William Howard, President of FIDIC, and Claudia Salomon, the President elect of the ICC Court of Arbitration

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Recent updates on the ICC court of arbitration

1. The ICC received a record-breaking number of requests to use its arbitration and alternative dispute resolution service in the year 2020:

    - The ICC court of arbitration handled 946 cases in 2020, the most recorded since 2016, whilst the ICC International Centre for ADR handled 77 cases in 2020.

    - The ICC's success is due to its ability to quickly adapt to the lockdowns imposed in countries across the world. This included improving the technology in its hearing centre and utilising online services to connect to its members and those who use the ICC.

    - The incumbent president of the ICC Court, Alexis Mourre, commented that "O*ur arbitration results for 2020 are testament to the Court's standing as the world's leading and most preferred arbitral institution in a competitive environment. Our success in this context can be put down to close to a century of experience and an ability to support users with a range of services – particularly for large, complex, multi-party and multi-contracts cases – and the continuous increase of the time and costs efficiency of the Court, notably in cases where lower amounts in disputes are involved."*
    - To find out more, please visit https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/

2. The ICC and Africa Investor are collaborating in order to launch a scheme that will enable the digitalisation of 5 million Small and Medium-sized Enterprises in Africa.

    - The scheme will involve a range of companies, media organisations, chambers of commerce and other organisations providing the apparatus, training and access to the SMEs' target market in order to facilitate the digitalisation of these businesses;

    - The scheme will help these SMEs to contact and connect with business opportunities in other parts of the continent and provides a great opportunity for growth of these businesses;

    - The ICC Secretary General, John W.H. Denton, who is leading the initiative alongside the chairman of Africa investor commented that "*We are extremely proud to announce ICC's partnership with Africa investor (Ai) to digitise five million SMEs in Africa. In the face of persisting the economic consequences of COVID-19, it's critical that African governments, businesses, chambers of commerce, and regional organisations unite to maximise the benefits of the digital economy for all. From women- and youth-led businesses to local start-ups and entrepreneurs, this campaign will enable all SMEs in Africa to grow sustainably, reach new markets, and build back better from the pandemic.*"

    - To find out more, please visit https://iccwbo.org/media-wall/news-speeches/icc-and-africa-investor-launch-global-etrade-partnership-to-digitise-five-million-smes-in-africa/

3. The ICC Court launches its 5th case management office aboard in Abu Dhabi, in the Abu Dhabi Global Market

    - The centre will be used for a variety of activities, including arbitration hearings, dispute resolution services workshops, ICC Young Arbitrator Forum events, and others;

- The United Arab Emirates was deemed a highly viable candidate to open a case management centre in as it has been in the top 10 countries in terms of participants involved in ICC arbitration proceedings. The wider Middle East and North Africa region in 2019 had 310 parties from its region involved in proceedings under the ICC Arbitration Rules;

- The ICC Court's president, Alexis Mourre, commented that "*The setting up of the ICC Court's office in ADGM will create an extraordinary platform for the development of our offering in the region. The new case management office will contribute to the development of ADGM's reputation by offering dispute resolution services of the highest standards to users in the region and beyond. I look forward to this new collaboration that will strengthen the ICC Court's position as a preferred institution in the region.*"

- To find out more, please visit https://iccwbo.org/media-wall/news-speeches/icc-court-to-open-5th-overseas-case-management-office-in-abu-dhabi-global-market/

4. The ICC Court has released updates to its Note in preparation for the release of the 2021 ICC Arbitration Rules:

    - The Note incorporates the guidance issued by the ICC Court in April 2020 in respect of how to mitigate the effects of the COVID-19 pandemic and confirms that tribunals may, after deliberating on it with the parties, hold a hearing remotely;

    - The note also details that the ICC's administrative expenses will be subject to French Value Added Tax where appropriate;

    - To find out more, please visit https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/

5. The ICC released its updated Rules of Arbitration on 1 January 2021:

    - Updates to the rules in the new revision include allowing the joinder of other parties during the course of the proceedings (Article 7(5)); the requirement for a party to reveal any third-party funding arrangements (article 11(7)); ensuring that any proceedings that may relate to the public interest are deemed completely neutral by ensuring that no arbitrators hearing the matter are from the same country as the parties to the matter (Article 13(6)).

