CONSTRUCTION BULLETIN
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Welcome to the September 2021 edition of our Construction Bulletin.

In this edition we cover a broad range of recent developments in international construction law, as follows:

- One Arbitration for Multiple Contracts: An Overlooked Tool?
- Can You Limit Liability for Deliberate Breach?
- Maintaining Momentum when the Money Stops
- Hong Kong to Introduce SOP Provisions in Government Contracts

The inside back page of this bulletin contains a listing of team news and webinars at which the members of the construction team will be speaking over the upcoming months.

Michael Sergeant, Partner
michael.sergeant@hfw.com

Joanne Button, Senior Associate
joanne.button@hfw.com

JO DELANEY
PARTNER, SYDNEY

"It is worthwhile considering whether there are any costs and time benefits to commencing one arbitration rather than later applying for consolidation of two or more arbitrations."

ONE ARBITRATION FOR MULTIPLE CONTRACTS: AN OVERLOOKED TOOL?

Many projects involve multiple parties with multiple contracts. Parties may agree to an umbrella dispute resolution clause to enable a "one stop shop" or at least promote a more time and cost effective regime to resolve disputes. However, it is more common that each contract contains its own dispute resolution clause, which may refer disputes to expert determination, arbitration or the courts.

Arbitral institutions have sought to provide a more efficient and effective mechanism to resolve disputes involving multiple parties and/or multiple contracts. Joinder and consolidation provisions are now prevalent in all major arbitral rules.

Another tool now commonly available, but perhaps not often used, allows a claimant to commence one arbitration for claims under multiple contracts. For example, the claimant may bring multiple claims against one respondent under separate contracts which contain the same or similar arbitration agreements. Other cases may be more complex or difficult to address, especially where there are different parties as well as different contracts.

The ICC was the first arbitral institution to introduce this mechanism in 2012, followed by SIAC in 2016 and the HKIAC in 2018. More recently, the LCIA in 2020 and ACICA in 2021 have both introduced new provisions allowing for multi-contract arbitrations and expanded their provisions relating to consolidation or concurrent hearings.

The institutions have adopted similar approaches to determining whether such an arbitration should proceed, which involves consideration of the criteria for consolidating arbitrations. The criteria commonly considered is whether the parties have agreed to consolidation; whether the claims are made under the same arbitration agreement; or whether the claims are made under arbitration agreements that are compatible and that relating to the same legal relationship or transaction or a series of transactions.

Summary of arbitral rules:

- **ICC Rules 2021:** a claimant(s) may commence one arbitration relating to claims arising out of more than one contract (Article 9). The ICC Court must be prima facie satisfied that the arbitration agreements are compatible and all the parties to the arbitration have agreed that the claims be determined in a single arbitration (Article 6(4)).
- **SIAC Rules 2016:** a claimant may file multiple notices of arbitration and request consolidation under Article 8 or one single notice of arbitration and demonstrate that the criteria for consolidation in Article 8 are satisfied (Article 6).
- **HKIAC Rules 2018:** claims relating to multiple contracts may be made in one arbitration provided there is a common question of law or fact, the rights to relief claimed arise out of the same or a series of transactions and the arbitration agreements are compatible (Article 29).
- **LCIA Rules 2020:** a claimant may serve a composite request of more than one arbitration (Article 1.2). Article 22A provides for consolidation of arbitrations and for the concurrent hearing of two or more arbitrations by the same arbitral tribunal.
- **ACICA Rules 2021:** a claimant may file one notice of arbitration in respect of two or more arbitration agreements and an application for consolidation to be decided by ACICA (Article 18).

It is worthwhile considering when commencing an arbitration involving multiple parties and/or multiple contracts, whether there are any costs and time benefits to commencing one arbitration rather than later applying for consolidation of two or more arbitrations.

JO DELANEY
Partner, Sydney
T +61 (0)2 9320 4621
E jo.delaney@hfw.com

CAN YOU LIMIT LIABILITY FOR DELIBERATE BREACH?

