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

Inside this issue:

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Welcome to Issue 35

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Welcome to our latest edition of IQ which highlights issues important to international arbitration and projects.

First looking at developments in the Gulf states, in this issue Sana Mahmud and Gilbert Hakim discuss a rare case out of the Dubai International Financial Centre ("**DIFC**") Court of Appeal, *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC*, which gives clear guidance on the use of conditions precedent (or time bars) under the FIDIC Form of Contract in the region.

Then, Leonie Sellers and Natalie Mackay highlight the new arbitration rules published by the Saudi Centre for Commercial Arbitration ("**SCCA**"), which signal a positive step for arbitration in the region.

Looking more generally at contract interpretation, I discuss the recent case of *Drax Energy Solutions Ltd v Wipro Ltd*, a case which concerned the interpretation of a limitation of liability clause in a contract for the supply of software services.

Finally, Ben Smith, Tajwinder Atwal and Oliver Weisemann review the latest developments in Environmental, Social and Governance ("**ESG**") as it relates to supply chains.

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

Jeremy

News and Events

Events

Partner Claire King will be speaking at the NEC Annual Conference on 13 July 2023. Claire will join a panel on the use of retention funds under NEC. Please *click here* for more information.

Partners Claire King and Nicholas Gould are both taking part in the 23rd Annual Construction Law Summer School in Cambridge, which takes place over the course of five days. Claire will present on 'FIDIC, NEC and Beyond – Comparison' and will participate in a panel discussion on 'forms of contract for international EPC contracts' on Tuesday 12 September. Nicholas will present on 'Interim Relief Measures from the Tribunal and the Courts – bonds, advanced payment bonds and guarantees' and will be joining a final panel to lead a quick-fire recap of the week on Friday 15 September. Please *click here* for more information.

For those in London, Fenwick Elliott will be hosting its next Construction Law Clinic on 11 October. The event is a chance to socialise with our team and ask any questions in an informal setting. For more details, please contact *events@fenwickelliott.com.*

Webinars

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

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

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

FIDIC Contracts: time bars limitation and good faith

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Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC
[2022] DIFC CA 016

Background

The Dubai International Finance Centre ("**DIFC**") Court of Appeal has recently handed down a judgment in which it considered issues such as notices as conditions precedent, limitation and good faith in the context of FIDIC Sub-Clauses 20.1 and 3.5. We summarise the case and review its potential implications below.

The facts

On 11 July 2017, the Employer, Panther Real Estate Development LLC ("**Panther**"), entered into a contract (the "**Contract**") with Modern Executive Systems Contracting LLC ("**MESC**"), the Main Contractor, for the construction and completion of a residential tower building in Dubai. The Contract was based on the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (First Edition, 1999), as amended by the Particular Conditions and other detailed provisions. The governing law of the contract was DIFC law and disputes were subject to the exclusive jurisdiction of the DIFC Courts.

The project experienced delays and MESC made three applications for an extension of time pursuant to Sub-Clause 8.4 of the Contract, all of which were rejected by the Engineer. MESC also eventually made a fourth EOT application for the period after termination.

Pursuant to Sub-Clause 8.7 of the Contract, if MESC failed to comply with Sub-Clause 8.2 [Time for Completion], MESC was liable for delay damages calculated at a daily rate of AED 42,500, capped at 10% of the contract price. The parties were unable to resolve their issues and Panther liquidated the Performance Guarantee and the Advance Payment Guarantee on 28 October 2019. The Contract was subsequently terminated by Panther with immediate effect on 6 November 2019.

The issues

In the claim, at first instance, Panther sought liquidated delay damages, other delay damages, damages for the cost of completion and damages for the loss of the opportunity to rent or sell the residential units within the period of 16 December 2018 to 1 May 2020. In addition, Panther sought a declaration that it was entitled to encash the guarantees and retain the proceeds.

MESC denied liability primarily on the basis that it was entitled to an extension of time for a period of 292 days, which would deprive Panther of its alleged right to terminate because it had exhausted the maximum amount of delay damages under the Contract.

In response to MESC's claims for an extension of time, Panther argued that MESC had failed to comply with the conditions precedent in Sub-Clauses 20.1 and 3.5 of the Contract, and was, therefore, not entitled to an extension of time.

The judge, at first instance, found that the project was delayed by 325 days, only 19 of which MESC was responsible for. However, he held that:

1. Compliance with the provision in Sub-Clause 20.1 that requires the Contractor to give notice to the Engineer of their claim to an extension of time, with reference to the event or circumstance giving raise to the claim, not later than 28 days after they became aware or should have become aware of the event or circumstance (the "28-day notice requirement") is a condition precedent to the Contractor's entitlement to an extension of time.

Footnotes

[1] For more information on [2014] EWHC 1028, see: *https://www.fenwickelliott.com/research-insight/newsletters/dispatch/archive/obrascon-huarte-lain-attorney-general-gibraltar.*

[2] For more information on [2022] EWHC 3275 (TCC), see: *https://www.fenwickelliott.com/blog/dispute-resolution/energy-works-mw-high-tech.*

[3] Paragraph 57

2. Compliance with the requirement in the fifth paragraph of Sub-Clause 20.1 that the Contractor must, within 42 days after it became or ought to have become aware of the event or circumstances giving rise to the claim, send to the Engineer a fully detailed claim with supporting particulars of the basis of the claim and the extension of time and/or the additional payment claimed (the "42-day detailed claim requirement") was also a condition precedent to the Contractor's entitlement to an extension of time.