    - This is the first revision of the rules since 2017.

    - The President of the ICC Court, Alexis Moore, commented that *"The amendments to the Rules … mark a further step towards greater efficiency, flexibility and transparency of the Rules, making ICC Arbitration even more attractive, both for large, complex arbitrations and for smaller cases."*

    - For more information, please visit https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/ and https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

Recent updates on the Fédération Internationale Des Ingénieurs-Conseils (FIDIC)

1. FIDIC announces the winner of the FIDIC Contract Awards 2020:

    - The winners of the awards included:

- The British Normandy Memorial (winner of Project of the Year Award) – The memorial can be found at Ver-sur-Mer, Normandy, France and commemorates the soldiers from Britain and 38 other countries who fought during the Normandy campaign in the Second World War.

- Taner Dedezade (winner of Trainer of the Year) – Mr Dedezade has provided FIDIC training all over the world for the last ten years and has provided training for government departments and large international contractors.

- White & Case LLP (winner of Legal or Professional Services of the Year Award) – Mr Ellis Baker of the firm is one of the leading legal authorities on FIDIC and is the lead author of the book 'FIDIC Contracts: Law and Practice'.

- To find out more, please visit https://fidic.org/node/31012

2. FIDIC took part in marking the UN's International Anti-Corruption Day by hosting a webinar on 9 December 2020 titled the "Recovery with integrity" webinar:

    - Mr Bill Howard opened up the event by expressing his pleasure at how FIDIC have been able to continue and expand its programme of online webinars.

    - Attendees included Hamid Sharif from the Asian Infrastructure Investment Bank in China, Julianna Fox from WSP Global Inc in Canada and Petter Matthews from CoST in the UK.

    - Mr James Mwangi discussed how the use of technology will improve the fight against corruption and will highlight corruption because of the exposure it provides.

    - Julianna Fox mentioned her concerns that countries may try to speed up their construction projects, probably as a result of stagnation due to the effects of COVID-19, and how this may mean corrupt practices may flourish in the future.

    - Mr Nelson Ogunshakin commented that *"Having a UN Anti-Corruption Day is a great initiative, but we also need to be ever vigilant and work tirelessly all year round to raise awareness of the scourge of corruption. Corruption has no place in the infrastructure sector or anywhere else and FIDIC is proud to be playing its part in rooting it out"*.

    - To find out more, please visit https://fidic.org/node/31093

For more updates on FIDIC in 2020, please review the handout we produced for the FIDIC webinar in November 2020. This can be found at https://www.bartonlegal.com/site/webinars/notes-video-fidic

Recent updates on the New Engineering Contracts (NEC)

1. NEC publishes a second set of amendments to its NEC4 suite of contracts:

    - Notably, the set of amendments included option Y(UK)2 on payments, which can be used when the Housing Grants, Construction and Regeneration Act 1996 applies to the project.

    - The amendment was in response to the case of *Rochford Construction Ltd v. Kilhan Construction Ltd [2020] EWHC 941 (TCC)* which found that a sub-contractor's payment provisions in its contract were not compliant with the Housing Grants, Construction and Regeneration Act 1996.

- The new secondary option Y(UK)2 is aimed at providing certainty in respect of payment provisions under a construction contract and means that the final date for payment will be 7 days after the due date. It also means that a Pay Less Notice must be served on the due date for payment.

- To find out more, please visit https://www.neccontract.com/About-NEC/News-and-Media/Why-clause-Y-UK-2-was-changed-in-the-October-2020-amendments-to-NEC4

2. NEC contracted projects have done well at the British Construction Industry Awards 2020:

   - NEC-procured projects won 3 of the 8 awards presented by the Awards ceremony in November 2020.

