rest of the year and into 2023.

This grim outlook has highlighted the challenge of quantifying and managing increases in the cost of materials and labour in the construction industry. Parties to construction contracts are beginning to look for alternatives to the fixed price lump sum contracts which have been prevalent in the industry.

The FIDIC Red and Yellow Books (second edition, 2017) both include provisions for adjustments to be made to the contract price to reflect changes in costs of labour, goods and other inputs required for the works. These provisions are optional and have traditionally been used in long-term complex construction projects where contractors cannot take the risk for price escalation over the contract term. This optional nature has been enhanced by the removal by FIDIC, in the re-print of the Second Edition issued in November 2022, of the formula from the General Conditions into the Special Conditions at the back of the Contract.

The FIDIC guidance on these clauses states that they may be required where it would be unreasonable for a contractor to bear the risk of escalating costs due to inflation. This opens up the possibility of the provisions being used for shorter term projects which would ordinarily be fixed price.

For these provisions to apply, the parties are required to prepare a schedule of cost indexation which is then included within the contract. Failure to include a schedule of cost indexation in the contract, even if the parties intended for there to be indexation provisions, means that cost fluctuations are deemed not to apply to the contract. Where the provisions apply, amounts payable to the contractor are adjusted for rises or falls in the cost of labour, goods and other inputs as calculated by reference to the schedule of cost indexation.

It is essential that both parties take professional advice in relation to the preparation of these schedules of cost indexation. This is particularly important as it is required that the schedules include formulae for the calculation of how the contract price is to be adjusted. A failure to prepare the formulae correctly could result in them being or becoming invalid or could result in the formulae generating the wrong outputs when used. The FIDIC guidance gives the following example formula:

$$Pn = a + b\frac{Ln}{Lo} + c\frac{En}{Eo} + d\frac{Mn}{Mo}$$

Breaking this formula down, *Pn* is the final output of the equation and the adjustment multiplier to be applied to the contract value carried out in the relevant period *(n)*. The relevant period is to be agreed between the parties but this could be annual or monthly.

The symbols *a, b, c* and *d* are coefficients for certain elements of costs. In this example, *a* represents a fixed element of the contractual payments. The other coefficients represent the weighting of other cost elements such as labour, goods and materials which are intended to be subject to adjustment, as stated in the accompanying table.

Ln, En and *Mn* are the current cost indices or reference prices as stated in the schedule of cost indexation for the period agreed between the parties. *Lo, Eo* and *Mo* are the base cost indices or reference prices as at the relevant base date.

The accompanying table sets out the coefficients and the scope of the index (e.g. *b* = 0.2 for Labour). Where payments are being made in different currencies, then each index should be linked to a particular currency. The index should also be properly sourced with the value stated on a particular date which can assist the parties clarifying the source of the index if required.

Where the contractor is in delay and fails to complete the works within the Time for Completion, the adjustment provisions would still apply but any adjustments after the Time for Completion are made by using whichever is more favourable to the employer: the index applicable 49 days before the expiry of the Time for Completion or the current index.

As the above demonstrates, the formulae required for the correct implementation of these adjustment clauses are complicated and contain a number of potential pitfalls for the unwary, especially in the choice of indexation used. Particular care should also be given where a contract utilises different currencies for different elements of work.

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Notify Now or Forever Hold Your Peace - Notices of Dissatisfaction under FIDIC and NEC

Under certain forms of contract, including FIDIC and the NEC Form, if a party wishes to preserve the right to challenge an adjudicator's or dispute board's decision, they must serve a valid notice of dissatisfaction. Under subclause 1.1.57 of the 2017 FIDIC Yellow Book, a Notice of Dissatisfaction or "NOD" is defined as being:

The Notice one Party may give to the other Party if it is dissatisfied, either with an Engineer's determination under Sub-Clause 3.7 [Agreement or Determination] or with a DAAB's decision under Sub-Clause 21.4.