In short, yes. However, there is conflicting authority on whether special rules of interpretation apply to clauses seeking to exclude or limit liability for deliberate breach. The recent case of Mott MacDonald Ltd v Trant Engineering Ltd[1] has provided helpful guidance on the interpretation of these clauses.

Case Background

The Claimant provided engineering consultancy services to the Defendant in connection with a project for the Ministry of Defence to construct a new power station on the Falkland Islands.

The Contract between the Parties contained clauses generally limiting the Claimant's liability to the Defendant up to a capped amount in the event of a breach (the 'Limitation Clauses').

The Defendant claimed that the Claimant *"deliberately, and wilfully breached its obligations"* and should therefore be unable to rely on the Limitation Clauses. The Defendant argued that there is a legal presumption against clauses precluding liability for a deliberate breach of contract that could only be rebutted by strong language, which the Limitation Clauses did not contain.

Conversely, the Claimant argued that the Limitation Clauses should be construed in accordance with normal principles of contractual interpretation. Given the Contract contained general wording capping liability, the Claimant argued the Parties intended to exclude any liability above that cap and that it should be able to rely on the Limitation Clauses no matter what type of breach occurred.

The Claimant applied for summary judgment on the issue of whether a deliberate breach fell within the scope of the Limitation Clauses. This case demonstrates the utility of summary judgments as a procedural tool for litigants to limit the scope of disputes and pressurise opponents at an early stage.

The Decision

Judge Eyre determined that the starting point to interpreting limitation clauses comes from a House of Lords decision,[2] which found that such clauses should be read using the general of rules contractual interpretation. Judge Eyre therefore decided that the Limitation Clauses in the Contract did apply to deliberate breaches, as the clause was sufficiently clear to cover any breach whether deliberate or otherwise.

Key Takeaways

- There is still some debate around this issue, but the current trend appears to be that clauses limiting or excluding liability should be interpreted using the general rules of contract interpretation. Interestingly, English law takes a different position from some other jurisdictions.[3]
- Take care when agreeing exclusions or limitations on liability; in this case, the Claimant's liability was limited to the cap in the Contract, which was about 10% of the losses allegedly suffered by the Defendant.
- Consider whether an agreed liability cap is aligned with the losses a party could suffer as a result of a deliberate breach of contract or agree an exclusion clause that is narrower in scope and which expressly carves out (from the exclusion) liability arising as a result of deliberate breach and/or wilful misconduct.

ROXANNE LANGFORD
ASSOCIATE, LONDON

"Consider whether an agreed liability cap is aligned with the losses a party could suffer as a result of a deliberate breach of contract."

ROXANNE LANGFORD
Associate, London
T +44 (0)20 7264 8475
E roxanne.langford@hfw.com

1 [2021] EWHC 754 (TCC)
2 Photo Production v Securicor Transport [1980] A.C. 827
3 There is a European tradition preventing parties from limiting their liability where they have deliberately breached a contract; e.g. Art.1231-3 of the French Code denies protection against certain losses where the breach is *"due à une faute lourde ou dolosive"*.

MARIA DEUS
LEGAL DIRECTOR, ABU DHABI

"It is usually possible for the parties to find alternative payment mechanisms to maintain project cash flow and keep the works progressing, when the main contractor suffers financial difficulty."

MAINTAINING MOMENTUM WHEN THE MONEY STOPS

A common and problematic issue in contracting in the Middle East is the failure of a main contractor to pay its subcontractors due to cash flow issues or worse, due to bankruptcy or liquidation of the main contractor.

When payment by the main contractor stops, the impact is felt throughout the contractual chain. It delays the completion of the project, potentially setting the employer up for considerable economic loss, and it puts subcontractors under onerous financial pressure, leaving them without payment for completed subcontract works.