3. Sub-Clause 3.5 amounted to a promise not to challenge an adverse determination (by the Engineer) if that determination was not challenged within 14 days of its issuance; combined with an agreement that, if a compliant 14-day notice is given, then the determination may be challenged but only in accordance with the dispute resolution provisions of Sub-Clause 20.

4. In respect of the 28-day notice requirement (and, inevitably, the 42-day detailed claim requirement), time ran from the date when the Contractor was aware or ought to have been aware of an event or circumstance that could give rise to a claim for an extension of time, regardless of whether there was or had been any actual delay by that time. The judge acknowledged that this interpretation of Sub-Clause 20.1 differed from Akenhead J's decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028.[1]

The Court of Appeal considered, amongst other issues, whether each of these provisions were a condition precedent to MESC's entitlement to an extension of time and point from which the 28-day period in Sub-Clause 20.1 starts to run. The Court also considered whether DIFC law on limitation and good faith could be used to circumvent the need for giving timely notices under the Contract.

Decision

Sub-Clause 20.1: the 28-day notice requirement and timing

The Court of Appeal agreed with the judge, at first instance, that the 28-day notice requirement was a condition precedent to the Contractor's entitlement to obtain an extension of time.

The judge confirmed that a failure to serve a notice in time meant that the claim for an extension of time (and/or additional payment) would fail, because this is made absolutely clear in the language of the second paragraph of Sub-Clause 20.1, which states:

> *"If the Contractor fails to give notice of a claim within the 28-day period, time for completion shall not be extended, the Contractor shall not be entitled to additional payment and the Employer shall be discharged from all liability in respect of the claim."*

MESC did not dispute this, save for a point concerning timing and the Court of Appeal, therefore, considered when time begins to run for the purposes of the 28-day and 42-day periods. The Court of Appeal agreed with the interpretation of the judge, at first instance, that the 28-day notice requirement is triggered when the Contractor becomes aware (or ought to have become aware) not of the delay or likely delay, but of the event or circumstance giving rise to the claim for an extension of the Time for Completion.

This approach was distinguished from Akenhead J's judgment in *Obrascon* where he appeared to say that time could start to run from the moment that delay to completion of the works, in fact, occurred or started to occur, which is usually later. This analysis was problematic because it meant that, for example, if, in a three-year project, an event that occurred in the first year eventually resulted in the works overrunning by a month or two after the Time for Completion in year three, then the 28-day notice would only have to be given in year three after the Time for Completion had passed and the works remained unfinished. The judge concluded that such an outcome would defeat the primary purpose of Sub-Clause 20.1, which is to ensure that claims are notified and dealt with quickly.

Sub-Clause 20.1: the 42-day detailed claim requirement

The Court of Appeal disagreed with the judge, at first instance, and held that the 42-day detailed claim requirement was not a condition precedent to the Contractor's entitlement to obtain an extension of time.

The judge noted that Sub-Clause 20.1 sets out the consequences of a failure to give the 28-day notice, but the wording made it clear that that same draconian regime does not apply to the 42-day detailed claim requirement.

It was noted that Sub-Clause 20.1 states that the Contractor must keep the necessary records to substantiate its claim, permit inspection of such records and that it must comply with the 42-day detailed claim requirement. The consequence of a failure to comply with these requirements is set out in the last paragraph of Sub-Clause 20.1, which states:

> *"If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause."*

The judge's view was that the purpose of the two notices under Sub-Clause 20.1 is different. The 28-day notice is designed to give the Employer notice that a claim for an extension of time and/or additional costs will or may be made and to identify the event or circumstances on which it is based. No precise form of notice is specified, so it can be short and to the point. The purpose of the 42-day detailed claim, however, is to provide sufficient information to enable the Engineer to determine the claim. The judge noted that the amount of information given in the 42-day detailed claim is likely to differ from case to case,

and he concluded that it was neither necessary nor appropriate to construe the provision in a way that results in the Contractor losing its right to a claim on the basis that insufficient detail has been provided.

Finally, the judge drew attention to the wording at the end of Sub-Clause 20.1 ("*unless the claim is excluded under the second paragraph of this Sub-Clause*") which makes a clear distinction between the regime applying to the 28-day notice period and remainder of Sub-Clause 20.1.

The judge concluded that the 42-day detailed claim requirement was not a condition precedent to EOT entitlement, and that any failure or delay in complying with the detailed claim provisions can be taken into account by the Engineer in arriving at his determination.

Sub-Clause 3.5: Notice of Dissatisfaction requirement

The Court of Appeal agreed with the judge, at first instance, that Sub-Clause 3.5 contains a condition precedent that the Contractor must issue a notice of dissatisfaction within 14 days of the date of the Engineer's determination before it can proceed in accordance with the dispute resolution mechanism under Clause 20.

