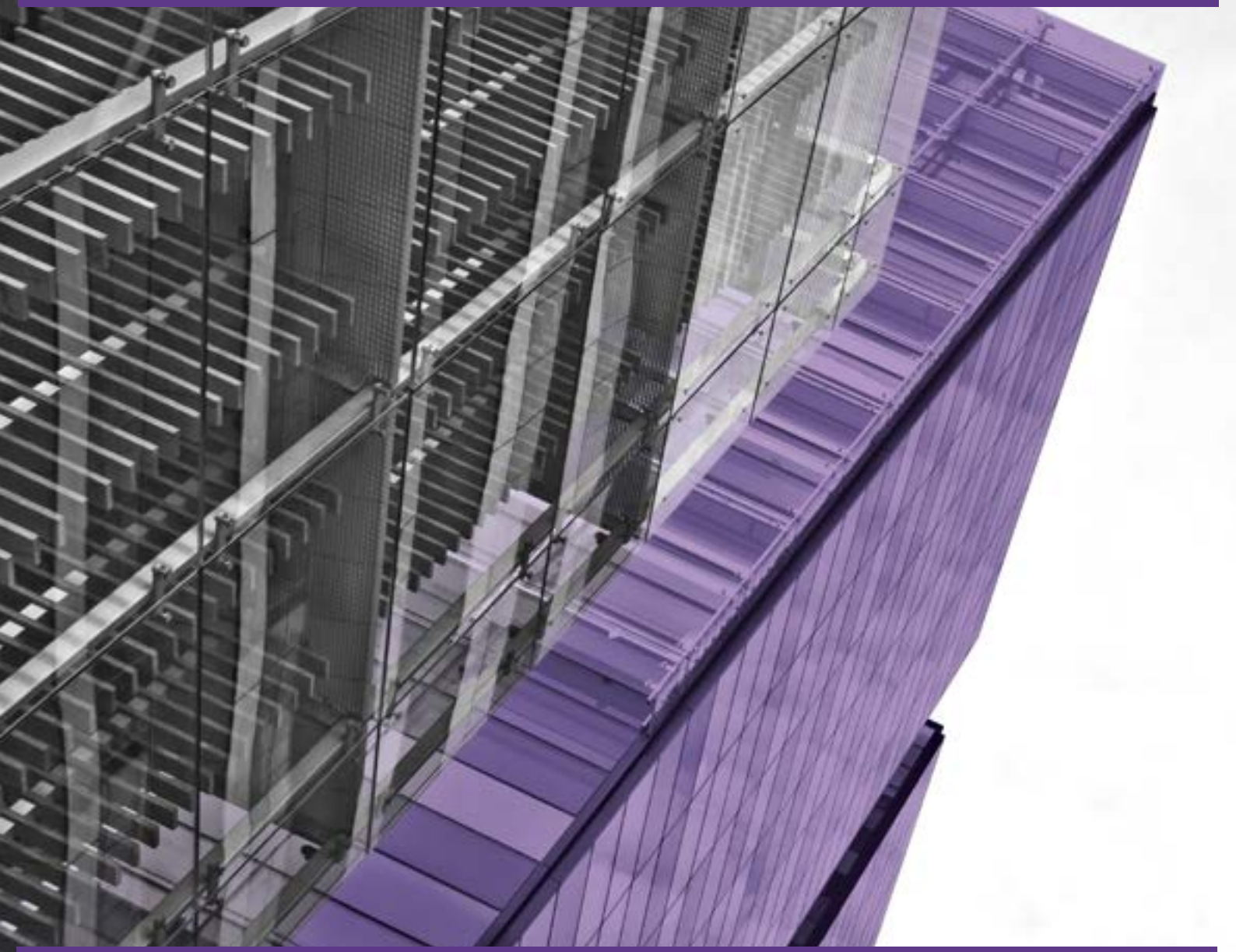
Fenwick Elliott

The construction & energy law specialists

International Quarterly

Issue 10, 2014

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



Inside this issue:

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

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 10, 2014

Termination by the Employer under the FIDIC form of contract

By Jeremy Glover
Partner, Fenwick Elliott

Termination is a serious step and is never one to be taken lightly. It is important that determination provisions are followed precisely. If a dispute arises, those procedures will usually be carefully considered and strictly applied. These issues recently came before the TCC in London, in the case of Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [1] where Mr Justice Akenhead had to consider whether or not the Employer, in a tunnel project at Gibraltar airport, was entitled to terminate the contract. The contract was the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, 1st edition, 1999 (better known as the "Yellow Book").

Sub-clause 15.1 states that: "If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time."

Sub-clause 15.2 lists the circumstances in which an Employer may terminate upon the giving of 14 days' notice, including if the Contractor:

"(a) fails to comply ... with a notice under Sub-Clause 15.1 ...

