Fenwick Elliott

The construction & energy law specialists

International Quarterly

Issue 08, 2013

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

Inside this issue:

Follow us on and for the latest construction and energy legal updates

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 08, 2013

Taking-Over under FIDIC

This issue's contract corner discusses taking-over in Doosan v Mabe

By Jeremy Glover
Partner, Fenwick Elliott

It is not often that the FIDIC form of contract comes before the English courts. The primary reason for this is that almost all disputes, if they arise, are settled through arbitration. The case of *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada*[1] is one exception.

Why did the court have jurisdiction?

The reason it came before the courts was because Doosan had applied to the Technology and Construction Court ("TCC") asking that the TCC grant relief under section 44(3) of the 1996 Arbitration Act. Section 44 of that Act deals with the court's powers that may be exercisable in support of arbitral proceedings. Under sub-clause 44(3), unless otherwise agreed by the parties, the court has the same power of making orders for the purposes of and in relation to arbitral proceedings as it has for the purposes of and in relation to legal proceedings:

"(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

The Judge applied the reasoning of Clarke LJ in the Court of Appeal case of *Cetelem SA v Roust Holdings*[2] and held that there was no reason why an order should not be made for the purpose of the preservation of a right if its effect is to preserve the value of that right. As Mr Justice Edwards-Stuart noted, a contractual right is not preserved if a failure to give effect to it would destroy much or all of its value. Therefore provided the requirements of urgency and necessity were met, the court would have the power to grant an injunction under section 44(3).

The performance guarantee

Here the case was said to be of some urgency because Doosan feared that Mabe might make a call under the performance guarantee. The situation was as follows. Doosan had contracted to supply two boilers to Mabe for a power plant in Brazil. In accordance with the Contract, Doosan arranged performance guarantees. The guarantees entitled Mabe to payment on demand and were to expire upon the issue by Mabe of Taking-Over Certificates ("TOCs") or by 31 December 2013, whichever was earlier. By the terms of the guarantees the provider of the guarantee undertook to pay Mabe:

"on receipt of your first demand on us in writing stating that [the Claimant] has not performed its obligations in conformity with the terms of the Contract".

As Mr Justice Edwards-Stuart noted: *"This wording could hardly be wider … the bank giving the guarantee is concerned only with the terms of the demand, not with the question of whether or not it is justified."*

Taking-Over under the contract

Sub-clause 10.2 of the FIDIC Contract included the following provisions: *"The Engineer may, at the sole discretion of the Employer, issue a Taking-Over Certificate for any part of the Permanent Works.*

The Employer shall not use any part of the Works (other than as a temporary measure which is either specified in the Contract or

1. [2013] EWHC 3010 (TCC), [2013] EWHC 3201 (TCC)
2. [2005] EWCA Civ 618

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 08, 2013

agreed by both Parties) unless and until the Engineer has issued a Taking-Over Certificate for this part. However, if the Employer does use any part of the Works before the Taking-Over Certificate is issued:

(a) the part which is used shall be deemed to have been taken-over as from the date on which it is used,

(b) the Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Employer, and

(c) if requested by the Contractor, the Engineer shall issue the Taking-Over Certificate for this part."

It was also relevant that the standard FIDIC sub-clause 9.1 had been deleted in its entirety. That clause, of course, provides that the Tests on Completion include pre-commissioning and commissioning tests and trial operation. It was relevant because Mabe were to argue that completion, or taking-over by Mabe, was only to occur after the Tests on Completion (including the Performance Tests) had been satisfactorily completed.

Taking-Over

During July 2013 Doosan requested that Mabe issue the TOCs on the grounds that the boilers had been taken into use in November 2012 and May 2013 respectively. Mabe refused and relied upon a provision in the Contract permitting it to withhold the TOCs if the boilers were only put into use as a "temporary measure".

During August 2013 Mabe notified a claim for US$57m for delayed supply and defects in the boilers. In reply Doosan requested that Mabe undertake to not make any demand on the guarantees without giving at least 7 days' notice. Mabe refused to give the undertaking so Doosan applied to the TCC for an interim injunction, contending that in refusing to issue the TOCs, Mabe was in breach of the Contract and was relying upon this breach to enable a demand for payment. At the first hearing on 4 October 2013 the Judge agreed with Doosan that the court had jurisdiction to grant relief under section 44(3) of the 1996 Arbitration Act and listed the matter for a return date in two weeks' time in order to allow the parties time to prepare evidence as to whether or not the boilers were operating on a "temporary measure" basis.

