

# International Quarterly

*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 the latest issue of International Quarterly.

Our recent issues of IQ have discussed in some detail some of the key provisions of the 2017 Edition of the FIDIC Rainbow Suite. Issue 26 is no exception, with Jesse Way looking at the completion provisions. One question that has been widely discussed was when the new FIDIC contract suite would start to be used. This may be about to change. In the spring of 2019, FIDIC agreed a five-year non-exclusive licence for the use of the 2017 Suite of Contracts with the World Bank. In July 2019, the Caribbean Development Bank followed suit.

In May 2019, FIDIC also welcomed a new contract, the Emerald Book for use on underground and tunnelling contracts. I review the new contract with an eye on how FIDIC are developing their dispute avoidance provisions.

Back in 2012, the ICC introduced rules and procedures for appointing Emergency Arbitrators. The idea was to allow applicants to obtain urgent interim relief, where necessary and appropriate, without having to resort to state courts or await the constitution of the arbitral tribunal. Seven years on, the ICC have realised a Task Force Report. Rebecca Ardagh discusses the ICC findings and discusses some of the key features of the emergency arbitrator process.

Parties to international arbitration agreements are always concerned about the enforceability of any award they may receive. With this in mind, Toby Randle and Aleem Shahid, look at the impact of the Implementing Regulations of the Arbitration Law which came into force in 2017, on arbitration in the Kingdom of Saudi Arabia.

In the UK there has been some discussion about whether parent companies domiciled in England can be sued in the English courts for alleged torts committed overseas by their international subsidiaries. As Nathalie Burton explains, the question has now been considered by the Supreme Court in a case involving claims arising from alleged toxic emissions from a copper mine.

Finally, in Issue 25, Stacy Sinclair discussed the nature of the partnership between Artificial Intelligence (AI) and construction law focussing on risk and contract management. In Part 2 of that article here, she considers the use of AI in predicting the outcome of disputes. Whilst we are still some way off the fictional realms of Minority Report and predicting disputes before they emerge, it is perhaps not so difficult to imagine a future where AI becomes a key part(ner) in the construction process and maybe becoming an important component of the dispute avoidance process.

Regards  
Jeremy

## News and events

### Our international arbitration credentials

With 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. Our international hub, the Dubai office, is headed up by Partner's Patrick Stone and Ahmed Ibrahim. Ahmed has recently been recognised by [Who's Who Legal 2019](#) for his "exceptional knowledge and understanding of construction-related arbitration proceedings".

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.

For more information on our arbitration practice please contact [Nicholas Gould](#) or [Richard Smellie](#).

### DRBF Board appointment

In May, Jeremy Glover was elected onto the Dispute Resolution Board Foundation (DRBF) DRBF Region 2 Board. The DRBF is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide through the use of Dispute Boards.

Jeremy has been involved with the DRBF since 2012 and regularly presents and delivers training at DRBF conferences and workshops worldwide. Both Jeremy and Nicholas Gould spoke at the 19th Annual International Conference which took place in Berlin in May.

Jeremy and Nicholas will also be delivering workshops at future DRBF conferences including the Regional Conference which takes place in Stockholm in October.

### Events

Throughout the year Fenwick Elliott host a range of construction law focused seminars and conferences in London and Dubai. We also are happy to organise events and internal workshops elsewhere.

A number of our expert lawyers are also regularly invited to speak to external audiences about industry specific topics including FIDIC and BIM. If you would like to enquire about organising a seminar with some of our team of specialist lawyers, please contact [nshaw@fenwickelliott.com](mailto:nshaw@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  
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## AI and Construction Law: an essential and inevitable partnership

### Part 2: Dispute resolution and predicting dispute outcomes

Wouldn't it be great to have a crystal ball to see into the future and understand the likely outcome of your dispute, before embarking on that costly adjudication or court proceedings?

Whilst this off-the-shelf crystal ball is not yet available in stores for immediate purchase, some exciting developments have taken place in legal tech over the past few years. We are now starting to see the use of new technologies in dispute resolution and indeed new studies and research allow us to glimpse what might be just around the corner.

Part 1 of this series considered AI and construction law in the context of risk and contract management, and looked at a few of the technologies that are available now to assist in this respect. Part 2 now looks at the use of AI in the context of dispute resolution and predicting the outcome of disputes.

#### AI and Dispute Resolution

It is now commonly accepted that the industry often uses the term "AI" generally to cover discussions around machine learning, automation, pattern recognition within text and the automation of extracting this text. This is known specifically as "applied" artificial intelligence and is well used in applications that require

the performance of a specific task and/or an automated, logic-based decision or action.

With regard to machine learning, this is a system or software which "learns" from the data it processes, through the use of algorithms. The software can learn from tags already applied to the documents (supervised learning) or it can categorise/cluster documents itself based on common characteristics (unsupervised learning). A system can also learn from the success of its previous decisions (reinforcement learning). In reinforcement learning there is no correct answer from the outset, but the system learns through trial and error when a user/reviewer says whether it is right or wrong, as it goes along.

"Strong" AI are those processes which are equivalent to human intelligence and have the ability to reason, make decisions and replicate human cognitive functions.

In the context of construction, whilst "strong" AI is perhaps some way off, "applied" AI certainly is here and is in use to some extent already. Machine learning technologies and AI-based data analytics are employed at various stages of construction and energy projects: contract formation, project management, manufacturing and construction and dispute resolution.

#### Disclosure

In terms of dispute resolution, to date, the disclosure process perhaps has seen the most visible benefits from machine learning.

Disclosure, the stage of formal litigation or arbitration proceedings where each party discloses to the other the documents that are relevant to the issues in dispute, requires the processing and review of potentially millions of documents, depending on the case. Historically, these documents would be manually reviewed by paralegals and lawyers – a lengthy and costly exercise. Now, with "predictive coding" (i.e. computer or technology assisted review), parties can employ machine learning technologies to train the software to assist with the review of the data set. Lawyers tag documents with a particular status (i.e. "relevant" or "not relevant") and the software learns from this categorisation, identifying and tagging subsequent documents similarly. The software's algorithm is constantly updating as it learns from either further tagged documents or corrections lawyers have made to the software's previous output. Predictive coding allows for a more focused and efficient document review process.

At the moment, whilst the use of predictive coding is certainly



increasing, there is still a somewhat hefty price tag for its use. Smaller, low value disputes are not necessarily able to justify this cost. However, with the rapid developments in technology these days, we may well see a change in this soon. Furthermore, the introduction of the Court's new Disclosure Pilot may also increase the use in machine learning and AI-based technologies.

On 1 January 2019 a two-year Disclosure Pilot scheme commenced in the Business and Property Courts in England and Wales, which include the Technology and Construction Court (TCC). A new Practice Direction to the Civil Procedure Rules (CPR) applies and the aim of the scheme is to facilitate and influence a change in the approach to disclosure of documents in the litigation process – including a greater use of technology in the process. Parties are required to consider the use of analytics and technology or computer-assisted review tools as a means of expediting document reviews. Where they have decided against the use of such tools (particularly when the number of documents to review exceeds 50,000), parties must justify that decision.

#### Big Data and Analytics

Dispute resolution inevitably concerns the analysis of data. Lawyers need to understand the issues and evidence in the case, analyse the strengths and weaknesses of that case and advise on their client's chances of success (amongst other things). Given the sheer amount of data generated each day (by next year the entire digital universe is expected to reach 44 zettabytes), the ability to analyse big data sets efficiently and effectively is of the utmost importance. Indeed, the ability to access, analyse and apply specific types of data could potentially have a strategic advantage to disputing parties.