(b) ... plainly demonstrates the intention not to continue performance of his obligations under the Contract,
(c) without reasonable excuse fails:
(i) to proceed with the Works in accordance with Clause 8."

Sub-clause 15.1: notice to correct

First of all, the Judge considered sub-clause 15.1, noting that the following:

(i) Sub-clause 15.1 related to "more than insignificant contractual failures" by the Contractor, for example a health and safety failure, bad work or a serious delay on aspects of the work. Given the potentially serious consequence of non-compliance, the notices need to be construed strictly, and the Judge noted that "generally in relation to termination for fault clauses, courts have often construed them in a commercial way so as to exclude reliance on trivial breaches". [2]

(ii) The specified time for compliance with the sub-clause 15.1 notice must be reasonable in all the circumstances prevailing at the time. What is reasonable is fact sensitive.

(iii) Sub-clause 15.1 is designed to give the Contractor an opportunity and a right to put right its previous, identified contractual failure.

(iv) The Judge noted with approval the comments of the editors of Hudson's Building and Engineering Contracts (12th edition) at para 8.056:

> "Termination clauses occasionally allow termination on the ground of 'any breach' or 'any default'. Although in principle, parties may agree whatever they wish, the courts will generally be reluctant to read such wording literally. 'Default' will be read as meaning a default relevant to the contract, and the courts will treat matters which are not a breach of contract as excluded from the meaning of default. 'Any breach' will be held to refer only to important breaches, to exclude minor breaches, and to include only such breaches as are of substantial importance."

(vi) The FIDIC contract has a warning mechanism whereby termination could be avoided by the Contractor's compliance with the sub-clause 15.1 notice:

> "Commercial parties would sensibly understand that this contractual chance is a warning as well to the Contractor and the remedy is in its hands in that *sense*."

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 10, 2014

Further, termination could not legally occur if the Contractor has been prevented or hindered from remedying the failure within the specified reasonable time. Under English law, there is an implied term that the Employer shall not prevent or hinder the Contractor from performing its contractual obligations and usually an implied term of mutual cooperation. If after a notice has been served, the Employer hindered or prevented the Contractor from remedying the breach, the Employer could not rely on the Contractor's failure in order to terminate the Contract.

The project sub-clause 15.1 notices

Two sub-clause 15.1 notices were served, one on 16 May 2011 and one on 5 July 2011. The Judge noted that prior to the first notice, for the preceding 5 months, no critical, substantive or permanent work had been done by OHL, the Contractor. Under the notice, OHL was called upon to "resume tunnel excavation work" and "proceed with the cropping and repairs to the diaphragm walls unaffected by standing water" by 30 May 2011. The Judge considered the time given to rectify the breach was reasonable, especially as the detailed design was approved sufficiently and the relevant approval forms were provided in a timely fashion well within this initial 14-day period. If they had not been, it might have been more arguable that there was some prevention on the part of the Employer.

The next failure alleged was that OHL had failed "to commence temporary sheet piling of the subway". Here the Judge was not satisfied that OHL was by 16 May 2011 in breach of Clause 8 in respect of the alleged failure to start sheet piling for the subway. The work was not on the critical path and it was therefore difficult to find that a deferment of the sheet piling until later would necessarily have led to any overall delay to the project. This meant that it could not be said that there was a failure to proceed without delay.

The next complaint was regarding a failure to start underwater trenching and ducting work. Here the Judge concluded that OHL was in breach of Clause 8.1 in that it was not and had not been proceeding with due expedition and without delay. Indeed the Contractor was already in culpable delay as from about October 2009 when the work could and should have been completed. However, the Judge was not satisfied that the time given to start this work (3 weeks) had been established as being reasonable. The onus was on the Employer to establish this.

A notice was also served in respect of OHL's failure to provide acceptable method statements which OHL proposed to adopt for tunnel excavation work. This was a breach of sub-clause 8.1, as an acceptable method statement was a prerequisite to starting the excavations for and in connection with the tunnel. There was no evidence that there was any good excuse or even explanation as to why an acceptable method statement had not been produced by 16 May 2011. Here, following the service of the notice, OHL submitted an unacceptable revised method statement late which was duly rejected 21 days later. Accordingly, OHL did not comply with the notice.

The next item on the 16 May 2011 Clause 15.1 notice was the failure "to proceed with the dewatering of the site with due expedition and without delay". Even on OHL's programme, it should have been operational by 16 May 2011. It was, in the view of the Judge, perfectly reasonable to require that the dewatering commenced by 30 May 2011. However, there was a continuing breach and non-compliance with the notice as no dewatering actually started by or even on 30 May 2011.