At the restored hearing, Doosan maintained that the boilers were in commercial use, relying upon press releases indicating that the boilers had exported over 7,500 hours of power to the grid since installation. Doosan submitted that where Mabe was relying upon its own breaches of the Contract to facilitate a call on the guarantees, it could show a strong case, entitling the court to grant interim relief. Mabe argued that Doosan did not have a strong case because it had misconstrued the contractual requirements for performance tests prior to the issue of the TOCs. Given that the Contract provided for arbitration, the Judge made it clear that the court had no jurisdiction to make final findings on the facts or to finally determine the proper meaning of the Contract.

On the facts the Judge found that Mabe had taken the boilers into commercial use. He also found that Mabe had not complied with the contractual requirements to show that use of the boilers as a "temporary measure" was in accordance with the terms of the Contract or as agreed by the parties. Further, it seemed to the Judge to be clear that some, if not all, of these performance tests could only be carried out once the units had been put into use.

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 08, 2013

Would the court grant interim relief?

In deciding whether to grant an interim injunction, the Judge recognised the principles set out in the *American Cyanamid* case and more recently in *Simon Carves v Ensus UK* (Legal Briefing, 12 of 2011) where Mr Justice Akenhead said that a claimant must show that it has a strong case that the terms of the underlying contract, in relation to which the bond had been provided by way of security, clearly and expressly prevented the beneficiary from making a demand under the bond. If so, the beneficiary could be restrained by the court from making such a demand. Unsurprisingly, the court recognised that any call, especially an unjustified one, would be likely to damage the commercial and financial reputation of a contractor.

The Judge rejected Mabe's argument that Doosan had misconstrued the Contract. He concluded that Doosan's factory tests were sufficient and that whilst any failure to achieve the performance tests would create a liability for liquidated damages, it would not justify non-issue of the TOCs. The Judge therefore agreed that Doosan had demonstrated a strong case. In granting Doosan interim relief, the Judge drew an analogy with the *Simon Carves* case where the parties had agreed expressly that the beneficiary's right to make a demand on the guarantee was either qualified or would be extinguished if certain events occurred.

Applying the principle set out by the House of Lords in *Alghussein Establishment v Eton College*, Mr Justice Edwards-Stuart made an alternative finding that interim relief could also be granted on the basis that Mabe should not be permitted to benefit from its own wrong. Doosan had a strong case that Mabe's refusal to issue the Taking-Over Certificates was a breach of contract. It was as a result of that breach, and only that breach, that Mabe was in a position to make a call on the guarantees. If Mabe had issued the certificates, the guarantees would have expired and so there would be no guarantee on which to make a call.

The courts will usually refuse to restrain a bank from making payment under an on-demand instrument unless there is clear evidence of fraud. Doosan submitted that it could not show fraud as Mabe had not yet made a call on the guarantees but that it should not have to because the position was different where it could dispute the validity of Mabe's right to make a call. Here, the right to make a call under an on-demand guarantee was qualified by the terms of the underlying contract.

Conclusions

The (interim and not binding[3]) conclusion on the question as to whether the works had been taken-over or not might, in light of the fact that the boilers had already exported some 7,500 hours of power, seem on the reported facts to have been an obvious one for the court to reach. However, disputes as to whether or not works are ready for takeover or have actually been taken-over are (as Nicholas Gould discusses elsewhere in this issue of *IQ*) an all too common feature of large international projects and any court decision that discusses the issue is always of interest.

This was a case relating to a broadly drawn on-demand guarantee and it should be noted that Mr Justice Edwards-Stuart, in applying previous case law, made it clear that to obtain interim relief, the claimant would have to show that it had a "strong case".

Finally, the TCC has provided clear support for the arbitration process by recognising that, as the application was one to preserve the value of a contractual right, it fell within the scope of section 44(3) of the 1996 Arbitration Act. The speed with which the court reacted may also be of some significance, as the changes to the ICC Rules, which came into place at the beginning of 2012, mean that a party may have an alternative route to obtaining interim relief through the use of the Emergency Arbitrator Rules.

Jeremy Glover, Partner
Fenwick Elliott
+44(0)207 421 1986
jglover@fenwickelliott.com

3. A point that the court took some care to make clear.

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

Romania and the UK: when are the works taken-over?

Taking-Over, Completion Certificates and Building Permits

By Nicholas Gould
Partner, Fenwick Elliott

Introduction

The issue of "taking-over" a construction project on completion in Romania always seems to raise the question of whether the works can be said to be taken-over when the contractor has complied with the contract (in terms of substantially completing the works), or whether the works need to have received the Building Permit from the local authority.