It is a little more than that as the giving of the notice is also a pre-condition to arbitration. In other words, if a valid notice is not served, you lose the right to challenge the determination or decision, which becomes final and binding. For example, in the recent English case of *The Metropolitan Borough Council of Sefton v Allenbuild Ltd*[1], the NEC2 Form provided that:

"93.1 If after the Adjudicator

• notifies his decision ...

... a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the tribunal. It is not referable to the tribunal unless the dissatisfied Party notifies his intention within four weeks of

• notification of the Adjudicator's decision or

• the time provided by this contract for this notification if the Adjudicator fails to notify his decision within that time whichever is the earlier."

NODs under the NEC Form

Allenbuild gave notice of its dissatisfaction with the adjudicator's decision by letter, dated 7 February 2022, stating:

"We hereby give notice under clause 93.1 of Allenbuild's dissatisfaction with the Adjudicator's Decision.

This Notice of Dissatisfaction relates to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions.

As a consequence of this Notice of Dissatisfaction, the Adjudicator's Decision shall not become final and binding.

Allenbuild reserves all of its rights in relation to this matter including the right to refer the dispute which is the subject of the Adjudicator's Decision to the tribunal for final determination under clause 93 ..."

The question for the court was whether this was sufficient to include a challenge to the adjudicator's jurisdiction. Allenbuild said that, because the NOD stated that it *"relates to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning and decisions"*, it had the effect of preventing that decision from becoming final and binding, and left open any challenges on any basis whatsoever both in relation to the enforceability of the decision or a final determination on the merits of the matters decided.

The courts in England had previously considered what level of detail was necessary to ensure that the NOD was valid in two cases from last year.

In *Transport for Greater Manchester v Kier Construction Ltd*[2], Kier, the successful party, argued that a NOD served by TfGM was invalid because it was not detailed enough. The NOD said that the adjudicator had:

"erred in law and in his interpretation and application of the express terms of contract between the parties in a number of fundamental respects."

Mrs Justice O'Farrell made the general comment that:

"The Contract did not stipulate the form of words that had to be used, or the level of detail that was required in any notice of dissatisfaction. The purpose of the notice was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding. A valid notice would have to be clear and unambiguous so as to put the other party on notice that the decision was disputed but did not have to condescend to detail to explain or set out the grounds on which it was disputed."

Applying those principles, the Judge continued that:

"The letter of 29 November 2019 was a valid notice of dissatisfaction for the purposes of clauses W2.3(11)

and W2.4. The words: 'it is clear that he has erred in law and in his interpretation and application of the express terms of contract between the parties in a number of fundamental respects' were sufficient to make clear that TfGM did not accept, and was dissatisfied with, the Adjudicator's decision. The words: 'TfGM's ... intention to seek formal resolution to reverse the outcome of the Decision' were sufficient to inform Kier that it intended to refer the disputed adjudication decision to the Court."

In *Prater Ltd v John Sisk & Son (Holdings) Ltd*[3], a different issue was raised. Was there a distinction between a challenge to an adjudicator's decision on the underlying merits of the dispute and to the adjudicator's jurisdiction? Deputy Judge Buehrlen QC said:

"[Counsel] also argued that what clauses W2.3(11) and W2.4(2) of the Subcontract contemplate is a rehearing of the underlying merits of the dispute not a challenge to the jurisdiction of the adjudicator. However, there is no such carve out in the relevant contractual provisions. Clause W2.4(2) is concerned with circumstances in which a party is dissatisfied with the decision regardless of the grounds for that dissatisfaction. Further, the parties have agreed that the decision will be binding unless and until revised by the Tribunal. 'Revised' must include a declaration that the decision is not enforceable or otherwise binding for jurisdictional reasons. Moreover, the provisions cannot be limited to a dispute as to the underlying merits of the decision because clause W2.3(11) provides that in the absence of a notice of dissatisfaction being served within four weeks of the notification of the Adjudicator's decision, the decision becomes final. Accordingly, if the dissatisfied party wants to challenge the decision for want of jurisdiction, he must serve a notice stating his intention to refer the matter to the tribunal."