Data sets of evidence in construction and energy disputes in particular can amount to many terabytes of data for each dispute – and no doubt with the advancement and increased use of new technologies in the design and construction of these projects, this is only set to rise.

Before turning to the resolution of disputes, in terms of dispute avoidance we are now starting to see AI-based, real-time analytics used on

construction projects. For example, parties can jointly monitor and analyse metrics from on-site activities, allowing them to track and report transparently and instantly, and therefore react and adjust as needed. This may assist in avoiding or minimising the escalation of disputes.

In dispute resolution, the ability to analyse and harness big data efficiently and effectively may have a strategic advantage. The technology available now, including AI searching and clustering functionalities, can enable lawyers and their clients to interrogate big data sets and draw out patterns and connections in the documents and correspondence, and generally gain a deeper insight into the evidence and facts of the case. The technology currently being developed goes further and aims to provide parties with analytics to assist in the prediction of the outcome of the case. Data analytics and metrics which aid in predicting outcomes ultimately may shape the trajectory of a case, allowing parties each to decide whether to continue with the proceedings and/or at what point to reach a settlement.

### Predicting Outcomes

Predicting the outcome of a case will depend on a number of both legal and non-legal factors. Having an understanding of these factors and access to data which analyses the influences of these factors on judicial decisions can be strategically advantageous: parties can make informed decisions during the course of the dispute process, manage expectations and possibly encourage early settlement.

Whilst the industry is only at the beginning of developing these technologies, there are platforms available now. For example, one UK solution has analysed the Commercial Court's decisions and provides smart data and metrics on its judges and their decisions. The solution provides data on issues such as what percentage of a particular type of claim is likely to succeed. What is the success rate of s. 68 arbitration appeals? What is the success rate in real estate claims? With regard to the data on specific judges, for example, how has a judge ruled in the past on a particular issue

and what is his or her willingness to disagree with previous decisions? The platform recognises that the identity of a particular judge may influence the outcome of a case and therefore success rates and other issues are also shown in relation to a specific judge. Another example is a US solution which provides analytics on California judges and their decisions.

In addition to emerging technology which provides metrics and smart data for informing decision-making during a dispute, there are also several recent studies which have sought to demonstrate the power of computers when it comes to predicting the outcome of disputes.

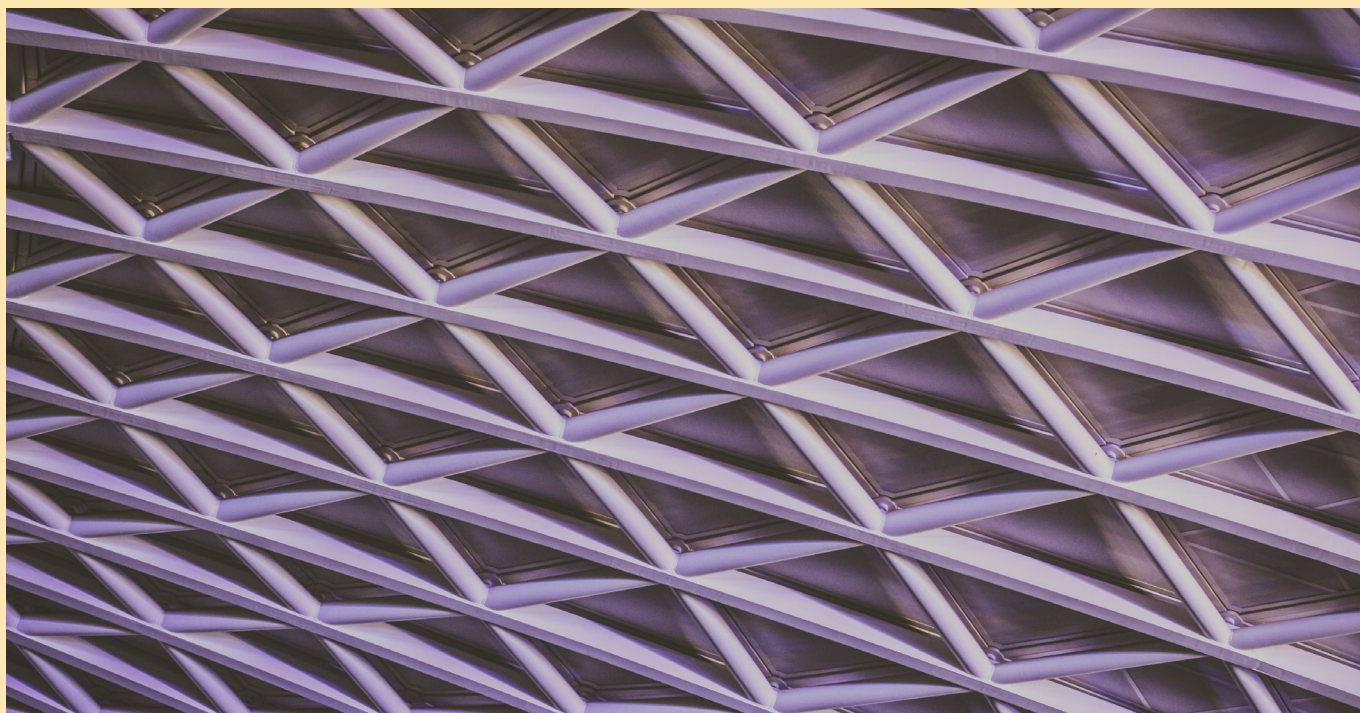
In October 2017 software developed by a Cambridge start-up company CaseCrunch predicted the outcomes of 775 PPI mis-selling claims. The software was asked to predict "yes or no" as to whether the financial ombudsman would succeed in the claim. The software had an accuracy of 86%. The 112 lawyers who analysed the same 775 claims had an average of 62.3%. CaseCrunch said

that if the question is defined precisely, as was the case with the 775 PPI claims, "machines are able to compete with and sometimes outperform human lawyers".

A further example is a study from researchers from University College London, University of Sheffield and University of Pennsylvania who were able to predict the results of human rights cases at the European Court of Human Rights (in respect of Articles 3, 6 and 8) with an accuracy of 79%.

### Conclusion

Emerging AI-based platforms have the potential to transform the landscape of dispute resolution. Whilst we are only at the start of these exciting developments, it is clear that the use of analytics, big data and new digital technologies will enhance efficiency and efficacy in dispute resolution. The crystal ball is not yet available for purchase; however, solutions which provide smart data for lawyers and their clients to review evidence, make informed decisions and predict outcomes are rapidly evolving.





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## The Emerald Book: the new FIDIC Tunnelling Contract

On 7 May 2019 at the World Tunnelling Congress 2019, in Naples, FIDIC launched a new contract, the Conditions of Contract for Underground Works ("the Emerald Book"). Taking the 2017 Yellow Book as its starting point, the new Emerald Book is a joint initiative between FIDIC and the International Tunnelling and Underground Space Association ("ITA") which had set up a joint task group back in 2014.

The Introduction to the new Contract identifies three "unique features" of underground work:

*"– the method of excavation and ground support are major factors for the successful realization of the project, and therefore part of the Works;  
– physical access to the Works is often limited to just a few locations or even a single location, which places serious constraints on construction logistics and the environment;  
– the land, beneath which the Works are to be constructed, typically belongs to a number of third parties."*

Laying on top of these three features is the difficulty in predicting, with any certainty, the ground conditions for the entirety of the underground works, meaning that considerable thought had to be given as to how to maintain FIDIC's fundamental

principle of balanced risk sharing and/or allocation.