A further notice was issued on 5 July 2011, relating to the exposure of some panels. It was suggested that this notice was part and parcel of a long-established strategy by the Employer to terminate the Contract. The Judge considered that the second notice was intended in effect *"as a test to encourage OHL to get on and do some work"*. The sub-clause 15.1 notice was issued when no work had been done to comply with an Instruction. The Judge thought that the motivation of the Employer was not relevant, unless it was shown to be in bad faith. It would not be bad faith to issue any such notice if it was justified under the Contract, even if it was issued in circumstances in which the Engineer and the Employer believed that it would not be complied with and, if not, termination might, could or would follow thereafter. On the facts, the Engineer was entitled to issue the second notice as not only had OHL not complied with the relevant instruction, but also it had shown no real intention of complying with it.

Next the Judge had to consider the extent to which the sub-clause 15.1 notices were or were not complied with. The Judge found that nothing was done by OHL with regard to the cropping of the diaphragm walls and the related excavation works. There was no good reason why OHL did not resume this work. Further, no adequate explanation was offered as to

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 10, 2014

why an appropriately revised method statement could not have been provided. There was continued non-compliance up to the date of termination in this regard. The real reason for, and indeed the true cause of, the continuing delay was in fact that OHL was unable to secure a sign off on the design because there was a very real problem with the stability of the revised tunnel design. However, this was the risk and the fault of OHL.

The position with the diaphragm panels was somewhat different: work started on 13 July 2011 (albeit 8 days after the notice) and continued until 21 July 2011. The precise detail of compliance was not fully investigated at the trial and the Judge noted that had this been the only item upon which the termination was based, he would not have found that there was sufficiently significant non-compliance with the scope of the instruction. For example, the Engineer actually instructed, whilst these works were going on, various changes to the original instruction. However, there was clearly non-compliance with the time period given in the second sub-clause 15.1 notice and there was no good reason why it was not complied with within the 7-day period referred to in the notice; OHL had had some 2½ weeks to comply with EI 20 and had not done so, and there was physically no good reason why they had not got on with and completed the instructed works within 7 days of the second notice. The relevance of this is that it was further evidence that OHL was not committed to pursuing work with any expedition or at best that it was in effect committed to doing the minimum that it thought it could get away with.

Notice of termination – sub-clause 15.2

Having concluded that there were continuing grounds of non-compliance by OHL with the sub-clause 15.1 notices after the times given for compliance had expired, the Judge went on to consider whether OHL had by 28 July 2011, the date of the termination letter, "plainly demonstrate[d] the intention not to continue performance of these obligations under the Contract" or "without reasonable excuse fail[ed] ... to proceed with the Works in accordance with Clause 8", within the meaning of Clauses 15.2(b) and (c). Again, whilst noting that this must be primarily a matter of fact and degree, the Judge set out some basic points of principle:

(i) The test must be an objective one. If OHL privately intended to stop work permanently but continued openly and assiduously to work hard at the site, this would, objectively not give rise to a plain "demonstration" of intention not to continue performance. Similarly, the fact that OHL was, and had been for many months, doing no work of any relevance without contractual excuse could, if judged objectively, give rise to a conclusion that it had failed to proceed in accordance with Clause 8.

(ii) The grounds for termination must relate to significant and more than minor defaults on the grounds that it cannot mutually have been intended that a (relatively) draconian clause such as a termination provision should be capable of being exercised for insignificant or insubstantial defaults. For example, a few days' delay in the context of a 2-year contract would not justify termination on the Clause 8 ground and an unwillingness or even refusal to perform relatively minor obligations would not justify termination on the "intention not to continue" ground.

The decision

The Judge was, on the facts, wholly satisfied that OHL had failed, almost from start to finish of this project, to proceed in accordance with Clause 8.1 of the Contract Conditions. The lack of expedition on the part of OHL had led to what amounted to a 2-year delay on a 2-year contract, for which there was at best a minimal entitlement to extension of time. Accordingly, the Employer was entitled to terminate the contract.

Footnotes

[1] [2014] EWHC 1028 (TCC)

[2] Per approach of Lord Diplock in Antaios Compania Naviera SA v Salen Rederierna AB
[1985] AC 191 at 201D: "... if a detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts common sense, it must be made to yield to business common sense."

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

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International issues around the globe

Issue 10, 2014

Project Bank Accounts: a UK—Australian comparison

By Stefan Cucos
Associate, Fenwick Elliott

How do governments ensure that fair payment practices in public sector construction contracts are promoted in a country's construction industry? The UK and Australia now have in place legislation which shows that governments in common-law jurisdictions are increasingly recognising the importance of parties to construction contracts having access to electronic bank accounts where money is held in trust for the contractual supply chain.

The potential benefits are obvious. The importance of timely payments in the construction industry is key; having sums of money available that are protected and ring-fenced for the purposes of payment to contractors and subcontractors benefits all parties. By being set up as trusts, the funds in the accounts can also be protected from the potential liquidation or receivership of employers.

