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International Quarterly

Issue 18, 2016

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

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The incorporation of arbitration agreements

By Jeremy Glover
Partner, Fenwick Elliott

Sub-clause 20.6 of the FIDIC Red Book is a good example of the express incorporation of an arbitration clause. The clause sits clearly within the main contract terms. However, that is not always the case. Often parties will not include an arbitration clause in the contract itself but you will find that arbitration has been included by reference to a standard set of conditions which contain an arbitration clause. In this situation it is often the case that there will be no separate indication that there is an arbitration clause in those standard conditions.

Under section 5 of the 1996 Arbitration Act, in England and Wales, arbitration agreements must be in writing but that can include agreements evidenced in writing, including where an agreement is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

A recent decision in the English courts demonstrates some of the difficulties that can arise, where the arbitration agreement is found in a separate set of standard terms which have not actually been seen by one of the parties to the contract. Could there be a valid arbitration agreement in such circumstances?

Barrier Ltd v Redhall Marine Ltd

In the case of *Barrier Ltd v Redhall Marine Ltd*[1] Redhall had entered into a contract with BAE for the construction of Astute Class submarines for the Ministry of Defence (MoD). In January 2002 Redhall then subcontracted part of its functions under the Main Contract to Barrier. Barrier's role under the subcontract related mainly to painting the submarines internally and externally. A dispute arose over payment. Barrier sought the disclosure of certain documents through the courts. However, Redhall said that the contract contained an arbitration clause. If that was right, the disclosure request would fail.

Redhall argued their case in two ways:

(i) The arbitration agreement was contained in the Redhall standard terms and Barrier had been given sufficient notice of these.

(ii) There was an arbitration agreement in the Main Contract between Redhall and Barrier. The terms of the Main Contract were explicitly incorporated into the subcontract.

Incorporation of the standard terms even though these had not been provided

Barrier worked on six submarines in total; however, the subcontract was only for Boats 1—3. In December 2001 Redhall sent Barrier a purchase order in respect of painting and scaffolding work on Astute submarines. The purchase order was numbered 122274. The purchase order included the words:

> *"The terms overleaf must be read and strictly adhered to."*

By clause 10, these terms were incorporated into the subcontract. For an unknown reason, the purchase order did not include conditions on the back. Standard Condition 18 stated:

> *"18. Arbitration.*
>
> *Any dispute or indifference (sic) arising from the Contract shall on application of either Seller or Purchaser be submitted to arbitration in accordance with the Arbitration Act 1950 or any amendment or re-enactment thereof for the time being in force."*

Redhall submitted that the provisions of the subcontract were sufficient to incorporate the arbitration clause into their standard terms. Redhall said that

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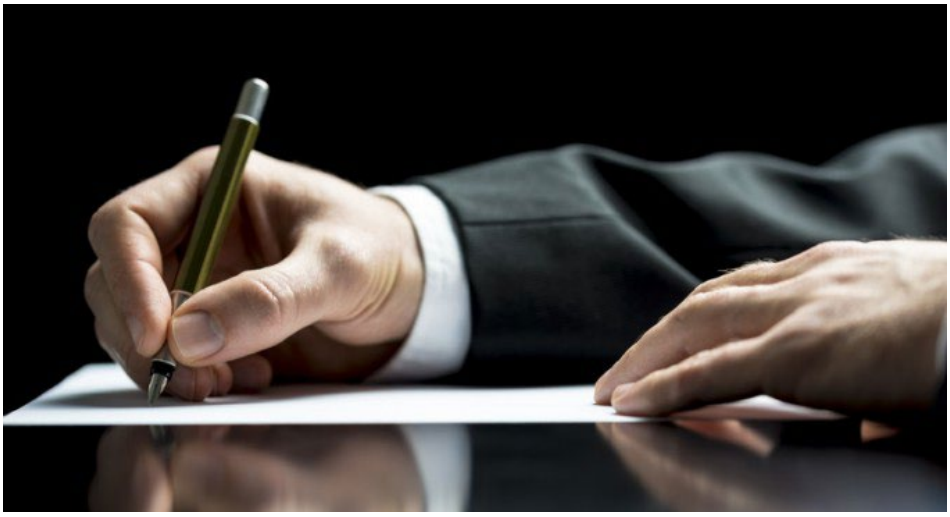

the Terms and Conditions were part of a standard form contract provided by CIL, which were communicated to Barrier. Crucially, Barrier did not need to have read the Terms and Conditions in order to be bound by them. It was sufficient that they had been drawn to Barrier's attention. Redhall made the following three points:[2]

(i) If the person receiving the document did not know that there was writing or printing on it, he is not bound;

(ii) If he knew that the writing or printing contained or referred to conditions, he is bound;

(iii) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

It is not necessary for the conditions to be set out in the document tendered. They can be incorporated by reference, provided that reasonable notice of them has been given. HHJ Behrens agreed, noting that assuming that the purchase order sent to Barrier had no conditions on the back and that for some unexplained reason the wrong copy was sent or given to Barrier:

