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Introducing the FIDIC emerald book

Page 11

Construction bonds - why releasing can be far from simple

Page 15

Target cost contracting and joint venture agreements

Page 27

From the Editor

John Green

Welcome to the 38th issue of BuildLaw® in which we draw on the experience and expertise of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to construction law.

In this issue we look at a NSW Supreme Court decision in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] which found that the claimant, despite using an expert programmer, failed to sufficiently prove that a delay by the respondent caused delay and loss to the entire project. Delays also feature in our examination of a recent target cost contract decision in the UK case of *Network Rail Infrastructure Ltd v ABC Electrification Ltd*. In this case a small change in the drafting of the contract had a significant impact on the financial outcomes for the parties. We discuss the benefits of 'Framework Contracting' in delivering infrastructure, the risks to an owner of refusing a builder the opportunity to rectify defective building work and the risks that contractors face should they incorrectly suspend works for non-payment or other issues.

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In Case In Brief we look at *C Spencer Limited v MW High Tech Projects UK Limited* which deals with how the The Housing Grants, Construction and Regeneration Act 1998 applies to hybrid construction contracts.

I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professional, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution and construction law.

Contributions of articles, papers and commentary for future issues of Buildlaw® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute BuildLaw® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Wishing you all a safe and enjoyable holiday season and a successful and prosperous New Year from all of us at BDT.

Warmest regards,

Editor and Director Building Disputes Tribunal

Contents

01 From the Editor

03 BUILDLAW® In Brief

07 It's called a contract

11 Introducing the FIDIC emerald book

15 Construction bonds - why releasing can be far from simple

19 The TCC opens the door (slightly) for adjudication proceedings by companies in liquidation

25 Case In Brief
Mann v Paterson Constructions Pty Ltd [2019] HCA 32

27 Target cost contracting and joint venture agreements

31 To DA(A)B, or not to DA(A)B...

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BuildLaw: In Brief

Maintaining privilege in expert communications

A recent Victorian Supreme Court decision gives some guidance as to when, in Australia, an expert's report will be admissible in evidence, and the extent to which lawyers may communicate with experts regarding the evidence they are preparing without compromising the admissibility of that evidence. This latter question is of great interest to lawyers; New South Wales Young Lawyers has created a guide devoted entirely to the briefing of experts.

While communication between a lawyer and expert is essential to the preparation of a useful expert's report, that communication should be carefully managed. In particular, communication between a lawyer and expert that is regarded as impermissible may come out in discovery and weigh against the credibility of the report.

In the recent case of *Finance & Guarantee Company Pty Ltd v Auswild (Expert Evidence Ruling)* (**Finance**), the plaintiffs objected to the admissibility of an expert report on the grounds of lack of independence. The judgment formed part of proceedings in relation to an alleged breach of fiduciary and equitable duties by former directors of Preston Motors Group.

Riordan J held that a loss of independence was not established, and so the evidence was admissible.

The Judge referred to the NSW Young Lawyers' Practitioner's 'Guide to Briefing Experts' to support the proposition that detailed discussions between a lawyer and expert about material that could be made available to the expert for their report and the questions that the expert might be capable of addressing were to be expected. It would also not be inappropriate for a lawyer to discuss preliminary views early in the process.

To retain independence, it is important that a) the expert approach questions impartially, and b) the lawyer does not attempt to influence the expert's opinion.

In addressing whether a lack of independence would render a report inadmissible, the Judge referred to *Rush v Nationwide News Pty Ltd (No 5)*, where it was stated that *an actual or perceived lack of independence, impartiality or objectivity of an expert witness goes to weight, not admissibility.*

Finance confirms that while a lawyer may discuss extensively with an expert as they prepare their report, they must not attempt to influence the expert's opinion. Doing so will not necessarily render the evidence inadmissible but will certainly militate against its credibility.

Cross claims in Expert Determination

When an issue is referred to Expert Determination, can the Expert validly decide on a cross claim which bears no relation to the initial issue?

It is not uncommon, in Australia at least, for a contract to specify that certain unresolved disputes must be referred to Expert Determination – where an expert makes a binding decision on the matter before them. In fact, the standard form contract provided by the New South Wales Government for construction projects valued at over $1 million does so (**Contract**). This Contract was used by Poonindle Pty Ltd (trading as Ted Wilson and Sons) (**TWS**) and Eurobodalla Shire Council (**the Council**) for construction works at a sewage treatment plant.

After the parties sought an Expert Determination for a dispute, TWS contested the validity of the determination. TWS brought proceedings seeking a declaration that the determination was void, arguing that some of the issues decided in the determination were outside of the Expert's jurisdiction. The Supreme Court of New South Wales dealt with the issue in *Poonindie Pty Ltd t/a Ted Wilson and Sons (TWS) v Eurobodalla Shire Council* [2019] NSWSC 1485.

NSW GOVERNMENT

According to the contract:

- a party wishing to refer an 'issue' to Expert Determination must follow the procedure set out in clauses 69 and 70 of the Contract (including correct notification to the other party of the issue being brought); then

- in response to any 'issue' referred to the Expert, the other party may raise 'any defence, set-off or cross-claim'.

In this case, TWS brought an 'issue' for determination. The Council responded with three cross claims (**the additional disputes**). The Expert determined all four issues. TWS contended that the Expert had no jurisdiction to deal with the additional disputes, because they were not connected with the subject matter of the initial 'issue'. The problem from TWS' perspective was that while the applicant was required to adhere to the procedure set out in clauses 69 and 70 when raising issues, the respondent could bring any claims as cross claims without adhering to the procedure.

BuildLaw:In Brief continued

The Court declined to declare the determination void. The Court said, *it has been accepted for a very long time that a cross claim does not have to bear any relationship to the claims put forward by the plaintiff or applicant.*

While the Court accepted parties were free to agree upon a different regime, in this case the Court did not find any reason to restrict the application of the clause which, plainly read, allowed any… cross-claim to be brought in response to an 'issue' referred to the Expert. The Court observed that if parties wished to restrict how a cross claim could be brought under the Contract, they would need to specify that.

Failure to give notice no bar to claim for damages where defects incapable of rectifications

In the recent NSW Court of Appeal decision in Visual Building Construction Pty Ltd v Armitstead (No 2) [2019] NSWCA 280, the Court considered whether a contract could be validly terminated without notice if the defects were unable to be remedied.

Visual Building Construction Pty Ltd (**the Appellant**) entered into a contract with Mr David Armistead and Ms Maria-Luisa Patisso (**the Respondents**) for the construction of two duplex buildings on a block of land in Caddens, NSW. There were delays and defects to the contracted building work. To remedy this, two variations to the contract were agreed to. They detailed the specific requirements for compliance with a rectification order.