The circumstances in which this question arises are always the same. The contractor has, in its view, completed the works and requested taking-over. There is, no doubt, a defects or "snagging" list (assume for the moment that these items are *de minimis*). However, the employer's or engineer's refusal to take over is on the basis that the Building Permit has not yet been obtained. This is, apparently, required in order for the employer to know that the works are in fact complete (because they meet with the local authority's requirements) and therefore meet with the requirements under the building contract. Thus, until the local authority is satisfied, taking-over can apparently be refused and liquidated damages continue to be deducted.

It is surprising that this argument is encountered so frequently in Romania. Romania is apparently a special case and unlike other countries. This argument is of course a fallacy. While the detail of a country's legislation in relation to buildings that are fit to be used varies, the general scheme is much the same in all developed countries. The building contract between the employer and contractor is governed by its terms. The works are either ready to be taken-over in accordance with the terms of their contract (because as a fact they are substantially complete) or they are not. None of the standard form contracts anticipate that the employer, and in particular the contractor, will be in limbo until a third party local authority decides (using some different standard) that the works are complete in accordance with local legislation. However, can the employer deduct liquidated delay damages until the local authority issues a Building Permit, even in circumstances where the construction is substantially completed or the employer has taken beneficial possession?

Issues

A number of important issues arise. First, it is the terms of the building contract that primarily govern the relationship between the employer and the contractor. The basis of virtually all standard form contracts (and any purpose-written ones or amended standard forms) is that the works are to be completed by a certain date. If the works are not completed, then compensation for the delay, if caused by a contractor risk event, is due to the employer. An extension of time mechanism can relieve the contractor of any delays that are at the employer's risk. These delay damages are to compensate the employer for late completion arising as a result of a contractor's risk. The commercial purpose, of course, of all of these provisions is to encourage the

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

contractor to complete the works in order that the employer has the completed project as soon as possible and can therefore make use of the facility.

The requirements for completion and taking-over the works should be set out in the contract. The general terms may be supplemented by the detail of the specifications or supplemented or amended by particular provisions. For example, the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer "Red Book" 1999 sub-clause 10.1 states that:

"Except as stated in Sub-Clause 9.4 [Failure to Pass Tests on Completion], the Works shall be taken-over by the Employer when (i) the Works have been completed in accordance with the Contract, including the matters described in Sub-Clause 8.2 [Time for Completion] and except as allowed in sub-paragraph (a) below, and (ii) a Taking-Over Certificate for the Works has been issued, or is deemed to have been issued in accordance with this Sub-Clause.

The Contractor may apply by notice to the Engineer for a Taking-Over Certificate not earlier than 14 days before the Works will, in the Contractor's opinion, be complete and ready for taking-over. If the Works are divided into Sections, the Contractor may similarly apply for a Taking-Over Certificate for each Section.

The Engineer shall, within 28 days after receiving the Contractor's application:

(a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose (either until or whilst this work is completed and these defects are remedied); or

(b) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under this Sub-Clause.

If the Engineer fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period."

Sub-clause 9.4 of the FIDIC Red Book states:

"If the Works, or a section, fail to pass the Tests on Completion repeated under Sub-Clause 9.3 [Retesting], the Engineer shall be entitled to:

(a) order further repetition of Tests on Completion under Sub-Clause 9.3;
(b) if the failure deprives the Employer of substantially the whole benefit of the Works or Section, reject the Works or Section…;
(c) issue a Taking-Over Certificate, if the Employer so requests."

The key to sub-clause 10.1 is that the Taking-Over Certificate "shall" be issued even if there are minor outstanding works and/or defects provided that they will not substantially affect the use of the Works or Section for their intended purpose.

Local legislation

The governing material law, namely in our case the law of Romania, also has very clear provisions regarding the rejection of construction work. The mandatory provisions of Government Decision no. 273/1994 state that the rejection of takeover is only permitted if two cumulative conditions are met:

1. The defects cannot be remedied; and

2. The defects that cannot be remedied interfere with one or more essential operational parameters of the works.

The essential parameters of the works are those defined in Article 5 of Law no. 10/1995 regarding the quality of construction, namely:

1. mechanical resistance and stability;

2. security in case of fire;

3. hygiene, health and environment;

4. safety during the exploitation;

5. noise protection; and

6. energy sustainable and heat insulation.

These conditions of Romania's governing law are mandatory and must be respected by the employer, contractor and the engineer, when they decide to accept, to

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

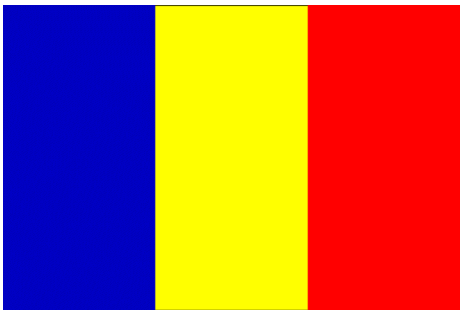
Issue 08, 2013

delay or to reject the taking-over of the works. This can be contrasted with any system of local authority Building Permit or building control. Consider building control in the UK as an example.

