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

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Welcome to Issue 31

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

We start this with a review of arbitration in Africa, looking in particular at the at the role of African arbitration institutions. Can they compete with the established institutions? Catherine Simpson also highlights the hunger for greater ethnic diversity amongst arbitrators, in the continent.

We then turn to Dispute Boards (DBs). First we look at the continued growth in the use and promotion of DBs, as demonstrated by their introduction to the UK JCT Form. This is a significant development as the idea is that the DB can fulfil its dispute avoidance function and comply with the short-form 28-day adjudication referrals mandated by UK legislation.

Whilst the focus of DBs is avoiding and resolving disputes that arise on a project, the World Bank has seen an opportunity to expand this role further, taking advantage of the DB's unique position as an objective third party, with extensive experience of the contract. Sam Thyne discusses the World Bank's recent initiative to use DBs to address gender-based violence occurring in, or stemming from, projects that the World Bank provides funding for.

Finally, I look at a biomass fuel power station project where the contract was based on the 1999 FIDIC Yellow Book. Whilst, initially, the contract related to one package of works, it was later varied to include a second. The dispute illustrates the care needed when dealing with multiple packages and deciding how to incorporate additional phases of work into an existing project, whether by variation or a separate contract for those works.

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

Stay safe.

Jeremy

News and Events

Our international arbitration credentials

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

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

For example, Partner Toby Randle recently spoke at the Leaders in Construction KSA Summit 2021 about expansion into the Kingdom, growth of entertainment projects, demand for affordable housing and the rise in modular construction.

Events

Fenwick Elliott Partners, Nicholas Gould, Jeremy Glover and Claire King are all part of the *King's College 2021 London FIDIC Summer School* which runs from 17 September to 9 October, 2021.

Jeremy Glover, Partner, current President of Region 2 of the DRBF is part of the *DRBF Latin America Conference* on 28 and 29 October 2021

We are also looking forward to being part of *Net Zero Live 2021* held in conjunction with Building Magazine on 17-18 November 2021.

Webinars

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

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

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

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

This publication

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

Arbitration out of Africa: is there a way back in?

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African governments have grown wise to the fact that arbitration can be a source of economic activity, with conference centres, hotels and local lawyers set to benefit. A recognised arbitration centre may also help to reinforce messages about political and legal stability, which could be seen as one way to reassure foreign investors.[1] This is part of the reason why so many institutions have emerged in Africa in recent years. There are now over 90 arbitration institutions existing on the continent, with some countries hosting multiple centres – Nigeria and South Africa have at least six each, and even Mauritius, one of the smallest countries in Africa, has three.

However, it has been said that the number of arbitration institutions in Africa is disproportionate, and only a few of them have managed to gain serious traction. Even fewer have managed to compete with the likes of the ICC[2] and the LCIA[3], which continue to dominate the international arbitration market in Africa. But, why is this the case? And could this change in the future?

There appear to be two key considerations which impact the decision as to where to arbitrate – (1) the safety and security of the seat of the host country, and (2) the reputation of the institution itself. These considerations mean the longstanding foreign centres are still more prevalent, but there is growing evidence that the African institutions could gain in popularity. Parties have made it clear that they are increasingly willing to favour the promotion of ethnic diversity within the tribunal by choosing African centres over the security of the tried and tested institutions in more developed nations, as we will explore.

The arbitral seat

The seat of the arbitration determines the law of the arbitration. This is important, because it will dictate the relationship between the tribunal and the courts, which will, in turn, be significant when it comes to enforcing the arbitral award.

The results of the White & Case and Queen Mary University of London ("QMUL") '2021 International Arbitration Survey'[4] found that the five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva. These cities each have a longstanding and recognised reputation as a "safe seat" for international arbitration – they are generally in jurisdictions with strong, modern arbitration laws and judiciaries that are supportive of the arbitral process. Most also have established democratic governments, which offers stability.

Of note, the survey found that significant gains had been made by Singapore and Hong Kong, as compared to previous surveys in 2018 and 2015. The growth in popularity of seats in this region might reflect an increasing willingness by parties with commercial interests linked to the area to resolve disputes "locally". This might indicate that we could see a similar trend in Africa in the future. However, it could take a long time for the apparent stability of an African seat to translate into utilisation of its institution, particularly when the reputation of the centre is another major factor for selection. It is also apparent that not all African countries would be considered a "safe seat" – in the afternoon keynote speech at the November 2018 African Law & Business Summit, Segun Osuntokun gave some examples of why arbitrating within certain African countries may give rise to "jitters"[5]. For example, states such as The Gambia, Somalia and Namibia are not signatories to the New York Convention (which aims to ensure the enforcement of foreign arbitration awards worldwide by requiring contracting states to enforce agreements that satisfy certain conditions).

"Greater support for arbitration by local courts and judiciary" (56%), "increased neutrality and impartiality of the local legal system" (54%), and "better track record in enforcing agreements to arbitrate and arbitral awards" (47%) were cited in the 2021 survey as the key adaptations that would make other arbitral seats (those failing to make the top spots) more attractive. Clearly, the responses point to the importance of the local courts and judiciary in recognising and supporting the use of international arbitration. This would suggest that changes to local legal systems to ensure that the seat offers a supportive judiciary, and an impartial court system, has the potential to make certain African seats more appealing.
This also seems to be reflected in

Emilia Onyema's (of SOAS University of London) '2020 Arbitration in Africa Survey Report'[6]. When rating the top African cities for arbitration (almost one third of respondents selected Cairo as the most popular African seat), the main reasons stated in support included the existence of arbitration friendly laws and jurisdictions, as well as the availability of arbitration expertise[7]. The survey also identified some of the difficulties faced by users when arbitrating in Africa. These included unclear local laws on arbitration and difficulties in enforcing an award.