   - The Climate Resilience Project of the Year award went to the Bacton to Walcott coastal management project. This is a £20 million sandscaping project in Norfolk, England between the North Norfolk District Council, Shell and Perenco using the Engineering and Construction Contract (ECC) Option C.

   - The Cultural and Leisure Project of the Year went to the Wave in Bristol, the England's first artificial surfing lake. The project used the ECC Option A.

   - The award for Utility Project of the Year went to the Morecambe Catchment Strategy in Morecambe, England. The £52 million project has helped reduce storm overflows in Morecambe Bay.

   - To find out more, please visit https://www.neccontract.com/About-NEC/News-and-Media/NEC-projects-again-shine-at-2020-s-online-British-Construction-Industry-Awards

3. The NEC releases new NEC4 facilities management forms of contract:

   - The NEC and Institute of Workplace and Facilities Management have collaborated to create the NEC4 Facilities Management Contract and NEC4 Facilities Management Subcontract.

   - The release of the contracts was in response to concerns amongst the facilities management sector that the NEC4 Term Service Contract and its short and subcontract versions were not appropriate for the work they did.

   - The suite is due to be launched on 26 January 2021, the launch will be accompanied by a joint webinar between the NEC and Workplace and Facilities Management to discuss the key provisions and procedures within the contracts and why they should be used by the Facilities Management industry. The webinar will be at 1pm (GMT) on 26 January 2021.

   - To find out more, please visit https://www.neccontract.com/About-NEC/News-and-Media/NEC-launches-new-NEC4-facilities-management-forms

4. NEC announces that the new, modern Wigan Bus Station was built using NEC3 ECC Option A:

   - The project was completed two months early and was within the allocated budget between Transport for Greater Manchester (TGM) and Vinci.

   - TGM commented that the use of the NEC3 ECC Option A allowed them to produce accurate cost and schedule forecasts and also encouraged a spirit of cooperation between the Client and Contractor.

- TGM also commented that the contract enabled improved communications and relationships, allowing decisions to made quickly and easily.
- The project is a testament to the ECC's ability to ensure projects are done effectively and efficiently on important developments such as this.
- To find out more, please visit https://www.neccontract.com/About-NEC/News-and-Media/Transport-for-Greater-Manchester-procures-new-Wigan-bus-station-with-ECC-Option

Case law update

Hochtief Solutions AG v Maspero Elevatori S.p.A [2020] CSOH 102

Hochtief formed an unincorporated joint venture called 'Forth Crossing Bridge Constructors' (FCBC).

FCBC entered into a sub-contract with Maspero to design, manufacture and install lifts at the Forth Replacement Crossing.

Disputes arose between the parties and in July 2018 the parties came to an arrangement covering Maspero's ongoing performance. Disputes continued despite the agreement and in November 2018 FCBC gave notice to terminate the sub-contract.

Maspero contested the termination of the sub-contract on the basis that the adjudicator had 'exceeded his jurisdiction' as the dispute now fell outside of the sub-contract and instead under the new agreement reached in July 2018.

They also argued that the adjudicator had 'failed to exhaust' his jurisdiction by failing to address the defences posited by Maspero.

FCBC argued that their claim fell within clause 12.3.1(c) of the sub-contract which entitled them to payment where works were required to be completed or corrected following termination.

Maspero argued that FCBC's claim fell outside of this clause as they were claiming for negligent design which was not applicable under this clause. The adjudicator was required to consider this defence as the sums claimed by FCBC exceeded the sub-contract sum.

➔ The outer house of the Court of Session found that Maspero never expressly stated within the July agreement that an adjudicator did not have jurisdiction to address this point and there was nothing to suggest this would affect the ongoing adjudication. Therefore, Maspero's first argument failed.