### **The Geotechnical Baseline Report and unforeseeable ground conditions**

The Emerald Book seeks to deal with the difficulties created by unforeseeable ground conditions primarily through the use of the Geotechnical Baseline Report ("GBR"). This is intended to be the sole source or contractual document that describes the anticipated subsurface conditions that are likely to be encountered during the execution of the Works. The GBR should also define the subsurface condition or ground-related risks between the Employer and the Contractor. Such is the importance of the GBR that Appendix A to the Emerald Book provides guidance as to what the GBR should contain. Further, the Emerald Contract provisions are based on the Employer including a GBR and are not intended for use where the Contractor is to construct the Works in accordance with a detailed design provided by the Employer.

Two of the other key documents are the Completion Schedule and the Schedules of Baselines. This is a reflection of the fact that the Time for Completion is largely influenced by ground conditions. The Completion Schedule sets out the Time for

Completion of the Milestones, which are "based on and consistent with the production rates provided by the Contractor in the Baseline Schedule". The Schedule of Baselines sets out details of the anticipated activities or items of work which are "consistent with the conditions described in the GBR".

The idea is that the Contractor enters production rates and durations for the excavation and lining works corresponding to each drive and/or other area of work, which are deemed to allow for the time the Contractor needs to complete that activity. In defining the duration, the Contractor is expected to take into account: economies of scale, learning curve, availability and deployment of resources, safety requirements, working space, accessibility, and working time.

The definition of "physical conditions" not only includes natural physical conditions, physical obstructions (natural or man-made) and pollutants but also "reactions of the ground to Excavation", a good example of the contract being tailored to tunnelling works. The excavation works need to be constantly monitored and there is also a requirement that the Contractor submits to the Engineer on a daily basis its interpretations of the subsurface and surface monitoring results.

By new sub-clause 13.8.3, the time allowed for the excavation and lining works in the Completion Schedule and/or the Programme, may be reassessed (and this means reduced or extended) by the Engineer who, when making the reassessment, applies the production rates provided by the Contractor in the Schedule of Baselines. There is a similar approach to cost, with the Emerald Contract providing a flexible mechanism for remuneration according to ground conditions, foreseen and unforeseen. The idea is that the Employer, who prepares the GBR, takes the risk for unexpected or unforeseeable underground conditions, which is the standard FIDIC Yellow Book approach. However, the Employer, whilst taking the burden of conditions that are worse than predicted, will get to enjoy the benefit if the conditions for the excavation and lining works turn out to be better than anticipated. In other words, if ground conditions actually encountered differ from those set out in the GBR, and the critical path is affected, the Time for Completion will be adjusted: increased if the conditions are worse but shortened if more favourable conditions are encountered.

**Dispute avoidance and advance warning**

The Emerald Contract comes some 17 months after the release of the 2017 Second Edition of the Rainbow Suite. Unsurprisingly, it follows the dispute resolution mechanisms found in Clauses 20 and 21. Further, the use of the GBR, and the efforts taken to provide guidance on how to draft the GBR, should help ensure that the allocation of the risks of underground conditions are as clear as possible, something which should also help avoid and reduce the scope for disputes.

Upon the release of the 2017 Suite, everyone remarked on its size. The contracts almost doubled in length. The Yellow Book General Conditions increased from 63 pages to 119 (or 69 pages to 132 including the DAAB

Agreement and Index of Sub-clauses). The Guidance and Annexes increased from 30 pages to 68. The Emerald Book is even longer. For example, there are now 104 Definitions, an increase of 14. However, that is not so surprising, given the need to make the contract specific to tunnelling and the importance of the GBR to the contractual scheme.

One of the new definitions comes at sub-clause 1.1.116. However, the introduction of the Contract Risk Register is not something that needs to be unique to tunnelling. Indeed, it could be seen as part of FIDIC’s continued attempts to promote real-time dispute avoidance.

Whilst the idea of the Contract Risk Register is nothing new in itself, it is new to the FIDIC Form. Here, the need for one suits the demands of the tunnelling contract, including the need to ensure that a close eye is kept on the changing ground conditions and progress. The Contract Risk Register is required to identify both relevant risks, and the actions which are to be taken to avoid or reduce those risks.

Under the Emerald Book scheme, the Contractor must complete and maintain the Contract Risk Register and prepare and maintain the Contract Risk Management Plan to manage and control any risks identified. Both must be regularly updated. Further, regular Contract Risk Management meetings are to be held. Sub-clause 1.16 (b) also requires that the Contractor has procedures in place to ensure that certain actions can be taken. These include issuing advance warning notices under sub-clause 8.4 (which deals with Advance Warning) and/or that meetings are called whenever a “known, probable or uncertain future event” is likely to:

- “(a) adversely affect the work of the Contractor’s Personnel;*
- (b) adversely affect the performance of the Works when completed;*
- (c) increase the Contract*

*Price; and/or  
(d) delay the execution of the Works or a Section or any Milestone.”*

Whilst the idea of early warning could be found in the 1999 Form, with sub-clause 8.3 including a requirement for the Contractor to give notice of “specific, probable future events or circumstances which may adversely affect the work”, it was the 2017 Edition that drew firm attention to the importance and potential value to the project of giving early or advance warning. Sub-clause 8.4 imposed a requirement on the Contractor, Employer and Engineer to give early warning of potential problems. The introduction here of the Contract Risk Register reinforces this further.

**FIDIC: the future**

There is no change in the Emerald Book in respect of the references to the FIDIC Golden Principles, which remain part of the guidance listed in the Special Provisions. And whilst the Advisory Notes where the project uses BIM have been modified slightly, in that there are changes to the list of sub-clauses that may be affected by BIM, for subsurface projects there is no real change. The “Technology Guideline” and “Definition of Scope Guideline Specific to BIM” documents are still awaited.

However, the introduction of the Emerald Book may be seen as timely given the increasing number of infrastructure and energy projects with underground elements. It also fits in with the gradual expansion of the use of the FIDIC Form globally. FIDIC has recently confirmed that it has agreed a five-year non-exclusive licence for the use of the 2017 Suite of Contracts with the World Bank. The Contracts are also going to be translated into Arabic, Chinese, French, Portuguese and Spanish, a move which will encourage their use. No doubt there will be further new developments soon.



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## Taking over: the meaning of completion under the 2017 FIDIC Contracts

In December 2017, FIDIC released the second editions of the Red, Silver and Yellow Books (“the 2017 FIDIC Contracts”).

At the end of March 2019, the Court of Appeal in England and Wales delivered judgment in *Mears Ltd v Costplan Services (South East) Ltd & Ors* [2019] EWCA Civ 502 (“*Mears*”).

In *Mears*, the Court of Appeal considered issues relating to material breaches of contract and practical completion. Judging when a project is complete, or suitable for taking over, is not always straightforward, and the *Mears* case provides a useful opportunity to consider the meaning of “completion” under the FIDIC Form and elsewhere.

### Completion under the 2017 FIDIC Contracts

The Red and Yellow Books are administered by an Engineer whereas the Silver Book is administered by the Employer or the Employer’s Representative.

The Date of Completion across all three books, whilst drafted in slightly different terms, essentially means the date stated in the Taking-Over Certificate issued by the Engineer or Employer, or, if applicable, the date on which the Works or Section are deemed to have been completed.

Only the issue of the Taking-Over Certificate will be examined in this article.

The Taking-Over Certificate is issued, or deemed to have been issued, in accordance with Clause 10 (*Employer’s Taking Over*). To summarise the process relating to the issue of a Taking-Over Certificate under Clause 10:

1. The Contractor may apply for a Taking-Over Certificate by giving a Notice to the Engineer or Employer not more than 14 days before the Works or Section will, in the Contractor’s opinion, be complete and ready for taking over.
2. Within 28 days after receiving the Contractor’s Notice, the Engineer or Employer shall either:

- a. issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects (as listed in the Taking-Over Certificate) which will not substantially affect the safe use of the Works or Section for their

intended purpose (either until or whilst this work is completed and these defects are remedied); or

- b. reject the application by giving a Notice to the Contractor, with reasons. This Notice shall specify the work required to be done, the defects required to be remedied and/or the documents required to be submitted by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work, remedy such defects and/or submit such documents before giving a further Notice under this Sub-Clause.