The arbitral institution

The five most preferred arbitral institutions as found in the 2021 survey are the ICC, SIAC[8], HKIAC[9], LCIA and CIETAC[10]. In Africa specifically, the preferred institutions were the ICC (79%), LCIA (57%), SIAC (39%), ICSID[11] (21%) and HKIAC (14%)[12]. Interviews confirmed the principal drivers behind choice of institution include the general reputation of the institution and the respondent's previous experience of that institution.

In Onyema's '2020 Arbitration in Africa Survey Report', the Arbitration Foundation of Southern Africa (AFSA) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) were selected as the top African centres and, similarly, the responses found that both centres enjoy a strong reputation from users both within and outside their locations. Respondents also praised their professionalism, efficiency and support facilities (including the quality of the support and administrative staff).

The findings of both surveys indicate that there is an emphasis on reputation, recognition and experience. It is obvious that this will result in a greater weighting towards long-established institutions, with proven track records and substantial experience. This means that it may take a long time before newer arbitration institutions in Africa can build their own following, particularly internationally.

Interestingly though, not all arbitration centres operating in Africa carry out the functions of an arbitral institution – some centres do not administer arbitration cases, but instead provide facilities such as hearing rooms to support the private dispute resolution process or act as appointing authorities. This might be another reason why some African institutions are not utilised much.[13]

Nevertheless, respondents to the 2021 survey revealed that in particular circumstances they would widen the list of institutions they might consider. For example, depending on the potential value of a given dispute, practitioners reported that they would be willing to consider less well-known institutions offering competitive fees, a diverse pool of arbitrators, and high quality administrative and logistical support for virtual hearings. These considerations do not displace the general factors of reputation and recognition, but they suggest that there are other distinguishing features which may influence the choice of one institution over another.

Diversity and appetite for change

There is a desire for greater diversity in arbitrators. Ethnic diversity in particular is an area where respondents to the QMUL survey felt there was a lack of progress and a distinct need for improvement.

An example from respondents was where an arbitral panel is composed entirely of arbitrators who have no relationship with, or understanding of, a specific country or culture central to a dispute. This could lead parties to feel that the arbitrators might not fully appreciate cultural differences and might subconsciously favour parties from areas or cultures with which they are more familiar. This concern arose particularly in relation to arbitrators from North America and Western Europe when dealing with disputes involving legal or cultural norms from other parts of the world.

Several interviewees highlighted that, depending on the nature and value of the dispute, they might be willing to use less widely known institutions based in jurisdictions that are emerging as arbitration hubs, or new entrants to the market. They explained that trusting in such institutions can be an effective means of encouraging greater diversity, particularly when those institutions may be able to suggest a different pool of arbitrators. This could include arbitrators who may not have high visibility globally, but who have experience of a region, applicable law or industry for a given dispute.

Separately, it has also been suggested[14] that African parties should regularly choose to appoint arbitrators of African origin, especially in those arbitration references affecting or emanating from that continent. This may help to develop arbitration jurisprudence and knowledge which would make Africa more competitive on the global arbitration stage. It has further been suggested that more needs to be done by way of training arbitrators to develop relevant skills, which will ensure the continued availability of experts within Africa.

This view is arguably supported by the findings of the 2021 survey – many respondents felt that opportunities to increase the visibility of diverse candidates should be encouraged through initiatives such as "education and promotion of arbitration in jurisdictions with less developed international arbitration networks" (38%), "more mentorship programmes for less experienced arbitration practitioners" (36%) and "speaking opportunities at conferences for less experienced and more diverse members of the arbitration community" (25%). Building visibility is particularly important considering the perception that users prefer arbitrators about whom they have knowledge or with whom they have had previous experience. If the African institutions can suggest a diverse pool of recognised and high-quality arbitrators, this might encourage greater use of the African centres.

This all suggests that there is an openness and possibly even an appetite for using "other" institutions if this might lead to greater ethnic

diversity or offer better knowledge of the locale amongst the tribunal members. Whilst it might not be considered appropriate for a dispute originating in North America, Europe or Asia, it seems as though choosing an African institution which would be able to recommend a pool of high-quality African arbitrators with local knowledge and experience would be both a sensible and welcome choice for parties and disputes originating in Africa.