It came to light that the Appellant had never obtained a Construction Certificate, which was required before building works could commence. Further, the Respondents alleged that the Appellant had failed to complete the works by the date for completion, failed to rectify defective works specified in the variations to the contract, and failed to proceed with due diligence.

Because of these failings, the Respondents purported to instantaneously terminate their contract with the Appellant. They commenced proceedings in the District Court seeking damages for breach of contract. At trial, the Appellant argued that the Respondents' failure to provide the 10-day notice period, which would allow them to remedy any defect, rendered the termination of the contract invalid. The Judge at first instance held that, as it was not possible to remedy the failure to obtain a construction certificate, the Appellant's argument must fail. Accordingly, damages were awarded to the Respondents.

The Appellant appealed this finding to the New South Wales Court of Appeal. They made the same argument and did not challenge the award of damages. The Court unanimously dismissed the

appeal. To commence works without the necessary construction certificate was held to be a fundamental breach incapable of remedy. As such the contract was validly terminated. The lack of a notice period was no bar to the termination of a contract when the defects were such that they could not have been properly remedied.

UK Government to fund replacement of all Grenfell-style cladding

After the tragedy of the Grenfell fire, all eyes turned to finding the cause of the disaster. It was discovered that the aluminium composite material cladding (**ACM cladding**) used was highly combustible and resulted in the rapid spread of the fire. Over 400 tower buildings with similar cladding have since been identified by the United Kingdom Government. Despite the obvious risk, building owners have been slow to replace ACM cladding. Determining who should bear the cost of such replacement has been complex. In response, the Government has announced a $200 million fund to speed up the process of removing and replacing the ACM cladding on privately-owned high-rise buildings.

As a pre-requisite to the use of the fund, entities responsible for removing ACM cladding must apply at the earliest possible juncture and must continue to pursue any available claim under latent defect insurance policies.

To make use of the fund, applicants must meet three eligibility criteria. First, the fund must be used for the benefit of lease holders of residential buildings which are over 18 metres tall. Second, applicants will need to confirm that they are replacing cladding with materials of limited flammability. Finally, owners will still be expected to actively pursue 'all reasonable claims' against any party involved in the original cladding installation, and to pursue warranty claims 'where possible'.

IT'S CALLED A CONTRACT

By Tom Grace

Introduction

A recent decision of the Full Court of the Supreme Court of South Australia demonstrates the horrendous consequences which may result from a dispute as to what works were included in a home renovation contract.

In or around June 2011, Mr McIntyre contacted SA Quality Roofing Services ("**QRS**") requesting a quote for the construction of a verandah and other works at his house.

Three separate quotes were supplied by QRS being for roof restoration work, replacement of gutters and downpipes, and to supply and install a new curved verandah. The verandah quote also referred to "optional extras," relating to work to enclose the verandah.

In July 2011 the QRS salesperson again attended at the property to further discuss the quotations. The parties agreed to go ahead, although there was a later disagreement about which documents were exchanged on that day.

A number of documents were produced including the Quote, the Construction Plan, Contract Details, plans and drawings submitted to the local council in August 2011, and a variation to the Contract agreed in September 2011. The variation, in part, increased the area of glass on the enclosure to "give a clear view over the lake". The Construction Plan, drawn by QRS in October 2011, envisaged enclosure to a full height, completely sealed and enclosed.

The August 2011 Application for Development Approval was lodged by QRS with the local council. The application included site floor plans and site elevation for the verandah but made no reference to the verandah being enclosed. It later emerged that QRS did not hold a licence that enabled it to construct an enclosed verandah.

In September 2011, the Council granted Development Plan Consent in relation to the construction of the verandah, stating the "verandah shall not be enclosed on any side with any solid material, roller door, or the like".

In November 2011 QRS built a verandah to the southern and western elevations of the house and the McIntyre's laid paving under the verandah. Ms McIntyre was not happy with the work performed by QRS and in late November, she wrote to QRS asking for "plans for works including 3D views as requested so I can get an idea on what we have purchased". Subsequently, Ms McIntyre wrote again saying "the verandah needs to be finished before any money is paid".

Ms McIntyre repeated her request for plans on other occasions before receiving, on 15 February 2012, a drawing showing a gap between the southern and western verandahs.

The parties were at odds about whether there should have been a "hip" connecting the two verandahs and what type of enclosure was included in the contract. The McIntyres considered the contract specified the construction of a single enclosed "return style verandah", whereas QRS maintained the specifications were for the construction of two curved verandahs on the southern and western sides of the property, which would include the "gap" between them. QRS contended the enclosed nature of the verandah was to be further developed and agreed after construction had commenced.

The McIntyres approached the Council to complain about the verandahs. The Council inspected and found the verandah as it had been erected, differed from the approved drawings, and a new application was required to seek retrospective approval.

QRS applied for that approval but the McIntyres refused to give their consent to the new application. Consequently, the Council declined to entertain the application. A stalemate emerged.

The parties go to Court

QRS wanted payment for the work it had completed and issued proceedings in Court. The McIntyres issued a defence and a counterclaim.

In 2013, the Council brought proceedings in the ERD Court due to the construction of the verandah being different to the council approval. In early 2014, the Court ordered for the demolition of the verandah. Before that occurred, the McIntyres made other alterations to their home that required the removal of at least part of the verandah. Each party then sought the legal costs of the other in relation to the ERD Court proceedings.

The District Court decision

The District Court proceedings[1] went to trial in November 2015. In June 2017, the Judge delivered her verdict, finding in favour of QRS. The Judge found that the parties had agreed for the construction of two separate verandahs, with an intention to further develop and vary the design by enclosing the walls of the verandah as the work proceeded.

The Judge found QRS was not licenced to construct an enclosed verandah. The absence of the licence precluded it from recovering the contract sum, but an alternative claim in quantum merit was granted. QRS was entitled to the sum of $37,360 but the cost of rectifying defects in the sum of $9,457 reduced that entitlement to $27,903, plus interest from the date of completion of the verandahs.

The Judge found the McIntyres should pay all of the costs of QRS in the ERD Court, including the costs it had been required to pay to the Council, on the basis that they had encouraged the Council to issue proceedings.

The appeal to the Full Court

The McIntyre's appealed to the Full Court[2]. The Full Court unanimously upheld the appeal. The Court reiterated the importance of the written Contract and the need, in determining any dispute, to interpret the documents that form the contract. It is the content of those documents, viewed objectively, that determines what the parties have agreed.

The Court said that the contract was clear in stating that the verandah was to be a single connected construction of the two verandahs and was to be fully enclosed.