3. If the Engineer or Employer does not issue a Taking-Over Certificate or reject the Contractor’s application within the 28-day period, and if certain conditions are fulfilled, the Works or Section shall be deemed to have been completed in accordance with the Contract on the fourteenth day after the Engineer or Employer received the Contractor’s Notice of application and the Taking-Over Certificate shall be deemed to have been issued.



The Date of Completion of the Works or Section is therefore either the date stated in the Taking-Over Certificate or the date the Taking-Over Certificate shall be deemed to have been issued.

Turning now to the decision in Mears.

**Mears Ltd v Costplan Services (South East) Ltd & Ors**

Mears Limited (“Mears”), a provider of student accommodation, entered into an agreement for lease (“AFL”) with Plymouth (Notte Street) Ltd (“PNSL”) to lease student accommodation. PNSL engaged a builder to construct the accommodation. The AFL provided that if practical completion was not achieved by the relevant date,

either party could terminate the AFL. Ultimately, Mears sought to be discharged from its obligations under the AFL.

The AFL provided that:

*“6.2 The Landlord shall not make any variations to the Landlord’s Works or Building Documents which:*

*6.2.1 materially affect the size (and a reduction of more than 3% of the size of any distinct area shown upon the Building Documents shall be deemed material), layout or appearance of the Property; or... ”*

Prior to completion of construction, it became apparent that a number of the rooms in the student accommodation were more than 3% smaller than specified. Mears took issue with this and commenced proceedings seeking declarations regarding the true construction of clause 6.2.1 of the AFL and also in respect of the certification of practical completion.

At first instance, the TCC refused to grant declarations sought by Mears relating to whether the proper construction of clause 6.2.1 meant that a reduction of the size of an area of more than 3% was a material breach and that this meant practical completion could be prevented and the building contract terminated. Mears appealed.



**Appeal**

The Court of Appeal dismissed the appeal and determined that parties could agree that a breach of a particular clause of a contract amounted to a material or a substantial breach of contract. However, the parties did not do that in this case. The parties agreed that a breach of contract would occur if there was a reduction of more than 3% in relation to the room size. The Court held:

1. The use of the words “material” and “materially” in the clause did not support Mears’ argument that the resulting breach of contract was material.
2. If the parties had agreed that, it would have amounted to an uncommercial result and meant that any breach of the 3% tolerance, no matter how trivial, would have allowed Mears to determine the agreement.
3. Clear words would be necessary for such a draconian result and there were no such words in the clause.

The Court also noted that PNSL was not attempting to rely on any breaches to its advantage or gain and the question of whether or not the breaches were material or substantial would be a matter for factual assessment (there were some 56 rooms out of tolerance).

Usefully, Coulson LJ considered the authorities relating to practical completion and summarised the law on practical completion as follows:

- a) *Practical completion is easier to recognise than define ... There are no hard and fast rules ...*
- b) *The existence of latent*

*defects cannot prevent practical completion ... In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certified from concluding that practical completion has been achieved.*

c) *In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.*

d) *Although one interpretation of Viscount Dilhorne in Jarvis and Lord Diplock in Kaye suggests that the very existence of patent defect prevents practical completion, that was emphatically not the view of Salmon LJ in Jarvis, and the practical approach developed by Judge Newey in William Press and Emson has been adopted in all the subsequent cases. As noted in Mariner, that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.*

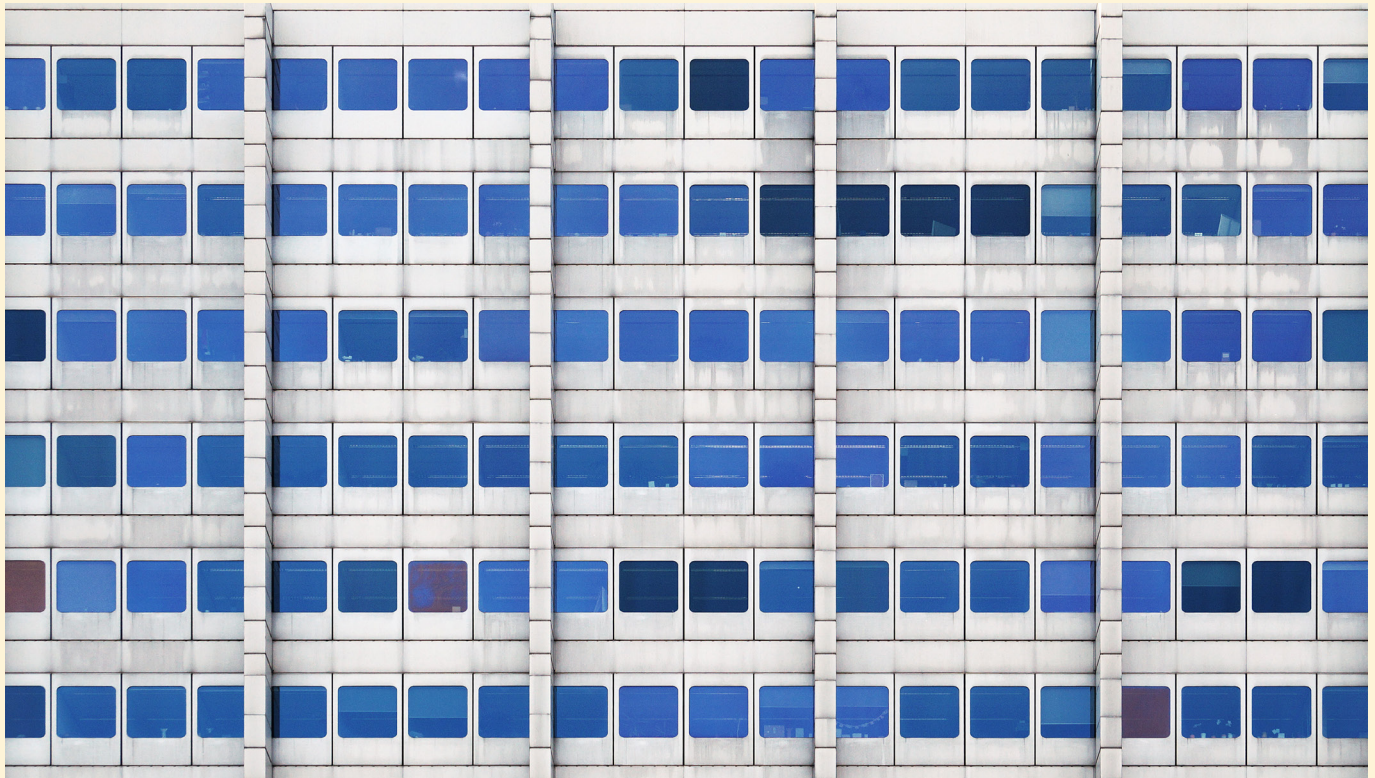
e) *Whether or not an item is trifling is a matter of fact and degree, to be measured against ‘the purpose of allowing the employers to take possession of the works and to use them as intended’ (see Salmon LJ in Jarvis). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied. Mariner is a good example of why such an approach is wrong. In consequence, I do not consider that paragraph [187] of the judgment in Bovis Lend Lease, with its emphasis on the employer’s ability to take possession,*

*should be regarded (without more) as an accurate statement of the law on practical completion.*

f) *Other than Ruxley, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work. And even Ruxley is of limited use because that issue did not go beyond the first instance decision. But on any view, Ruxley does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete.”*

Accordingly, in relation to practical completion, the Court of Appeal held:

1. Parties can agree parameters to guide and control certifiers, but they did not do that here.
2. Whether a departure from drawings is trifling or otherwise is a matter of fact and degree.
3. In the absence of any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier.
4. The fact that the property is habitable as student accommodation does not, by itself, mean it is practically complete.
5. The issue of whether or not a breach is remediable is irrelevant to the issue of practical completion. If a defect is regarded as trifling then it cannot prevent practical completion, whether it is capable of economic remedy or not. If the defect is more than trifling, it will prevent practical completion, regardless of whether or not it is capable of remedy.