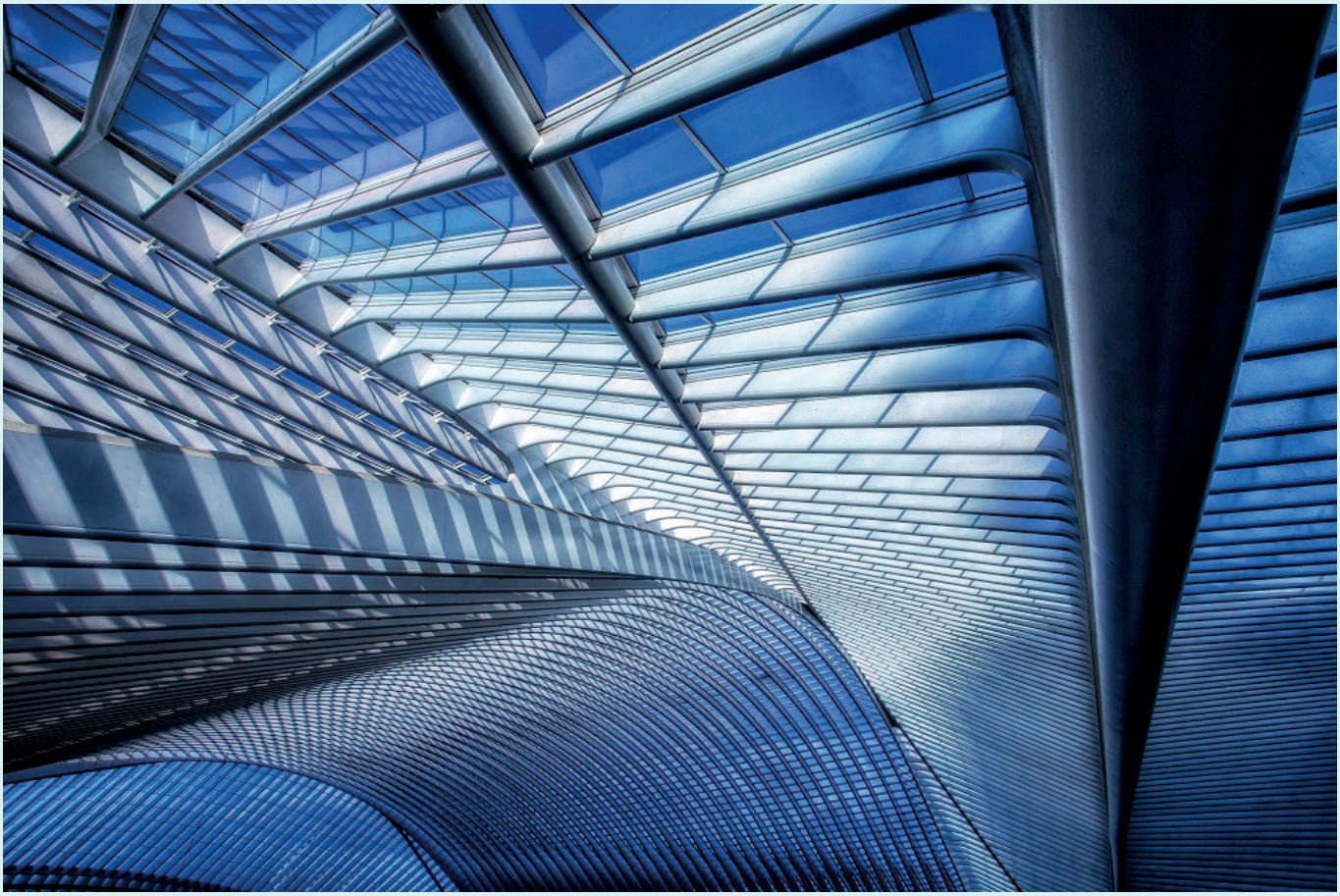
Conclusion

Institutions like the ICC and the LCIA continue to dominate the market for reasons which centre on reputation, recognition and experience. Firstly, the top-rated institutions are based in cities with a recognised and longstanding reputation as a "safe seat" for international arbitration. Those seats have strong, modern arbitration laws and supportive judiciaries. Secondly, the centres themselves have a strong reputation and parties are even more likely to choose those institutions if they have had a previous positive experience with them. This means that it would take a long time for newer institutions in Africa to build an international following.

However, research suggests that there is a hunger for greater ethnic diversity in arbitrators, particularly where the arbitrator has a relationship with or understanding of a specific country or culture central to a dispute. It is apparent that there needs to be a level playing field of opportunities for engagement and visibility within the arbitration community to help promote African arbitrators. Training will be important to ensure that such arbitrators are skilled and knowledgeable. Depending on where they are based, parties may be more willing to use new or less widely known institutions based in African jurisdictions, where this is appropriate for the dispute. For arbitration currently being conducted "out of Africa", this may be a way for it to be encouraged back in.

Footnotes

1. Global Arbitration Review, 'Developments in African Arbitration' by Michael Ostrove, Ben Sanderson and Andrea Lapunzina Veronelli (10 May 2018) *https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration*
2. International Chamber of Commerce.
3. London Court of International Arbitration.
4. White & Case and Queen Mary University of London's '2021 International Arbitration Survey: Adapting arbitration to a changing world'. The survey is the result of over 1,200 completed questionnaires and nearly 200 interviews conducted during 2020.
5. African Law & Business, 'Opportunities and obstacles for African arbitration' (23 May 2019) *https://iclg.com/alb/9574-opportunities-and-obstacles-for-african-arbitration*
6. Emilia Onyema's '2020 Arbitration in Africa Survey Report, Top African Arbitral Centres and Seats' (30 June 2020). The survey was based on 350 responses received from individuals in 34 countries across Africa, Asia, Middle East, North America and Europe. 83% of respondents had participated in arbitration in Africa between 2010 and 2019 in some capacity (as arbitrator, counsel, tribunal secretary, expert or disputants). Most responses were from individuals in South Africa, Nigeria and Egypt.
7. Other reasons for choosing certain African seats over others included easy accessibility and transport links, access to modern technology and facilities, the fact that the cities are major economic hubs, the reputation of the arbitral centre situated in the city concerned, the fact that the cities are multilingual, their geographical location, political stability and a sense of security.
8. Singapore International Arbitration Centre.
9. Hong Kong International Arbitration Centre.
10. China International Economic and Trade Arbitration Commission.
11. International Centre for Settlement of Investment Disputes, based in Washington, D.C.
12. These percentages indicate the percentage of respondents who included the institution in their answer for the top five most preferred institutions.
13. It is worth noting that the two African institutions which were rated the highest administered the greatest number of cases under their own Rules.
14. See Emilia Onyema's paper 'Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors' delivered at the 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR (29-31 July 2008)



The continued global rise of dispute boards

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Back in 2017, the second edition of the FIDIC Rainbow Suite expanded the role of the dispute board, the new name, the Dispute Adjudication and Avoidance Board, a testament to the importance given by FIDIC to the dispute avoidance. Earlier that year, the NEC, when releasing NEC4, had introduced the option of dispute boards. The role of dispute boards has been reinforced by the series of agreements FIDIC has entered into with the multilateral development banks for the use of the FIDIC contract.

