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Infra.Law

Autumn 2020

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Welcome to the latest edition of our infrastructure publication, Infra.Law.

Welcome to the Autumn edition of our construction and infrastructure publication, Infra.Law.

Whilst Covid-19 continues to impact our personal and professional lives and the news cycles are dominated by Covid-19 stories, the UK courts have handed down a number of recent judgments which are not related to Covid-19 but may well have a significant impact on the construction and infrastructure industry. Our Summer edition of Construct.law considered the implications of the Supreme Court's decision in the Bresco case, whilst this edition of Infra.Law looks at the courts' decisions on the meaning of "design life" in construction contracts, the interpretation of indemnity provisions in sale and purchase agreements and the importance of clear and unambiguous wording in vesting certificates.

Paul Henty considers the implications of the Boohoo scandal and the *Modern Slavery Act* on the construction industry, whilst Niel Coertse and Glenn Bull consider the implications of termination for convenience clauses in Qatar and decennial liability in the Middle East respectively. Finally, the publication considers issues around apparent bias in arbitrations where arbitrators, experts and counsel have acted previously for the same clients and the need to disclose potential conflicts of interest.

We hope you enjoy reading this edition of Infra.Law. Please get in touch if you would like to discuss any of the topics detailed within, or if there are any topics that you would like to read about in future editions.

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Routine maintenance or major repair? The meaning of 'design life' obligations

The TCC recently handed down its judgment in *Blackpool Borough Council v Volkerfitzpatrick Limited*, which included claims that the upgrade of the Blackpool tram depot failed to meet its design life. The detailed judgment addressed a variety of interesting issues. However, this article will focus on the helpful guidance given by the court in respect of what is meant by 'design life' where the term is not defined in the contract.

By Christopher Hadnutt, Associate, Construction

Background

Blackpool Borough Council appointed Volkerfitzpatrick Limited **(VFP)** under a form of NEC3 contract with amendments to design and build a new tram depot as part of a major upgrade to the long-running Blackpool tramway system.

VFP's works were completed in 2011 and brought into operation in 2012. The Council complained that several elements of the new depot suffered from corrosion so soon after installation as to put VFP in breach of its obligations to design the works to achieve the contractually specified design life. The Council claimed for repairs to the corroded elements of approximately £6,700,000. However, the amount awarded to the Council was just over £1,100,000, and a large proportion of this difference came down to the court's interpretation of the design life requirements applicable to certain parts of the works.

Contractual clauses

The Works Information contained a general statement that *"unless otherwise specified in the Functional Procurement Specification, [the works] have a design life of at least 20 years"*.

The contract also contained a 'Functional Procurement Specification', which set out various requirements applicable to the works, including a requirement for a 50 year design life for the *"building structure"*. The contract incorporated a design development log, which further specified a range of design life requirements for various parts of the works.

It was also material to the court's decision (although not strictly to its analysis of what is meant by 'design life') that the conditions of contract incorporated a 'fitness for purpose' obligation which required the completed works to comply with any requirement included or referred to in the contract. The court held that the design life obligation would be a 'fitness for purpose' obligation, as was the case in the Supreme Court's decision in *MT Hojgaard v E.ON Climate & Renewables UK*.

In *MT Hojgaard v E.ON* the court had interpreted the particular wording of the design life obligation as a strict liability obligation. It was therefore a strict warranty that the design of the works would enable it to have a lifespan equal to the contractual design life, and any failure to achieve this would constitute a breach of contract (regardless of any evidence that the contractor has designed the works using reasonable skill and care).

The meaning of 'design life'

The Council's claims centred on whether VFP had met its contractual design life obligations in respect of certain works. In order to assess this, the court had to consider what is meant by the term 'design life', as the contract itself contained no definition.

In addressing this question, the court drew upon two British Standards: BS ISO 15686-1:2000 ('buildings and constructed assets – service life planning') and BS EN 1990:2002 ('basis of structural design'). The court summarised the position in these documents as follows:

"BS ISO 15686-1:2000, entitled "buildings and constructed assets - service life planning", contains a definition of design life as the service life intended by the designer. In turn the service life is defined as the period of time after installation during which a building or its parts meets or exceeds the performance requirements. A performance requirement is defined as a minimum acceptable level of a critical property. There is also a definition of durability as the capability of a building or its parts to perform its required function over a specified period of time under the influence of the agents anticipated in service."

The court did not consider that this passage answered the question at hand, but nonetheless approved the inter-relation between the connected concepts of *"design life"*, *"service life"*, *"performance"* and *"durability"*.

The court went on to consider the second standard:

"BS EN 1990:2002, entitled "basis of structural design", contains at 1.5.2.8 a reference to "design working life", which means the "assumed period for which a structure or part of it is to be used for its intended purpose with anticipated maintenance but without major repair being necessary". Maintenance is defined in the same standard as being the "set of activities performed during the working life of the structure in order to enable it to fulfil the requirements for reliability".

The court noted the importance of recognising that no asset can be expected to perform throughout its entire design life without any maintenance at all. The key distinction is between *"anticipated maintenance"* and *"major repair"* – while some routine maintenance is expected, an asset should not require major repair during its design life.