The discussions of the parties at the time of forming the Contract and what they intended when they reached the agreement, are generally irrelevant, when the documents are clear.

While documents produced had showed a different type of construction, including the separated verandahs and the absence of the full enclosure, these documents did not form part of the Contract and were not relevant to the enquiry as to what the parties had agreed. Given the reversal of the decision of the District Court on the issue of the Contract, the contingent findings as to liability for the costs of the ERD Court proceedings were also reversed.

The matter was remitted to be heard by another Judge in the District Court with the following issues to be determined:

- resolution of the McIntyre's' cross-action and counterclaim;
- costs of the proceedings in the ERD Court;
- costs of the proceedings in the Magistrates and District Courts; and
- questions of pre and post-judgment interest.

Conclusion

The legal fees incurred by the parties in this dispute are not known but will almost certainly exceed by an order of magnitude the quantum of the original contract sum.

The intention of one or other of the parties is irrelevant to the meaning of the written contract. Subsequent conduct is irrelevant to the bargain that has been struck. Contractors who construct at variance to the approved plans and specifications run the risk of alienating both their clients and the relevant authorities.

This case is a stark reminder of the way in which disputes escalate in magnitude with the passage of time. Prompt attention to dispute resolution, including seeking appropriate expert advice, in the early stages of a dispute, is the most economic and sustainable way of construction contracting.

End Notes

[1] Quality Roofing Services P/L v McIntyre & Anor [2017] SADC 118

[2] McIntyre v Quality Roofing Services Pty Ltd [2019] SASCFC 29

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INTRODUCING THE FIDIC EMERALD BOOK

By Claudia Russell, Christine Worthington, Victoria Peckett and Ian McCann

Earlier this year FIDIC released its new "Emerald Book" – Conditions of Contract for Underground Works. This addition to the FIDIC suite seeks to fill a gap amongst standard forms as a specialist contract for use on underground projects, including tunnelling works. We provide an overview of the key features of the Emerald Book below.

A new approach to risk allocation

The Emerald book sets out a distinctive approach to risk allocation designed specifically with underground projects in mind. In particular:

- Risk allocation is based on a Geotechnical Baseline Report ("GBR") and a Schedule of Baselines and Geotechnical Data Report ("GDR").
- The intention is that Employer should carry out significant investigations prior to tendering the works to obtain as much information as possible regarding subsurface risk (including water risks).
- Foreseeable risks (i.e. those risks identified in the GBR) are allocated to the party best placed to manage them.
- The Employer takes the risk associated with conditions worse than those set out in the GBR, but also gets the benefit where conditions are more favourable than those set out in the GBR – the Time for Completion time can be shortened and the Contract Price reduced.
- The Contractor assumes the risk of delivering the works where conditions are as per those expected in the GBR – the Contractor designs the works in accordance with the GBR and the Employer's Requirements.
- Anything outside the scope of GBR is deemed to be Unforeseeable, entitling the Contractor to additional time/money.
- The Contractor is required to complete and maintain a Contract Risk Register and prepare and maintain a Contract Risk Management Plan (concepts familiar from the NEC suite of Contracts) – recognition that much can go wrong in projects of this nature.

Excavation and lining works

- Specific provision is made for excavation and lining works:
- These works are recognised as being a key part of the Works themselves, and difficult to accurately scope out/quantify at tender stage.
- These works are therefore paid for on a remeasurement basis - rates and prices are set out in the Bills of Quantities.
- These are divided into Fixed rate items, Time related rate items and Quantity related rate items.
- These rates also allow a mechanism for valuation of prolongation costs in the event of Unforeseeable subsurface conditions being encountered.

Payment and performance security

- The Contract provides for an Advance Payment Guarantee as well as Performance Security being delivered by the Contractor. Advance payments are likely to be necessary where high value plant is to be paid for up front.

- There is provision for a JV Undertaking – to provide for joint and several liability between the JV parties, to allocate a leader and to set out their individual scopes where relevant.

- As in other FIDI contracts, the Employer must provide details of its financial arrangements for the project, and revisit these where project costs increase.

Engineer's role, dispute avoidance and resolution

- The role of the Engineer and the dispute resolution provisions of the Emerald Book are similar to those in other FIDIC books:

- The Engineer acts as Employer's Agent and has specific role in respect of monitoring progress of the Excavation and Lining Works

- The Engineer is also required to determine certain matters as between the parties. There is a specific statement that the Engineer will act impartially in this role. The Engineer must be wary of conflicts of interest.

- Where either party is dissatisfied with the Engineer's decision the matter is referred to a Dispute Avoidance/Adjudication Board (appointed for the duration of the contract).

- Where a party remains dissatisfied, the matter will be referred to Arbitration (ICC rules).

Considerations for early adopters

- The agreement of the GBR is likely to be an involved process requiring significant negotiation. As this is so central to the Contract (with time and cost both hinging on it) it will be crucial to get it right before it becomes contractual.

- As with other FIDIC forms, the Contract places a fitness for purpose obligation on the Contractor. The Employer will need to ensure that the intended purpose is stated clearly in the Employer's Requirements in order to

benefit from this – including any expected lifetime of the works.

- The Contract provides that the Employer is required to obtain all permits, licenses and consents stated in the Employer's Requirements to be its responsibility, and that the Contractor is required to obtain any others. The Employer is also responsible for allowing the Contractor access to the Site – which could be complicated in respect of tunnelling contracts affecting ground in the ownership of a number of different parties. It will remain important to ensure that the full jigsaw of permissions and consents is in place prior to work commencing, and that sufficient time is allowed for this exercise (as negotiations could be lengthy).

- The Contractor is required to take measures to limit nuisance to third parties but it is likely that in tunnelling projects third party interests will need to represented much more robustly than this. In particular, landowners consenting to tunnelling under their property are likely to require collateral warranties with clear undertakings as to the manner of working, ability to call upon the Contractor's insurances and perhaps even rights to scrutinise and input into methodology, as well as indemnities in event of any loss being suffered. Additional contractual provisions are likely to be driven by discussions with the third parties themselves.

- Although an Advance Payment Guarantee is provided for, the Employer may wish to consider whether further comfort is required in respect of expensive tunnelling equipment or specialist materials. Where costly items are paid for in advance, ownership may be agreed to vest in the Employer as the item(s) is/are fabricated (before shipment/delivery). It is never possible to provide a 100% safeguard against supplier insolvency, particularly where dealing with foreign suppliers, but direct contractual links can assist. Seeking advice in respect of insolvency laws in the local jurisdiction may also be prudent.