It is not just standard form contracts which are introducing dispute boards. In Brazil, legislation is moving through parliament, who regulates the use of Dispute Boards by the Public Administration. Whilst, in Chile, the first Pilot Program in Dispute Boards and Mediation in the Private Sector was launched in September of this year. If you are interested in learning more about the growth of dispute boards in South America, the DRBF is holding a Latin America Conference on 28 and 29 October 2021 (for full details, please click here).

In the UK, however, when the NEC introduced dispute boards, as the NEC made clear[1], they were not compliant with, and not suitable for, use where the contract in question was subject to the Housing Grants legislation which provides for short-form 28-day adjudication. Whereas, in relation to the FIDIC Rainbow Suite, whether the DAB is standing (appointed at the outset of the project to follow its progress) or ad-hoc (appointed when the dispute arises), there are 84-days for the DAB to decide any dispute referred to it.

The other main difference is one of approach. Today, the idea behind DABs is that they follow the project and assist in avoiding and disputes; in the UK, an adjudicator is typically appointed once a dispute has arisen. The focus of FIDIC and the development banks is on the avoidance of disputes, and only make binding decisions where necessary.

In May of this year, the Joint Contracts Tribunal ("JCT") (who worked together with the Chartered Institute of Arbitrators, ("CIArb")) released the first Dispute Adjudication Board ("DAB") Rules for use with the JCT Design & Build Contract and Major Project Construction Contract forms.

The JCT's aim is to:

> *"provide a framework for parties to identify and resolve potential disputes early on and to avoid costly litigation and damaging of project relationships".*

Unlike with the NEC, the new DAB rules comply with the UK adjudication regime by providing for the DAB to take a proactive approach to dispute avoidance, whilst also enabling the DAB to conduct an adjudication, where necessary. As such, it is entirely in line with the movement along the road to dispute avoidance and facilitative contracting to achieve the completion of a project on time, avoiding (or, if necessary, resolving) differences as they arise and helping to ensure prompt payment and support for the needs of a supply chain.

Key features of the new DAB Rules

The aim of the new DAB Rules is to comply with the 28-day adjudication legislation but, at the same time, provide for the establishment of a DAB with the primary aim of dispute avoidance. The role of the new DAB is to assist the parties in the avoidance of dispute and also the timing and resolution of disputes.

As a starting point, the new DAB Rules are accompanied by a DAB tripartite agreement (TPA) which provides a means of contractually binding the contracting parties with the DAB member, or members, depending on the size of the DAB. Typically, DAB will comprise one or three members, although that is the choice of the parties. Those members must be able to comply with the impartiality and independence requirements of Article 5 of the new DAB Rules.

In many respects, the new DAB Rules are familiar to those who use the FIDIC or ICC options, as under the FIDIC Form, once the DAB is in place, it can only be terminated by the mutual agreement of both parties. The reason for this is to prevent a

situation arising where one party becomes dissatisfied and unilaterally tries to bring the DAB to an end.

Again, as with FIDIC, the new DAB Rules provide a mechanism for default appointment and replacement of a particular member. Here, the CIArb, and not FIDIC, is the default appointing body. This is important to try and ensure that the DAB can run for the entire duration of the project in question.

In 2013[2], Mr Justice Akenhead said that:

> *"DRBs have become quite common on very substantial infrastructure type projects around the world, many of them involving hundreds of millions of dollars or more. They often comprise three members, one being chairman, who will keep a weather eye on the project as it goes along, with more or less regular meetings at the site. One of the main ideas of having DRBs is that they can look at disputes as they emerge and make recommendations to the parties with a view to 'nipping in the bud' such incipient disputes."*

Those words hold true today. Once appointed, the DAB and parties should hold regular meetings and site visits. Article 7 says every two months; on the FIDIC form, the suggestion is between 70 and 140 days. Communication is fundamental to the role of the DAB on any project. This enables everyone to get to know each other and build relationships. It also enables the DAB to gain an understanding of how the project was supposed to be going and what current progress actually is.

Article 9 of the new DAB Rules provides that the parties can request an informal advisory opinion at any time. Again, this concept can be found in the FIDIC form. Alternatively, the DAB may, on its own initiative, raise an issue with the parties, perhaps to try and encourage discussion of (or nip in the bud) an issue the DAB is concerned could become a dispute. This could be done during a site visit or in a written note to the parties. The idea behind the informal opinion is that it is just that: informal. No one is bound by it. It is not the same as mediation, and both parties should be involved in any discussion. The JCT and CIArb have given careful thought to the potential problems encountered in *Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Limited* [2001] EWHC (TCC) 15 where an adjudicator attempted to resolve an ongoing adjudication dispute through a mediation process and where HHJ Lloyd QC commented that:

> *"There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking."*

The key to avoiding these problems is transparency, and making sure that are no separate causes. Both parties should be involved in any discussions.

If a dispute arises, then either party may give notice of its intention to refer the dispute. This is similar to the FIDIC approach. However, where the new DAB Rules part company with FIDIC is in timing. In order to comply with the UK adjudication legislation, the referral is then served on the other party and the DAB within 7 days, and a decision is to be issued within 28 days[3]. This may represent a major challenge for some DAB members, who will need to be act with speed and flexibility to reach a decision in one not three months. Something to think about when selecting the right people to form the DAB.