**Mears and the 2017 FIDIC Contracts**

Mears will apply to contracts subject to English law and provide guidance to decision-makers in common law jurisdictions. And whilst the 2017 FIDIC Contracts adopt a slightly different approach, there are principles from Mears which can be applied to their administration. In that regard, Sub-Clause 10.1 of the 2017 FIDIC Contracts provides that the Engineer or Employer shall:

*“... within 28 days after receiving the Contractor’s Notice, either:*

*(i) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects (as listed in the Taking-Over Certificate) which will not substantially*

*affect the safe use of the Works or Section for their intended purpose (either until or whilst this work is completed and these defects are remedied); or*

*(ii) reject the application by giving a Notice to the Contractor, with reasons. This Notice shall specify the work required to be done, the defects required to be remedied and/or the documents required to be submitted by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work, remedy such defects and/or submit such documents before giving a further Notice under this Sub-Clause [emphasis added].”*

Disputes over completion dates are frequent in construction projects

and it is not difficult to imagine disputes arising over the issue or non-issue of a Taking-Over Certificate. Under the 2017 FIDIC Contracts, and consistent with the decision in *Mears*, unless there is a contractual provision providing otherwise, then the decision as to whether or not to issue a Taking-Over Certificate is a matter for the Engineer or the Employer in the first instance. If parties are not content with that being the case then parties should agree parameters to guide or control the certifiers. Any such parameters must be reflected in amendments to the contract and in clear terms.

Disputes are likely to arise as to whether or not outstanding work or defects are “minor” and whether or not they “substantially affect” the safe use of the Works or Section for their intended purpose. In *Mears*, whilst the argument was centred on whether a breach of a clause was material, the parties did agree as to

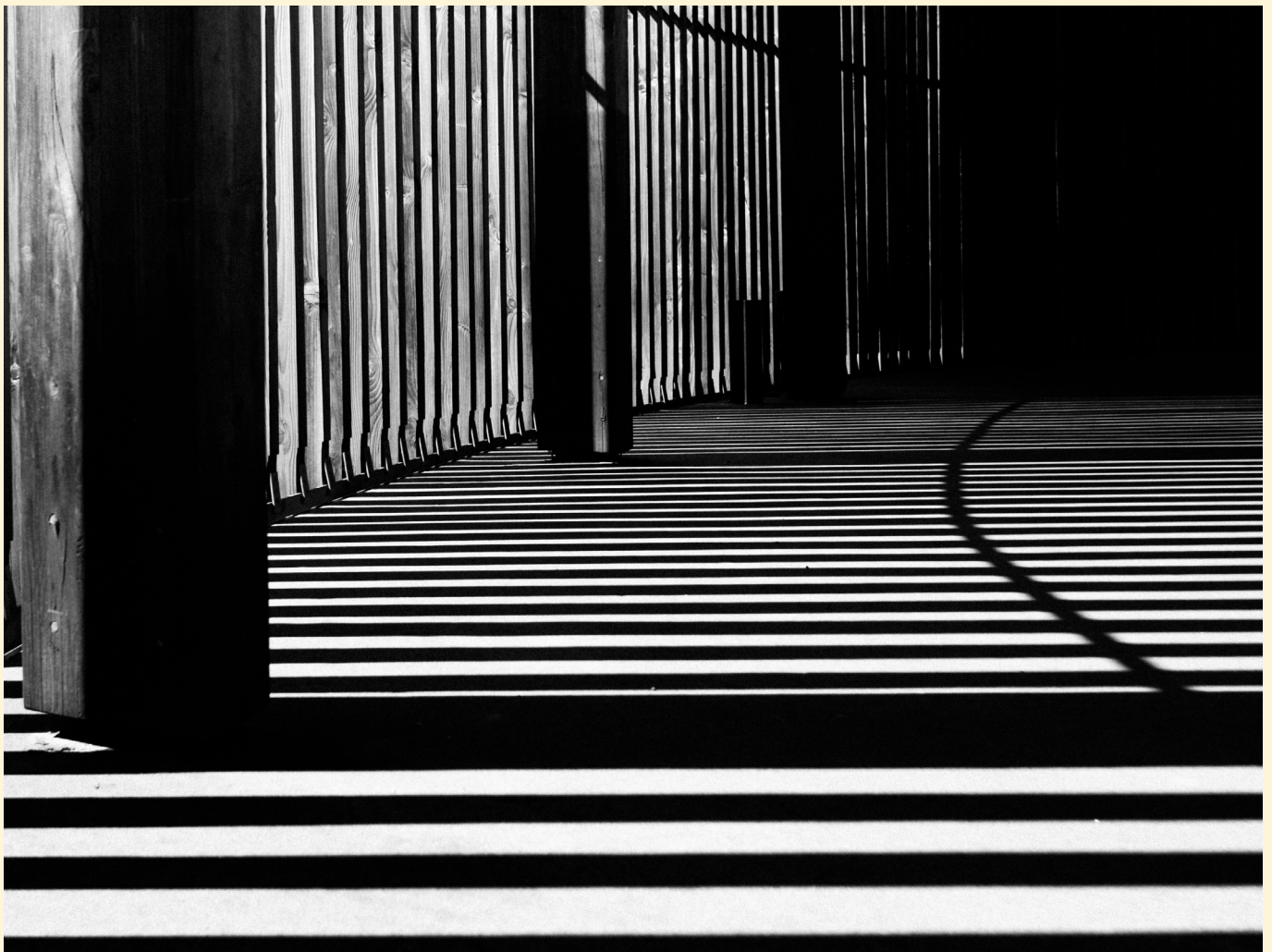
whether a reduction was “material”. Similarly, parties may attempt to agree or qualify in the terms of their contracts what constitutes “minor” outstanding work or defects and what “substantially affect” is taken to mean. Again, if parties intend to do this then it must be reflected in amendments to the contract in clear terms. Absent any express contractual qualification, if one applies the decision in *Mears*, whether or not outstanding work or defects are “minor” would be a matter of fact and degree. As to whether or not the outstanding work or defect would “substantially affect” the safe use of the Works, there is some guidance to be found from *Mears*. The Court of Appeal made clear that if a defect is

trifling it cannot prevent practical completion but if a defect is more than trifling then it will prevent practical completion. Applying that to the 2017 FIDIC Contracts, it may be argued that a defect which is trifling is one which does not substantially affect the safe use of the Works.

### Conclusion

As is clear from the above, there are a number of possible scenarios where disputes may arise over the issue of a Taking-Over Certificate. *Mears* has clarified the principles relating to practical completion and they may impact on those using the 2017 FIDIC Contracts. Parties

using them should be aware that any amendments, whether to place controls on certifiers, to clarify what constitutes minor defects, or otherwise, need to be in clear terms which are reflected in the contract. Absent that, then any decision in the first instance will be a matter for the certifier.