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CONSTRUCTION BONDS - WHY RELEASING CAN BE FAR FROM SIMPLE

By James Dow & Katie Shorter

The importance of having clear provisions in construction contracts regarding the circumstances where a Principal may call up a contractor's bond was highlighted in the recent High Court decision of *Arrow International (NZ) Limited (in liq) & Ors v NZ Project 29 Limited & AAI Limited (formerly Vero)* [2019] NZHC 1326. The case involved an application made by contractor Arrow International (NZ) Limited (in liquidation) (**Arrow**) to extend an interim injunction that prevented AAI Ltd (**Vero**) from making payment to NZ Project 29 Ltd (**Project 29**) under a construction bond (Bond).

Key Facts

The Bond was issued by Vero in favour of Project 29 in association with a construction contract between Arrow and Project 29 for a property at 89 Courtney Place, Wellington (**Contract**). During construction, Arrow went into voluntary administration, causing construction works to cease. Project 29 then exercised its "step-in" right under the Contract to assume control of the works and resume possession of the construction site. Once Project 29 had resumed possession of the site, it exercised its right under the Contract to withhold further payments to Arrow and call on the Bond.

Arrow and its liquidators disputed that the claims made by Project 29 under the Bond were legitimate. Arrow applied to the High Court for orders to extend the interim injunction granted by the Court the month prior that prevented Vero from making payment to Project 29 under the Bond.

Decision

The Bond was conditional both via the Contract and the Bond itself. The Contract contained a clause providing that the Engineer was required to certify that Arrow had breached the Contract and then make a provisional assessment of all amounts that may become owing to Project 29 by Arrow, before Project 29 was able to make a call on the Bond.

Arrow argued that the clause contemplates the Engineer making an assessment of the amount Project 29 would have paid to Arrow had Arrow completed the works under the Contract, against the amount Project 29 would have to pay to complete the works following Arrow's default. However, there was no calculation of such costs in the spreadsheet provided by the Engineer. The Court accepted this argument and found that without a direct assessment of the cost to complete the Contract works, the Engineer had not issued the certificate in accordance with the terms of the Contract.

The Bond also contained a clause that reinforced the obligations of the Engineer as a condition of a demand by Project 29 under the Bond. The clause stated that demand by Project 29 for the Bond must be accompanied by a certificate from the Engineer which certified that Arrow was in default under the Contract and that "*the sum demanded is in the opinion of the Engineer reasonable having regards to the nature and consequence of the default*".

The Court took issue with the Engineer's certification that the sum demanded by Project 29

was reasonable. The Court held that it was arguable that by not certifying the claim in accordance with the terms of the Contract, the Engineer had not met the terms of the Bond allowing Project 29 to issue a demand on Vero under the Bond.

However, for the Court to extend the period of the interim injunction, Arrow had to demonstrate that the contractual provisions were not given effect to and the Engineer's certificate was not valid under the Contract. While by failing to assess the cost of completion, the Engineer had not complied with the terms of the Contract and Bond, this did not mean the Engineer's certificate was invalid under the contractual machinery. The purpose of the Engineer's certificate was to relieve Project 29 from the adverse impacts of disputes. It would be inappropriate for the Court to transfer the risk of dispute back to Project 29.

The Court held that ultimately, it is not for them to make orders that are inconsistent with what the parties had contractually agreed would occur if Arrow failed to fulfil its obligations under the Contract. The Contract expressly outlined that if Arrow failed to meet its contractual obligations, Project 29 had a right to "step-in" and resume possession of the site and call up the Bond. The Bond itself also stated that Vero was liable to release the Bond, irrespective of any dispute or disagreement between Arrow and Project 29.

The Court held there was no basis to continue the interim injunction and discharged the interim injunction in place.

Practical Considerations

Arrow is a timely reminder of the importance of parties including clear provisions regarding bonds (both in construction contracts and in bonds themselves). Wherever possible, the Courts will give effect to the intention of the contracting parties and the allocation of risk expressly negotiated by the parties, but this can be a lengthy process if the contract and bond are not clear.

In deciding what form of bond to use, principals should consider using on-demand bonds over conditional bonds. In Arrow, the Bond was a conditional bond, meaning there was only an obligation on Vero to release the Bond if certain conditions were met. Arrow's argument would have had no weight if the Bond had been a pure on-demand bond, as Vero would have had an absolute obligation to release the Bond, regardless of whether the Engineer had correctly certified the amounts owed.

Principals could also consider including a clause in their construction contracts and/or bonds that precludes the contractor from interfering with the principal recovering payment under a bond, by for example, applying for an injunction as in Arrow. In Arrow, the Court placed significant weight on the inclusion of a clause in the Contract and Bond that provided that Vero was still liable to release the Bond to Project 29 regardless of any disagreement between Arrow and Project 29 as to the amount owed. The purpose of such a clause is to prevent principals from being disadvantaged from having access to a bond simply because the contractor, or the contractor's liquidator, disputes the amount owed.

It is also important to carefully consider what performance security should be in place when negotiating construction contracts. Bonds operate as a financial remedy only and will not remedy incomplete or deficient works. In appropriate circumstances, principals should consider whether a parent company guarantee should also be obtained in conjunction with a bond as a practical remedy in regards to performance.

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ReSolution

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ReSolution is the quarterly journal of NZDRC and NZIAC, published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

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THE TCC OPENS THE DOOR (SLIGHTLY) FOR ADJUDICATION PROCEEDINGS BY COMPANIES IN LIQUIDATION

By Kathryn Moffett, Matthew Taylor & Rita Lowe

A recent TCC decision has provided further guidance on a liquidator's options when seeking payments owed to insolvent companies through adjudication and the interplay with the Insolvency Rules. The decision establishes an exception to the general principle that such adjudication proceedings will not be enforced (and are liable to be injuncted) where the responding party has a cross-claim. The exception focuses on the provision of adequate security by the company in liquidation and the absence of any abuse of process where such claims are to be pursued by third parties on the liquidator's behalf in exchange for a share of the proceeds.

Adjudication proceedings by companies in liquidation: a recap of the current position

Under the Insolvency (England and Wales) Rules 2016 (the "Insolvency Rules"), a mandatory set-off takes effect upon a company's entry into liquidation. The set-off applies where there have been mutual dealings between the company and a creditor. The effect of the rule is to net-off those dealings so that only the balance is provable in the liquidation.

The rule is an exception to the *pari passu* principle (i.e. equal treatment) as the set-off provides the creditor with a full recovery of part of its claim. Without the rule, the creditor would be obliged to make full payment of any amounts owed to the company, whilst only being able prove in the liquidation for its own claims. If the dividend from the liquidation is small, the creditor could well be required to pay more into the liquidation than it would receive in return despite the fact that its claims against the company exceed the company's claims against it.