Sub-Clause 3.5 states that each party is required to give effect to a determination "*unless one party notifies the other of his dissatisfaction with a determination within 14 days of having received it*". Either party "*may **then** refer the dispute to be settled in accordance with Clause 20 [Claims and Disputes]*". The judge highlighted the key word "*then*" in this context as both having a sequential and conditional meaning. It is sequential in that the party wishing to dispute an Engineer's determination in accordance with Clause 20 can do so only after a party has already issued a notice of dissatisfaction within 14 days of having received the determination. It is conditional because the right to refer a dispute to be resolved in accordance with Clause 20 is conditional upon the 14-day notice provision having been complied with. The judge confirmed that, if no notice of dissatisfaction was given within 14 days of a determination, the determination stands.

MESC had sought to argue that it was entitled to challenge a condition precedent under Article 123(1) of the DIFC Contract Law on limitation pursuant to which an action for breach of contract must be commenced within six years after the cause of action has accrued. The judge rejected this argument on the grounds that Sub-Clause 3.5 is not concerned with breaches of contract as it simply limits the time in which a party can challenge an Engineer's determination.

MESC's arguments based on the prevention principle

At first instance, MESC had sought to argue that the prevention principle applied, pursuant to which Panther was not entitled to benefit from its own wrongdoing by way of the application of liquidated damages. MESC argued that time was at large because the extension of time provisions in the Contract could not be operated in the absence of strict compliance with the notice provisions. MESC relied on the Australian judgment in *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143. Both the judge, at first instance, and the Court of Appeal rejected this argument. The Court of Appeal noted that the judgment in *Gaymark* had not been greeted with universal approval and MESC did not refer to any authority in which it had been applied or approved.

The judge rejected MESC's argument at appeal. The meaning and effect of a contractual provision must be capable of being ascertained at the time the contract was entered into. At the time the contract was entered into, it contained a clear provision entitling the Contractor to an extension of time if the appropriate notices are given, and there was nothing to say that these notice requirements were either unreasonable or incapable of being performed. The clause was, therefore, effective in allowing an extension of time and preserving the Employer's right to liquidated damages. The judge concluded that, if the Contractor failed to give notice in accordance with the clause, then they must accept the consequences.

Additionally, the judge noted that the effect of the argument advanced by MESC is that it would enable the Contractor to pick and choose whether to invoke the extension of time clause. If the Contractor chose not to give any notices, then they could argue that they are not obliged to complete the works by any specified date and no liquidated damages for delay can apply. Such an outcome made no commercial sense and was at odds with the purpose of the Contract.

MESC's arguments based on good faith

MESC argued that Articles 57 and 58 of the DIFC Contract Law required Panther to act in good faith, and that it was unconscionable for Panther to apply liquidated damages for a period of delay for which it was mainly responsible. The judge rejected this argument for primarily the same reason as that specified in relation to the prevention principle point, namely that MESC was a willing party to a contract which included clear notice requirements in Sub-Clauses 3.5 and 20.1. The judge concluded that there was no justification for using the implied terms in Articles 57 and 58 of the DIFC Contract Law to override the agreed terms of the Contract.

Separately, at appeal, MESC also argued that, where liquidated damages applied, Panther was not entitled to claim any such damages for any part of the delay for which it was responsible. In support of this argument, MESC relied on the Court's discretion based on the principles of good faith and Article 122 of the DIFC Contract Law, which provides that a pre-agreed sum for non-performance can be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance. The judge also rejected this argument.

In respect of the obligations of good faith, the judge held that Articles 57 and 58 of the DIFC Contract Law do not suggest that the contracting parties should not be held to the terms they have agreed in the Contract. Nor do they provide any basis for the courts to rewrite the Contract for the purpose of achieving *"some balancing or re-balancing of equities between [the parties] or to redress what one party claims to be an unfair consequence of the terms which have been agreed"*.

In respect of Article 122 of the DIFC Contract Law, the judge noted that liquidated damages are payable for non-performance of MESC's obligation to complete by the contractually agreed completion date, and not, as MESC suggested, for the failure to serve the required notices. The judge noted that there had been no attack on the amount of liquidated damages for a failure to complete on time, and that this would not have been possible without detailed information concerning the cost of that delay to Panther.

Analysis

This case provides clear guidance that FIDIC Sub-Clauses 20.1 and 3.5 contain specific conditions precedent to which Contractors must strictly adhere or run a real risk of losing their right to claim for extensions of time and prolongation costs. It underscores the need for Contractors to always issue required notices on time because not doing so is likely to have serious consequences.

DIFC's approach to notices as strict conditions precedent is in line with the recent decision in *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and others* [2022] EWHC 3275 (TCC),[2] which concerned a JCT contract, and where a Contactor's claims were rejected because it could not establish breaches of contract on part of the Employer that had caused delay. Although it proved academic in that case, the judge also found that the Contractor had, on a number of occasions, failed to give adequate notice, and that failure would have prevented the Contractor from being able to rely on those alleged breaches in its claim for an extension of time.