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**Introduction**

The Kingdom of Saudi Arabia (KSA) has been a signatory to the Riyadh Convention since 1983, and to the New York Convention since 1994. However, it was not until quite recently that arbitration has, at last, begun to emerge as a truly viable form of dispute resolution.

There have been monumental changes to KSA's legal landscape in recent years. Against the backdrop of wide-ranging reforms to the judicial system initiated in the late 2000s, two landmark enactments were promulgated in 2012: a new Arbitration Law (repealing the earlier Arbitration Law of 1983) and the Enforcement Law. The Implementing Regulations of the Arbitration Law subsequently came into force in 2017, providing welcome clarity on the mechanics of the new legislation.

## Enforcing foreign arbitral awards in Saudi Arabia: winds of change?

The country's first formal arbitration institute, the Saudi Centre for Commercial Arbitration, was established by Royal Decree in 2014, and it has since become fully operational. It is therefore fair to say that arbitration is enjoying something of a moment in the Sun in KSA.

That the Kingdom's overhaul of its legislative framework for arbitration comes during a period of unprecedented economic diversification and expansion is no coincidence. Large-scale public infrastructure and development projects are in progress across the Kingdom, and foreign investment reached record levels in 2019 – with much of that being directed towards non-hydrocarbon sectors of the economy.

Arbitration is, of course, well-established as the "default" mode of resolution for construction and engineering disputes in the Gulf and wider Middle-East. Historically, however, parties – especially foreigners – had good reason to be wary of resorting to arbitration in KSA, or even against Saudi counterparties in international arbitrations.

To put in context the significance of the recent legislative reforms and judicial trends in the Kingdom, a brief recap of the pre-2012 legal position is in order.

**The position prior to 2012**

Depending on the arbitral award's country of origin, it was (and remains) open to successful parties to seek its enforcement in KSA under either the Riyadh or New York Convention. To do so, one was required to file the award before the Board of Grievances – an administrative judicial body with vested with broad jurisdiction, ranging from commercial disputes to claims against the Saudi government.<sup>1</sup>

Although the earlier Arbitration Law of 1983 contained an express "presumption" in favour of giving effect of the decision of the arbitral tribunal, in practice, matters were far from straightforward when it came to the recognition and enforcement of a foreign award.

In practice, it was common for the Board of Grievances to embark upon an extensive review of any foreign award placed before it – both in terms of compliance with local formalities and as to the substance of the decision itself.

Aside from the need to establish reciprocity between the state of award and KSA, the Arbitration Law required the Board to scrutinise the award to ensure that it was not in conflict with Sharia principles, Saudi public policy, or any previous decision or ruling of the competent Saudi authorities (which included, but was not limited to, judicial decisions).

Undertaking a review at so many levels necessarily entailed a consideration of the substance of the decision itself, and from the Board's perspective, the temptation to assume the role of an appellate tribunal was indeed a strong one.

While Saudi judgments have not been routinely published until very recently, the consensus is that prior to 2013, enforcing foreign arbitral awards in KSA was akin to Russian roulette: the outcome being unpredictable at best, and potentially catastrophic at worst.

In dealing with arbitral awards, it was not unusual for the Board to adopt an interventionist stance so as to do "justice" where, in the Board's opinion, the circumstances of a particular case so warranted. Domestic Saudi awards, in particular, were prime targets for judicial intervention; however, that is not to say non-domestic awards fared any better.

A well-known illustration of the pre-2013 approach is *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, an action for the enforcement of an ICC award issued in 2008. The background to the case was that *Jadawel* had brought a \$1.2 billion claim against *Emaar* arising from a construction project before a three-member ICC tribunal seated in KSA. The tribunal eventually dismissed *Jadawel's* claims in their entirety, and it was ordered to pay *Emaar's* legal costs. The award was then filed with the Board for enforcement.

Upon review, the Board clearly took exception to the tribunal's findings, and in a memorable decision, it not only refused to enforce the award, but reversed the underlying decision itself – ordering *Emaar* to pay over \$250 million in damages to *Jadawel*. The decision in *Jadawel* is perhaps best viewed as being somewhat

outlandish, even by the standards of its time; nonetheless, it is usefully exemplifies all that was wrong with previous legislative regime, and the anti-arbitration ethos it helped foster.

### **2013 – Present**

The Arbitration Law of 2012 is a modern, UNCITRAL Model Law-based statute, which addresses many of the criticisms and perceived shortcomings of its 1983 predecessor. It has been well-received by the legal profession in the region, and heralded as a genuine game-changer.

The Arbitration Law is complemented by the Enforcement Law, which established specialised enforcement courts in the Kingdom – greatly simplifying the procedure for enforcing foreign judgments and arbitral awards. The enforcement courts (rather than the Board of Grievances) are now vested with exclusive jurisdiction in relation to the enforcement or setting aside of arbitral awards, both domestic and foreign.

Chapter 6 of the Arbitration Law confirms that arbitral awards are not subject to appeal, and are to be treated as having the force of a court judgment. The only recourse available against an arbitral award is an action to set aside, pursuant to Article 50 of the Arbitration Law. A decision to enforce an award is final and not subject to appeal.

It remains the case, however, that as a precondition to enforcement, the enforcement judgment will need to be satisfied that the award does not contradict any previous ruling or decision by the Saudi courts, and that it does not conflict with any principle of the Sharia or Saudi public policy (which may be one and the same).

The potential for a re-examination of an arbitral award on merit therefore remains, and with it, lingering doubts as to the residual scope for judicial interference in awards. Nonetheless, anecdotal reports of recent decisions by the enforcement courts are encouraging, with the Saudi Ministry of Justice itself reporting that several (substantial) foreign awards and judgments had been successfully enforced in KSA between 2016 and 2018.

It is hoped that the new legislative framework will serve to boost confidence both in the Saudi legal system and in KSA more generally, as a seat of arbitration.

### **Conclusion**

Although it is perhaps still too early to offer conclusive views as to the actual mechanics of the new system, early case law suggests that decisions such as *Jadawel* are now a thing of the past: the future for arbitration in KSA looks bright.

### Footnotes

1. Under the Board of Grievances Law of 2007 (enacted as part of a wider package of reforms to the Saudi judicial system that year), the Board was divested of jurisdiction in private commercial disputes, returning it to its roots as a more traditional administrative tribunal. However, in practice, the Board continued to hear cases relating to the enforcement of foreign judgements and awards until the new Enforcement Courts became functional in 2017.



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## Parental Controls: Supreme Court holds that claims can be brought against a parent company domiciled in England for activities of overseas subsidiaries

### Vedanta Case Summary

The Supreme Court handed down a much-anticipated judgment on 10 April 2019, holding that parent companies domiciled in England (known as “anchor defendants”) can be sued in the English courts for alleged torts committed overseas by their international subsidiaries (“foreign defendants”).

The potential liability of a parent company will depend upon the degree of involvement or influence that it has over the operations of its international subsidiary. This judgment offers useful guidance as to what may constitute a sufficient degree of involvement and in particular considers the effect of group-wide policies and training.

The decision in this judgment contrasts with two recent Court of Appeal judgments dealing with similar issues, and which both held that the English courts did not have jurisdiction.<sup>1</sup>

This judgment has also diluted the irreconcilable judgments “trump card” relied upon by claimants to facilitate bringing claims against foreign subsidiaries in the English courts.

### Background to the Supreme Court hearing

In July 2015, 1,826 Zambian citizens

commenced a claim against two defendants: Konkola Copper Mines Plc (“KCM”) and its ultimate parent company, Vedanta Resources Plc (“Vedanta”). KCM is a public company incorporated in Zambia. Vedanta is KCM’s ultimate parent company and is incorporated and domiciled in the UK. The claim against KCM and Vedanta arose from the alleged toxic emissions from the Nchanga Copper Mine in Zambia, owned and operated by KCM.