Building control in the UK is governed by a set of building regulations, which are the minimum standard set by the Department for Communities and Local Government ("DCLG"). These are to cover the design and construction of buildings. The important point here is that they are concerned with the health and safety of the building users, energy and water efficiency, access issues and facilities for people with disability.[1] The focus then is on safety, durability, building methods, materials, sustainability of the design and the building process. It is not concerned with a particular employer's requirement. Rather, it is concerned with whether employers, contractors and others completing buildings meet minimum standards.

Planning permission will be required for most works. However, building regulations approval is likely to be required for an even broader range of work. For example, small-scale internal alterations or loft conversions that might not require planning permission will be subject to building regulations. The purpose is to ensure the health and safety of users, etc.

Two procedures are available in the UK for obtaining building approval. The first is a simple building notice procedure. All work can start two days after notice has been given.[2] The second procedure is the full plans procedure which requires deposit of all of the drawings for the development with the local authority or an improved inspector. The local authority has five weeks to accept or reject the plans, and this period can be extended to two months by agreement. The benefit of a full plan procedure is that discussions can take place with the local authority in order to resolve any issues that could cause difficulty later in the building process. This is important because local authorities will only issue a completion certificate once the building work has been completed. Plans that are rejected need to be amended in order to meet with local authorities' requirements. In summary, the initial deposit of the plans needs to be full and complete so that they are accepted. Once the works are completed, the local authority will then issue a completion certificate if the completed works appear to be in accordance with those plans and the building regulations.



The Romanian approach is, like that of many other countries, for all intents and purposes the same. Full plans are to be submitted which are either rejected or accepted. A "Building Permit" is issued once the works are completed. In the UK and in Romania, the inspector may visit in order to inspect the completed works. An inspector considers the submitted drawings and then has a brief visit to the completed works. An inspector can only examine, on completion, the visible features of the works. Visits during the course of the works can only be intermittent and limited. Therefore an inspector has only a limited opportunity to consider obviously visible "defects". However, by defects we mean items that do not comply with the local authority's requirements in relation to health and safety, sustainability, etc. An inspector is not at all concerned with the level of detail which does concern the employer or the employer's engineer or architect.

In addition, it is the building owner who needs to apply for building regulations approval of the plans, a Completion Certificate or a Building Permit as the case may be. It is not the contractor's primary responsibility. It is the building owner who must ensure that the completed works are compliant, and it is the owner who has to apply, not the contractor. The contractor could, if the building contract required it, manage the process or act as the owner's agent, but it is the owner who requires the Completion Certificate in the UK or Building Permit in Romania.

Further, the contractor has little control over delays that might be caused by the third party local authority. It is true

1. See HTTP://www.cic.org.uk/services/guidance.php
2. Building Regulation 16(1)(a) and (b).

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

that the building contract might try to push that risk onto the contractor, but this approach does not really deal with the true issues. Those are that the employer most likely wants possession, and will take possession when the works are substantially complete, regardless of the Building Permit. In addition, even if the owner no longer wishes to take immediate occupation or possession of the building, the test for completion is established by the contract.

Once the provisions of the FIDIC contract are objectively met, then taking-over has occurred. If the owner takes possession, then how can they be suffering any losses that would have been covered by the delay penalties? Clearly, they cannot. If the owner chooses not to take possession when the works are suitable for taking-over, then it is the owner's failure that causes the loss rather than a contractor breach. An application of civil law or common law principles to these situations varies, but in general terms they all amount to the same thing. An owner cannot rely upon its own default in order to claim damages for delay during a period when the building was suitable for taking-over regardless of whether local authority approval or a Building Permit had been issued by a third party applying the same or a *different* standard than that required under the building contract.

Conclusion

Romania is not substantially different from other countries in respect of its requirement for a new building or structure to comply with building laws and regulations enforced by local authorities. The local authority requires details of the design of the construction at the commencement, and then wants to be satisfied on completion that the works have been constructed in accordance with the approved design, good practice, applicable laws and regulations.

However, it is not possible for the local authority to check every aspect of the construction on completion. Much of the works are, of course, covered up by the finishes. Delays could occur, with approval beyond the control of the contractor. Further, and perhaps more importantly, it is usually not right that an employer can continue to deduct liquidated damages until a third party (with no direct authority under the building contract) has the opportunity to visit the premises and to issue a Building Permit.