> *"a reasonable person reading clause 10 of the subcontract would have no doubt that CIL's standard terms were incorporated. The fact that they were not on the back of the purchase order does not affect this.* ***It would, at all times have been open to Barrier to request a copy of the terms if they had wanted to."*** *[Emphasis added]*

Incorporation of the Main Contract Arbitration Agreement

HHJ Judge Akenhead QC noted in the case of *Walter Llewellyn & Sons Ltd v Excel Brickwork Ltd*[3] that for parties to have agreed on arbitration as the dispute resolution tribunal or forum, there needs to be something in subcontract documents that shows or demonstrates an express or conscious agreement that arbitration was the ultimate dispute resolution process. In the case here there was a clear reference to arbitration in the standard terms. The problem for Barrier was that they had not seen it, although they could have requested a copy of the standard terms if they had wanted to.

The situation was different in relation to the suggested incorporation of the main contract arbitration agreement. In the case here, HHJ Behrens followed the decision of Mr Justice Clarke who, in *Habas Sinai v Sometal*,[4] had distinguished between a case where a party is attempting to incorporate an arbitration clause between two other parties or one of the parties and a third party (i.e. BAE, Redhall and then Barrier), and incorporation where the same two parties had previously contracted (i.e. Redhall and Barrier).

Where a third party was involved, there was a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on was the incorporation of the terms of a contract made between different parties, even if one of them was a party to the particular contract in question. In contrast, where, as here, there were just two parties involved, the court would follow the traditional rules of contractual incorporation. Here there were no clear words that the parties intended to and/or had agreed to incorporate the main contract arbitration agreement. Further, the main contract arbitration agreement would have needed to be modified to make sense in terms of the subcontract for the painting of the submarines.

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Boats 4—6 – an oral agreement?

This left Boats 4–6. Here the instructions were oral. The only document that was provided to the court was the minutes of a relationship meeting held on 29 October 2012. The Relevant Minute recorded that there was no contract for Boats 4—6 and noted that:

> *"RNL and Barrier agreed the following:*
>
> *All works completed under Sis for Boats` 4 and 5 do fall under the contract in accordance with Addendum 4 (attached for information)*
>
> *RNL and Barrier agreed the following:*
>
> *Neither RNL nor Barrier are contracted to complete the full scope of supply for Boats 4 and 5.*
>
> *This position supersedes all comments/ actions stated in any correspondences referred above."*

Addendum 4 is a document between BAE and Redhall which referred to a number of further purchase orders, at least one of which referred to Boat 4. It acknowledged that the purchase orders were a modification to the [Main] Contract and that further work may be needed to be incorporated into the Contract in particular until such time as a separate Boat 4 Contract is agreed.

Was the contract in writing?

The question for the court was whether the contracts for Boats 4–6 were contracts in writing within the meaning of the Arbitration Act 1996. Section 5 of the 1996 Arbitration Act defines agreements in writing quite widely:

> *"5 Agreements to be in writing*
>
> *(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.*
>
> *The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.*
>
> *(2) There is an agreement in writing —*
>
> *(a) if the agreement is made in writing (whether or not it is signed by the parties),*
>
> *(b) if the agreement is made by exchange of communications in writing, or*
>
> *(c) if the agreement is evidenced in writing.*
>
> *(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*
>
> *(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."*

The court was clear that where Boats 4–5 are concerned, it appears that the agreement was evidenced in writing by the Minute of the 29 October 2012 meeting which incorporated the work for those two boats into the subcontract.

Boat 6 was not mentioned in any written document. However, oral evidence was provided which suggested that the parties had agreed that the work on Boat 6 would be carried out subject to the subcontract. This was sufficient to bring the agreement relating to Boat 6 within s. 5(3) of the 1996 Arbitration Act.

Conclusion

This is an interesting decision. The reminder that terms of a contract can be incorporated even though one of the parties to that contact has not seen them, is a valuable one. If your draft contract documentation refers to terms and documents you have not seen, you should ask to see them. Usually, it will be too late if a dispute comes to court and you say you were not aware of what the terms had to say.

Footnotes

1. [2016] EWHC 381 (QB)
2. Taken from Chitty on Contracts at 13-013 Published by Sweet v Maxwell. 32nd edn, November 2015
3. [2010] EWHC 3415 (TCC)
4. [2010] EWHC 29 Comm

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Case note: The jurisdiction of arbitral tribunals

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In a multi-party, multi-contract dispute, the English Court of Appeal dismisses an appeal against an order made regarding jurisdiction of the arbitral tribunal

By Martin Ewen,
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In *Sadruddin Hashwani (1), Zaver Petroleum Corporation Ltd (2), Ocean Pakistan Ltd (3) v OMV Maurice Energy Ltd* [2015] EWHC Civ 1171 the Court of Appeal had to decide whether an International Chamber of Commerce ("*ICC*") tribunal had jurisdiction to hear a dispute which arose out of myriad agreements related to oil exploration in Pakistan.