The powers of the DAB comply and mirror the requirements of the UK Scheme for Construction Contracts, part of the adjudication legislation. Article 13 provides the DAB with the power to establish a procedure in relation to the making of a decision, to decide its own jurisdiction and call for a site visit or hearing. The DAB can take the initiative in ascertaining the facts and the law and may open up and review certificates, as well as make use of its own specialist knowledge and order the payment of money or other redress. Decisions are binding on the parties until the dispute is finally determined in the manner of UK statutory adjudication and the FIDIC DAB process.

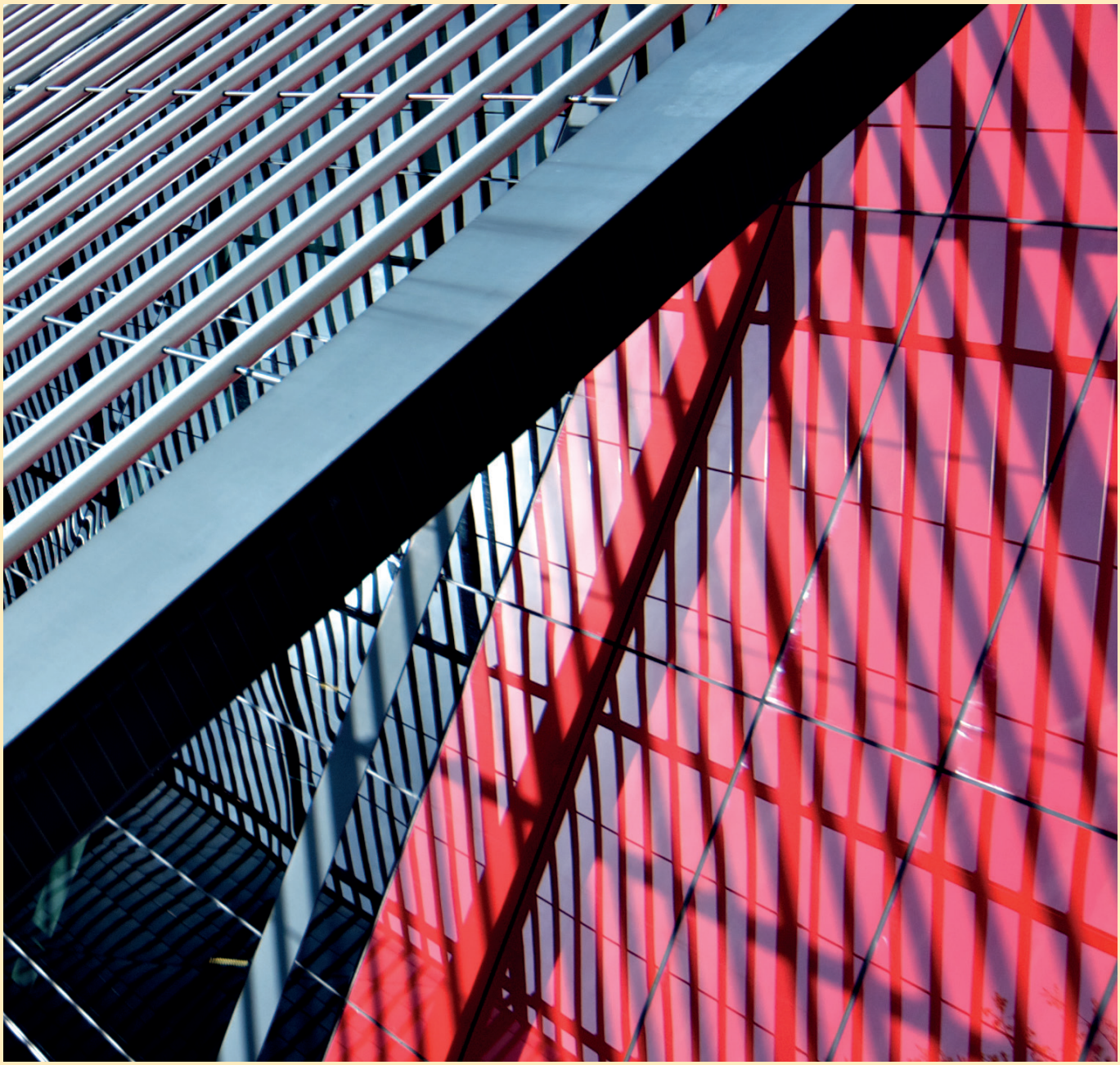
The new DAB Rules are part of a global trend towards the adoption of a more collaborative approach to dispute avoidance. In the UK, the government, through the Construction Playbook[4], endorsed the Conflict Avoidance Pledge[5]. That pledge includes the following:

> *"We recognise the importance of embedding conflict avoidance mechanisms into projects with the aim of identifying, controlling and managing potential conflict, whilst preventing the need for formal, adversarial dispute resolution procedures. We commit our resources to embedding these into our projects.*
>
> *We commit to working proactively to avoid conflict and to facilitate early resolution of potential disputes."*

These are all features of disputes boards so it will be interesting to see whether parties agree to incorporate the new DAB Rules into their contracts. It may depend on the size, duration and complexity of the individual projects. For small, short projects, parties are likely to stick with the familiar adjudication-only approach, although the potential merits of being able to access real-time dispute avoidance advice should not be underestimated. However, it is clearly a positive step for parties to be able to consider adopting a dispute avoidance alternative to simply relying upon statutory adjudication.