In our experience, there is a common misconception in the UAE that such provisions will not be enforced by the courts on the basis that their application may be contrary to various mandatory provisions of the law including the principle of good faith (which is codified in the DIFC Contract Law). This judgment, while not binding on UAE courts or other civil law jurisdictions in the Middle East, may go some way to dispel that view.

We have also seen submissions based on the decision in *Gaymark* deployed frequently in the UAE to argue that time is at large, so it is worth noting that the Court of Appeal has found that it does not represent the law as applied in DIFC[3] and that it cannot be used to circumvent the notice requirements in Sub-Clause 20.1.

The decision on Article 122 of the DIFC Contract Law does, however, leave the door open for Contractors to argue that any liquidated damages applied can be reduced, despite an express provision for a daily rate in a contract, provided that an Employer's costs can be determined and found to be unreasonable. This element does not sit easily with the court's approach to strictly holding parties to their agreed contractual terms, and we note that similar provisions to Article 122 are found in many other civil code jurisdictions in the Middle East.

This case is unusual in that it has been heard in the DIFC Courts. In the UAE, most construction disputes are either litigated in the local courts or in arbitration behind closed doors, so it is difficult to get hold of detailed well-reasoned judgments in English dealing with these issues. The court's approach to the 28-day notice condition precedent in Sub-Clause 20.1 could encourage other larger employers to refer their disputes to the DIFC Courts.

New SCCA Arbitration Rules: another positive development for arbitration in the Kingdom of Saudi Arabia

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On 1 May 2023, the Saudi Center for Commercial Arbitration ("**SCCA**") announced the publication of its revised arbitration rules ("**New Rules**"), demonstrating yet another positive step forward for arbitration in the region.

The New Rules, which apply to all arbitrations filed on or after 1 May 2023, were introduced following a thorough consultation process led by the SCCA and SCCA Rules Advisory Committee, and seek to address various concerns and challenges previously raised by practitioners and stakeholders in the arbitration community.

Key changes

The New Rules have introduced significant changes, bringing the SCCA in line with other major arbitral institutions and international best practice. The key features are highlighted below.

SCCA Court

Of notable importance, the SCCA Court now replaces the SCCA Committee for Administrative Decisions and will effectively assume the administrative role of the SCCA (Article 3). The new court is chaired by Mr Jan Paulsson, a world-renowned arbitrator, and is comprised of fifteen other international arbitration practitioners (including arbitrators, high profile practitioners, former heads of arbitral institutions and retired judges).

In a nutshell, the SCCA Court is in charge of administering matters related to arbitrations and mediations conducted under the auspices of the New Rules. Examples of the SCCA Court's role include: (i) appointment of arbitrators and emergency arbitrators; (ii) challenges of arbitrators; and (iii) determining the administrative fees and those of the arbitral tribunal.

This is a key improvement which contributes to bringing the SCCA in line with other international arbitration centres (e.g. ICC, LCIA and SIAC).

Reliance of Technology and the Environmental Impact of Arbitration

An overarching and new feature of the New Rules is the promotion of the use of technology to file documents and manage cases. By way of example, the New Rules:

- allow for and encourage the electronic transmission of documents and submissions;
- permit arbitral awards to be signed electronicallyby the arbitrators (Article 36.1);
- provide that the administrative conference shall be held remotely by video conference, telephone or any other appropriate means of remote communication, unless otherwise agreed, and further acknowledge that hearings may also be conducted remotely, or in a hybrid format (Articles 10 and 29).

Further, the New Rules expressly encourage the use of technology to not only optimise efficiency, but to minimise environmental impact, with arbitrators being encouraged to consider the reduction of the environmental impact of the arbitration when establishing procedures for the arbitration (Article 25.2).

At a time when the environmental impact of arbitrations is of growing concern in the industry, these provisions offer a welcome move in the right direction.

Choice of Law

The New Rules no longer make reference to Sharia principles and only refer to the applicable law chosen by the parties. However, we note that parties should still be mindful that Sharia law will apply as a matter of: (i) law, where arbitrations are seated in the Kingdom of Saudi Arabia; and (ii) public policy, where enforcement is sought in the Kingdom of Saudi Arabia.

Efficiency of the Proceedings

The New Rules place an important emphasis on the efficiency of the arbitration process, with the importance of an efficient and cost-effective arbitration being referenced several times throughout the New Rules. In addition, the New Rules have introduced several provisions that will help to ensure a more efficient arbitral process. The most noteworthy of these inclusions are as follows:

- Emergency arbitrators are required to issue interim awards no later than 15 days from the date on which the case file was transmitted to them (Article 7.8).
- The parties are granted 30 days (or longer, if agreed) from the commencement of the arbitration in which to nominate the arbitral tribunal (Article 16.4), and the timeframe in which to carry out the case management conference is limited to 30 days from the constitution of the arbitral tribunal (Article 25.2).
- In addition to an instance where circumstances give rise to justifiable doubts as to the arbitrator's impartiality and independence, an arbitrator may now also be challenged where: (i) there is a failure on the part of the arbitrator to perform its duties; and (ii) where the arbitrator manifestly lacks the qualifications as agreed to by the parties (Article 18).
- Arbitral tribunals are granted certain discretionary powers to efficiently conduct the arbitration process, including: (i) limiting the length and content of written submissions (Article 27); (ii) encouraging the parties to settle (including through mediation) (Article 25); and (iii) striking out a claim based on an allegation of fact or law that is manifestly without merit and/or where no award could be issued in the claimant's favour under the applicable law (Article 26).
- Where claims arise under multiple contracts or arbitration agreements, parties may issue a single request for arbitration, where: (i) the request is related to the same transaction(s); (ii) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and (iii) if, where multiple arbitration agreements are involved, they are compatible (Article 11).
- Consolidation of two or more arbitrations is permissible if: (i) consolidation is agreed between the parties; (ii) claims are made under the same arbitration agreement; or (iii) the disputes arise in connection with the same legal relationship (Article 13).
- Unless otherwise agreed by the parties, the Arbitral Tribunal shall issue its award within 75 days from the date of closing of proceedings, which may be extended by another 75 days, if necessary (Article 33).

Third-Party Funding

In line with both the ICC Rules, and the recent introduction of a similar provision in the 2022 version of the Dubai International Arbitration Centre ("**DIAC**") Rules, Article 17.6 requires parties relying on litigation funding to disclose the identity of third-party funders to the Administrator, all other parties and the arbitral tribunal.

The recognition of third-party funding in the New Rules is a welcome addition, both in respect of transparency and in protecting the financial interests of the parties, especially where third-party funding is becoming more prominent in the region.

Conclusion

The New Rules are a welcome addition to the rapidly developing arbitration landscape, both in the Kingdom of Saudi Arabia, and the Middle East as a whole. Together with the opening of the SCCA's first Dubai-based branch, located in the Dubai International Financial Centre ("**DIFC**"), in February 2023, the strides being taken by the SCCA, specifically in respect of efficiency and environmental impacts, are likely to help make the SCCA a go-to arbitral centre in the region.

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Interpreting indemnity clauses: how many caps and what size?

Limitation of liability clauses are intended to provide certainty as to a party's potential exposure following a breach of contract. It is unsurprisingly therefore of some importance to take care to ensure that the intended limits reflect what is agreed. A recent case about a contract for the supply of software services provides a useful refresher of some of the key principles parties need to bear in mind.

Drax Energy Solutions Ltd v Wipro Ltd

[2023] EWHC 134 (TCC)

The dispute here centred on the interpretation of a limitation of liability clause, sub-clause 33.2, contained in a Master Services Agreement ("**MSA**") made between Drax and Wipro in January 2017 for the provision of a new IT system. The project was not a success, although the reasons for this remain under dispute and were not the subject of these court proceedings. However, Drax terminated the MSA on account of what were said to be repudiatory breaches on the part of Wipro.

Whilst cases such as these will always depend on their facts, or here the wording of the clause in question, it is always interesting to see the arguments used and the way the court approaches its decision. In 2021, the Supreme Court[1] in the UK gave guidance about the way to construe exclusion limitation clauses. Lord Leggatt noted that the approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) had changed markedly in the last 50 years and, following a consideration of the authorities, he went on to say:

> "*The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.*"

Drax's claims, which totalled some £31 million, fell into four categories. The Judge explained that "*using round figures*", Drax was seeking:

1. Quality: £9.8 million;

2. Delay: £9.7 million;

3. Termination: £12 million; and

4. Misrepresentation: £31 million.

The first three claims were distinct and separate losses. The way the misrepresentation claim was framed, with Drax alleging that, but for the representations which were false, it would not have entered into the MSA meant that different parts of it overlapped with each of the other three claims.

The relevant clause of the MSA was, in full, as follows:

> "*33. LIABILITY*
>
> *33.2 Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement*

Footnotes

[1] *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29. For more information on the case, see: *https://www.fenwickelliott.com/research-insight/annual-review/2021/triple-point-more-than-liquidated-damages.*

(including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year, then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months."

Mr Justice Waksman had to consider two issues:

Issue 1: Did clause 33.2 of the MSA provide for a single aggregate cap which applied to Drax's liability for Wipro's claim; or multiple caps with a separate financial limit applying to each of Wipro's claims?

Issue 2: If there were multiple caps, how did they apply to Wipro's claims?

Drax said that, if these preliminary issues were determined in its favour, the effect of the cap would be to reduce Wipro's maximum possible liability in these proceedings down from £31.7 million to around £23 million. This was because, while the claims in respect of Quality and Delay would fall below the relevant caps for each, and those claims are worth £19.5 million, there would be an applicable cap of £3.78 million on the Termination Claims of £12 million.

Wipro said that the charges payable in the first 12 months were £7,671,118 and 150% of that figure was £11,506,677. Rounded to £11.5 million, this was the maximum amount of loss for which Wipro could be made liable, in respect of all and any of the claims made against it. In other words, if Drax succeeded entirely, and in principle, Wipro was liable for £31.7 million of loss, Drax could only recover £11.5 million.