Contractual payment procedures

Since October 2011, a number of UK governmental agencies have adopted Project Bank Accounts ("PBAs") in public sector contracts as a way of protecting sums that have been earmarked by employers for paying contractors. In Australia similar "Security for Payment" arrangements will shortly be adopted. In April 2014 the Department of Finance and Services of New South Wales plans to introduce new laws applicable to construction contracts which will focus on Security for Payment by way of amendments to its existing Building and Construction Industry Security of Payment Act 1999.

The UK government is exceeding its targets in the roll-out of PBAs after paying for £1.4 billion of public works in six months through the initiative. Indeed, the Highways Agency in the UK has adopted PBAs on all contracts awarded since October 2011 unless there is a compelling reason not to do so, for example if the administrative costs of setting up the account cannot be justified by the low value of the project.

It is easy to see the basic advantages of such accounts. Those at the bottom of the payment chain have traditionally felt exposed not only to slow and/or irregular payments from paying parties in the chain above but also to the possibility of the employer above going into liquidation, particularly where, in most cases, the contractor or subcontractor is not a secured creditor and is therefore usually the bearer of the brunt of insolvency in the construction industry.

More often it is main contractors who, rather than applying the correct sums to deserving subcontractors from the money they receive from employers, apply them to more preferred creditors, at the subcontractor's expense. A guarantee of specific funds to be designated on a project-specific basis is therefore popular with subcontractors. However, the benefits work for both the contractors (and subcontractors) and the employers.

Employers are content because they can earmark sums to specific payees on specific projects, while the payee contractor also benefits because his payments should not be affected by any liquidation event suffered by the payer employer. This is because the accounts are effectively in trust, whereby the payee is the beneficiary and the trustees are the parties to the contract.

The UK public sector recognises that having a PBA available can also speed up payments. The UK Highways Agency, which categorises its suppliers into tiers one, two and three, can now pay all tiered contractors from the same PBA. It also means that all tiered suppliers on a single project can be paid at the same time, provided the sums are properly payable under the contract. This guarantees some degree of certainty as to when the payment will be made.

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Universal view:

International issues around the globe

Issue 10, 2014

In addition to the guarantee of payment there is also likely to be some savings in the cost of administrating the contract. Disruption, delay and the add¬tional cost of avoidable supply-chain failure caused by cash-flow shortage would be among the savings. Setting up and administering the PBAs will now be new additional project costs though any interest earned on the account will go to the party chosen to administrate the account. By and large the UK view is that the net costs will still make such arrangements unsuitable for small-scale projects. However, overall, in the UK, such arrangements could help to reduce overall project delivery costs while allowing tiered suppliers to build the benefits of an accelerated payment into their price structure.

In the private sector, the availability in the UK of standard form PBA documentation for public works has been encouraged since the recommendation by the Office of Government Commerce (now a part of the UK Cabinet Office). The Joint Contracts Tribunal ("JCT") offers a standard form by which certainty of payment, decreased vulnerability for subcontractors, fewer payment defaults or disputes and predictable cash flow are encouraged.

In Australia the approach will be more prescriptive overall. The new payments are set to be more wide-ranging, while the introduction of Retention Money Trust Accounts (as the equivalent PBAs in Australia will be called) will be more cautious. Further construction industry consultation will be undertaken following the introduction of the new legislation and this will lead to the drafting of specific regulations. For now, the reforms will concentrate on payment provisions including the introduction of a maximum payment cycle of 15 days for employers to main contractors and 30-day terms for payments to subcontractors. Head contractors will be required to include supporting statements in their claims for payment that confirm that all subcontractors have been paid all sums due. The NSW Department of Finance and Services' measures will even allow Authorised Officers to police the transactions and have search and seizure powers.

How do PBAs or their equivalent work?

The bank accounts themselves differ from a normal account in that the sums held on account are held in trust for nominated suppliers and cannot therefore be accessed by a liquidator or receiver. The legal framework is straightforward. One party, usually the contractor, nominates a bank to act as PBA host. A deed of trust is then entered into by the parties by which each nominated supplier is to be paid directly from the PBA once he has signed the joining deed. In England and Wales, if properly established so that a secure trust is effectively set up, the funds in the account will be protected from other creditors if the employer becomes insolvent.

The Australian statutory construction trust model, the Retention Money Trust Account, though based on the UK PBAs (and US models) remains only at the pilot stage. The Government of New South Wales is proposing to use Retention Money Trust Accounts on 10 government construction projects for 2014. Many observers have felt that such measures do not go far enough. While the intention is to adopt the UK PBA trust protection model, the failure to introduce the Trust Accounts on all projects has been criticised for not protecting the subcontractors whose commercial exposure to main contractor insolvencies "up the line" has been devastating to sub-contractors in Australia, as well as those in other countries.