The civil codes of many Middle Eastern jurisdictions are strongly influenced by the Egyptian Civil Code, which in turn was influenced by the older French Napoleonic civil law tradition.

One particular French Civil Code principle, under which subcontracted labourers are entitled to claim payment directly from employers, can be perceived in the civil codes of Bahrain, Qatar and Kuwait which confer the same right on labourers and extend such right even further by conferring it on subcontractors, also.

For example, Article 702 of the Qatar Civil Code provides:

"1. The subcontractor and the workers working for the original contractor for carrying out the work shall have the right to claim directly from the employer the payment of not more than the amount for which he is indebted to the original contractor from the time of initiating the action. The workers of the subcontractors shall have a similar right towards both of the original contractor and the employer".

However, the position is not the same under the laws of UAE and Oman,[1] which both provide that subcontractors cannot make such direct claims against the employer for payments due from the main contractor, unless the main contractor has validly assigned such right to the subcontractor.

For example, Article 891 of the UAE Civil Code provides:

"The subcontractor may not have a claim against the master, as regards the dues of the first contractor, unless the latter refers him to the master".

Assignment of the Right to Payment

It is unusual to find provision for such assignments within subcontracts in UAE and Oman, and even where such provision does exist in a subcontract, it is unlikely to be expressed with sufficient clarity to effect a valid transfer to the subcontractor of a right to direct payment from the employer.

In a case considering the validity of a purported assignment of a right to payment, the UAE Federal Supreme Court held that a high level of certainty was required to effect a valid assignment. In this particular case, the court deemed that the purported assignment lacked sufficient certainty as it did not expressly particularise the status of the relevant works, the specific amounts due from the main contractor or the name of the employer against whom the assigned right was to be claimed.[2]

Similarly in a Dubai Court of Cassation case[3] relating to the assignment of a debt, the court held that in order for the assignment to be valid, the requirements of Article 1113 of the UAE Civil Code, which require that the scope of the transferred right and fixed debt be certain and identifiable, must be met.

Furthermore, while some UAE courts have held that the consent of the obligor (i.e. the employer for the purposes of this article) is not required to effect a valid assignment and all that is required is for the obligor to be notified of the assignment,[4] other UAE courts have taken a stricter approach and have held that the consent of the obligor is required for a valid assignment of a debt, in accordance with Article 1109(1) of the UAE Civil Code.[5]

Direct Payment Arrangements

Increasingly, in circumstances where the main contractor is still present on site and willing to continue management of the subcontracting teams, our team is encountering employers who are proposing to make direct payments to subcontractors. Employers tend to suggest such direct payment as a practical solution to maintain progress and get projects *"over the line"* where the subcontract works are critical to the timely completion of a project or where a particular subcontractor is providing specialist equipment that is critical to a project, and the employer wants to ensure such specialist works are completed.

However, employers wishing to pursue this course of action must be aware that by doing so, they potentially expose themselves to greater liability and a heightened risk of claims from the subcontractor, which risks would normally be borne by the main contractor.

Accordingly, employers wishing to make such direct payments to subcontractors are strongly advised to seek legal advice first and to formalise such arrangements legally by entering into tri-partite agreements (drafted by their lawyers) with the respective subcontractors and the main contractor.

Such agreements can include provisions effecting legal variation of the terms of the main contract and the respective subcontracts, so that the employer is granted an express right to make direct payments to respective subcontractors, in lieu of the main contractor.

Under such direct payment agreements, the employer should consider including provisions to ensure that its liability to the subcontractor is limited solely to payments due for completed subcontract work, in order to avoid exposure to liability for any other direct claims from the subcontractor, such as claims for extension of time and/or disruption and associated costs.

Also, the employer may require an indemnity from the main contractor to be included in the direct payment agreement, in order to indemnify the employer against claims by the subcontractor due to the main contractor's failure to make the payment to the subcontractor e.g. in respect of claims for extension of time and associated costs due to prior delays caused by the subcontractor's inability to pay for labour or materials.