Insolvency set-off takes place automatically upon liquidation and overrides all other set-offs or contract terms to the contrary. In addition, the parties cannot contract out of insolvency set-off nor waive its operation.

The interaction between the Insolvency Rules and construction adjudication was considered recently by the TCC in *Lonsdale v Bresco* and then on appeal. Please see our Law Nows available here and here for more detail on those decisions. In summary, the TCC initially held that mandatory set-off under the Insolvency Rules deprived an adjudicator of any jurisdiction to determine disputes under a construction contract involving the company in liquidation. The Court of Appeal overruled this finding, considering that adjudications could still be validly commenced by companies in liquidation, but agreed that there was a basic incompatibility between adjudication and the Insolvency Rules. This was reflected in previous cases which have held that the court will not, save in exceptional circumstances, enforce adjudication decisions in favour of companies in liquidation where the responding party has a cross-claim. To do so would force the responding party to pay the amount of the adjudication decision, while being left to prove in the liquidation for its cross claim

and receive only a partial recovery together with other unsecured creditors. In such circumstances the responding party would be deprived of the benefit it was intended to have through the mandatory set-off under the Insolvency Rules.

The upshot of the Court of Appeal's decision was that, save for exceptional circumstances, an adjudication by a company in liquidation would be liable to be stopped by the court as an exercise in futility where the other party has a cross-claim (i.e. because any adjudication decision would not be enforced). A recent decision of the TCC has now considered what exceptional circumstances might justify the enforcement of adjudication proceedings by a company in liquidation in such circumstances.

Meadowside Building Developments Ltd (in Liquidation) v 12-18 Hill Street Management Company Ltd

Meadowside was appointed by 12-18 Hill Street Management Company ("Hill") to carry out repair works and practical completion was certified in March 2015. In July 2015, Meadowside was wound up voluntarily.

Meadowside's liquidators had engaged Pythagoras Capital Limited as agent to seek to recover sums the liquidators claimed were due to Meadowside. Pythagoras's terms of engagement were undisclosed, save that it was to be paid a percentage of the amount recovered from Hill.

Pythagoras sought to recover sums from Hill by way of adjudication. Despite resistance from Hill, the adjudicator heard the case and decided that £26,000 was due to Meadowside. Pythagoras then brought TCC proceedings to enforce the decision against Hill.

Pythagoras offered a guarantee from itself as security for any costs incurred by Hill in resisting enforcement and/or successfully litigating to overturn the adjudicator's decision, including any adverse costs awarded against Meadowside.

The court considered the *Bresco* decision in detail and the extent to which there could be an exception to the general principle that a company in liquidation could not pursue adjudication to enforcement (in the face of a cross-claim by the other party). The court concluded that an exception to this general principle was likely to arise where:

- the adjudication brought or to be brought determines the final net position between the parties under the relevant contract,
- satisfactory security is provided in respect of the sum awarded in the adjudication and in respect of any adverse order for costs made against the company in liquidation,
- satisfactory security is a question of fact but it is likely to be a combination of an undertaking to the court to ring fence the sum, a third party guarantee or bond and / or ATE insurance, and
- any agreement to provide funding or security for the claim could not amount to an abuse of process.

Balancing these principles, the court refused summary judgement on the basis that there was not an adequate security in place and there was no real degree of certainty that should the guarantee be called Pythagoras would have the financial ability to pay. The court considered that strong security was required to allow the exception to apply, such as a payment into court, a bank guarantee, or an ATE insurance policy in relation to costs.

Another significant factor in the court's decision was the potential for Pythagoras' terms of engagement to be an abuse of process. As the terms had not been disclosed, the court could not determine whether they breached the Damages Based Agreements Regulations (2013) i.e. that Meadowside would not receive less than 50% of the recovered money. Assuming the regulations had been breached, there was a reasonable prospect that the terms were champertous and an abuse of process, although that could not be decided definitively due to the lack of disclosure.

Conclusions and implications

This decision appears to leave open the path for liquidators to use adjudication as a tool for recovering sums due to an insolvent company, subject to conditions as to security and the ability of third parties to pursue those rights on their behalf. It remains to be seen whether the conditions imposed by the court will be commercially acceptable to those considering such action in the future.

This decision also provides an interesting example of abuse of process being raised in relation to a funding agreement and makes it clear that the scope of the 2013 Regulations is not limited to funding agreements made in relation to court proceedings but also embraces adjudication proceedings themselves. Claims consultants will now need to review any damages-based funding practices and satisfy themselves that their agreements are compliant with the Regulations.

This is not likely to be the end of the discussion on these issues, as the decision in *Bresco v Lonsdale* is being appealed to the Supreme Court with a decision expected in 2020.

Reference

http://www.bailii.org/ew/cases/EWHC/TCC/2019/2651.html

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CASE IN BRIEF

AUSTRALIA EXAMINES THE LEGITIMACY OF *QUANTUM MERUIT* CLAIMS FOLLOWING CONTRACT TERMINATION FOR REPUDIATION

In *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, the High Court of Australia has clarified the ongoing controversy as to the remedial options available to a contractor that has terminated a contract following a repudiation by the principal.

Mann v Paterson Constructions Pty Ltd: the facts

The appellants, Peter and Angela Mann, engaged the respondent, Paterson Constructions Pty Ltd (**Paterson**), to construct two double story town houses on their Langtree Court property in Blackburn, Melbourne. The terms of the engagement were recorded in a written construction contract. Construction commenced in March 2014, but the town houses were not completed by the due date for completion in December 2014. Unit 1 was completed and handed over to the Manns in March 2015. In April 2015, before the completion of the second unit, the Manns said that Paterson had refused to return to site until payment of an invoice for variations was paid and that works completed were defective. They argued that this amounted to a repudiation of the contract which they then purported to accept.

Paterson's position was that the Manns had unlawfully terminated the contract, that unlawful termination itself amounted to a repudiation which Paterson then purported to accept.

Whatever the case, one thing was certain – the contract had been terminated one way or another.

In the first instance, Paterson was successful in seeking relief on a *quantum meruit* basis. That judgment was upheld by the Supreme Court of Victoria. Special leave to appeal was granted for the Manns to challenge that decision in the High Court of Australia.

There were two key issues before the High Court. First, whether a contractor was entitled to sue on a *quantum meruit* after terminating the contract for repudiation, and second, if the contractor was so entitled, whether the contract price operated as a ceiling on the amount able to be claimed on a *quantum meruit* basis, even where the contract had been terminated.

The position prior to Mann

In a case where a contract had been terminated following a repudiation of that contract, the innocent party was entitled to elect to sue for damages on the basis of breach of contract or on a quantum meruit basis. Damages awarded on a quantum meruit basis might exceed what would be recoverable under a breach of contract action. This is the position followed by much of the common law world.