Footnotes

1. NEC Practice Note 5 introduced in 2019 provided a Z clause for the use of a DAB which would comply with the UK adjudication legislation. However this DAB can only provide recommendations. Adjudications must be dealt with separately.
2. *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC)
3. This can be extended by agreement.
4. The Construction Playbook - GOV.UK (*www.gov.uk*)
5. Conflict Avoidance Pledge (*rics.org*)



World Bank uses DAABs to address Gender Based Violence

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Introduction

Dispute Adjudication Boards ("DABs") have been a feature of the FIDIC suite of contracts since the 1995 Orange Book. In 2017, the DAB evolved to include a dispute avoidance function and was re-tooled as the Dispute Avoidance/ Adjudication Board ("DAAB").

Whilst the focus of dispute boards is avoiding and resolving disputes that arise on a project, the World Bank has seen an opportunity to expand this role further, taking advantage of the dispute board's unique position as an objective third party, with extensive experience of the contract. In this article, we discuss the World Bank's recent initiative to use dispute boards to address gender based violence ("GBV") occurring in, or stemming from, projects that the World Bank provides funding for.

Background to initiative

The World Bank works extensively with developing countries in its aim of ending poverty and boosting prosperity, guided by the priorities of creating sustainable economic growth, investing in people, and building resilience. To this end, a core function of the World Bank's work is providing low-interest loans, zero to low-interest credits, and grants to developing countries. These are provided to support a wide array of investments, including infrastructure projects. With these investments, the World Bank understandably exercises considerable oversight and mandates many aspects of the project, including procurement processes and the form of contract that the work is to be carried out under.

While, by no means, an issue exclusive to developing countries, several World Bank funded projects have had funding cancelled due to the discovery of endemic GBV on, and stemming from, the projects. For instance, in 2015, the World Bank cancelled funding on a roading project in Uganda where numerous allegations of adverse environmental and social impacts stemming from the project's construction works were made, including serious allegations of road workers' sexual relations with minor girls in the community, and sexual harassment of female employees.[1]

Incidents such as these prompted the World Bank to form a GBV task force, to strengthen the institution's response through its projects to issues involving sexual exploitation and abuse. The Task Force had nine months to:[2]

- Develop a set of actionable recommendations for the President and the Bank's Management on ways to strengthen prevention, design, reporting and supervision interventions in World Bank Group operations, including infrastructure construction such as roads, energy, water and sanitation, slum upgrading and resettlement; and
- Identify effective ways for the World Bank to increase coordination with multiple stakeholders, locally, nationally and internationally, to prevent and respond to gender-based violence.

In reporting back, the Task Force made numerous recommendations, including that projects identified as high risk of sexual exploitation and abuse trigger a series of mandatory requirements. The requirements included a demonstration by bidders that they have the capacity to manage risks related to sexual exploitation and abuse, such as providing indications of appropriate technical capacity and key personnel. A further mandatory measure required hiring Third-Party Monitors to ensure provisions to prevent and respond to sexual exploitation and abuse are in place and functioning.[3]

Gender Based Violence

Gender Based Violence is an umbrella term which includes many harmful behaviours. The World Bank have focussed on addressing two behaviours that fall within this umbrella, Sexual Exploitation and Abuse ("SEA") and Sexual

Harassment ("SH"). These terms are defined (contractually in World Bank procurement documents) as:

- **Sexual Exploitation and Abuse:**

  Sexual Exploitation - any actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

  Sexual Abuse - the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

- **Sexual Harassment:**

  Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature by the Contractor's Personnel with other Contractor's or Employer's Personnel.

World Bank Approach

In order to implement the recommendations and address SEA/SH the World Bank have turned to a tried and tested tool within their tool kit by enhancing the DAAB found within the FIDIC standard form contract so that it can also serve as the third party monitor required by the Task Force. In November 2020, the World Bank announced an enhanced role for DAABs in monitoring contractors' and subcontractors' compliance with obligations to prevent SEA/SH.

The strategy makes use of the fact that the World Bank have required the use of dispute boards on projects ever since dispute boards were included in the 1999 FIDIC Contract suite. This is a policy which is set to continue with the 2017 FIDIC Contracts, which have been endorsed by the World Bank and which the World Bank have entered into a five-year arrangement with FIDIC to use.[4] The World Bank now includes the 2017 Red Book in its Standard Procurement Documents, which incorporates the contract's DAAB mechanism.

This additional role for DAABs applies to projects which the World Bank assesses as having a high risk of SEA/SH, and which are procured using the World Bank's Standard Procurement Documents after 1 January 2021. The contracts on these projects include specific SEA/SH prevention and response obligations. For instance, examples of the Contractor's obligations include:

- Before mobilising to site, obtaining the Engineer's "no objection" to the measures it proposes to manage environmental and social risks (including Code of Conduct);
- Ensuring that personnel are made aware of the Code of Conduct (which outlines examples of SEA and SH behaviours) and understand the consequences of engaging in prohibited behaviours;
- Requiring its subcontractors comply with the SEA/SH obligations and accept consequences (such as disqualification);
- Taking immediate action on personnel that breach the Code of Conduct, including by removing from site or works;
- Putting in place a mechanism for handling allegations of SEA and/or SH from the Contractor's or Employer's Personnel or any other person including third parties ("SEA/SH Response Mechanism");
- Informing its personnel of the mechanism at the time of engagement and providing details of the mechanism, in languages comprehensible to the Contractor's Personnel, Employer's Personnel, and the affected communities. These are to be displayed in easily accessible locations; and
- Delivering, on an ongoing basis, in a language/method that the recipients of the training can understand, training/sensitisation on the prohibition of SEA and SH and application of the Code of Conduct.