Allenbuild argued that, for a NOD to be valid, it need only set out that the decision was disputed. Such a notice did *"not have to condescend to detail to explain or set out the grounds on which it was disputed"*. Sefton agreed that, whilst a notice of dissatisfaction need not descend into the details of the substantive challenge, the issue of the validity of an adjudication decision (or jurisdiction of the adjudicator) was of a fundamentally different character from its merits. Whatever is being referred to the Tribunal needs to be spelt out. Here, there was no need for any particulars of the substantive dispute to be spelt out at this stage (that will be for the notice of arbitration and beyond) but whether or not the decision was valid was a matter of an entirely different character, particularly where the existence of a valid adjudication decision is the first step in the resolution of any dispute, and a precondition to the bringing of an arbitration.

Allenbuild's NOD was a challenge to the substance of the adjudicator's decision; in other words, what the adjudicator decided, not the fairness of the procedure or the jurisdiction of the adjudicator to make the decision.

HHJ Hodge QC said that:

"Whilst a notice of dissatisfaction need not descend into the details of any substantive challenge to an adjudicator's decision, the issue of the validity of such a decision is of a fundamentally different character from its substantive merits; and a notice of dissatisfaction needs to make it clear whether a challenge is being made to the validity of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits."

Here, the NOD, on its true construction, did not make it clear that a challenge was being made to the validity of the adjudicator's decision, on jurisdictional grounds, in addition to a challenge to its substantive merits. Allenbuild had lost the right to make that challenge.

NODs under the FIDIC Form

The 1999 and 2017 FIDIC Forms have different requirements. As you would expect, the 2017 Form sets out what a party is required to do in far more detail than the 1999 Form. This was deliberate, being designed to prevent disputes about whether or not a NOD was valid.

Under the 1999 From, the NOD had to state that it was given under subclause 20.4 and then "set out the matter in dispute and the reason(s) for dissatisfaction." It went on to make it clear that neither Party shall be entitled to commence arbitration of a dispute unless a valid NOD had been given.

Under the 2017 Yellow Book, both the Engineer's determination under subclause 3.7 and the DAAB's decision under subclause 21.4 will become final and binding if no NOD is provided .

If either Party was dissatisfied with the DAAB's decision, they must give a NOD to the other Party and the Engineer within 28 days. The NOD must also state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and set out the matter in Dispute and the reason(s) for dissatisfaction.

Subclause 21.4.4 also states that if the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision, provided those parts are clearly identified in the NOD, those parts shall be deemed to be severable from the remainder of the Decision which will become final and binding. Theoretically, this provides the opportunity for the Parties to focus on the matters that are really in dispute and to finally resolve those that are not.

This subclause wording ''neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with" appears in both the 1999 and 2017 Forms. In other words, in order to commence arbitration, a NOD must be submitted that complies with the subclause, i.e. that provides reasons. A Party is, therefore, unable to validly commence arbitration if it does not submit a compliant NOD within the prescribed time period, here 28 days. Failure to do so will cause the DAAB's decision to become final and binding.

Conclusions

It is obviously a matter of some importance to understand and follow the contractual requirements for the NOD under the NEC, FIDIC or, indeed, any form, and the recent English NEC court cases provide a valuable reminder as to the care needed when drafting any NOD. A failure to follow the contract will result in the decision or determination in question becoming binding, something which will apply to challenges both to the merits and any jurisdictional objection.

Finally, care to needs to be taken to ensure the NOD is sent to the right parties and at the right addresses. Under the 2017 Form, the FIDIC NOD must go to the Engineer; there is no such requirement in the 1999 Form. In the Kier case, communications had been sent to the *"last address notified by the recipient for receiving communications"*. Was that the last notified address set out in the contract or the contact details for the parties' solicitors who had been acting in the adjudication? The court held that the details exchanged during the adjudication had become the last address notified under the contract. If there is room for doubt, consider sending the NOD to more than one address.