The facts

On 29 December 1999 the President of Pakistan issued a Petroleum Exploration Licence in relation to an area identified as the Mehar Block in favour of American company Ocean Pakistan Ltd ("*OPL*") and the Government of Pakistan ("*Government Holdings*"). On the same date the President entered into a Petroleum Concession Agreement ("*PCA*") with OPL and Government Holdings which contained the terms under which exploration and production operations were to be carried out. The PCA contained Article XXVIII, which set out provisions for arbitration under ICSID rules and, if ICSID refused or was unable to act, then disputes were to be submitted to arbitration under ICC Rules. The arbitration clause was expressed to apply only to disputes between *"foreign Working Interest Owners inter se or between foreign Working Interest Owners and The President"*. Disputes between Pakistani owners inter se or between Pakistani owners and the President were to be submitted to arbitration in accordance with the Pakistan Arbitration Act.

On the same date OPL and Government Holdings entered into a Joint Operating Agreement ("*JOA*"), which contained detailed provisions for carrying out operations within the concession area. The agreement was annexed to, and was expressed to be part of, the PCA. It contained its own arbitration clause in Article 17, which provided that any dispute should be dealt with *mutatis mutandis* in accordance with Article XXVIII of the PCA.

On 30 March 2000, OPL entered into a Farmout Agreement ("*FOA*") with a Pakistani company, Zaver Petroleum Corporation Ltd ("*Zaver*") and a Mauritian company, OMV Maurice Energy Limited ("*OMV*") under which it agreed to transfer the bulk of its interest in the Mehar Block and make OMV the operating company in place of OPL. Article 7 of the FOA provided that the agreement and the relationship between the parties was governed by Pakistani law and all disputes were to be referred to arbitration in Pakistan.

By two Deeds of Assignment, OMV and Zaver became parties to, and bound by, the PCA and the JOA.

A dispute arose between OMV, on the one hand, and OPL and Zaver, on the other, in relation to operations in the Mehar Block. OPL and Zaver maintained that OMV was in breach of the JOA and stopped paying their respective shares of the operating costs. In November 2014, OMV sought to refer the dispute to arbitration under the auspices of the ICC (ICSID having declined to act). In response, OPL and Zaver issued an application under section 72 of the Arbitration Act 1996 seeking a declaration

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that the ICC did not have jurisdiction in the matter.

Court at first instance

The key issue was whether the dispute fell within the arbitration clause in the JOA, or within Article 7.2 of the FOA.

OPL and Zaver contended that the provision for ICC arbitration, which is to be found in Article XXVIII of the PCA, had not survived the execution of the FOA. They argued that any dispute of any kind relating to the concession was to be determined by arbitration under Article 7.2 of the FOA. They also argued that in this case there was only one dispute involving OMV, OPL and Zaver, and to which Article XXVIII of the PCA did not apply.

The judge disagreed. He held that there were two separate disputes, one between OMV and OPL and one between OMV and Zaver; that both disputes arose under the JOA; that Article 7.2 of the FOA was limited to disputes arising under that agreement and so had no application to the disputes in issue; that the dispute between OMV and OPL fell within the terms of Article XXVIII of the PCA, because they were both foreign working interest owners; and that any dispute between OMV and Zaver also fell within Article XXVIII because the effects of the words "mutatis mutandis" in Article 17 of the JOA was to render Article XXVIII applicable to it.

The judge gave a declaration that the ICC did have jurisdiction in respect of the dispute between OMV and OPL. The judge was, however, less certain that the ICC had jurisdiction in respect of the dispute between OMV and Zaver and therefore stayed the proceedings to give the arbitrators appointed by the ICC an opportunity to decide that question.

Court of Appeal

OPL and Zaver appealed against the judge's order. OMV cross-appealed, seeking to set aside the judge's order staying the proceedings in relation to Zaver. It contended that the same order should have been made in relation to Zaver as was made in relation to OPL.

OPL and Zaver argued that the ICC did not have jurisdiction and that there was only one dispute between the parties, which should be referred to arbitration in Pakistan in accordance with Article 7.2 of the FOA. They argued that the parties to the FOA had intended to simplify the agreements containing different arbitration clauses, by agreeing to an arbitration clause that would apply to disputes arising between one or more of them in relation to the concession. This was not a dispute between two foreign working owners and so could not be referred to the ICC under the PCA.

OMV argued that there were two distinct disputes, which arose under the JOA because OMV was claiming from each of OPL and Zaver operating costs owed to it under the JOA. Even if there were only one dispute, the PCA would still apply because two parties on opposite sides were foreign interest owners. In addition, the words "mutatis mutandis" in the JOA were included with the intention of extending to OPL the benefit of ICSID or ICC arbitration, which the PCA clause provided. When OMV and Zaver later became parties to the JOA under the Deeds of Assignment, they became bound by the arbitration clause in the PCA in relation to disputes under the JOA. The arbitration clause in the FOA was limited to disputes arising under the FOA.

The Court of Appeal dismissed the appeal and allowed the cross-appeal. The court held that there were two disputes both of which were subject to arbitration under the ICC. The court also held that the judge had been wrong to stay the proceedings in respect of the dispute between OMV and Zaver.

There were a number of factors which influenced the court's decision that disputes under the JOA were to be resolved in accordance with Article XXVIII of the PCA.