➔ The court rejected Maspero's argument and concluded that '*clause 12.3.1(c) permitted recovery, including the costs of re-design, on the grounds identified',* therefore the claim based on negligent design fell within this clause.

Issues of design were also relevant when considering this issue of mitigation of loss.

Sainsbury's Supermarkets Ltd v Ryan Jayberg Ltd [2020] EWHC 3404 (TCC)

SSL entered into a Framework Agreement with RJL for RJL to provide refrigeration systems. The refrigeration systems provided by RJL use carbon dioxide and require "external heat rejection cooler devices ("the CO_2 Units") to cool the refrigerant".

SSL brought a claim against RJL for negligence and breach of contract.

It was SSL's case that between 2010-2014 RJL supplied and/or installed new carbon dioxide refrigeration systems at 78/79 of its supermarket stores. From 2014 it was found that the CO2 Units had suffered corrosion and a number were replaced.

SSL alleged the corrosion was caused by RJL's breach of contract and/or negligence when providing advice in respect to installation.

RJL served its defence on 18 July 2019 and argued that it was not engaged to design or advise on the CO_2 Units but only to install and supply them. There was no such requirement in the specification for a minimum service life.

In September 2019, SSL served proposed Amended Particulars of Claim. SSL's original case claimed breach of contract and/or negligence and in the amended POC they alleged breaches of statutory duty.

RJL refused to allow the amended particulars on the basis SSL had sought to add a new claim after expiry of the limitation period.

SSL issued an application seeking to rely on the amended POC in on 2 June 2020 pleading pursuant to CPR 17.1 and/or 17.4.

- ➔ The court found that parts of a SSL's proposed amendments could not be permitted as they constituted a new claim which "*did not arise out of the same, or substantially the same, facts and matters already pleaded, outside the limitation period*".

<u>D McLaughlin & Sons Limited v East Ayrshire Council [2020] CSOH 109</u>

DM&SL was a contractor employed by EAC to carry out construction to Hurlford Primary School, East Ayrshire. A dispute was referred to adjudication.

DM&SL sought to enforce the adjudicator's award but EAC challenged the adjudicator's decision contending that the adjudicator made errors in judgment.

EAC argued that the Final Certificate is conclusive evidence in the adjudication and the adjudicator erred by failing to treat it as such.

In Scotland, errors of law or fact by the adjudicator do not permit a challenge to enforcement (only issues around jurisdiction and natural justice). However, EAC sought to rely on an English authority to the extent that there are limited exceptions that do allow an adjudicator's decision to be challenged because of an error of fact or law. The courts of Scotland should follow suit as this was a circumstance where the adjudicator's decision should not be enforced.

- ➔ The Court found that in principle it is permissible for '*an unsuccessful party to adjudication to seek final determination of the dispute during enforcement proceedings in the Scottish courts'* but warned that the circumstances where this approach is suitable would be 'few and far between'. *'Whether any issue was suitable for final determination at the enforcement stage would be a matter for the relevant judge.'*
- ➔ It was held that EAC's case does not fall within such an exception.

<u>Rochford Construction Ltd v Kilhan Construction Ltd</u> <u>[2020] EWHC 941 (TCC)</u>

The Sub-contract at the centre of the dispute stated that *"Works are lump sum ... [the claimant] will issue activity schedule to [the defendant], application date end of month ... valuations monthly as per attached payment schedule end of month. Payment terms thirty days from invoice as per attached payment schedule. S/C payment cert must be issued with invoice"*. The payment schedule referred to was never produced.

One of the key points of the dispute was whether the interim payment provisions of the sub-contract complied with the Housing Grants, Construction and Regeneration Act 1996 and whether or not the Scheme for Construction Contracts should apply.

The claimant argued that the use of the term 'end of month' made it clear that a payment application had to be issued on the last day of the month.