Vedanta and KCM challenged jurisdiction unsuccessfully in the English High Court. They then appealed to the Court of Appeal, and finally to the Supreme Court, to challenge the jurisdiction of the English courts to hear this claim against Vedanta and KCM.

This appeal dealt solely with the issue of jurisdiction – that is, the ability of the English courts to hear the claims brought by the claimants against Vedanta and KCM. It made no determination with regard to liability of Vedanta or KCM which will be dealt with at a substantive hearing.

### Decision of the Supreme Court

The Supreme Court unanimously upheld the decisions of the lower courts, dismissing the appeals of Vedanta and KCM. This means that the claimants’ case can now proceed to a full hearing to determine the substantive issues in the English courts.

Importantly, and of relevance to international organisations domiciled in the UK, the judgment considered circumstances in which parent companies may be liable for the actions of their international subsidiaries – see issue ii below. The judgment also considered several interesting points regarding jurisdiction of the English courts, which will be of interest to legal practitioners.

The following four key issues were considered in the judgment:

- i) Would it be an abuse of EU law to permit the claimants to sue Vedanta, as the anchor defendant, for the sole purpose of attracting jurisdiction over KCM, the foreign defendant?
- ii) Was there a real issue to be tried against Vedanta, as anchor defendant?
- iii) Are the English courts the proper place to hear the claims?
- iv) Would the claimants have access to substantial justice outside of the English courts?

### 1. Abuse of EU law?

The jurisdiction of the English courts over an “anchor defendant” is derived from Article 4.1 of the Recast Brussels Regulation which states:



*“Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state.”*

It is well established in English case law that Article 4.1 of the Recast Brussels Regulation confers a right on any claimant (regardless of their own domicile) to sue an English-domiciled defendant in England.

The Supreme Court upheld the decisions of the lower courts and ruled that bringing the claims against Vedanta and KCM in England did not constitute an abuse of EU law.

**2. Real issue to be tried as against Vedanta: liability as a parent company.**

The key question here was whether Vedanta had sufficiently intervened in the management of the Zambian copper mine, owned by its subsidiary KCM, to have incurred either a common law or statutory duty of care to the claimants. The Supreme Court held that there was a real issue to be tried against Vedanta, both under common law and under Zambian statutory law. This is of

practical importance to all UK-domiciled organisations that have subsidiary operations overseas.

Whether Vedanta had sufficiently intervened in the management of the mine to incur a duty of care (under Zambian law) was a question of fact for the Supreme Court to consider in this case. The Supreme Court noted that the question of parent company liability turns upon the *“extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary”*.

The Supreme Court was reluctant to categorise all potential cases of parental liability, acknowledging that there is *“no limit to the models of management and control which may be put in place within a multinational group of companies”*.

However, the Supreme Court offered useful insight into the effect of group-wide policies. It was held that a parent company could incur a duty of care in respect of the activities of

its subsidiaries in a number of ways, including:

- implementing group-wide policies or guidelines and by expecting each subsidiary to comply with them;
- taking active steps by training, supervision or enforcement of group policies;
- holding itself out as exercising a degree of supervision and control, even if it does not actually do so.

In this case, Vedanta had, amongst other things:

- published materials in which Vedanta assumed responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular with regard to the copper mine;
- implemented those standards by training, monitoring and enforcement.



It was held that these demonstrated a sufficient level of intervention by Vedanta, for the purpose of bringing a claim against Vedanta in the English courts.

**3. Is England the “proper place” to bring a claim against KCM?**

This question generally requires consideration of connecting factors between the claim and the jurisdictions in which it could be litigated. These factors may include issues of practical convenience such as accessibility to courts, availability of a common language or the place where the act or omission occurred. Another important factor is the risk of irreconcilable judgments arising from parallel proceedings in different jurisdictions, which was a key consideration in this case. Prior to this judgment, following *Owusu v Jackson*,<sup>2</sup> if a claim is to be pursued against an anchor defendant in England regardless of the claim against the foreign defendant, the risk of irreconcilable judgments was sufficient for the English courts to accept jurisdiction in respect of the claim against the foreign defendant too. This argument was often a trump card for claimants pursuing claims in the English courts against foreign defendants.

In this case, Vedanta had in fact offered to submit to the jurisdiction of the Zambian courts, so that the whole case against Vedanta and KCM could be heard in Zambia. However, the claimants still sought to pursue the claim against both Vedanta and KCM in the English courts, whilst simultaneously claiming that a risk of irreconcilable judgments would be prejudicial to the claimants.

The Supreme Court overruled the decision of the lower courts and held that the claimants had failed to demonstrate that England was the proper place for the trial of their claims against Vedanta and KCM. The Supreme Court instead held that *if* substantial justice was available in Zambia (see Point 4 below), there

was in fact good reason why the claimants should have to choose between England and Zambia to bring their claims, including the avoidance of irreconcilable judgments.

Although the risk of irreconcilable judgments remains a relevant factor in considering whether England is the proper place to bring a claim, following this judgment that risk “ceases to be a trump card” for prospective claimants.

**4. If the English courts do not accept jurisdiction, could the claimants obtain substantial justice?**

Even if a foreign jurisdiction may be the proper place to bring a claim rather than England, the English courts *can* permit service of English proceedings on a foreign defendant if they are satisfied that there is a real risk that substantial justice may be denied in that jurisdiction.

In this case, although there was no doubt as to the independence or competence of the Zambian judiciary, the Supreme Court found that there was still a risk that substantial justice would be unavailable in Zambia. This was due to:

- the practical impossibility of funding group claims, where the claimants were in extreme poverty, where there was no legal aid available to them and where Conditional Fee Agreements are unlawful in Zambia;
- the absence of sufficiently substantial or experienced legal teams to handle litigation of this size and complexity.

**How does this judgment affect your organisation?**

This judgment is of significance to parent companies domiciled in England, with international

subsidiaries operating overseas. A parent company, with little day-to-day involvement with the operations of its international subsidiaries, may nonetheless leave itself open to litigation in the English courts from overseas claimants. As seen in this case, this may be on the basis of publicly available group-wide policies and/or group-wide training programmes.

If your organisation has subsidiaries operating overseas, particularly in countries which may not offer sufficient access to justice (as described in Point 4 above), this judgment serves as a useful reminder to review the wording and implementation of group-wide policies and training programmes. It will also pay to be mindful as to whether public statements, inadvertently or otherwise, convey an assumption of responsibility for the actions of subsidiaries.

This judgment is particularly important when set against the backdrop of the current rise of activism relating to environmental, climate change and human rights issues. It paves the way for more such claims against international organisations to be commenced in London. The willingness of UK-based law firms to represent overseas claimants in this jurisdiction offers a mechanism through which to bring claims in the English courts which may be otherwise unavailable to claimants in their home countries.

This judgment also highlights that when faced with a claim of this nature, there could be tactical advantages in submitting to the local jurisdiction that are worth exploring with your legal team.

Footnotes

1. *Okpabj and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, and *AAA v Unilever plc* [2018] EWCA Civ 1532
2. [2005] QB 802



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## ICC Emergency Arbitrator Proceedings

### Introduction

In 2015, the ICC established a Task Force on Emergency Arbitrator Proceedings to examine the use of the ICC Emergency Arbitrator Procedure and try to identify any trends and issues that may have emerged. Earlier this year, the Task Force released its Report entitled *Emergency Arbitrator Proceedings – ICC Arbitration and ADR Commission Report*.