Overall, public sector projects will increasingly be required to adopt PBAs or their equivalents. This should make for fairer and more streamlined payment systems where sums owed are protected and payments are made on time. This has promoted a climate of fairness in public sector construction in the UK because payment funds held in trust are regarded as secure by all parties. In New South Wales, the advantages of such schemes have been acknowledged. It now remains for those new regulations to implement the trust schemes on all public-sector projects as they have been in the UK as well as in many parts of Canada and 16 US states.

Stefan Cucos, Associate
Fenwick Elliott
+44(0)207 421 1986
scucos@fenwickelliott.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 10, 2014

Serving contractual notices under the FIDIC form of contract

By Jeremy Glover
Partner, Fenwick Elliott

The *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* case, referred to above, also contained a useful decision about the need to ensure that any contractual notice was validly served. As a general rule, you should always read the contract carefully and ensure that any notice is served in the correct way and on the correct people. If the words of the contract impose a condition precedent about how notices are to be served, you might find that your right to terminate is lost, even if the notice was delivered into the hands of the other party.

Was the notice served on the correct address?

Mr Justice Akenhead had to consider whether the termination notice had been correctly served. The termination notice letter was delivered by hand to OHL's site office in Gibraltar where it was signed for by one of OHL's employees. It was dispatched promptly by the site office to the main Madrid office. Sub-clause 1.3 required all notices called for in the Conditions to be delivered by hand or sent by mail or courier to OHL's Madrid office. There was also the following wording:

> *"However: (i) if the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and (ii) if the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued."*

Was service of the termination notice at the site office effective?

Throughout the project correspondence had been frequently sent to OHL's site office without any objection being made by OHL. Indeed, the sub-clause 15.1 notices were sent to the site office. The project was being run by OHL from the site office as from late 2009. The project manager was based there. In these circumstances, in effect and in practice, the parties operated as if the site office was an appropriate address at which service of notices could be made.

In discussing this point, Mr Justice Akenhead referred to the adoption of a "commercially realistic interpretation" on what parties agree and noted that the courts in the past have been slow to regard non-compliance with certain termination formalities, including service at the "wrong" address, as ineffective, provided that the notice has actually been served on responsible officers of the recipient. He gave a number of examples including *Worldpro Software Ltd v Desi Ltd* [3] where the notice provision stated:

> *"Notices permitted or required to be given hereunder shall be in writing and shall be delivered by hand or despatched by registered airmail, facsimile, or cable, shall be deemed given upon receipt thereof, and shall be sent to the parties at the following address ..."*

The actual termination letter was handed over physically by one director to another. Mr Justice Ferris held that there had been valid service, saying:

> *"There is no provision for despatch by ordinary, recorded delivery or registered post. It would be quite wrong, in my view, to treat successful service by any of these means, or delivery by hand to the managing director of WorldPro, as having no effect. Regard must be had ... to the subject matter and the object to be fulfilled."*

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Contract Corner:

A review of typical contracts and clauses

Issue 10, 2014

The decision

The Judge concluded that in relation to termination clauses in engineering and building contracts in general and specifically in relation to the Contract in this case:

(i) Termination is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.

(ii) Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.

(iii) It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective. That interpretation needs to be "tempered by reference to commercial common sense".

(iv) In the FIDIC Contract here, neither sub-clause 1.3 nor sub-clause 15.2 used words such as would give rise to any condition precedent or make the giving of a notice served only at OHL's Madrid office a pre-condition to an effective termination.

(v) The primary purpose of sub-clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are dispatched effectively to and received by the Contractor.

(vi) The primary purpose of a sub-clause 15.2 termination notice is to ensure that the Contractor is made aware that its continued employment on the project is to be at an end.

Therefore, the service of a sub-clause 15.2 notice at the Madrid office of OHL was not an indispensable requirement. Provided that service of a written sub-clause 15.2 notice was actually effected on OHL personnel at a sufficiently senior level, then that would be sufficient service to be effective. Therefore, it followed that the termination notices had been validly served and that the Employer had validly terminated the Contract pursuant to sub-clause 15.2.

Footnotes

[3] [1997-98] TLR 279

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

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:
International dispute resolution & adjudication

Issue 10, 2014

English courts refuse bribery-based application to set aside Dubai arbitration award

By Monique Hansen
Fenwick Elliott

If you have obtained a judgment or arbitral award outside England and Wales, you may wish to enforce it in England or Wales because your debtor is located or has assets here. If so, it is positive to know that English courts do not tread lightly regarding requests to set aside orders enforcing foreign arbitral awards.

This was recently demonstrated by the TCC in London, in the case of *Honeywell International Middle East Limited v Meydan Group LLC* [1] (formerly known as Medan LLC) where Mr Justice Ramsey made it clear that the English courts take a robust approach to challenges to the enforcement of foreign arbitration awards, even where allegations of bribery are involved.