Nicholas Gould
Partner, Fenwick Elliott
+44(0)207 421 1986
ngould@fenwickelliott.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:

International dispute resolution & adjudication

Issue 08, 2013

What happens if a party opts not to participate in arbitration proceedings?

By Ahmed Ibrahim
Partner, Ahmed Ibrahim in association with Fenwick Elliott

In principle, when the parties agree to arbitrate, they shall be bound by that agreement. It should therefore follow that when a party initiates arbitration proceedings, the other party - the respondent – will avail itself of the opportunity to present its case and participate in the proceedings. Ideally (and usually), a respondent will participate effectively; it will comply with the provisions of the arbitration agreement, the provisions of the arbitral rules, if any, and the arbitral tribunal's directions. However, this is not always the case in practice. However it does happen that a respondent will opt not to participate in arbitration proceedings if, for example, it believes there is no chance of success. It may sometimes be the case that a respondent does not appreciate the significance of the notice of arbitration due to a lack of familiarity with arbitration, which may lead to the decision not to participate in the proceedings. In other cases, the respondent may be unable to participate due to financial constraints, if it is, for example, in the process of liquidation.

In all the above scenarios, the arbitral tribunal may have no option but to proceed in default of the participation of the respondent. One of the crucial steps that needs to be taken when this happens, is to ensure that the respondent is aware of the existence of the arbitration proceedings filed against it, and to ensure that the respondent is given full opportunity to present its case by filing a defence. If at a later stage, it is proven that the respondent was not properly notified, then the enforcement of the final award will be at risk.

Article V (1) (b) of the New York Convention provides that the recognition and enforcement of the award may be refused, if "[t]*he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*".

Therefore a key question is what is considered a "proper notice"? Some jurisdictions adopt a rigid approach for the proper notice. For example, the Swedish Supreme Court on 16 April 2010 held that the lack of notification due to the change of the respondent's address was not deemed as a proper notification and hence annulled a final award rendered under the auspices of the Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. In that case, the request for arbitration was served to the respondent at its last known address mentioned in the contract, and a delivery receipt was provided by the courier service. The proceedings went ahead on an *ex parte* basis. However, it appeared at the enforcement stage that the respondent had changed its address and did not inform the claimant as explicitly required under the terms of the contract. Notwithstanding the respondent's failure to notify the claimant with its new address, the Swedish Supreme Court found that the respondent was not properly made aware of the proceedings and annulled the final award.[1]

Other jurisdictions adopt a more flexible approach. Under section 14 of the UK Arbitration Act, the arbitration is commenced when a party serves a notice to the other party requesting it to appoint an arbitrator. According to section 76 of the Act, in the absence of the parties' agreement, notifications have to be made by "any effective means" to the addressee's last known address. This section is derived from Article 3 of the UNCITRAL Model Law. In *Bernuth Lines Ltd v High Seas Shipping Ltd*,[2] the court held that "any effective means" includes serving the notice by email. The email was ignored by the staff of the respondent as it was received as spam; the court nonetheless considered it a valid notification, stating that "*there was no reason why delivery of a document by email - a method habitually used by businessmen, lawyers and civil servants - should be regarded as essentially different from communication by post, fax or telex*". The position in English law can be summarised as follows: notification of the respondent is valid if there is proof that

1. *Journal of International Arbitration* (2010) 27 J. Int. Arb. 5.
2. [2005] EWHC 3020

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:

International dispute resolution & adjudication

Issue 08, 2013

the service of notice has been effective. The approach of English law seems to be helpful practically and one can say that it generally supports the use of arbitration, where it has been agreed between the parties.

In the UAE, there is no clear set of guidelines or requirements for a proper notification. Article 208 of the UAE Civil Procedure Law provides that "*the arbitrator shall, without the need to comply with the rules provided under this Law in respect of serving of notices, notify the parties to the dispute*" Due to the lack of guidelines and proper awareness of the principles of arbitration, practitioners in the UAE tend to apply the classic rules of the UAE Civil Procedure Law to the notification. In particular, some lawyers prefer to serve the notices through the court and in case of failing to reach the respondent, they conclude all the required steps under the notification provisions of the Civil Procedure Law including notification by publication in newspapers. This approach may be recommended in some cases where the respondent is intentionally hiding and is expected to appear and fight their case at the enforcement stage. The advantage of this approach is to show the ratification judge at the state court that the respondent has been notified of the arbitration in compliance with the classic requirements under the Civil Procedure Law, a law which the judge is familiar with.