To understand how the Australian common law developed to adopt this position, it is necessary to examine the establishing line of authorities starting with the Privy Council decision in *Lodder v Slowey* [1904] NZPC 3. In that case, the Privy Council held that contracts terminated for repudiation were rescinded *ab initio*. This meant that the contract was treated as though it had never existed, so claims for compensation were not restricted by the contract price. Rather, they were at large.

Without a contract to constrain the claimant to breach of contract damages, a restitutionary claim for *quantum meruit* became available as an alternative cause of action. An action for *quantum meruit* allows recovery of a fair and reasonable sum for services or goods supplied when there is no contract or no contractual agreement to govern payment. The amount recoverable in *quantum meruit* could therefore far exceed that available under a breach of contract claim, particularly if the contract had been underpriced.

The result of the Privy Council decision in *Lodder* was that the contract price agreed in a contract, which had been partially performed but terminated prior to completion, could be entirely irrelevant to the question of quantum of damages if one party could prove repudiation of the contract by the other party. There was significant criticism of this position.

The next key development is found in a decision of the High Court of Australia in the case of *McDonald v Dennys Lascelles* Ltd [1933] HCA 25. In that case, the High Court rejected the notion that termination of a contract for repudiation had the effect of rescinding the contract in its entirety. In doing so, it overturned the 'rescission fallacy' — the notion that the repudiation of a contract has the effect of rescinding it *ab initio*.

McDonald corrected the illogicality that an existing contract under which parties had performed some obligations could be rescinded *ab initio*. However, subsequent cases persisted in applying the 'rescission fallacy.'

The issue as to whether a claim for *quantum meruit* as an alternative to contractual damages was still available was raised in *Sopov v Kane Constructions Pty Ltd* [No 2] [2009] VSCA 141.

The Supreme Court of Victoria declined to follow *McDonald*. The Court acknowledged that *McDonald* appeared to overturn the 'rescission fallacy'. However, the Court noted that the decision in *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405 created a line of authority which – relying on the 'rescission fallacy' – continued to allow a contractor to advance a claim for *quantum meruit* in lieu of a claim for contractual damages following the contractor's acceptance of the principal's repudiation and the consequent termination of the contract.

This meant that where a principal repudiated a contract leading to termination by the contractor, the contractor was entitled to elect between a claim for general loss of bargain damages under the contract or a claim in restitution on *quantum meruit* for the recovery of the value of work completed to the date of termination. The practical implication being that a contractor could claim a windfall if it was able to engineer a repudiation by the principal in a situation where the contract had become a financial loss for contractor. This posed significant risk to employers in that the agreement as to price the parties had agreed to would be undermined in the case of a repudiation leading to termination.

Mann v Paterson Constructions Pty Ltd

The High Court held that a contractor could no longer claim compensation on a *quantum meruit* basis with respect to works where it had accrued a contractual entitlement to payment. In other words, the 'rescission fallacy' was no longer good law in respect of contracts that provide for separable stages or portions which have been completed prior to termination and in respect of which the contractor has accrued rights in the nature of a debt.

However, *quantum meruit* could still apply in relation to works for which the contractor had not accrued a right to payment. This might occur if the contract was an entire contract, ie where the contractor is not entitled to payment until the whole of the works are completed or if the right to payment had not yet accrued for certain separable portions of the contract. In such a situation, the total amount recoverable under *quantum meruit* would be capped by the agreed price for that particular uncompleted stage or portion of the works and future separable portions no longer able to be performed by the contractor.

The position in New Zealand

The position in New Zealand is rather unique. Initially, *Lodder* was followed by the New Zealand courts[1]. In 1979, however, the Contractual Remedies Act (**CRA**), was enacted to "reform the law relating to remedies for misrepresentation and breach of contract." There was no provision in the CRA for recovering damages on a *quantum meruit* basis following termination of contract for repudiation.

The question as to whether the CRA had displaced the common law remedies, rendering a claim in *quantum meruit* unavailable, was raised in the case of *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63. In that case, the Judge held that s 7(1) of the CRA did replace the common law right of rescission with a right of cancellation as defined in the CRA. *Quantum meruit* would normally be available for a contract rescinded *ab initio*, but is not available under the CRA for a cancelled contract[2]. It was held that there was no right to claim in *quantum meruit* after the enactment of the CRA[3]. The Judge was persuaded in this view primarily because of the illogicality inherent in the previous common law. Now, the statutory scheme provides that the court may grant any relief the court thinks just. This imports a test of reasonableness otherwise absent from a claim in *quantum meruit*.

In 2017, the Contract and Commercial Law Act (**CCLA**) was enacted, incorporating various acts including the CRA. Remedies available upon cancellation of a contract are now provided for by section 43 of the

CCLA. As with ss 9 and 10 of the CRA, *quantum meruit* is not provided for. Even if there were substantive changes to that legislation in the future, it is unlikely that the current position on *quantum meruit* would change.

Comment

Mann confirms that *quantum meruit* claims, although not to be written off entirely, are now clearly limited in scope.

The decision has been much awaited as it has clarified the ongoing controversy as to what remedial options are open to a contractor upon termination of a building contract following repudiation by the principal. However, questions remain, particularly with uncertainty in relation to restitutionary claims as to whether simple pro-rating of the contract price or market value subject to the contract price cap is the appropriate methodology to calculate the amount recoverable and as to how an adjustable contract price may limit any *quantum meruit* assessment or how provisional payments might be dealt with in the same context.

This case has understandably drawn the attention of many in the legal field; it overturns in Australia an approach which has been upheld throughout much of the common law world for over 100 years. It will be interesting to see how other jurisdictions respond to *Mann v Paterson*. It is likely that, noting the dissatisfaction with the approach thus far, *Mann v Paterson* will spark change in other jurisdictions throughout the common law world.[4]

End Notes

[1] *Watson v Watson* [1953] NZLR 266; and Snell v Potter [1953] NZLR 696.

[2] The remedies for cancellation were described in ss 9 and 10 of the CRA (now s 43 of the CCLA), and do not include the remedy of *quantum meruit*.

[3] This was affirmed in *Programmed Maintenance Services (NZ) Ltd v Witters* HC Auckland CIV 2008-416-90, 8 April 2009.

[4] See Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 Southern California Law Review 1465; Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 Law Quarterly Review 470; Mark P. Gergen, Restitution as a Bridge Over Troubled Contractual Waters, 71 Fordham L. Rev. 709 (2002).