1. The court noted that the parties had gone to some trouble to identify well-recognised independent international bodies for resolution of disputes under the PCA. In particular, the agreement to refer disputes to ICSID suggested that they were conscious of the status of OPL as a foreign investor which wished to have the comfort of a dispute resolution procedure insulated from the country in which it was investing. On the other hand, there was a clear intention to subject other kinds of dispute to domestic arbitration.

2. The most likely purpose of using the expression "*mutatis mutandis*" was to enable Government Holdings to be substituted for the President,

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so that for the purposes of the JOA the arbitration agreement extended to disputes between OPL as a foreign working interest owner and Government Holdings as representative of the state.

3. The court found it difficult to accept that when the parties entered into the FOA the parties were so concerned about uncertainties over the way in which Article XXVIII would apply once they had acquired working interests in the concession that they decided to put in place different arbitration agreements in respect of any disputes that might arise under the JOA. Article 7.2 should be understood to be limited in its scope to the FOA itself.

4. Under the Deeds of Assignment, the parties ratified and confirmed the documents and became bound by them.

In terms of the jurisdiction of the ICC, the court decided:

1. There were two separate disputes, one between OMV and OPL and one between OMV and Zaver.

2. Both of these disputes arose under the JOA.

3. The arbitration agreement in the FOA was limited to disputes arising under that agreement.

4. The dispute between OMV and OPL fell within the arbitration clause in the PCA, because they were both foreign interest owners. The dispute between OMV and Zaver was slightly more difficult because the PCA made no mention of disputes arising between foreign and Pakistani owners. The court held that given that the PCA, the JOA and the OMV Deed of Assignment all provided for arbitration in accordance with the PCA, and that on becoming parties to the concession documents Zaver formally ratified and confirmed them, it could not accept the parties intended disputes between Zaver and OMV to fall outside the terms of the PCA arbitration clause.

Stay of proceedings

The court at first instance had stayed Zaver's application in order to allow the arbitrators appointed by the ICC to decide for themselves whether they had jurisdiction to act. The Court of Appeal decided that this was wrong.

The court said that it will only be in exceptional cases that a court, faced with proceedings which require it to determine the jurisdiction of arbitrators, will be justified in exercising its inherent power to stay those proceedings to enable arbitrators themselves to decide the question.

The court's view was that it was in the interests of good case management to decide whether the ICC tribunal had jurisdiction.

Commentary

Parties must carefully consider the dispute resolution provisions in their agreements at contract drafting stage, particularly so in a multiple parties and multiple contracts scenario. If a further new contract is to be entered into, or a party leaves or a party joins a project, attention should be given to the clarity of the dispute resolution provisions.

It is far better, through careful drafting, to avoid the time and cost required to resolve jurisdictional issues such as these, which will only serve to delay arbitral proceedings, increase costs and could even lead to decisions which are inconsistent with each other.

If parties do, however, wish for different disputes under related agreements to be decided by a different forum, clear wording to this effect will be expected by the court.

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SIAC releases updated Arbitration Rules and new Investor-State Arbitration Rules

By Robbie McCrea
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Introduction

The Singapore International Arbitration Centre ("*SIAC*") released the sixth edition of its arbitration rules (the "*2016 Arbitration Rules*") on 1 July 2016, with the stated aim of providing an updated set of procedures that are *"timely, efficient, cost-effective, and user-friendly"*.[1] The Rules contain a number of significant refinements and innovations, although the most notable development is the introduction of a second set of arbitration rules to deal with investor-state arbitration (the *"Investment Arbitration Rules"*).

SIAC have stated that the 2016 Arbitration Rules will come into effect on 1 August 2016. SIAC have indicated that this will be followed by the Investment Arbitration Rules in September 2016. The Arbitration Rules will apply to any arbitration commenced on or after the date these new rules come into force, 1 August 2016, The Investment Arbitration Rules will apply if they have been incorporated into a contract, international treaty, or other instrument applicable to the parties.

We set out below details of the key developments in the updated Arbitration Rules and highlighted notable elements of the Investment Arbitration Rules.

The Singapore International Arbitration Centre

SIAC is an increasingly popular forum for international arbitrations. Earlier this year SIAC reported a 300% increase in its caseload during the past 10 years, and 271 new cases were filed with SIAC in 2015.[2] This makes SIAC the fourth most used international arbitration centre, behind the International Chamber of Commerce (801 new cases in 2015[3]), Hong Kong International Arbitration Centre (477 new cases in 2014[4]), and London Court of International Arbitration (326 new cases in 2015[5]).

Over this time Singapore has established itself as a major player in international arbitration, and its output includes the now infamous Persero series of cases which dealt with the enforcement of dispute board decisions under the FIDIC Form of Contract.[6] SIAC arbitrations are roughly equivalent to the ICC, HKIAC and LCIA in terms of price and time (on average 9—18 months for a completed arbitration), but even in the rapidly developing world of international arbitration SIAC's rules have a reputation for being progressive.