Background

In September 2007 Meydan (a company incorporated in Dubai) entered a contract with a main contractor Arabtec-WCT JV under which Arabtec agreed to carry out certain works at the Meydan Racecourse. The employer's representative under the contract between Arabtec and Meydan was Teo A Khing Design Consultants SDN Bhd (Dubai Branch) ("TAK") who were engineering consultants.

In March 2008 TAK, on behalf of Meydan, invited Honeywell to submit a tender for the supply and installation of an Extra-Low Voltage System at the Racecourse. In order to secure its nomination as a subcontractor, the invitation to tender included provisions requiring Honeywell to pay TAK AED 526,000.00 (approximately £85,000.00) in deposit, documentation and lithography fees.

In June 2008 Meydan nominated Honeywell to be appointed by Arabtec, though no formal agreement was made between Arabtec and Honeywell. Seven months later Meydan terminated the contract with Arabtec, and in June 2009 a contract was signed between Meydan and Honeywell.

Arbitration (DIAC Case 201/2010) was commenced by Honeywell against Meydan under the rules of the Dubai International Arbitration Centre (DIAC) in July 2010 and was triggered by the fact that Honeywell had not been paid since December 2009 and had subsequently suspended work. Honeywell was seeking the sums it claimed were owed under the contract. Meydan did not nominate an arbitrator or participate in the proceedings but despite Meydan's lack of cooperation Honeywell proceeded with the tribunal to a hearing in February 2012. However, in January 2012 Meydan commenced a separate DIAC arbitration against Honeywell (DIAC Case 18/2012). Notwithstanding this new arbitration, DIAC Case 201/2010 proceeded and Honeywell was awarded just over AED 77 million (approximately £12.6 million).

Eager to seek ratification of the award in DIAC Case 201/2010, Honeywell commenced proceedings before the Dubai courts. Meydan opposed the application and argued that the award should be held void and/or invalid, asserting (with reference to an opinion from an English Queen's Counsel relating to DIAC Case 02/2009 between Arabtec and Meydan) that there were concerns that TAK and Arabtec had engaged in criminal acts of corruption, though further evidence would be needed to substantiate these allegations.

In November 2012, Honeywell made a without notice application before the English courts under the Arbitration Act 1996 seeking leave to enforce DIAC Case 201/2010 in the UK. The application came before Mr Justice Akenhead who made an order granting Honeywell leave to enforce the award.[2] Meydan in turn applied to have the order set aside and it is Meydan's application to set aside this order which was brought to a hearing before Mr Justice Ramsey in February 2014.

Prior to Meydan's application to set aside the order, there were developments made regarding the cases in Dubai. In February 2013 the Dubai Court of First Instance ratified the award in DIAC Case 201/2010. Meydan appealed this decision and the appeal proceedings were stayed by the courts in November 2013 (and remained stayed at the date of Mr Justice Ramsey's judgment). In staying the proceedings

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:

International dispute resolution & adjudication

Issue 10, 2014

the court referred to a bribery complaint against Honeywell made in October 2013 to the Dubai Public Prosecutor as well as a letter from the Head of Dubai Public Funds Prosecution Department to the head of a local Dubai police station in November 2013 requesting that investigations be conducted against Honeywell pursuant to UAE Federal Civil Procedures Law.

In August 2013 the tribunal in DIAC Case 18/2012 (brought by Meydan) held that the claims raised by Meydan were barred by *res judicata* and therefore could not be considered by the tribunal because the parties were the same as in DIAC Case 201/2010. Despite this Meydan nonetheless submitted a memorial to the tribunal referring to the same documents that had caused the Court of Appeal proceedings to be stayed.

Decision

Meydan raised a number of arguments before Mr Justice Ramsey in support of its application to set aside the order made by Mr Justice Akenhead in November 2012; the main arguments were largely threefold. One argument was based on the validity of the arbitration agreement between Meydan and Honeywell, another was based on English public policy and on top of that a number of procedural challenges were raised by Meydan. The Judge was wholly dissatisfied by all of these arguments and rejected Meydan's application to set aside the order.

The invalidity of the arbitration agreement

In accordance with s.103(1) of the Arbitration Act 1996, recognition or enforcement of a New York Convention award shall not be refused except under

the grounds listed at s.103(2) and (3). If one of these grounds is met, then recognition or enforcement of the award "may be refused". Mr Justice Ramsey noted that this discretion "is not open-ended and the court would be unlikely to exercise its discretion to enforce an award which is subject to a fundamental or structural defect". He also reiterated that "the intention of the New York Convention … is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively".[3]

Meydan asserted that, pursuant to s.103(2)(b) which states that recognition or enforcement of an award may be refused if the arbitration agreement was invalid under the law to which the parties subjected it, a ground for refusing enforcement under s.103(2) had been met. Meydan argued that the award in DIAC Case 201/2010 was invalid under UAE law as it resulted from a contract which was procured by Honeywell bribing public servants in Dubai. It argued that the tender invitation evidences an agreement between Honeywell and TAK for Honeywell to pay a bribe under the false cover of "lithography", "Tender" and "document fees". Meydan submitted that these payments amounted to bribery under English law, citing *Fiona Trust v Yuri Privalov*[4] where Andrew Smith J had defined a bribe as a secret commission; a payment which is kept secret from the principal.