A question has arisen concerning the validity of notifications by publication as they are in clear breach of the principle of confidentiality of arbitration. The UAE courts, however, do not seem to condemn such notifications. A related question is whether arbitration is indeed confidential. The UAE law is silent on this point and in practice notifications that may constitute a breach of the confidentiality principle are deemed to be acceptable by local courts.

The above approach is considered as the safer approach by many lawyers even if the dispute is handled under the DIAC Rules, which established a clear set of rules for the notification. Article 3.4 of the DIAC Rules provides that all notifications "*shall be deemed to have been received if physically delivered to the addressee or its representative at his habitual residence, place of business, mailing address*". In practice, the case management unit of DIAC sets a high standard with regard to notification to ensure that the notifications have indeed been received by the respondent. Article 3.5 provides that "[s]*uch notification or communication shall be in writing and shall be delivered by registered post or courier service or transmitted by facsimile transmission, telex, telegram, email or any other means of telecommunication that provides a record of transmission*".

In cases where the respondent is not found at the provided address, the claimant will be requested by the DIAC or the arbitral tribunal after it has been constituted to make reasonable enquiry and to provide an alternate address, failing which, the communication would be deemed to have been received by the respondent at its last known address pursuant to Article 3.4 of the DIAC Rules. Article 2 of the Swiss Rules adopts the same approach as well as Article 3(2) of the ICC Arbitration Rules.

If it is proved that the respondent was properly notified of the existence of the proceedings in accordance with the requirements of the seat of arbitration and that the principle of due process was respected, the enforcement of the final award rendered by default should not be rejected on the grounds of the non-participation of the respondent in the proceedings. This principle is commonly acknowledged by most jurisdictions in the world. It was acknowledged in the Emirate of Ajman in the UAE where the First Instance Court applied the New York Convention and decided to enforce a foreign arbitration award in default of an appearance of the respondent. However it is important, where notification may be an issue, that appropriate advice is taken to ensure that the proper procedures have been complied with.

Ahmed Ibrahim, Partner
Ahmed Ibrahim in association with Fenwick Elliott
+971 4 2522 005
aibrahim@ibrahim-lawfirm.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

The engineer - third wheeling without liability

By Heba Osman
Partner, Ahmed Ibrahim in association with Fenwick Elliott

Designing the project, preparing tender and contract documents, supervising the construction, administering the contract, certifying payments, determining extension of time and compensation claims, and much more — these are all the roles of the Engineer. In each of these roles the Engineer wears a different hat. In certain instances, the Engineer is simply acting as a service provider to the Employer, and in others the Engineer is the neutral third party deciding on matters between the Employer and the Contractor.

Achieving a balance between these roles has been the subject of more papers and conferences than I can remember. However, this multiple role is the primary reason for disputes in the construction industry. In fact, according to a recent report,[1] three out of the five major causes of construction disputes in the Middle East relate to the Engineer's role. These three causes are:

1. failure to properly administer the contract;
2. failure to make interim awards on extension of time and compensation; and
3. errors and omissions in contract documents.

The Engineer's liability in the United Arab Emirates (UAE) for these various roles can be split into three major categories: (1) contractual liability; (2) liability as a designer and/or supervisor; and (3) liability in tort. These are, of course, in addition to the Engineer's professional liabilities under the relevant regulatory body.

Contractual liability

In the UAE, the parties to a contract are free to agree the terms and conditions of their contract as long as none of these terms conflict with a mandatory law provision or public order in that country.

The UAE Civil Transactions Law (the Civil Code) mandates that each of the parties to the contract performs its obligations.[2] In the event that one of the parties fails to perform its obligations, the other party has the right to request specific performance (if possible). If specific performance is not possible, then the non-breaching party has the right to claim damages.[3]

As in any other contractual relationship, the Engineer will have a contractual liability towards the Employer for its actions (or inactions) under the consultancy agreement.

This Engineer's liability may be limited or set out in any manner that the parties agree. However, this does not mean that an Engineer may limit its liability totally. By way of example, an Engineer operating in the UAE will remain liable for any actions of fraud or gross negligence.[4] Moreover, while it is common in contracts to agree a ceiling for liability in the form of a certain sum of money or the contract value, the courts in the UAE (and/or any arbitral tribunal), when considering a contractual dispute between the Employer and the Engineer, have the authority to reassess this amount in order to equate it to the actual damage sum.

Designer/Supervisor liability

The major liability arising out of designing and/or supervising construction in the UAE (and in the majority of civil law countries) is the decennial liability. In this respect Article 880 of the UAE

1. EC Harris, *Global Construction Disputes Report* 2013 - http://www.echarris.com/pdf/EC%20Harris%20Construction%20Disputes%202013Final.pdf
2. Article 243 Civil Code.
3. Article 380 Civil Code.
4. Article 383, Civil Code.