The 2016 Arbitration Rules

The 2016 Arbitration Rules include three principal amendments: (1) new provisions for multi-party disputes, (2) refined Emergency Arbitrator and Expedited Procedure, and (3) new provisions for early dismissal of claims and time limit to close proceedings.

Multi-party disputes

Disputes in international arbitration, and particularly construction disputes, frequently involve multiple parties and contracts, and there is a trend towards consolidating these disputes into one arbitration. Further to this, while the 2013 Rules allow for third parties to be joined to an arbitration if they are a party to the same arbitration agreement and

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consent to being joined, the 2016 Rules include significantly broader provisions for multiple party disputes.

First, the 2016 Rules provide two options for including multiple contracts within the same arbitration, whereby a claimant may elect to:

1. file a single Notice of Arbitration that encompasses multiple contracts (Rule 6); or
2. file multiple Notices of Arbitration, one for each contract, but apply to consolidate each of those arbitrations into a single arbitration (Rule 8).

Of particular note is that in both instances above it will not always be necessary to obtain the consent of the party being joined, provided, broadly, that the arbitration agreements in question are "*compatible*" and the disputes are sufficiently proximate.

Secondly, the 2016 Rules permit third parties to be joined to an arbitration even if they are not a party to the same arbitration agreement (Rule 7). Of note, third parties will be able to be joined without their consent if they are a party to the arbitration agreement and the joinder application is made before the Tribunal is constituted. It is not clear why SIAC has distinguished between applications made before and after the constitution of the Tribunal, but parties should bear in mind when seeking to join another party that it may pay to make an application early.

The new multi-party provisions are clearly aimed at providing a commercially sensible mechanism for dealing with multi-party disputes. In doing so SIAC has gone a step further than its competitors in an industry-wide trend towards more efficient and cost-effective arbitrations. However, the new provisions also run the risk of contradicting the principle of consent which underpins arbitration. This may be a future battleground for parties joined without consent, and the use of broad concepts such as the "*compatibility*" of arbitration agreements will inevitably give rise to differences in opinion. Parties would be well advised to approach consolidation and joinder without consent cautiously.

Emergency Arbitrator and Expedited Procedure

In respect of the still relatively new Emergency Arbitrator provisions, which allow very fast interim awards or orders to be issued where there is an urgent need for relief, the 2016 Rules refine this procedure by introducing a time limit (the time from receipt of a party's application to the issuing of an award must be completed within 15 days), and a fixed fee of S$25,000 for the Emergency Arbitrator's fees (at Rule 30, Schedule 1 and Schedule of Fees).

The Expedited Procedure, which provides a fast-track procedure for lower-value disputes, has also been tweaked, including an enlarged scope of disputes up to S$6,000,000 (from S$5,000,000 under the 2013 Rules), and refined clauses providing for expedited disputes to be settled by one arbitrator (Rule 5.2.b.) and decided upon documentary evidence rather than a hearing (Rule 5.2.c.).

Early dismissal of claims and reduced time limit to close proceedings

The 2016 Rules also introduce a procedure for the early dismissal of claims (Rule 29) that are manifestly without legal merit or manifestly outside the jurisdiction of the Tribunal. Under the proposed new procedure either party may apply within 30 days of the Tribunal being constituted to have any claim(s) or defence(s) struck out, and the Tribunal must decide the application within 60 days of receiving it. This procedure should result in time and cost savings by allowing frivolous claims to be dealt with quickly, although it could also potentially be used as a strike weapon against unprepared claimants.

Finally, the 2016 Rules require the Tribunal to declare the proceedings closed no later than 30 days after the last hearing or submissions concerning matters to be decided in the award. This amendment is in keeping with the move towards more efficient proceedings, and tightens up the 2013 Rules which do not set a deadline to close proceedings.

The Investment Arbitration Rules

The release of the Investment Arbitration Rules is a bold move into the field of investment arbitration, where SIAC will be competing with the well-established ICSID and UNCITRAL Rules.

Investment arbitration can provide an effective alternative method of dispute resolution to commercial arbitration, in certain instances. In investment arbitration a party will claim as a foreign investor against a host country based upon either an investment treaty or an agreement, for instance a BIT, or the host state's national investment laws (rather than as two parties under a contract). A typical claim would be that a foreign investor has suffered prejudice as a result of an organ

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of the host state exercising a sovereign power in breach of an investment treaty to which it is a signatory, or a domestic investment law.

There are an increasing number of international investment treaties and a strong global trend of effecting domestic laws aimed at promoting foreign investment; however, investment arbitration is still not nearly as popular as commercial arbitration. The most frequent criticisms of investment arbitration are that it is slow (on average three years and eight months from filing a request for arbitration until the final award is issued,[7] compared with an average of 9 to 18 months for SIAC commercial arbitrations[8]), and expensive (average party costs are approximately £3,000,000 plus Tribunal costs of £500,000, which is more expensive than all but the largest commercial arbitrations).