Further, the direct payment agreement should expressly provide that the employer is entitled to withhold or deduct payments made to the subcontractor from monies due and payable to the main contractor under the main contract and it should incorporate a provision enabling the employer to effect valid termination of the agreement at any time.

Given the financial insecurity of the main contractor, it may also be prudent for the direct payment agreement to include a right for the employer to step into the role of the main contractor under the subcontract in the event of termination of the main contract or the bankruptcy or insolvency of the main contractor.

It is worth noting that some standard form contacts such as the FIDIC Conditions provide an option for an employer to make direct payments to subcontractors who have been nominated or selected by the employer, if the main contractor is not making such payments, and to deduct such payments from sums due to the main contractor.[6]

Indirect Claims

In circumstances where a main contractor is subject to bankruptcy proceedings and is deliberately failing to pursue the employer for payment due under the main contract, which is owed to the subcontractor, in order to procure or increase his bankruptcy, then UAE law gives the subcontractor the power to commence court proceedings to make an indirect claim against the employer, for the payment due to it under the subcontract.[7]

In conclusion, on projects where all parties within the contractual chain maintain good and open communication, it is usually possible for the parties to find alternative payment mechanisms to maintain project cash flow and keep the works progressing, when the main contractor suffers financial difficulty.

However, such measures represent variations to the contracts between the various parties and also impact the allocation of risk in such contracts. Accordingly, parties are advised to record such measures and confirm associated acceptances or exclusions of liability, in formal agreements, which have been reviewed before execution by the parties' legal and commercial advisors, to ensure that the parties are fully aware of the impacts of such new measures upon their commercial and legal risk profile.

MARIA DEUS
Legal Director, Abu Dhabi
T +971 2 235 4907
E maria.deus@hfw.com

1 UAE Civil Code Art 891 and Omani Civil Code Art 645
2 Federal Supreme Court No. 33/15 dated 26 June 1994
3 Dubai Court of Cassation Case No. 188/2006 issued on 13 March 2007
4 For example, in Dubai Court of Cassation Case No. 34/1999 issued on 1 May 1999
5 For example, Dubai Court of Cassation Case No. 188/2006 issued on 13 March 2007
6 For example see clause 5.4(b) of the FIDIC Red Book Conditions of Contract 1999
7 UAE Civil Code Arts. 392 and 393

KELVIN LO
REGISTERED FOREIGN LAWYER (NEW SOUTH WALES, AUSTRALIA), HONG KONG

"Industry participants should start evaluating and understanding the commercial effect of the provisions for projects in Hong Kong."

HONG KONG TO INTRODUCE SOP PROVISIONS IN GOVERNMENT CONTRACTS

Hong Kong has taken the first substantive step towards introducing security of payment ("SOP") measures, however the planned legislative scheme will be introduced as additional contract clauses in certain categories of Government contracts, as a pilot scheme, rather than via legislation.

Various common law jurisdictions already have similar legislation in place, with an aim to improve the efficiency and sustainability of the construction ecosphere. It is achieved partly by providing the aggrieved party with statutory rights to payment and by facilitating statutory dispute resolution through a quasi-judicial process (adjudication). Based on experience in other jurisdictions, the measures should reduce the disruption to working capital within the supply chain when disputes arise and address the inherent problem of insufficient cash flow on construction projects.

These are important changes that all international and domestic contractors should be aware of when tendering for new public works contracts in Hong Kong, effective from the second half of 2021.

Implications

Main contractors tendering for new construction contracts for public works will soon find themselves contractually bound by additional SOP provisions incorporated into the Additional Conditions or Special Conditions of Government Contracts. It will also be mandatory for main contractors to incorporate the same contractual provisions into their sub-contracts.