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

Civil Transactions Law (the Civil Code) provides that both the Engineer (whether designing or supervising the works) and the Contractor will be jointly and severally liable for the complete or partial demolition of any building (or structure) that was intended to last for more than 10 years. This liability arises in respect of any defect affecting the safety or stability of the building (or the structure).

The decennial liability is a strict no fault liability and cannot be contracted out of or limited, although it may be increased. This means that the Employer does not have the burden of proving any error, negligence or mistake on the part of the Engineer, but simply the occurrence of one of the circumstances giving rise to the decennial liability.

The law also differentiates between the Engineer's liability as a designer and as a supervisor. Article 881 of the Civil Code provides that if the Engineer produces the design but does not supervise the work, the Engineer will only be liable for demolition or defects related to the design. On the other hand, if the Engineer has only supervised the construction works, the Engineer will only be liable for demolition or defects arising from that supervision.

As one cannot contract out of this liability, the best way to deal with it is to procure insurance covering decennial liability.

Liability in tort

Although the Engineer may be the major source of construction disputes, the Contractor would not normally pursue claims against the Engineer, but rather against the Employer. This is of course for some good practical reasons, most importantly because there is no contractual agreement between the Contractor and the Engineer.

However, this does not mean that the Engineer may not be liable, in tort, due to its actions (or inactions) with regard to the Contractor. In respect of a tort liability (literally referred to as "harmful acts"), Article 282 of the Civil Code sets the general premise that anyone causing damage to another person will be liable for damages.

For this liability to arise there must be a breach of the law itself and this breach must cause a loss. However, for the Contractor to have such a right of action against the Engineer, the Contractor will need to show that the Engineer has performed a "harmful act" that is not covered by the construction contract itself.

Heba Osman, Partner
Ahmed Ibrahim in association with Fenwick Elliott
+971 4 2522 005
hosman@ibrahim-lawfirm.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

Termination at will

By Peter Collie
Partner, Fenwick Elliott

Termination at will or termination at the employer's convenience clauses have become very common over the past 20 years. The clauses usually give the employer the right to escape from what is becoming an onerous contract but very rarely give the contractor the same right.

Obviously a clause such as this is very useful for the employer in cases where the project is abandoned for commercial, financial or political reasons, or possibly even if the contractor is underperforming to an extent not sufficient to allow termination for cause.

The FIDIC Red Book provides:

> The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

Clauses such as this cause a good deal of heat, especially if the contractor feels that he has lost a very lucrative contract without compensation. Contractors will want to see if anything can be done to improve the position. There are two issues to consider: first, what the clause states and second, the applicable law.

Whilst every applicable law needs to be expressly considered, there is a reasonably common theme internationally. Termination at will clauses seem to be accepted if they provide for the contractor to be compensated for loss of profit and the project is abandoned rather than given to a new contractor.

It is fairly common for the right to terminate a contract to be subject to strict requirements or approval by the courts. For instance, in France the Code Civile restricts a party's freedom to terminate a contract unless it is by mutual consent or for permissible reasons. However, if an employer terminates for convenience it will have to compensate the contractor for costs and for the loss of profit.

In Australia termination at will is allowed if the contractor is compensated for their losses.

Even in the USA (the home of freedom) the employer is required to use good faith and cannot use the provision "simply to acquire a better bargain from another source".

In Egypt the Civil Code provides:

> *"(1) An employer may terminate the contract and stop the work at any time before the completion of the works, provided that he compensates the contractor for all expenses he has incurred, for the work that he has done and the profit that he would have made if he had completed the work.*
>
> *(2) The Court may, however, reduce the compensation due to the contractor for loss of profit if the circumstances justify such reduction. In particular, the court shall deduct from such compensation any savings realized by the contractor as a result of the rescission of the contract by the employer and any profit which the contractor could have made by employing his time otherwise."*

This provision is unusual in that it expressly allows for termination at the employer's convenience. It is more usual to see a civil code that seeks to limit the ability of a party to escape from a contract. Such a provision is to be found in the UAE Civil Code which expressly forbids a party to terminate a contract unless by agreement or the termination is authorised by the court (Article 267).

However, even in the UAE the courts have adopted a pragmatic approach and

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International contractual issues around the globe

Issue 08, 2013

in one case it was found to be "judicially established" that the employer may terminate for any reason as long as the contractor is compensated for the loss of profit and other losses. The reasoning is that construction projects are long and circumstances may change such that the project is no longer feasible.