The burden was on Meydan to establish a ground under s.103(2), and the Judge was not satisfied by the arguments put forward for a number of reasons and stated that "the court needs to assess what is put before it with a critical eye".

Whilst the Judge accepted that a payment was made to TAK, he was not satisfied that it was a secret commission because within days of the letter of invitation being sent to Honeywell, Honeywell made their suspicions regarding the payment known to a senior member of Meydan's staff. Therefore, he rejected the argument that it was a secret payment made by Honeywell to TAK. However, the Judge went further to say that even had he not come to that conclusion, the evidence of bribery was available to Meydan at the time of the arbitration but Meydan chose not to participate in the arbitration or to raise the allegations in that arbitration. He also noted that the alleged bribe arose in the context of a tender where Honeywell was nominated as a sub-contractor to Arabtec. There was no allegation that a bribe had secured the contract between Honeywell and Meydan in 2009. Ramsey J therefore found it "difficult to see how the bribe could affect the Contract between Meydan and Honeywell or the arbitration clause within that Contract".

Finally, he stated that even if there was a causative link between the alleged bribe and the Contract between Meydan and Honeywell, it would have to be shown

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:

International dispute resolution & adjudication

Issue 10, 2014

that as a matter of UAE law, the arbitration agreement within the Contract was itself procured by bribery. While this had not been alleged, Mr Justice Ramsey noted Article 6.1 of the DIAC Rules which deal with the separability of the Arbitration Agreement and provides that unless the parties agree otherwise, "the Arbitration Agreement shall … be treated as a distinct agreement". Therefore, even if the allegation of bribery was made out and found to have affected the Contract between Meydan and Honeywell, it would not have affected the arbitration agreement due to the principle of separability.

Procedural rules

Meydan also contended that, pursuant to s.103(2)(f) which states that recognition or enforcement of an award may be refused if the award is suspended by a competent authority in the country in which it is made, a ground for refusing enforcement under s.103(2) had been met.

Meydan argued that because Honeywell's application for ratification had been stayed by the Dubai Court of Appeal, it had therefore been suspended by a competent authority in the country in which it was made.

The Judge also rejected this argument, stating that under the DIAC Rules the award was final and binding. He noted that as the New York Convention has limited the *"double exequatur"* requirement, there was therefore no requirement for anything to occur in the local courts for the award to be given some further status in terms of its binding nature. He also held that proceedings in the local court were of no relevance as to whether an award was binding and that the process currently being followed in the Dubai courts had not currently led to the award being "set aside or suspended".

Another procedural challenge made by Meydan was that the request for arbitration wrongly named "Meydan LLC" rather than "Meydan Group LLC" as the respondent. Mr Justice Ramsey was entirely unsatisfied with this argument and held that it did not matter as the request was addressed to Meydan LLC as a party with all the attributes of Meydan Group LLC which meant that the request would reasonably, and did, come to the attention of Meydan Group LLC.

Public policy and bribery

Meydan further asserted that English public policy prevents enforcement of awards that would give a person who bribes the fruits of their bribery and that therefore enforcement of the award was contrary to English public policy.

The Judge rejected this on the basis that bribery had not been proven. He also stated that even if bribery was proven, there is no principle of English law to the effect that it is contrary to English public policy to enforce a contract which has been procured by bribery. He emphasised the distinction between the enforcement of contracts to commit fraud or bribery and contracts that are procured by bribery, only the former of which are contrary to public policy.

Conclusion

The Judge rejected all of Meydan's claims and found that Meydan had not raised any grounds for contending that recognition or enforcement of the Award should be refused under s.103 of the Arbitration Act 1996.

This decision is yet another illustration that the English courts are taking a critical and narrow view in terms of their willingness to refuse recognition and enforcement of foreign arbitration awards. This case demonstrates that even with a shield of bribery allegations you cannot presuppose that a ground under s.103 of the Arbitration Act 1996 will be made out. The English courts will resist using their discretion under s.103 to refuse recognition and enforcement of a New York Convention award.

A significant amount of litigation and arbitration has unravelled out of the development of the Meydan Racecourse and this is unlikely to be the last we hear of it. This is certainly one for arbitration practitioners to keep an eye on, particularly for those in London and Dubai.

Footnotes

[1] [2014] EWHC 1344 (TCC)

[2] Akenhead J qualified this order by stating that it should not be enforced for 21 days after service of the relevant documents on Meydan or, in the event that Meydan applied within those 21 days to set aside the order, until such application had been finally disposed of.