The role of the standing DAAB, in respect of SEA/SH obligations will be to:

- Undertake regular meetings and site visits to monitor compliance with SEA/SH prevention and response obligations (and other contractual requirements); and
- If a Contractor or Subcontractor's non-compliance is referred to the DAAB, decide whether there has been a failure to comply with contractual SEA/SH obligations.

The DAAB will not be involved in determining the factual aspects or assessing the merits of any underlying SEA/SH allegation. In theory, it should operate much in the same way DAABs currently determine contractual compliance issues, such as whether notices are issued timeously. This may be of some importance to experienced DAAB members whose experience is primarily related to construction specific issues and who may not feel comfortable with the transition to assessing compliance with SEA/SH obligations.

The borrower or contractor may refer the DAAB decision to emergency arbitration or a full arbitration under ICC rules if they are dissatisfied by the DAAB's decision.

The World Bank will be notified of the DAAB decision by the borrower. If the DAAB has determined that the Contractor (and any Subcontractor) has failed to comply with its SEA/SH contractual obligations, the Bank will conduct a procedural review of the DAAB decision and may decide to disqualify the Contractor/Subcontractor from Bank-funded projects for a period of two years (unless the Contractor receives an arbitration award in its favour during this time).

Conclusion

The new initiative introduced by the World Bank has undeniably laudable goals, and the adaptation of an existing and familiar tool to address the issue is sensible. However, it will be interesting to see how the initiative operates in practice.

Usually, DAAB members are sourced from practitioners with a background complementary to construction work; for instance, senior construction lawyers, engineers, or quantity surveyors. This pool of individuals is small, especially given pre-requisites such as having 10 years' experience in contract administration/management and dispute resolution, out of which at least five years of experience as an arbitrator or adjudicator in construction related disputes.

Further, the World Bank have understandably indicated a preference for DAAB members on high GBV risk projects they fund to have extensive experience working in the developing world, preferably in Fragile Conflict Volatile (FCV) situations as well as experience reviewing Contractors' performance against their social contractual obligations (preferably SEA/SH prevention contractual obligations). While the World Bank's description of its ideal candidate can be understood given the gravity of what is at stake, there may only be a small number of individuals who satisfy such criteria.

Finally, the decision to limit the implementation of the disqualification mechanism to High Risk projects may send the wrong message. GBV should not be tolerated on any project. Therefore whilst starting with High Risk projects sends a powerful message, perhaps this new approach ought to become a benchmark for every project.

Footnotes

1. *https://www.worldbank.org/en/news/press-release/2015/12/21/wb-statement-cancellation-uganda-transport-sector-development-project*
2. World Bank Launches Global Task Force to Tackle Gender-Based Violence
3. Task Force Recommends Steps to Tackle Gender-Based Violence in World Bank-Supported Projects
4. *https://fidic.org/world-bank-signs-five-year-agreement-use-fidic-standard-contracts*

The need for care when adding additional packages of works to a contract

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Shepherd Construction Limited v Drax Power Limited
[2021] EWHC 1478 (TCC)

Drax engaged Shepherd to carry out works relating to the conversion of four generating units to operate on biomass fuel at a power station in North Yorkshire. The contract was based on the 1999 FIDIC Yellow Book, although there were a number of amendments. Whilst, initially, the contract related to one package of works, it was later varied to include a second. These two elements were the "Ecostore Works" and the "BDS Works". They could have been performed by different contractors or could have been governed by two separate contracts between Drax and Shepherd. It was later deemed to be significant that Drax and Shepherd provided for them to be governed by the same contract.

In September 2014, Taking Over Certificates were issued for the Ecostore Works and the final Milestone Payment, which was the last part of the retention in relation to the Ecostore Works, was made on 31 December 2014. In July 2017, the Taking Over Certificate for the last part of the BDS Works was issued and the Defects Notification Period in relation to those works expired in July 2018.

Disputes arose over whether Drax could make deductions from a final milestone payment for the BDS works if those deductions related to the Ecostore package had been taken over some time earlier. In February 2019, Shepherd issued Interim Payment Application 35A seeking payment of £1.3million; this being the balance of retention in respect of the BDS works. Drax relied on Subclause 14.9.6 in respect of the cost of remedying defects in the Ecostore Works to make those deductions.

The contract

The standard FIDIC terms had been expanded and Subclause 14.9, as amended, read:

"In relation to the Works comprising and relating to Sections 1, 1A, and 2:

14.9.1 Subject always to the Contractor's compliance with Clause 5.6.4 of the Contract in relation to Sections 1, 1A, and 2 the final Milestone Payment in relation to Sections 1, 1A, and 2 shall be paid to the Contractor in accordance with and subject to Clause 14 following the issue of the Taking-Over Certificate in respect of the whole of the Works Sections 1, 1A, and 2 and delivery of the Retention Bond to the Employer ... and in an amount equal to 2.5% of the part of the Contract Price relating to Sections 1, 1A, and 2 ... No amount shall be due to the Contractor in respect of the final Milestone Payment in relation to Sections 1, 1A, and 2 until the Engineer has issued the Taking Over Certificate in relation to Sections 1, 1A, and 2 and received the related Retention Bond, and any application for payment which seeks payment of the final Milestone Payment in relation to Sections 1, 1A, and 2 by the Contractor prior to such Taking-Over Certificate being issued and the related Retention Bond being provided to the Employer ... shall not be a valid Interim Statement ...

14.9.2 Promptly after the latest of the expiry dates of the Defects Notification Periods for Sections 1, 1A, and 2 the Contractor shall be entitled to apply for payment of the outstanding balance remaining part of the Retention Money referred to in limb (i) (c) of the definition `Retention Money' (taking into account any reduction in said amount by way of any claim or deduction by the Employer in relation to the Works) in the next Statement which amount shall, subject to Clause 14, be paid to the Contractor.