### Background to the Emergency Arbitrator Procedure

Having long recognised the value of providing pre-arbitral relief where the circumstances call for it, the ICC first introduced Emergency Arbitrator (“EA”) proceedings as part of its 2012 revision of the ICC International Arbitration Rules.<sup>1</sup> The purpose of the EA Procedure is to allow applicants to obtain urgent interim relief, where necessary and appropriate, without having to resort to state courts or await the constitution of the arbitral tribunal. Using state courts might mean using local law, even where this is not the law provided for by the arbitration agreement, as well as losing other benefits associated with arbitration, such as confidentiality. On the other hand, any delays whilst awaiting the formation of the tribunal in situations where urgent interim relief is required may cause harmful

consequences to one or both of the parties, which could otherwise have been avoided.

To this end, the intention behind EA proceedings is to fill a void that had previously existed in the system and to allow applicants to obtain urgent interim relief whilst still maintaining the benefits of the arbitration process and the arbitration agreement which the parties had agreed to. The ICC Report sheds light on whether or not users see it that way too.

### What does the Report say?

#### *ICC Rules*

One recurring point in the Report is that there is little guidance as to the appropriate application of the EA provisions within the ICC Rules themselves. The Task Force notes that this was a deliberate measure taken when drafting the ICC Rules to ensure that the EAs were afforded as much flexibility as possible.

This flexibility provides the EAs with the ability to freely assess the circumstances of a particular case and lend as much weight to the relevant issues as is necessary to ensure that the relief granted, or the refusal to grant such relief, as the case may be, is appropriate for those particular circumstances. One

of the disadvantages to providing such flexibility, however, is that the approach by EAs to each application is so case specific that there is very little uniformity between EAs that can be used to provide predictability for the user or transparency across the procedure.

#### *General findings*

The general findings of the Report were positive; there has been increasing use of the procedure over the years. This signals that it is a course of action that users are finding meets their needs more fully than other urgent interim relief options that are available. It also tends to confirm that it was a necessary addition to the ICC framework.

Relief is only offered in a minority of cases but, perhaps given the nature of urgent interim relief, this is to be expected.

The process is also quick, with almost all cases concluded within or very shortly after the 15-day deadline contained in the ICC Rules. The fact that the process consistently meets the prescribed expedited time frame is something that is likely to be very attractive to potential users who turn to the Report when assessing the ICC EA procedure as a potential course of action.



The Task Force did not consider that the process has been abused, and attributes this to the preventative measures in the ICC Rules (such as the relatively high application fee, for example). In saying this, it did appear some users may have been making applications strategically in an attempt to assess the strength of the merits of their cases.<sup>2</sup> What can be seen from the data is that a high number of the applications analysed by the Task Force ended up settling on the merits before a final award was issued.

As of 1 March 2019, 95 EA applications had been filed under the ICC's EA procedure. The Report analyses 80 of these, namely those that had been filed by 30 April 2018, and breaks its findings into 4 key issues:

1. Threshold issues.
2. Procedural matters.
3. Substantive standards.
4. Post-emergency arbitration considerations.

*Threshold issues*

The Task Force notes that generally, when it comes to threshold issues, EAs will strictly apply the criteria set out in the ICC Rules. Articles 29(5) and 29(6) are used by the President of the ICC International Court of Arbitration to determine whether the procedure is applicable to the application. The same Articles, and sometimes Article 29(1), are then used by most EAs to determine both applicability of the procedure and whether the EA has the jurisdiction to hear the application.

Twenty-one of the 80 applications considered by the Task Force were rejected wholly or in part on the grounds of threshold issues.

*Procedural matters*

There is no prescribed method for the EA Procedure in the ICC Rules, and this has led to various approaches to procedural matters amongst EAs. Despite the lack of prescription in the ICC Rules,

however, the Task Force encourages the EAs to refer to ICC guidance in the form of:

1. The ICC Note to Parties and *Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (specifically the section on "Emergency Arbitrator") and *ICC Emergency Arbitrator Order Checklist*.
2. The ICC Expedited Procedures Provisions in Appendix VI to the ICC Rules.

The suggestion from the Task Force is that there is a large amount of guidance within the broader ICC Rules and notes that provide a framework that can be used by the EAs to establish a more uniform approach to procedural matters. The EA still has enough flexibility, however, to tailor the procedure to the specific needs of each case, if required.

The Task Force also suggested holding an initial case management

conference by telephone (which in fact was done by EAs in a number of cases), which can address not only initial procedural issues but also the following:

1. Identify any temporary orders required in advance of the final order.
2. Determine how evidence will be presented.
3. Determine the substantive standard that will be applied.

Ultimately, the benefit of the flexibility when it comes to procedural matters is that EAs are able to implement a procedure that is most suitable for the specific case: many will have case management, where others will not; some will have oral hearings but no witnesses, where others will be decided on the papers. The ability to tailor a suitable but time-efficient process is of value in expedited proceedings such as these.

#### *Substantive standards*

The Task Force acknowledged that there is no prescribed approach in the ICC Rules nor broader guidance from the ICC. From its analysis, however, the Task Force has concluded that the EAs have mostly been guided by international practice and principles of international arbitration when it comes to applicable standards. The Task Force considers this a positive approach as guidance from established standards in this way assists with predictability for parties and transparency when it comes to the EA procedure.

The most frequently used standard identified by the Task Force is “urgency”, which is a common basis for denial of relief in the EA process. In addition to the ability of the matter to await the constitution of a tribunal (which is considered as a

threshold issue), EAs also consider other urgency issues such as imminent or irreparable harm.

Other standards that the Task Force observed are considered by EAs include:

1. Likelihood of success on the merits.
2. The risk of aggravation of the dispute.
3. The absence of pre-judgment on the merits.
4. Proportionality/balance of equities.

Again, the Task Force observed that the EAs’ consideration of these standards and the weight afforded to them is heavily influenced by the specific circumstances of each case and so, even though the standards generally applied by EAs could be identified, there is no uniform approach in the application of these standards.

#### *Post-emergency arbitration considerations*

In addition to trends in approach to and application of the EA provisions, the Task Force also considered issues arising post-emergency arbitration, particularly in so far as enforcement may be concerned.

The Task Force concluded that most EA orders are complied with by the Parties voluntarily. As with most interim relief, this may be something that the parties do out of concern for the way non-compliance would be treated by the tribunal when it comes to the arbitration on the merits. However, there are concerns when it comes to enforceability in the rare circumstances in which this may be necessary.

Ultimately, the Task Force found that the enforceability of EA orders is

not certain. In some jurisdictions, a party seeking compliance could turn to the domestic courts (particularly, it notes, in jurisdictions inspired by UNITRAL Model Law). The issue in many cases, however, is the fact that these orders will be classified as interim measures and therefore be seen as not as enforceable as a final award. This is, however, a universal concern with orders for interim relief and, to a certain extent, expected when it comes to this procedure.

Despite this, the Task Force notes that the use of this procedure is increasing and so concludes that any concerns about enforceability are not deterring parties from making an application.

#### **Conclusion**

The use of the ICC EA Procedure is increasing worldwide and the Report confirms that it is working as quickly as it was intended to do. The intentional flexibility put into the rules means that users cannot anticipate the approach that an EA will take, but ensures that the application can be considered in light of its specific circumstances and the process adjusted where necessary to make it as efficient as possible.

Although there is no guidance when it comes to substantive standards, the Report does offer users some insight into the standards that are more consistently applied by the EAs, providing an element of predictability and transparency that the Task Force set out to achieve.

In all, the findings in the Report are positive and show that the introduction of the EA procedure in the ICC Rules has succeeded in providing a necessary avenue for urgent interim relief that was otherwise unavailable.