Footnotes

[1] [2022] EWHC 1443 (TCC)

[2] [2021] EWHC 804 (TCC)

[3] [2021] EWHC 1113 (TCC)

[4] This was not the case with the 1999 Red and Yellow Books, although it did apply to the Employer's determination under subclause 3.5 of the 1999 Silver Book.

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The Importance of Choosing an Arbitral Seat for the Parties

The seat of arbitration is crucial to defining the legal framework for arbitral proceedings. By selecting the seat, the parties are able to choose the legal environment in which they wish to operate.

Therefore, parties should not neglect the seat when negotiating arbitration agreements. Rather, thoughtful consideration should be given to it as a failure to do so could have an unintended and/or a detrimental effect on the parties' respective positions. This includes the risk of arbitral awards being susceptible to challenges by the local courts which in turn may entail reopening the merits of the dispute. Moreover, as in this case, the failure to choose a seat may prevent a party from seeking an interim measure including urgent temporary relief.

The Significance of the Arbitration Seat

The arbitration seat is a key factor in any arbitration and is of major practical importance. The seat is the legal home of the arbitration and provides its supporting legal framework. Given its specific legal effect, parties should specify the arbitral seat in their agreement to arbitrate.

The seat influences a number of key issues. It determines which procedural laws will apply to various practical aspects of the arbitration including any rights of appeal, the availability of interim remedies and the extent to which local courts will support, supervise and/or hinder the arbitration process. More importantly, the seat of the arbitration will be the place where the award is deemed to have been made. Therefore, the law of the seat will determine the grounds on which an award can be challenged before the local courts.

In circumstances where the parties have failed to designate a seat or failed to do so clearly, parties more often than not lose their right to choose the seat. In the case of institutional arbitration, the arbitration rules may provide a default seat (e.g. Article 20.1 of the Dubai International Arbitration Centre Arbitration Rules 2022 ("DIAC Rules")). If there is no default seat under the arbitration rules, then the arbitration institution may determine the seat. However, this could take up to three months or more depending on whether the seat will be determined after the formation of the Tribunal. This in turn could make it more difficult for the parties to take strategic and procedural decisions (e.g. when seeking interim relief). Alternatively, a court may also be called upon to decide the seat (e.g. ad hoc arbitrations).

A Practical Example of the Parties' Failure to Select the Seat

A recent case where the parties' failed to specify the arbitral seat ultimately resulted in the dismissal of a party's ex parte application for emergency interim relief (the "Application").

Here, the Application was made under the Exceptional Procedures provisions of the DIAC Rules in order to resist a demand on a performance bond (the "Proceedings"). The governing law of the contract was Dubai law and the arbitration agreement provided for the DIAC Rules as the arbitration rules. However, the arbitration agreement failed to specify the arbitration seat.

When considering the Application, the Emergency Arbitrator ("EA") referred to Article 2.6 of Appendix II of the DIAC Rules to determine the seat of the Proceedings, which provides as follows:

"The seat of the proceedings for emergency interim relief shall be determined by the Emergency Arbitrator in accordance with Article 20.1, without prejudice to the Tribunal's powers finally to determine the seat of the arbitration."

In turn, Article 20.1 of the DIAC Rules sets out in relevant parts:

"Where the parties have not agreed a seat, but they have agreed a location/venue for the arbitration, unless the parties agree otherwise, such location/venue shall be deemed to be the seat of the arbitration. In the absence of an agreement on the seat and location/venue, the initial seat of the arbitration shall be DIFC. In such case, the Tribunal shall, upon its constitution, have the power finally to determine the seat of the arbitration, having due regard to any observations from the parties and any other relevant circumstances."

Article 20.1 of the DIAC Rules provide for the Dubai International Financial Centre ("DIFC") as the default seat. As such, the EA found DIFC as the seat of the Proceedings and DIFC Law No. 1 of 2008 ("DIFC Arbitration Law") as the applicable governing procedural law.