The Court held:

1. In relation to the due date for the payment application:
    a. The term 'end of month' was too ambiguous to say it meant the last day of the month;
    b. The facts of the case did not make it clear what the term 'end of month' meant;
    c. The other contract provisions were not written in this way;
    d. The 'end of month' should be construed as meaning when the time period started to make an application, in the interest of fairness and contractual certainty. The court also observed that the defendant had made claims after the end of the month;
    e. The above factors meant that the scheme had to apply as the payment provisions were uncertain.
2. The final date for payment:
    a. As the payment terms were uncertain, due to a lack of payment schedule and the fact the terms of the contract were not being adhered to (may be because of their uncertainty), the Scheme had to take force and override these terms in respect of the final date for payment.

Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc., No. 407A19, 2020 WL 7415061, at *1 (N.C. Dec. 18, 2020).

Crescent was the developer of a project to construct student apartment buildings at the University of North Carolina in Charlotte, NC, USA.

Crescent contracted with AP Atlantic who were the general contractor. AP Atlantic contracted with Madison, the framing subcontractor who subcontracted with Trussway, the floor truss manager.

When students began to occupy the buildings the floors in a number of apartments started to sag, which was found to be because of defective floor trusses.

Crescent hired another contractor to repair the defective floor trusses incurring large repair costs and needed to pay for alternative accommodation for the displaced students.

This led to 3 separate lawsuits:

1. AP Atlantic claimed against Crescent for their failure to pay;

2. Crescent claimed against AP Atlantic's parent corporation for damages for the defective floor trusses; and

3. Crescent later sued Trussway for negligence by supplying and manufacturing defective trusses.

Judgment for the negligence case against Trussway:

The North Carolina Supreme Court held that Crescent could not bring a negligence claim which was based on purely economic loss as it was actually a contractual claim. Crescent and Trussway did not have a contract so were not in contractual privity with each other.

The court confirmed that the 'economic loss rule' as established in the *Ports Authority* case requires that a plaintiff's claim fall under one of the four exceptions, which were not present here. Alternatively, a claim can be based on violation of an extra-contractual duty under law which is separate from duties owned under the contract.

Claims for failure to perform duties under a contract cannot be brought in negligence and can be brought as a contractual claim.

This case indicates that project owners and commercial developers should limit their cause of action against contractors and subcontractors to breach of contract claims.

The other 2 cases were not resolved by this judgment.

Another lesson from this case is that Developers must ensure they have some form of contract with all the parties to a project.

Maeda Corporation and China State Construction Engineering (Hong Kong) Limited v Bauer Hong Kong Limited

This dispute was concerned with the 'time-bar' provisions that are found in many EPC contracts, particularly clause 20.2.4 of the second edition of the FIDIC Silver Book.

The subcontractor, in its time bar notice, stated a different contractual reason for its claim than the one it brought in arbitration.

The Court of Appeal in Hong Kong held that a sub-contractor cannot bring a claim to arbitration if the sub-contractor did not bring this claim to the attention of the other party to the contract in its time bar notice. The court held that such notices need to be definitive about the reason for bringing the claim and cannot be broad and ambiguous about the reason(s) for the claim.

The court held that the "*wording of Clause 21.2.1 is clear and unambiguous. Within the stipulated time, the Subcontractor is required to give notice of the contractual basis, not any possible contractual basis which may turn out not to be the correct basis*". The court also held that to allow a party not to abide by the reason it gave in its time bar notice when bringing a claim to arbitration "*would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line*".

Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd [2019] CSOH 110

The parties entered into a contract for HS Barrier to carry out re-preservation of shiplift docking cradles at HM Naval Base Clyde.

The contract incorporated the NEC3 Engineering and Construction Short Contract (June 2005) with bespoke Z clause amendments.

After the works commenced, a number of disagreements arose as to the amount of progress made and an adjudicator was appointed.

The adjudicator confirmed his appointment and enclosed a "Terms and Conditions of Appointment" which at paragraph 14 stated "If I require quantity surveying input during the Adjudication I will utilise the resources of [...]. This matter is at my absolute discretion and I will not require the consent of the parties."