The SIAC Investment Arbitration Rules have clearly been designed to address the above criticisms. This has been done by merging traditional investment arbitration rules with a number of commercial arbitration rules, including: a streamlined process for the appointment of the Tribunal (Rule 6.2) and challenges to the Tribunal (Rule 12), early dismissal of claims manifestly without merit (Rule 25), and an optional Emergency Arbitrator procedure (Rule 24.6), and by setting a time limit for the Tribunal to declare proceedings closed (Rule 29.2).

These proposed amendments introduce some welcome innovation, and reflect a growing understanding of the potential significance of investment arbitration.

Upon the release of the draft rules the President of SIAC's Court of Arbitration, Gary Born, commented as follows:

> *"As investment arbitration continues to grow, in Asia and elsewhere, the new SIAC Investment Arbitration Rules are intended to provide an efficient and neutral set of procedural rules tailored to the needs of both states and investors."*

Once finalised, the Investment Arbitration Rules will be able to be adopted in new and re-negotiated investment treaties. Negotiating countries will need to consider whether they are best served by including rules designed to make arbitration of those treaties and investment agreements more accessible. International contractors and state-employers should note that through investment arbitration they may find they have a remedy or claim they did not contract for. Whether or not SIAC's rules signal a move towards more accessible investment arbitration claims, watch this space.

Conclusion

In all, the revised 2016 Arbitration Rules provide a useful update that is in keeping with and contributes to current commercial arbitration trends. The Investment Arbitration Rules are a bold play at investor-state arbitration which still is, and certainly is perceived to be, very inaccessible. We will follow the impact of the new rules and provide further updates in International Quarterly.

Footnotes

1. Gary Born, President of the Court of Arbitration of SIAC.
2. SIAC Announcement 25 February 2016.
3. ICC Arbitration Statistics 2015.
4. PLC (Practical Law Company), *New Arbitration/ADR cases received.*
5. LCIA Registrar's Report 2015.
6. The Persero series are discussed in Fenwick Elliott's 2015/2016 Annual Review, which can be found at the following link: http://www.fenwickelliott.com/research-insight/annual-review/2015/persero-ll-dispute-board-decisions
7. Allen & Overy, *Investment Treaty Arbitration: How much does it cost? How long does it take,* 18 February 2014.
8. SIAC FAQs.

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Case note: enforcing foreign judgments in the UAE

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DNB Bank v Eyadah: jurisdiction of the DIFC courts

By Nicholas Gould, Partner, Fenwick Elliott

DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings PJSJ CA 007/2015, 25 February 2016

DNB Bank ASA were seeking recognition and enforcement of an English High Court order in the United Arab Emirates by bringing an action in the Dubai International Financial Centre (DIFC) Court. The English court order required Gulf Eyadah Corporation and Gulf Navigation Holdings PJSJ to pay DNB Bank ASA US$8.7 million together with costs in relation to finance documents and a guarantee. The issue in this case was whether the DIFC Court had jurisdiction to enforce a foreign award.

At first instance, the DIFC Court held that the English order was a "*foreign*" court order which fell within Article 7(6) of the Judicial Authority Law (JAL). The relevant part of the JAL in relation to this case comprises Dubai law no.12 of 2004 (amended by Dubai law no.16 of 2011 and also Article 24(1) of the DIFC Court law no.10 of 2004). The judge considered that the English order constituted a "*foreign*" court order within the meaning of Article 7(6) of the JAL. In particular, that the English order came under Article 5(A)(1)(e) of the JAL and so the jurisdictional "*gateway*" was satisfied. Basically, the English court order was a foreign court order that fell within the JAL, and so could be recognised by the DIFC Court. As a result it could be referred to the Dubai Court for execution.

The Court of Appeal did not agree with this reasoning, but still enforced the English order, albeit under a different JAL provision. The Appeal Court concluded that Articles 7(4) to 7(6) did not apply to the English order. However, the DIFC Court still had jurisdiction to consider the claim under Article 7(2) of the JAL, which provides for the execution of judgments, decisions and orders given by the DIFC Court was relevant. In conclusion, it was held that Article 7(2) of the JAL applied, and this provided for the execution of judgments, orders and decisions which were given by the DIFC Court. As this was a foreign judgment, it could be enforced by the DIFC Court. On enforcement, it became an independent local judgment.

Reliance was placed upon the Memorandum of Guidance that had been entered into by the Commercial Courts of England and Wales and the DIFC Court. This Memorandum provided reciprocity mechanisms for the execution of judgment for assets in other jurisdictions. The JAL therefore provided a gateway for the recognition of foreign awards.

The Court of Appeal also considered that the presence of assets in the DIFC was not a condition to the enforcement of foreign court judgments. It did not matter that the defendant did not have any assets within the direct jurisdiction of the DIFC.

Conclusion

This is interesting and helpful because the DIFC Court could be used as a "*conduit*" to enforce a foreign judgment in a subsequent jurisdiction. An English court order for payment of money can be taken to the DIFC Court for recognition and enforcement. The DIFC Court can recognise and enforce the order, and then the claimant can use the DIFC judgment to enforce the order in the local Dubai courts.

Finally, the respondent was unable to demonstrate that the enforcement of an English order was manifestly unfair or breached the administration of justice. This point was not pursued on appeal, but the Court of Appeal commented that this process of enforcement would not be unfair or breach the administration of justice in any event.