[3] At [66] Ramsey J quotes Redfern and Hunter on International Arbitration at para 11.60.

[4] [2010] EWHC 3199 (Comm).

Monique Hansen
Fenwick Elliott
+44(0)207 421 1986
mhansen@fenwickelliott.com

Fenwick Elliott
The construction & energy law specialists

International Quarterly

News and events

Trends, topics and news from Fenwick Elliott

Issue 10, 2014

This edition

Fenwick Elliott Autumn events

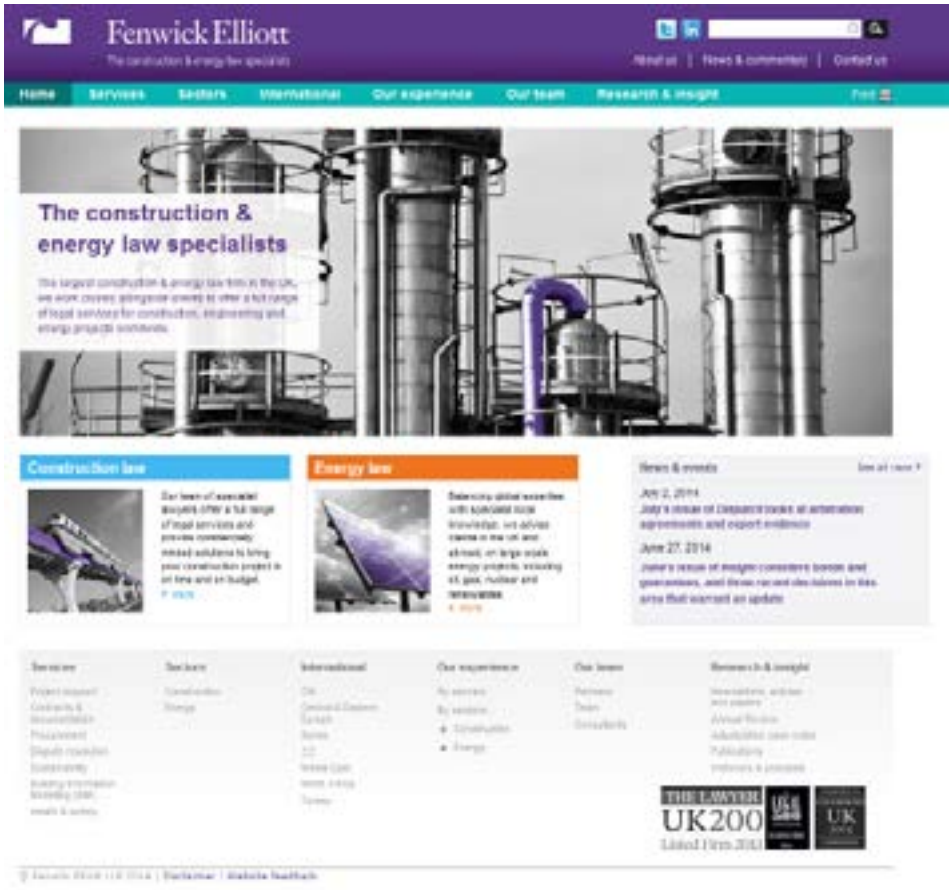
We are busy planning our series of Autumn events which includes our Annual Construction Law Update seminar on 06 November 2014, a BIM breakfast seminar 25 November 2014 and a BIM webinar 13 November 2014. If you would like to attend these seminars or to receive a copy of any presentations or papers presented please contact skirby@fenwickelliott.com

FIDIC International Contractors' Users Conference 2014

We are also delighted to confirm once again our support of the 27th Annual FIDIC International Contractors' Users conference 2014 to be held in London on 2-3 December. Partners Jeremy Glover and Nicholas Gould will provide an update on Time Bar application under civil and common law perspectives. If you would like to attend this conference please contact jglover@fenwickelliott.com as we can offer you a discount of 30% off the delegate registration fee.

Fenwick Elliott website

We would like to remind you that our website www.fenwickelliott.com is a valuable source to keep you up to date with the latest developments and debates in construction and energy law. Go to http://www.fenwickelliott.com/research-insight to access our latest newsletters and articles + papers. Fenwick Elliott team members are regularly asked by leading legal sector organisations to participate in webinars & podcasts to share their knowledge and expertise and provide updates on topical legal issues. Our new Webinars & podcasts page is now live on our website http://www.fenwickelliott.com/research-insight/webinars-podcasts



About the editor, Jeremy Glover

Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both in the UK and abroad, from initial procurement to where necessary dispute avoidance and resolution. Jeremy organises and regularly addresses Fenwick Elliott hosted seminars and provides bespoke in-house training to clients. He also edits Fenwick Elliott's monthly legal bulletin, *Dispatch*.

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

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