Deployment of the new SOP provisions is currently limited to public works contracts issued by the Government and will not apply to contracts with statutory bodies or government-owned entities. There will be some uncertainty surrounding the effect of the new contractual scheme on EOT claims since the official circular published by the government authorises adjudicators to make binding decisions on cost claims and non-binding decisions on EOT claims, yet EOT claims are not addressed in the SOP provisions.

Key Elements of the New SOP Provisions include:

- Within 30 days of a payment claim, the payer must serve a response indicating the amount due, the amount under dispute, and also the net amount agreed to be paid. The amount admitted by the payer shall be paid within 60 days of receiving the payment claim.
- Within 28 days of a dispute arising out of a payment claim, the claimant may submit the dispute to adjudication. The adjudicator shall have 55 days from the date of his appointment to make a decision. If the adjudicator determines that a sum is due from one party to another, the amount shall be paid within 30 days of the decision.
- Any conditional payment provisions included in the contract shall be ineffective and unenforceable.
- Materials submitted for a payment claim should be prepared vigilantly to include all essential information, since they may be subsequently used to establish the claim if a payment dispute is referred to adjudication.
- Claimant has a contractual right to reduce the rate of progress or even suspend its work if an admitted or adjudicated amount is not received by the due date, in addition to the right to apply to the Courts to enforce an adjudicator's decision.

Conclusion

The new SOP provisions in public works contracts are intended to allow the industry to experience and familiarise themselves with the new regime before full enactment of the legislation. Although the new provisions do not apply to every construction project at present, industry participants should start evaluating and understanding the commercial effect of the provisions for projects in Hong Kong in the near future.

KELVIN LO
Registered Foreign Lawyer
(New South Wales, Australia),
Hong Kong
T +852 3983 7687
E kelvin.lo@hfw.com

Upcoming Events & Webinars:

ICC Australia: New Updates from the ICC International Court of Arbitration
A New President, New Arbitral Rules and the 2020 ICC Dispute Resolution Statistics
2 September (5.00 pm AEST)
Speakers: Jo Delaney

Lighthouse Club Australia
The Missing Link – Funding Budgets, Cost Estimates and Project Schedules
9 September (5:00pm AEST)
Speakers: Nick Longley

Construction Law Summer School
Cambridge, UK
13 - 17 September
Speakers: Michael Sergeant, Ben Mellors

HFW International Construction Arbitration Webinar Series
New Arbitral Rules: Key Changes made to "Modernise/ Adjust/Adapt" Arbitration
7 October
Speakers: Nick Longley, Jo Delaney, Ben Mellors

HFW Webinar for EPC Korean Contractors
Variations to Construction Contracts in the Middle East
13 October (7:00am – 8:00am GMT)
Speakers: Max Wieliczko, Maria Deus, James Plant

Australian Arbitration Week
Work of the ICC Court of Arbitration and the ICC Commission on Arbitration and ADR
21 October (3:00pm AEST)
Speakers: Jo Delaney

Hong Kong Arbitration Week
Staying on Track for a Successful Arbitration Process
25 October (4:00 - 5:30pm HKT)
Speakers: Ben Bury, Peter Murphy

RenewableUK Legal & Commercial Conference
19 November
Speakers: Richard Booth, Joanne Button

17th Annual Australian Tunnelling Conference, Sydney
Design Liability
29 - 30 November
Speakers: Nick Longley

Our recent team news:

We have boosted our global construction international arbitration practice with the hire of partner Jo Delaney. Jo is an internationally-recognised disputes expert – ranked in Band 1 in legal directory Chambers – with significant experience in commercial, construction and investment treaty arbitrations and joins our Sydney office.

Jo has conducted arbitrations under all major arbitration rules, including the ICC, LCIA, SIAC, AAA, UNCITRAL, PCA and ICSID Arbitration rules. She is one of Australia's two members to the ICC Court of Arbitration, and is also a member of the ACICA Practice and Procedures Board, and the CIArb Practice and Standards Committee.

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