With regards to the EA's power to issue an interim measure ex parte, the EA relied on Article 1.10 of Appendix II of the DIAC Rules:

"Nothing in the Rules shall have the effect of creating (where it does not exist), or limiting (where it does exist), any right of a party to apply to the Tribunal, and any powers of the Tribunal, to order an interim measure and issue a preliminary order in support of such interim measure without prior notice to a party. For this purpose, the Tribunal shall consider its power to issue such an order, having due regard to the seat of the arbitration and also any agreement reached by the parties in the agreement to arbitrate."

Although the Contract did not include any limitative wording akin to Article 1.10 of Appendix II of the DIAC Rules, the DIFC Arbitration Law does prohibit ex parte applications for interim relief in DIFC-seated arbitrations. Section 24(1)(a) of the DIFC Arbitration Law only allows for interim relief if it is made with copy or notice to all other parties to the arbitration. As such, the EA dismissed the ex parte application on the basis that:

1. The prohibition on ex parte applications contained in the DIFC Arbitration Law prevailed over the provisions under Appendix II of the DIAC Rules; and

2. Article 1.10 of Appendix II of the DIAC Rules does not create a right in favour of ex parte applications to DIAC Emergency Arbitrators for interim relief in DIFC-seated arbitrations where no such rights exists under the DIFC Arbitration Law.

This case acts as a strong reminder to parties that, as a golden rule, arbitration agreements should always include the seat of the arbitration and careful consideration should be given as to the choice of such seat.

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Thin Ice – Freezing assets across jurisdictions

In international arbitration, winning your case is only half the battle. The harder part is often getting the money. Even if an unsuccessful party has assets, gaining access to them is no sure thing. Large companies, operating across multiple jurisdictions, will often have assets all over the world. Winning a case in one jurisdiction (where the losing party does not have the funds to satisfy a judgment debt) does not guarantee that its assets in other jurisdictions will be readily available to the victor.

Fortunately, it is generally straightforward to have an arbitral award recognised and enforced (provided that the jurisdictions are both signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958). However, parties need to turn to other remedies to ensure there are still assets there to recover.

A freezing order (alternatively called a Mareva injunction for the case which popularised its use[1]) is a form of injunctive relief that can be awarded by a court to prevent the disposal of assets. It has the dubious distinction of being described as a "nuclear weapon"[2] of judicial remedies alongside the seizing order (or Anton Piller order[3]). A large focus of private law is the protection of private property, hence why court orders which sanction the restriction and re-appropriation of private property are viewed as weapons of mass destruction – and why courts are careful about granting them.

As the name suggests, a freezing order can freeze almost any asset, including bank accounts and property, both real and intangible. The requirements for obtaining a freezing order vary depending on jurisdiction. However, in England (and other commonwealth jurisdictions), the position is broadly that:

- The applicant must have a cause of action (i.e. an underlying legal or equitable right).
- The applicant must have a good arguable case.
- There must be assets for the order to be applied to.
- There must be a real risk of assets dissipating if the order is not put into place.
- The applicant must provide an undertaking as to damages to compensate the respondent if it is decided that the freezing order should not have been awarded.

Another feature of a freezing order is that they are typically sought on an ex parte basis. This means that they can be issued without the party that the order is subject to being notified until after the order is granted. Accordingly, the applicant needs to consider and address any possible evidence that the defendant may claim against the freezing order and place an emphasis on the risk of asset dissipation.

A recent Australian case illustrates why, in the context of international arbitration, freezing orders are a useful tool, but also highlights the difficulties involved.

Viterra BV v Shandong Ruyi Technology Co Ltd[4] concerned the applicant Viterra BV ("Viterra") seeking the continuation of various injunctions against Shandong Ruyi Technology Group Co Ltd ("Ruyi") and related entities.

In 2020, Viterra commenced arbitration proceedings (in Liverpool) against Ruyi in relation to Ruyi's failure to perform aspects of several contracts. Viterra was successful in these proceedings and was awarded US$12.2 million along with interest. Ruyi did not pay, leaving Viterra to look for ways to recover.