In England the courts have recently considered a termination clause which did not provide for any compensation (see *TSG v South Anglia Housing Ltd*). Further, the situation was one where, following termination, the project was going to be given to a new contractor. The facts were that the contract was a maintenance contract which the Housing Association was required by statute to have in place.

The court simply decided that the parties had freely negotiated the terms of the contract and the court applied those terms:

> *"I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of 'trust fairness and mutual co-operation' and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term…"*

The court was not in the least concerned about SAH's motives or the fact that the contract had to be given to someone else.

It is doubly interesting as a common law case because it is well established that an employer cannot omit all the rest of the work in order to give it to another contractor per *Amec Building Ltd v Cadmus Investment Co Ltd* (1996) 51 ConLR 105.

However, it may be that one of the unique aspects of the TSG case was that the clause allowed either party to terminate for convenience and so either party could escape from an onerous contract.

The FIDIC Red Book allows the employer to terminate for convenience provided the employer is abandoning the project and the contractor is compensated for costs incurred. However, it does not provide the contractor with a right to loss of profit. In this aspect the clause seems to be out of step with most of the world. Therefore whether the termination will be legal will depend wholly on the jurisdiction of the country you are in.

Peter Collie
Partner, Fenwick Elliott
+44(0)207 421 1986
pcollie@fenwickelliott.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

News and events

Trends, topics and news from Fenwick Elliott

Issue 08, 2013

This edition

We hope that you have found this edition of International Quarterly informative and useful. We aim to keep you updated regarding legal and commercial developments in construction and energy sectors around the world. Fenwick Elliott's team of specialist lawyers have advised on numerous major construction and energy projects worldwide, nurturing schemes to completion with a combination of careful planning, project support and risk assessment. From document preparation to dispute resolution, our services span every stage of the development process.

If you would like us to comment on a particular commercial issue or aspect of law that is affecting your business please contact Jeremy Glover - jglover@fenwickelliott.com

Fenwick Elliott at the FIDIC Contract User's Conference, London, Dec 2013

Nicholas Gould and Jeremy Glover joined Siobhan Fahey (a member of the FIDIC Contracts Committee) in a panel session entitled "Pursuing Claims under FIDIC", at the FIDIC Contract Users' Conference held in London on 3-4 December 2013. The session covered a variety of topics including time bars and force majeure or exceptional risks. A copy of Jeremy's slides can be found by clicking here.

The number of questions posed during (and after) the session confirm that the time bar continues to be a controversial issue. Speakers from the floor raised the Australian case of Andrews v Australia and New Zealand Banking Group where the suggestion was made that if the detriment caused by the time bar was out of all proportion to the loss or damage sustained it might mean that the time bar clause would amount to a penalty and so would be unenforceable. There was also discussion about the potential escape route provided in the Gold Book (and the Gold Book alone) where sub-clause 20.1 notes that a contractor may submit details to the DAB (but not apparently the arbitral tribunal) as to why it is fair and reasonable that a late submission be accepted. What should the contractor be addressing: the reasons why the submission was late, or perhaps the reasons why no prejudice has been suffered by the employer as a result of the late submission? Probably the answer is a mixture of both, and certainly any DAB would be wise to allow submissions from both parties if a contractor is looking to take advantage of this provision.

As always, the conference covered a wide range of topics, and we learnt the slightly surprising news that it may be another two years before the long-expected updates to the FIDIC suite of contracts are released. Before that there may be an update released to the Contract for Dredging and Reclamation Works (or Blue Book) next year. There was also an interesting session explaining a little bit more about the new Model Representative Agreement (or Purple Book), which was released this year and is intended for use by those firms who engage an agent to develop business or provide assistance in a foreign country.

One particularly interesting feature of the conference was the wide variety of different types of projects that were discussed where the FIDIC form is used. These ranged from small road projects in Africa run by UNOPS (the UN central resource for civil works and infrastructure development) through to the wide range of projects operated in the renewable energy market. The interesting point to emerge here was that most of the contracts used by this sector are based on the FIDIC form. The question posed was whether the time was right for a new form of FIDIC Contract to cater more specifically for this sector.

About the editor, Jeremy Glover

Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both in the UK and abroad, from initial procurement to where necessary dispute avoidance and resolution.

Jeremy organises and regularly addresses Fenwick Elliott hosted seminars and provides bespoke in-house training to clients. He also edits Fenwick Elliott's monthly legal bulletin, *Dispatch*.

***International Quarterly* is produced quarterly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.**

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com Tel: + 44 (0) 207 421 1986
Fenwick Elliott LLP
Aldwych House, 71-91 Aldwych
London , WC2B 4HN
www.fenwickelliott.com