Drax said that the £11.5 million figure was a limit which applied to each and every separate claim, assuming they all arose in the first year. It was not a single maximum applied to all claims. Drax further said that a "claim" meant "cause of action". There was one claim for misrepresentation; nine quality claims; four claims in respect of delay; one claim for repudiatory breach, and one claim in respect of the Exit Plan. Alternatively, there were four "claims": misrepresentation, quality, delay and termination.

Issue 1

As a starting point, the Judge did not accept Drax's wider interpretation of "claim". The expression "claim" could not here by simply equated with "cause of action". This meant that the only interpretation of "claim" put forward by Drax which the court did consider was the narrower one whereby there were only four relevant claims. Wipro's position was that (a) there was only one claim anyway, but (b), even if not, clause 33.2 imposed one single cap in relation to all claims, however described and however numerous, unless any of them fell within another part of clause 33.

The Language of the Clause

The Judge started with the languge of the clause 33.2 itself. Taken in isolation, looking at the first three lines of the clause and the words "limited to", the language strongly suggested that this was a cap for all claims. The phrase "total liability" supported that reading, as well as the absence of words like "for each claim" after the word "liability". So, if there had been here a specific sum stated after the words "limited to", for example £10 million or £20 million, rather than the formulae which in fact follow them, the language would clearly indicate a single cap.

However, one had to have regard to the actual words used after the words "limited to". The formulae used when "the claim" first arose or arises. If "claim" was to be interpreted as meaning each claim that had arisen, then this would suggest that the relevant formula was to be applied to each such claim, in which case there would be a number of separate caps. However, the Judge felt that, if one looked at "claim", the reference to when "the claim first arose" really meant when the **first** [of the various] claim[s] arose. On that interpretation, although there could be several claims, the cap is still for the total of those claims and the timing of the first of those claims simply sets the appropriate limit.

The Judge also looked at the language of other provisions. For example, clause 33.3, which imposed a single cap for all claims relating to a breach of clause 21 of the MSA. That provision dealt with data protection. One particular feature was the reference to the date when "the claim first arose". This was in circumstances where it is accepted that, while there could be more than one claim (as contemplated by the words "… any and all claims …"), there was a single cap for all claims. This would then suggest that the same expression in the clause should be interpreted in the same way, since the same words are used in each provision. That would, therefore, provide added support for view of the clause as imposing a single cap.

Overall, the Judge considered that despite some "*linguistic quirks*", the correct interpretation was that there was a single cap, as argued by Wipro, and not separate caps for each claim. In making this decision, the Judge expressly noted: "*the context of where both parties are large corporations which obviously had professional advice and assistance in the making of the MSA*".

Commercial Considerations

Drax submitted that Wipro's interpretation would lead to some surprising results. There was no business sense to Wipro's interpretation because a single cap would be inappropriate where there could be (looking at the date when the MSA was made) many potential claims over an indefinite period of time by more than one Drax entity. The Judge thought that this was, in theory, true, but commented that one had to be "realistic". If, as Drax alleged here, the project was proving or threatening to be a disaster within the first year, it was hardly likely to commission yet further work and, indeed, at some point, it would surely terminate. That, of course, is exactly what Drax did.

Drax also said that, on the basis that there were only four relevant claims, on Wipro's interpretation, they were still capped at one third of their potential value, i.e., £11.5 million as opposed to £31 million. The Judge said this was true but noted that £11.5

million was not insignificant. If Drax did not, in the end, protect itself in terms of claims to be made as much as it could or should have done, that was not a reason for preferring its interpretation and was quite different from saying that a clause makes no commercial sense.

Issue 2

As there was a single cap for all of the claims, strictly, Issue 2 did not matter, but it was relevant to how the Judge had decided the first issue.

Drax's primary position was that "claim" here meant "cause of action". The Judge noted the "*classic definition of a cause of action*" given by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, being a factual situation, the existence of which entitles one party to obtain a remedy against another.

However, here, the Judge said that you had to construe "claim" in the context of the operation of clause 33.2. The four claims here did not (save in the case of the Misrepresentation Claim) overlap in terms of loss, and they represented how Drax had pleaded out its claim. Further, and in a broad sense, they corresponded to different causes of action, because they were plainly different and relied on different sets of facts. They, therefore, corresponded to a common-sense view of what claims were being made here. Given that the exercise of identification could not simply be avoided, the answer had to be here that whilst clause 33.2 did not provide for multiple caps, if it had done, then the claims to which those caps applied would be the four claims detailed above: misrepresentation, quality, delay and termination.

Conclusion

Accordingly, clause 33.2 of the MSA provided for a single aggregate cap which applied to Wipro's liability for all of Drax's claims.

Environmental, Social and Governance (ESG) and supply chain risk management

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Introduction

It is uncontroversial that ESG is a boardroom level issue for many businesses, and this is unlikely to change in the near future. ESG is pervasive and cuts across many different aspects of a what a business does or areas with which it may be involved. With new and pending legislation, a Court of Appeal judgment, as well as a UK Supreme Court judgment, ESG and risk management, particularly in relation to supply chains, is fundamentally important for every company to prioritise.

Key considerations:

- Increasing demand for transparency and accountability by the public and non-governmental stakeholders.
- Introduction of legislation that increases businesses' reporting requirements.
- Expansion of legal responsibility to cover actions of the supply chain.
- How do you manage the risk?