Ruyi itself was a company registered in the People's Republic of China. Viterra sought to enforce the arbitral award in the PRC; however, this did not appear as if it would be successful. Ruyi already had many outstanding judgments in the PRC so the prospect of recovery there was slim.

However, Ruyi had international assets. Ruyi was the owner of a Singaporean company called CSTT Co Holdings Pte Ltd ("CSTT Singapore"). Further, CSTT Singapore had international holdings including two Australian based companies CS Agriculture Pty Ltd ("CS Agriculture") of which CSTT Singapore owned 80%, and CSTT Holdings Pty Ltd ("CSTT Australia") which was wholly owned by CSTT Singapore.

Viterra had a plan. Viterra had commenced recognition and enforcement proceedings in Singapore. Once it had done this, it intended to execute on that judgment a process whereby it would either recover its judgment debt through the outcome of a share auction, or purchase all the shares itself and assume control over CSTT Singapore at the auction and recover the judgment debt through realising the company's assets and paying itself a dividend.

The second option would necessitate the sale of the Australian assets of CSTT Singapore, hence why Viterra had asked the Australian courts to grant a freezing order against Ruyi, CSTT Singapore, CS Agriculture and CSTT Australia.

Unfortunately for Viterra, the Court declined to uphold the freezing orders.

Viterra had not identified any process under Australian law which would allow the Australian Courts to grant the orders. They had applied for recognition and enforcement of the arbitral decision in the PRC and Singapore, but not Australia. There was no legal reason under Australian law for CSTT Singapore to pay Viterra anything; therefore, the Australian courts did not have a legal reason to prevent the disposal of assets. In effect, the request for a freezing order in Australia was outside of the court's powers to grant. As noted by the Judge, if Viterra wanted to protect its processes of enforcement of a Singapore judgment in Singapore, then it could be expected to seek freezing orders in Singapore.

The court gave two alternative reasons for declining to uphold the freezing orders.

First, Viterra's proposed scheme of recovering its judgment debt through the forced auction of CSTT Singapore's shares was not a process of enforcement under the Australian Courts or the High Court of Singapore. The Judge observed that it was necessary to keep the distinction between what a judgment creditor could do, and what the shareholder of a company could do. The proposed actions of a shareholder did not attract the protection of the court's enforcement processes.

Second, the Judge gave several discretionary considerations against the continuation of the freezing orders:

- The Judge noted it would be a rare case in which a freezing order will be granted against a third party which did not hold assets to which the debtor or prospective debtor is beneficially entitled.
- The orders would be too onerous in the circumstances.
- If the freezing order was made effective and maintained against Ruyi, then there would be no demonstrated need or warrant for the order against CSTT Singapore; if, on the other hand, the freezing order against Ruyi was not made effective or not maintained, then there would be no justification for an order against CSTT Singapore.
- The Judge was not convinced there was anything to suggest that Ruyi would dispose of the assets.
- Finally, the assets (held by CSTT Singapore) were beyond any relevant control by Ruyi.

The *Viterra* case is illustrative of the types of circumstances which make recovery of arbitral awards difficult. While Viterra knew that Ruyi had assets, it struggled to find an effective path to them. It is also a useful example of the difficulties in convincing courts to grant freezing orders. While the order can be a very effective tool, obtaining the nuclear codes is unsurprisingly no easy feat.

When considering bringing arbitral proceedings, enforcement should be considered from the outset. As part of the calculus of deciding to bring a claim, a claimant should understand where possible assets are and how these could be recovered as there would be nothing worse that reaching the end of a hard fought arbitration to wind up no better off than when you started.

Footnotes

[1] *Mareva Compania Naviera SA v. International Bulkcarriers SA,* [1975] 2 Lloyd's Rep 509

[2] *Bank Mellat v Nikpour* [1985] FSR 87

[3] *Anton Piller KG v Manufacturing Processes Ltd & Ors* [1975] EWCA Civ 12

[4] [2022] FCA 215

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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