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BUILDING DISPUTES TRIBUNAL

TARGET COST CONTRACTING AND JOINT VENTURE AGREEMENTS

By Victoria Peckett, Phillip Ashley, Mark Breslin & Kate Jones

A recent TCC decision has considered the target cost provisions of the NEC3 Option C contract in the context of a joint venture agreement between two contractors. The decision considers the ability of the parties to make pain/gain share adjustments for interim payments both at main contract and joint venture agreement level. Joint venture disputes are rarely before the courts and the decision provides valuable insights as to the implications of joint venture contracting under target cost arrangements.

Target Cost contracts in brief

Target Cost contracts are a form of cost reimbursable contract under which the contractor is paid the "Total Cost" it incurs in carrying out the works plus a fee, subject to a "Target Cost" agreed by the parties at the beginning of the project. Upon completion, the parties ascertain whether savings were made and the project delivered for less than the Target Cost; or whether costs overran and the cost of delivery was above the Target Cost. Any saving or overrun is then allocated according to a predetermined formula commonly known as a "pain/gain share" mechanism. If the costs of the project exceed the Target Cost the excess, or "pain", is allocated between the employer and the contractor, and if the project comes in under cost then the "gain" is allocated. The philosophy behind such contracts is to actively encourage both parties to work together to manage the costs of the works.

Doosan Enpure Limited v Interserve Construction Limited

Doosan and Interserve entered into a Joint Venture Agreement ("JVA") for the purpose of carrying out upgrade works at the Horsley Water Treatment works in Northumberland for Northumbrian Water Limited ("NWL"). The JV parties and NWL entered into a contract based on the NEC3 Option C form (Target contract with activity schedule).

The progress of the works was delayed with an increase in cost. The JV parties fell into dispute over whether interim payments under the JVA should be made on an actual cost basis or whether they should reflect the anticipated pain-share likely to result upon completion of the works. The JV parties also disagreed over whether the NEC3 contract with NWL allowed the pain-share mechanism to be applied at an interim payment stage, although in practice it appears that NWL's Project Manager did not seek to deduct any amount for pain-share from interim payments applied for by the JV parties.

TCC proceedings were commenced for various declarations to resolve the impasse between the JV parties and to determine entitlement to sums held in the JV bank account. Those sums had been received from NWL in relation to the most recent interim payment application made by the JV parties.

Pain/gain share under the NEC3

Before considering the position under the JVA the court considered whether interim payments under

the NEC3 contract with NWL could include pain/gain share adjustments. The court concluded that such adjustments could not be made at an interim stage, emphasising the terms of clause 53.3 of the contract as follows (unamended from the standard form):

"The Project Manager makes a preliminary assessment of the Contractor's share at Completion of the whole of the works using his forecasts of the final Price for Work Done to Date and the final total of the Prices. This share is included in the amount due following Completion of the whole of the works."

The court rejected the suggestion that this provision left open the ability of NWL to apply the pain/gain share mechanism at an earlier stage.

Pain/gain share under the Joint Venture Agreement

In relation to interim payments, clause 8.6 of the JVA provided that:

"The parties shall receive interim payments from the JV in reimbursement of the Works Part Costs incurred by each party as shown on the parties' Interim Cost Statements. Works Part Costs shall be reimbursed in accordance with the principles set out in Schedule 4."

The "Interim Cost Statements" were simply those applications submitted by each of the JV parties which combined together to form the joint application for payment submitted to NWL. Schedule 4 contained reference to the pain/gain share mechanism to be applied on completion but made no specific reference to interim payments.

The only clauses which dealt with the issue directly provided that where costs were likely to exceed the relevant target or where delay to completion was likely to result in the deduction of delay damages, the JV Committee could be requested to, *"suspend or reduce the level of interim payments to the other Party to take account of the anticipated damages. Where the JV Committee is unable to reach agreement, the matter may be referred to resolution under Clause 21."*

The JV Committee had been requested to suspend payments, but had been unable to reach agreement. Accordingly, the position remained as per clause 8.6 quoted above. The court considered that the first sentence of that clause required the full amount of the payment from NWL to be distributed to the parties without adjustment or suspension for anticipated pain-share.

Conclusion and implications

This is an interesting decision in relation to target cost contracting in a joint venture context. The court's finding that the standard NEC target cost provisions do not permit pain/gain share adjustments for interim payments underscores the desirability for employers of negotiating such contracts to build in the ability to make pain-share adjustments at an interim stage where the target cost has already been exceeded. This avoids the need to recover overpayments upon completion of the works, although brings added complexity to the interim payment process and raises other issues such as whether the target cost figure should be updated on a rolling basis.

Such cashflow considerations can also, as here, be seen at the joint venture level: which may lead to the inclusion of provisions preventing the release of funds to JV parties where pain-share adjustments are at risk, although that will force the issue to be dealt with at an earlier stage by the JV parties during the course of the works.

The judgment also highlights the governance issues which can arise in JV structures where decisions are often required to be taken on a unanimous basis. Parties negotiating JVAs should consider carefully what options are available for the breaking of any deadlock which arises if JV relations are tested. The JVA in the present case permitted deadlock over the suspension or reduction of interim payments to be referred to dispute resolution, but did not indicate any specific criteria to be applied in resolving the deadlock.

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TO DA(A)B, OR NOT TO DA(A)B... (PART ONE)

By Vincent Rowan, Shareena Edmonds, Bree Miechel and Elinor Crowther

FIDIC has made clear that it considers the use of a dispute board fundamental to a fair and balanced contract, which is the underlying philosophy of its forms. Despite this, employers and contractors are often resistant to using dispute boards, and the dispute board provisions are often deleted when using the FIDIC forms. In this two-part alert, we look at the reasons behind the resistance to dispute boards and what parties to FIDIC contracts might do to make the dispute board provisions work better for both them and their project.

Here we look at the benefits that might be expected from using a dispute board and some practical experiences of using dispute boards, before considering why the expected benefits may not be being realised.

The intention behind the dispute board in the FIDIC forms

Arbitration (and litigation), in the international projects and construction sector, have traditionally been regarded as costly and time consuming. There is a perception (and sometimes a reality) that contractual disputes often take almost as long to be resolved as the project itself. Recognising this, FIDIC has sought to develop its standard forms in a way that provides for and encourages early and efficient dispute resolution without recourse to arbitration or litigation.[1]

In the FIDIC 1999 Rainbow Suite, provisions for dispute adjudication boards (DABs) were introduced and developed as part of a three tier dispute resolution process.[2] The DAB provisions were developed with the aim of providing the parties with a quick (84 days from referral to decision), inexpensive and effective method of dispute resolution, available contemporaneously during the project works. The intention was that the procedure, if used correctly, would remove, or at least limit, the need for recourse to arbitration or litigation and help the parties to maintain a good working relationship. In the 1999 Suite, the Red Book required that the DAB be appointed on a 'standing basis' (from an early stage in the project), in contrast to the Yellow and Silver Books, where the DAB is to be appointed on an 'ad-hoc' basis, when a claim has already become a dispute.