Increasing demand for transparency and accountabiity

There is increasing pressure on companies to adopt "best practice". A survey by PWC in 2021 found that 83% of consumers think companies should be actively shaping ESG best practices and 86% of employees prefer to support or work for companies that care about the same issues they do. These are striking figures. Companies can also find themselves named and shamed where they fail to meet the standards expected of them.

Legislation

EU Legislation

The European Union and its member states have been particularly active in developing new legislation related to ESG.

In 2014, the EU took the first major step towards a new ESG framework by implementing the Non-Financial Reporting Directive ("**NFRD**"), which introduced reporting requirements for large companies, including listed companies, banks and insurance companies. Under the NFRD, these companies are under an obligation to publish information related to environmental matters, social matters, human rights, anti-corruption and bribery, and diversity of company boards.[1]

In 2019, the EU implemented the Sustainable Finance Disclosure Regulation ("**SFDR**"), which imposes mandatory ESG disclosure obligations and introduces rules for reporting on sustainability and ESG factors. For example, it states investments must *"do no significant harm"*. This means that if an economic activity contributes to an environmental or social objective, then it should also not significantly harm any other social or environmental objectives.

This is being taken further with the implementation of the Corporate Sustainability Reporting Directive[2] ("**CSRD**") in January 2023 (set to be implemented by EU member states in July 2024) which will affect EU companies but also those with large EU-based subsidiaries.[3] Currently, the reporting standards under the CSRD remain undefined, although it seems likely that these will be even more onerous than the requirements already in place and may align with EFRAG's Draft European Sustainability Reporting Standards issued in November 2022,[4] which include disclosures expected of companies in respect of its own workforce, workers in the supply chain and affected communities and end-users.

UK Legislation

At the time of writing, the EU standards above remain applicable in the UK. However, given the withdrawal from the European Union in 2020, the UK government is under no obligation to give effect to the CSRD. Even though the CSRD isn't likely to be implemented into UK law in the immediate future, it is likely to affect UK-based companies nonetheless, as any UK company that has a large EU-based subsidiary, or a subsidiary that is an SME listed in the EU, will need to make disclosures under the CSRD.

The UK has also independently made its own advances in ESG legislation. While generally concerned with environmental governance of water, nature and biodiversity, the Environment Act 2021 ("**the Environment Act**") enables secondary legislation to be made, including regulations requiring payment towards the disposal of products and materials. In the context of a construction site, employers and contractors need to be mindful of disposing of materials correctly and the associated costs. This can be done by fixing the price of disposing materials during the tender process and embedding this in the contract.

The Environment Act also enables the creation of new extended producer responsibility schemes, whereby the government can make anyone who produces, sells or supplies packaging responsible for the full net costs of managing clients' products and packaging. These schemes are extensive and include the power to order the payment of waste management fees and other charges.

DEFRA also held a consultation between March and June of 2022 to determine environmental targets in the context of the Environment Act. Notably, one of the core issues in this consultation was the government's target of eliminating avoidable waste of all kinds by 2050.[5]

The construction industry is the second largest consumer of plastic packaging in the UK behind the packaging industry itself,[6] and it is estimated that an average 34% of a construction site's waste (by volume) is packaging waste.[7] Therefore, it seems likely that the Environment Act and future legislation will impact producers of construction products and other stakeholders further down in the construction supply chain.

Expansion of legal responsibility to cover actions of the supply chain

Recent case law has also opened up the prospect of liability for the actions of one's supply chain.

In *Begum v Maran (UK) Ltd*,[8] the Court of Appeal unanimously held that a duty of care owed by a UK company could extend to actions of international third parties in its supply chain. This followed the landmark ruling in *Vedanta Resources PLC v Lungowe*[9] whereby parent companies in the UK could be liable to communities affected by the actions of their non-UK subsidiaries.

Furthermore, the ruling in *Okpabi v Royal Dutch Shell*[10] concerning pollution caused by oil exploration saw a successful cross-border environmental litigation in the UK Supreme Court. In this dispute, the Court allowed Nigerian citizens' environmental damage claim to proceed against the UK parent company of the local subsidiary, Royal Dutch Shell.

These cases serve as a timely reminder that, in the current climate, UK companies need to be more aware than ever of the actions of the third parties they incorporate into their supply chains as well as their non-UK subsidiaries. This area, in particular, will be of some concern to companies in the construction industry as construction supply chains can be long, complex and multinational, potentially making it difficult and expensive to exercise sufficient oversight to eliminate the risk of litigation.

How do you manage the risk?

As is clear from the above, the due diligence burden and the potential liability of contractors, suppliers and manufacturers within the construction industry has increased in the last few years. This is not simply a negative development, as the new standards that firms are now required to comply with serve as signposts of where one needs to go to become a more ethical and sustainable business.