The adjudicator's decision was issued and a fee note was provided which specified "QS assistance – 28 hours @ £95 £2,660."

At Clause 2.3 of the NEC Adjudicator's Contract (April 2013 edition) it states that "After notifying the parties of his intention, the Adjudicator may obtain from others help that he considers necessary in reaching his decision. Before making his decision, the Adjudicator provides the parties with a copy of any information or advice from others and invites their comments on it."

HS barrier brought proceedings stating that "To the extent that the defender was not advised of the appointment of the QS and the nature of the assistance provided by him, an opportunity has been afforded for injustice to be done."

Judgment:

- Lord Doherty found that "*Paragraph 14 did not communicate an intention on the part of the adjudicator to employ quantity surveying assistance. Rather, it purported to make provision for what would happen if it subsequently transpired that the adjudicator considered that he needed quantity surveying input during the adjudication."*
- It was in his view *"going too far too fast to infer at this stage that the assistance provided by the surveyor was of a type which did not require to be disclosed."*

- He was of the view "*that even if the assistance provided by the surveyor was merely clerical and administrative, natural justice required that the adjudicator ought to have told the parties that the surveyor had been engaged; and that while detailed disclosure for comment would not have been necessary, the adjudicator ought to have indicated (at least in brief, broad terms) just what it was that the surveyor was doing"*
- He was unable, however, to decide whether there was a material breach of natural justice without inquiry more into the matter and noted it was *"highly regrettable*" that HS Barrier took 6 months to raise this event as he expected a defendant to raise it "*expeditiously"*.
- This case makes it clear that adjudicators need to be as transparent as they can with the parties to an adjudication, especially when it involves them obtaining advise that will influence his decision and which he expects the parties to the adjudication to pay for.

APCO Construction, Inc. v. Zitting Brothers Construction, Inc., 136 Nev. Adv. Op. 64, 473 P.3d 1021 (2020)

This case related to the Manhattan West mixed-use development project in Las Vegas.

The Subcontract required APCO (the Contractor) to pay Zitting (the Sub-contractor) for 100 percent of the work done minus 10 percent retention within 15 days of APCO being paid by Gemstone (the Developer), commonly known as a 'pay-if-paid' clause. The sub-contract also stated that if the main contract was terminated then APCO would pay Zitting for the work done up until termination after APCO was paid by Gemstone.

The contract between APCO and Zitting was terminated in August 2008, Zitting was then appointed by the subsequent contractor, Camco, until the project was shut down in December 2008. Zitting subsequently claimed against APCO and Gemstone for breach of contract due in part to lack of payment.

In APCO's defence, it claimed that it was not obliged to pay Zitting as they had never received their payment from Gemstone.

The Nevada Supreme Court held that pay-if-paid clauses are not void or unenforceable per se but each clause must be examined on a case-by-case basis. However, the court held that such clauses will be unenforceable if they require the sub-contractor to waive or limit its rights under NRS 624.624-.630 (which includes a right to prompt payment). If the clause limits the sub-contractor's rights under the Nevada Prompt Payment Act, then it will be deemed unenforceable.

Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2020] 1 MLJ 174

This case involved a contract that contained a pay-when-paid clause, where the subcontractor, Jack-in-Pile, would be paid after Bauer received payment from the Developer.

Jack-in-Pile argued that section 35 of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) applied, which stipulates that pay-when-paid clauses are void.

The Federal Court of Malaysia held that the provisions of CIPAA do not apply retrospectively. Any contracts that were entered into before 15 April 2014 would not be subject to the act.

The court held that CIPAA should not apply retrospectively because it provides substantive rights to the parties that would not have been known about or envisaged by parties who contracted before CIPAA was implemented. There were also concerns that allowing CIPAA to apply retrospectively would mean many contracts would be illegal and it was not practical to allow this.