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Complacency costs when it comes to anti-bribery legislation

By Sarah Buckingham, Associate, Fenwick Elliott

It may not be at the forefront of most parties' minds when tendering for and negotiating the contractual terms of a construction project, as the more immediate key commercial considerations such as price and allocation of risk etc., will inevitably take priority, but failing to properly take stock of anti-bribery legislation can, as a recent case has shown, have far reaching consequences and scupper more than just one deal.

In February this year, Sweett Group Plc ("*Sweett*"), a UK-listed construction and professional services company, was sentenced and ordered to pay £2.25m after pleading guilty to failing to prevent an act of bribery in the United Arab Emirates. This was the first conviction under section 7 of the Bribery Act 2010 and highlighted both the danger of corporate complacency and the extra-territorial reach of UK anti-bribery legislation.

Consequence of a failure to act

Under section 7 of the Bribery Act 2010, a corporate body is guilty of an offence if an '*associated person*' (which can be an employee, agent or subsidiary company) bribes another person intending to obtain or retain business or a business advantage for the company. The offence can be committed in the UK or overseas and criminalises corporate bodies for failing to act to prevent, rather than being complicit in, bribery. The only defence to a section 7 prosecution is if the company can show, on the balance of probabilities, that it had in place "*adequate procedures*" designed to prevent bribery.

Following an investigation by the Serious Fraud Office ("*SFO*"), it was revealed that between December 2012 and December 2015 Sweett's subsidiary company, Cyril Sweett International Limited had made corrupt payments to Khaled Al Badie, the Vice Chairman of the Board and Chairman of the Real Estate and Investment Committee of Al Ain Ahlia Insurance Company to secure and retain a contract for project management and consulting services in connection with the building of a hotel in Abu Dhabi. Sweett had not prevented the bribery. A lack of '*adequate procedures*' in place meant that it had failed to properly supervise the running of its subsidiary, the actions of its employees and their commercial activities in the Middle East.

In the words of one of the sentencing judges, this amounted to a "*system failure*" for which the UK company had to take full responsibility. The only defence under section 7 was therefore not available to Sweett and it had no choice but to admit the offence.

A decision to commence criminal proceedings will also take into account an organisation's behaviour and Sweett did not help itself in this respect either. In contrast to the full and swift cooperation with previous SFO investigations by other corporate entities, Sweett was criticised by the judge for trying to conceal matters, a lack of cooperation at the start of the investigation and self-reporting only when knowing a press report was to be published imminently. The lack of adequate procedures was therefore exacerbated by its apparent unwillingness to take immediate responsibility.

Taking appropriate action

But where did they start to go wrong? What '*adequate procedures*' are necessary to form the basis of a section 7 defence?

Although the Sweett case does not provide much helpful commentary on this aspect, the guidance published by the Ministry of Justice sets out six principles intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing the procedures they can put in place.

The principles: proportionate procedures; top level commitment; risk assessment; due diligence; communication; monitoring and review, do not amount to a prescriptive set of rules - instead the emphasis is on a risk based and proportionate approach, acknowledging that different procedures will be appropriate depending on the size of the organisation, the sector, the jurisdiction in which business is transacted and the nature of those transactions. It is, therefore, for organisations to assess the relevant risks they face and to judge for themselves how best to implement procedures that will be proportionate to those risks. It is important not only to be able to demonstrate that appropriate measures are in place but also to ensure

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that these are espoused from the top management levels down, communicated to all members of staff in all relevant jurisdictions, monitored and reviewed.

Are corporate bodies now taking note?

Despite this guidance and the negative publicity associated with the Sweett case, we have recently seen that even where a contract includes clear anti-bribery provisions the parties still may not consciously engage with these requirements in a practical sense. For example, a recent contract for the appointment of an Engineering, Procurement, Construction Management ("*EPCM*") consultant included provisions expressly requiring the consultant to: comply with all applicable anti-bribery laws including the Bribery Act 2010; not engage in any activity or conduct constituting an offence under that Act; comply with the employer's anti-bribery and anti-corruption policies as published and provided to it prior to entry into the contract; and have and maintain its own anti-bribery and anti-corruption policies and procedures including procedures adequate to ensure compliance with the Bribery Act 2010.

It emerged, however, shortly before signing was due to take place that neither party actually had anti-bribery or anti-corruption policies or procedures that could be published, provided to each other or indeed complied with. As a result, the consultant would not only be in breach of contract (a terminable event) but both parties were also exposed to the far reaching consequences of anti-bribery legislation without any form of defence. In this particular instance, a policy was rapidly put in place by the consultant prior to signing to avoid being in breach, but whether or not this would constitute 'adequate procedures' is another question. The employer simply waived the obligation for the consultant to comply with its anti-bribery policies for the duration of the contract – but it would be interesting to know if it now has policies and procedures in place to provide to consultants in respect of future contracts.