However, the implication is that companies now need to consider whether the typical existing due diligence structures, contractual obligations, audits, etc., are still sufficient to discharge one's duties and protect against liability and whether further steps should be taken. For example:

- Is it possible to consolidate the supply chain to take greater control and oversight of these risks?
- Consider enforcing standards more rigorously, which will require a greater degree of transparency from the supplier, which may itself need to be enforced by way of audit, monitoring and spot checks.
- It may not even be enough to enforce these changes on one's direct suppliers; it may also be necessary to ensure they do so with their own suppliers in turn.

Conclusion

The rise of ESG as a novel supply chain pressure comes at an inauspicious time for many in the construction industry. The necessity to be in a position to report on your supply chains and to have complete oversight is an onerous obligation in any event, and will undoubtedly require additional resourcing and the establishment of robust procedures to comply with.

[1] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095*

[2] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464*

[3] Ibid.

[4] *https://www.efrag.org/lab6*

[5] See *https://consult.defra.gov.uk/natural-environment-policy/consultation-on-environmental-targets/*, Resource efficiency and waste reduction targets – Detailed evidence report.

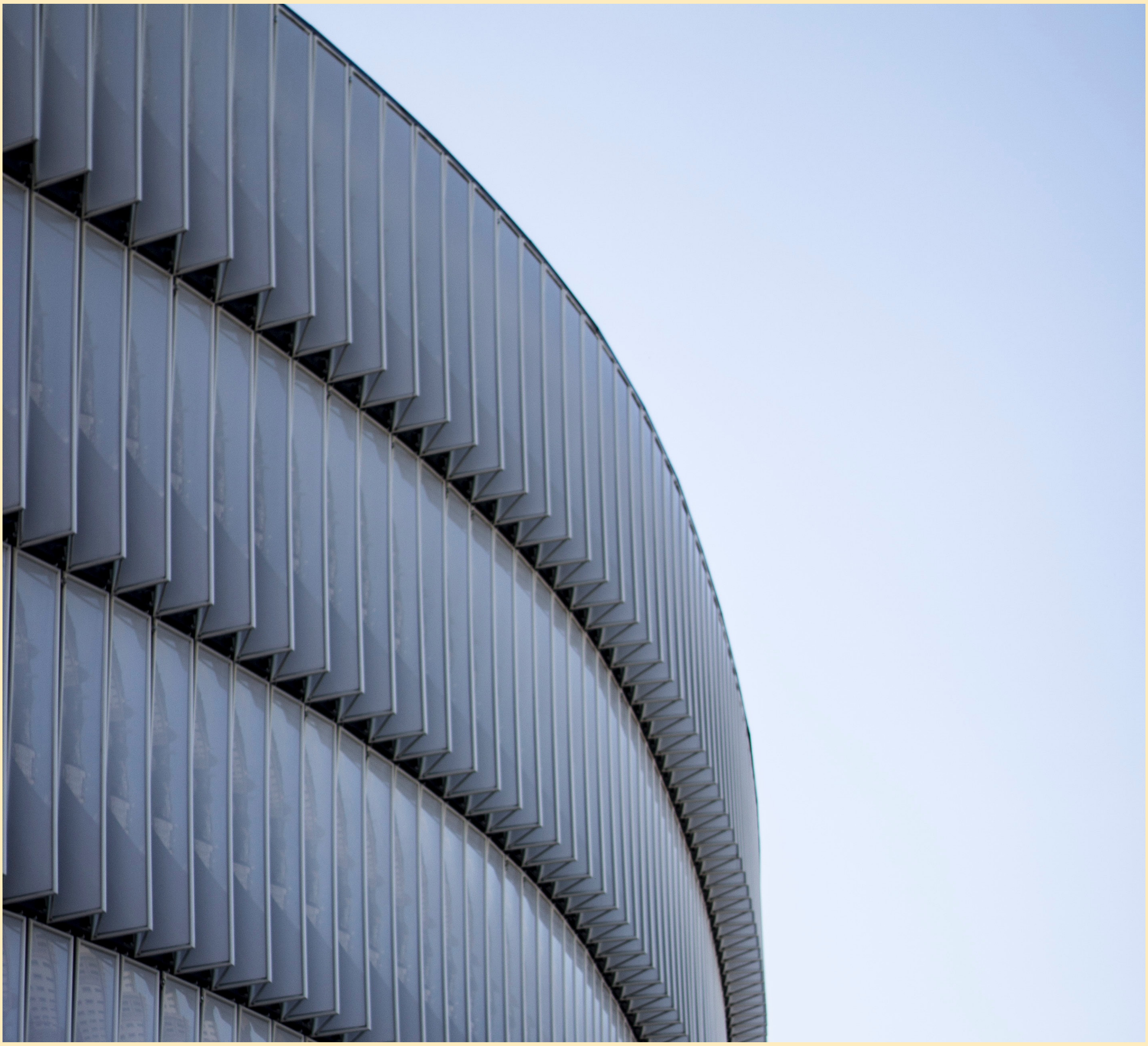
[6] *https://www.swiftpak.co.uk/insights/packaging-waste-in-construction-industry*

[7] *https://asbp.org.uk/asbp-news/packaging-reduction-toolkit-launched*

[8] [2021] EWCA Civ 326 *https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html*

[9] [2019] UKSC 20 *https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf*

[10] [2021] UKSC 3 *https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf*



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