Practical experience of the use of FIDIC dispute boards

There are early and significant reported successes of dispute boards in large (US$billion) FIDIC projects, for example the Ertan Hydroelectrical Project in China and the Katse Dam Project in Africa. Both projects provided for a three person dispute review board, appointed early on in the project, who were able to provide non-binding recommendations. In both projects the board made numerous site visits.[3] In the Ertan project over 40 disputes were referred to the board, not one of which went on to arbitration or litigation. In the Katse Dam project, out of 12 disputes referred to the board only one went on to arbitration and, at arbitration, the board's recommendation was upheld.[4]

Beyond FIDIC, there are many instances of dispute board success on large projects, for example, the 2012 Olympics in the UK, Chek Lap Kok International airport in Hong Kong, and the Eurotunnel. The 2019 Global Construction Disputes Report from Arcadis[5] notes that owners and other

project participants who are engaging in formal contract-mandated avoidance, mitigation and resolution techniques are reaping success. The Dispute Resolution Board Foundation (DRBF), which tracks and analyses the use of dispute boards worldwide, reports that 85 – 98 percent of dispute board recommendations/decisions have not gone on to further arbitration or litigation.[6]

Despite these statistics, not all parties view dispute boards positively. The FIDIC dispute board provisions are frequently struck out, usually by Employers and more often in particular jurisdictions. While cost is often the first reason given for removal of the provisions, other common concerns include that the provisions encourage contractor claims, the board may deliver rough justice or bad decisions, the decisions may not be enforceable, or payments made in compliance with a decision may not later be recoverable.

Even where a contract has provided for the use of a dispute board, this does not always mean that the contractual provisions will be operated as intended, with the result that the perceived benefits of the dispute board are unlikely to be realised.

Sometimes, the lack of success may be a result of the board itself, rather than any action by or failure of the parties. This might happen where the board members appointed have more in common with one of the parties (shared nationality, language, culture, project experience), where the board appointed is not sufficiently experienced for the role of DAB, chosen perhaps for cost reasons, and not able to properly manage and assist the parties to resolve their disputes. These factors can lead to untenable or inconsistent decisions, which one or both parties will not respect and which will do nothing to reduce and finally resolve the disputes and issues between the parties.

In other cases, the lack of success of the dispute board provisions is down to one or both of the parties, not taking seriously, ignoring or misusing the provisions, for example:

Failure to appoint the DAB as specified.

Often the parties fail to appoint the DAB as specified in the contract. Late appointments perhaps have the most impact where the Red Book 1999 or the 2017 Editions are being used, which provide for a standing board appointed at the outset. If the board is not actually appointed until a dispute has arisen, this removes the intended benefit of having a standing board already familiar with the project and ready to "hit the ground running" on the dispute.

Failure to comply with the DAB's decision.

Sometimes the unsuccessful party issues a "notice of dissatisfaction" (NOD) with the DAB's decision (as it is entitled to do). However, sometimes that party also fails to comply with the binding decision in the period prior to final resolution in arbitration. This means that the successful party will need to commence further proceedings in order to enforce the board's decision, sometimes without a favourable result. This issue arises in large part due to drafting in the 1999 Editions which provide only for final DAB decisions (that is where no NOD had been issued in time) to be directly enforced in arbitration. The 1999 Editions made no express provision in relation to enforcement of not-final DAB decisions.[7]

Provisions not taken seriously or manipulated to cause delay.

Sometimes the provisions are simply viewed by one or both of the parties as a necessary procedural step before arbitration can commence.[8] Where one or both parties simply "go through the motions" without any real commitment or attempt to narrow or resolve the issues between them at the DAB stage, the process is unlikely to result in a decision that the parties respect. Sometimes the reluctant or unsuccessful party may seek to manipulate the provisions to bring about delays in order to put off a final and binding decision for as long as possible.

Inappropriate use of the provisions.

There have been cases where parties misuse the procedure and "ambush" the other party, with either (i) a significant volume of documentation or assessments; or (ii) a number of arguments which the other party was unaware of and, under the adjudication process and timetable, is unable to respond to properly. One of the parties may bring so many related and complex claims that they would be better dealt with in arbitration (or litigation) than under the adjudication process and timetable.

Typically, where the dispute board is not used properly, for each dispute board decision there will be a NOD from at least one party, such that all disputes end up moving forward to arbitration. In these circumstances, the parties may consider themselves to be worse off - having diverted project resources to (and paid for) multiple dispute board referrals but resolved little.

Against that background, is there a justified resistance to the use of dispute boards in international projects? Or, are the problems experienced simply down to misunderstanding and misuse, which could be overcome?

Part Two of this alert will look at the development of the 2017 FIDIC dispute resolution provisions and whether they address the issues discussed above, as well as considering what else parties to FIDIC contracts might do in order to make the dispute board provisions work better for both them and their project.

End Notes

[1] Some countries have statutory adjudication regimes applicable to construction projects in that jurisdiction, for example, in England & Wales, the regime introduced by the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996). Any contractual regime would be required to meet the minimum applicable statutory requirements in those jurisdictions.

[2] A dispute review board giving recommendations that would only bind the parties if there were no objections was first introduced as a 1995 World Bank Standard Bidding Conditions requirement. The first introduction of a dispute adjudication board giving binding decisions was in the Orange Book 1995.

[3] 16 on the Kaise Dam Project and more than 20 on the Ertan Project.

[4] See Chern on Dispute Boards: Practice and Procedure, 2008, Cyril Chern.

[5] Global Construction Disputes Report 2019: Laying the foundation for success: Available at www.arcadis.com)

[6] Available at http://www.drb.org based on an analysis of its database.

[7] Although FIDIC has repeatedly confirmed that any DAB decision, regardless of whether or not a NOD has been issued, should be able to be enforced summarily in arbitration. See for example the FIDIC Guidance Memorandum of 1 April 2013 which provided suggested amendments to sub-clause 20.7 in the 1999 Editions to provide for binding but not final decisions to be enforced in arbitration. This issue caused extensive debate regarding the ability to enforce a binding but not final DAB decision. See for example, the Persero series of cases where the claimant was able to enforce a binding but not final DAB decision, but only after two sets of arbitration, High Court, and Court of Appeal proceedings, PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30. The FIDIC 2017 Editions include drafting aimed at preventing these issues, though there may still be difficulties with enforcement in some jurisdictions. This will be considered in Part Two of this alert.

[8] This is particularly the case as some national courts have now confirmed that the DAB is a mandatory pre-condition to arbitration, Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC).

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