In the UAE, anti-bribery and corruption provisions are contained in the Federal and Emirate-specific penal codes and human resources management laws. UAE Federal Law no.3 1987, known as the "*Penal Code*" specifically prohibits passive bribery (receiving or requesting a bribe) in both the public and private sectors and active bribery (giving or offering a bribe) in the public sector. However, it is significant that at present active bribery in the private sector is not specifically prohibited.

Although there is currently no stand-alone or equivalent piece of legislation to the Bribery Act 2010, the UAE government has recently recognised a need for more specific and up to date anti-corruption legislation. Two key developments in this area took place in 2015; the decision to establish a new anti-corruption unit to be based in Abu Dhabi and the enactment of a new Data Law in Dubai, giving residents enhanced access to certain types of data. Although the new unit's primary objective is to ensure that public entities' resources and funds are managed and spent efficiently, it will also investigate financial irregularities and corruption and identify gaps in legislation – one such gap being the criminalisation of the active form of bribery in the private sector.

Both of these developments are, however, seen as positive progress in two of the UAE's major financial centres in combatting bribery and corruption, demonstrating the UAE's commitment to the United Nations Convention Against Corruption ("*UNCAC*") and, it is hoped, will accelerate the enactment of UAE-wide legislation to address any gaps.

What lies ahead

With the SFO's first prosecution under section 7 of the Bribery Act having been achieved in an extra-territorial context, the progress being made towards the passing of anti-corruption legislation in other jurisdictions around the world and a commitment to attaining the targets that UNCAC represents, corruption may well increasingly figure as an item on the global corporate agenda going forward. Organisations should take the opportunity to undertake proper due diligence on their domestic and international business structures and operations in order to ensure that '*adequate procedures*' are in place to prevent bribery and corrupt practices occurring. There is no excuse for ignorance or complacency and, as can now be seen by the evidence, the cost of exposed corruption will inevitably be far greater than the potentially unlimited fine which may be imposed – Sweett entirely pulled its operations out of the Middle East, its share price plummeted and its reputation in the industry has been badly tarnished.

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News and events

Trends, topics and news from Fenwick Elliott

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This edition

Ahmed Ibrahim, Partner in our Dubai office, recently took part in the training course organised by the Dubai International Arbitration Centre (DIAC) in cooperation with the Kuwait Bar Association, entitled 'The Role of Arbitration in Settling Disputes'. The training session, which was attended by Kuwaiti lawyers who also benefited from the expertise of DIAC, focused on enhancing knowledge and experience of international commercial arbitration and its role in settling trade disputes in accordance with the Dubai International Arbitration Centre guidelines and procedures based on the UAE Civil Procedure Act No. 11 of 1992.

Ahmed spoke about initiating arbitration proceedings and the best practices in nominating and appointing arbitrators. If you want to know more or are interested in similar events please contact Ahmed, aibrahim@fenwickeliott.com.

FIDIC

In April, Nicholas Gould, the head of our office in Dubai, spoke at The Challenges of the Egyptian Construction Industry and the Role of FIDIC Workshop in Cairo. On day one he looked at FIDIC Contracts and whether they were the right tool for the construction industry in Egypt and then on day two he discussed Dispute Resolution. With over 100 participants from 6 nationalities, the CRCICA – FIDIC business day in Cairo was a huge success and we were pleased to be a part of it.

Nicholas also recently spoke in Abu Dhabi and Dubai at the ICE Learned Event: Managing your FIDIC Contract. This seminar considered the legal and practical aspects of setting up and managing a FIDIC contract as the engineer or employer's representative. Consideration was given to the key contract data, instructions, variations, extensions of time, financial claims, determinations and clause 20 claims as well as avoiding disputes. Taking a practical view point, he considered the he meaning and structure of the key clauses of the FIDIC form against the realities of an on-going construction project.

If you want to know more about our Dubai office or are interested in our organising similar FIDIC talks, please contact Nicholas, ngould@fenwickeliott.com

New partners at Fenwick Elliott

We are pleased to announce that we have promoted Claire King from senior associate to partner and welcomed Jonathan Shaw to the firm, also as partner. Claire and Jon's new roles took effect from 1 April 2016. These new additions bring the number of partners in the firm to 19.

Claire King specialises in the resolution of construction and engineering disputes through all major forms of dispute resolution. She has acted on a wide range of international construction disputes; including power stations; desalination plants; nuclear projects, railway; and hotel and residential developments. Claire was on the drafting committee for the 2016 update of the CIArb and Adjudication Society's Guidelines on the "*Jurisdiction of the UK Construction Adjudicator*" and was a co-author of *Mediating Construction Disputes: An Evaluation of Existing Practice* which received a CEDR award for excellence.

Jonathan Shaw, a Chartered Quantity Surveyor, worked for seven years for a national contractor, prior to working as a construction specialist consultant for 11 years. He was subsequently called to the Bar in 2008 and practised at the Independent Bar until 2016. Jon has experience of: high-spec buildings; water and wastewater civil engineering and facilities; residential; road building; large diameter pipework; power generation; retail; bridges; rail; and hospitals, amongst other sectors.

This publication

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

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

International Quarterly is a newsletter and does not provide legal advice.

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