14.9.3 However, if any work remains to be executed under Clause 11 (Defects Liability) or Clause 12 (Tests after Completion) the Employer shall be entitled to withhold the estimated cost of this work until it has been

executed and to deduct the same from amounts otherwise due to the Contractor until such time as the work is completed.

In relation to the Works comprised and relating to Sections 3, 4, and 5:

14.9.4 Subject always to the Contractor's compliance with Clause 5.6.4 of the Contract in relation to Sections 3, 4, and 5, the final Milestone Payment in relation to Sections 3, 4, and 5 shall be paid to the Contractor in accordance with and subject to Clause 14 following the issue of the Taking-Over Certificate in respect of Sections 3, 4, and 5 and delivery of the Retention Bond to the Employer ... and in an amount equal to 2.5% of the part of the Contract Price relating to Sections 3, 4, and 5 ... No amount shall be due to the Contractor in respect of the final Milestone Payment in relation to Sections 3, 4, and 5 until the Engineer has issued the Taking Over Certificate in relation to Sections3, 4, and 5 and received the related Retention Bond and any application for payment which seeks payment of the final Milestone Payment in relation to Sections3, 4, and 5 by the Contractor prior to such Taking-Over Certificate being issued and the related Retention Bond being provided to the Employer ... shall not be a valid Interim Statement ...

14.9.5 Promptly after the latest of the expiry dates of the Defects Notification Periods for Sections 3, 4, and 5 the Contractor shall be entitled to apply for payment of the remaining part of the Retention Money referred to in limb (ii) (c) of the definition `Retention Money' (taking into account any reduction in said amount by way of any claim or deduction by the Employer in relation to the Works) in the next Statement which amount shall, subject to Clause 14, be paid to the Contractor.

14.9.6 However, <u>if any work</u> remains to be executed under Clause 11 (Defects Liability) or Clause 12 (Tests after Completion) the Employer shall be entitled to withhold the estimated cost of this work until it has been executed and to deduct the same from amounts otherwise due to the Contractor until such time as the work is completed." [Our underlining]

So, whilst Clause 14 generally addressed the final milestone payments and retention bond separately in relation to each package, the final part said that Drax could withhold the estimated cost of "any work" that remained to be executed from the final milestone payment for the second package.

The meaning of "any work"

The dispute turned on the correct interpretation of the words "any work". Was it unqualified, as Drax said, so as to include work necessary to remedy defects in the Ecostore Works as well as the BDS Works? Alternatively, as Shepherd said, was it to be read as qualified by the words "In relation to the Works comprising and relating to Sections 3, 4, and 5" and so confined to work necessary to remedy defects in the BDS Works? Was Drax permitted to withhold the estimated cost of "any work" that remained from the final milestone payment for the second package? Or was Shepherd correct that the right to withhold only related to the second package of works?

Judge Eyre QC agreed with Drax that the words applied to both packages and that they could withhold the estimated cost of any work remaining to be executed from the sums due for the BDS Works, under Clause 11 or 12 regardless of whether that work related to the Ecostore Works or the BDS Works.

The most important reason for this was the wording of sub-clause 14.9.6. The reference was to "any work". It was not put forward as a defined term and was qualified only by the requirement that the work is to be unexecuted under Clause 11 or Clause 12. The clause could have referred to "any such work" or "any of the said Works". Either of which terms would have indicated that reference was being made to the preamble to Clauses 14.9.4 – 6 and to the limitation there to the BDS Works. Alternatively, there could have been an express reference to Sections 3, 4, and 5 as there was in Clauses 14.9.4 and 14.9.5. The absence of any express qualification was a powerful indication that the reference was not limited as suggested by Shepherd.

This was confirmed by the use of the word "however" at the start of the clause, which supported the view that the clause stood in distinction to the previous provisions. It was a distinct provision to be construed primarily by reference to its own language (albeit read in context). The combined effect of Subclauses 14.9.5 and 14.9.6 was that, by virtue of the former, claims or deductions relating to the BDS Works were to be taken into account when determining how much of the Retention Money was due to be paid, but that the latter provided for a further withholding (in addition to deductions relating to the BDS Works) if any work remained outstanding under Clauses 11 or 12.

Sub-clause 14.9.6 dealt with the amount to be withheld from the money due for the BDS Works. There was no given reason as to why the amount to be withheld from the final payments in respect of the BDS Works should be limited to the cost of the outstanding defects liability works in respect of those works when other sums remain due to Drax under the same contract. It would not, in the view of the Judge, make commercial sense for Shepherd to be entitled to the full amount due in respect of the BDS Works at a time when it had received payment for the Ecostore Works but when work remained to be executed by way of Defects Liability in respect of the latter works.

The Interim Payment application

Drax said that Shepherd's interim payment application was invalid because it did not take into account the claims or deductions asserted by Drax in relation to the Ecostore works. The Judge dismissed this saying that Shepherd were entitled to apply for the payment that it said was due. There was no requirement to subtract from that amount any claims and deductions asserted (i.e., not necessarily determined as being due) by an employer. In the UK, it was always open for Drax to serve a pay less notice.

Conclusions

Like most construction disputes, the dispute turned on the precise meaning of the contract. However, the dispute does illustrate the care needed when dealing with multiple packages and deciding how to incorporate additional phases of work into an existing project, whether by variation or a separate contract for those works. The issue here was whether any right to withhold payment was limited to a specific package of works. It was not because there had been no attempt to distinguish between the two packages in the relevant clauses; "any works" meant just that.

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