What exactly constitutes *"major repair"* was determined to be a matter of *"fact and degree in any given case"*. In the present case, the court took guidance from a contractual requirement that any required maintenance of the works should not include anything which is 'non-standard' or 'unusually onerous'. The court concluded that these contractual provisions could illustrate the sort of repairs that might be 'major' for the purpose of assessing design life.

This finding was relevant to a determination that VFP was in breach of the design life obligation in respect of blistering to the wall cladding panels. It was accepted that the cladding panels may have met the design life obligation if they had been cleaned 'frequently and intensively'. The court held that such maintenance requirements would not have fallen within the ambit of *"anticipated maintenance"* for design life purposes, as the court did not think such maintenance would have been either 'standard' or 'non-onerous'.

Contractual design obligations

Going forward, parties to construction contracts with design obligations should note that 'design life' may equate to 'lifetime to first major repair', even though the judge did not go so far as to approve such a definition in this case.

Arguably, the judgment outlines a means by which one can determine whether undefined design life obligations have been complied with – that is, by asking whether and when major repair has been necessary. However, as lawyers so often say, each case will depend on its own particular facts and contract terms.

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Offshore wind farms – how to properly interpret an indemnity?

The recent judgment of *Gwynt y Môr OFTO Plc v Gywnt y Môr Offshore Wind Farm Limited and ors* [2020] EWHC 850 (Comm) concerned the proper interpretation of an indemnity in a sale and purchase agreement for the offshore transmission assets of one of the UK's largest offshore wind farms. This case is an interesting example of how the courts will interpret indemnities, which are commonly included in contracts regarding offshore wind farms.

By Amelia Hamilton, Associate, Construction

The SPA and repair of the cables

By a sale and purchase agreement dated 11 February 2015 **(SPA)**, the Defendants agreed to sell and the Claimant agreed to buy the business of owning, maintaining and operating the electrical transmission link between Gwynt y Môr wind farm and the National Grid. The assets covered by the SPA included four subsea export cables. The transaction completed on 17 February 2015.

On 2 March 2015, one of the export cables (SSEC1) failed, with a second export cable (SSEC2) subsequently failing on 25 September 2015. As a result, the Claimant had to undertake substantial emergency repairs. The cost of reinstatement was agreed between the parties at £15 million.

Following examination of the faulty sections of cable, it was discovered that the cables had suffered from severe corrosion. It was undisputed that the most likely cause of damage was to part of the polyethylene **(PE)** sheath during the process of manufacture, permitting seawater to penetrate and starting the process of corrosion.

The Claimant claimed the reinstatement costs from the Defendants and relied upon an indemnity in clause 8.2 of the SPA **(Indemnity)**, which stated as follows:

"If any of the Assets are destroyed or damaged prior to Completion (Pre-Completion Damage), then, following Completion, the [Defendants] shall indemnify the [Claimant] against the full cost of reinstatement of any Assets affected by the Pre-Completion Damage."

In addition, the Vendors (comprising the 2nd to 9th Defendants) gave a specific warranty **(Warranty)** as to the absence of damage to the assets as at the date of the SPA (save as disclosed). The Warranty was limited to what had been (a) discovered and (b) was reasonably likely to cause material disruption to the offshore transmission system.

The period encompassed by *"prior to Completion"*

The dispute centred on what was meant by the phrase *"prior to Completion"* in the Indemnity. The Claimant contended that the natural and ordinary meaning of the Indemnity was that it applied if any of the assets were damaged at any time before completion, including before the execution of the SPA.

However, the court came to the opposite conclusion, for the following reasons:

- The SPA must be interpreted as at the date it comes into force, so the natural and ordinary meaning of the phrase *"If any of the Assets **are** destroyed or damaged prior to Completion…"* (emphasis added) is that it applies to destruction or damage which occurs thereafter, i.e. after execution but before completion.
- Regarding the context of the provision within the SPA, it was obvious that clause 8.1 dealt with execution of the SPA and clause 9 dealt with completion. The insertion, between those provisions of the Indemnity was understood as intended to relate to damage occurring between execution and completion.
- To the extent there was a question about whether the Indemnity covered the warranted matters (pre-execution), the existence of the Warranty was a powerful indication that the Indemnity did not so extend. The court considered it unlikely that the intention was for the limited Warranty to be subsumed and rendered largely ineffective by the all-embracing Indemnity. Further, if the Defendants would be liable for reinstating the damage in any event, the Indemnity would remove the suggested incentive to make full disclosure.

In light of the above, the court determined that the specific wording of clause 8.2 and the broader structure, provisions and commercial sense of the SPA supported the case that the Indemnity related only to damage occurring between the execution of the SPA and completion.

The meaning of *"are destroyed or damaged"*

The court then considered the phrase *"are damaged or destroyed"* in clause 8.2. The Claimant argued that, as the corrosion to the cables constituted an adverse change to the physical condition of the cables, beyond the pre-existing defect in the PE sheath, and as it affected the value or worth of the cables, there was damage to the cables triggering the Indemnity.

The court found no basis for confining the phrase to entirely new damage, or to damage caused by an external event. However, it did observe that the phrase requires damage to be patent, i.e. readily observable or discoverable, and so did not include undiscoverable corrosion which had not adversely affected the performance of the cable.

The key reasons for this were:

- The word *"damaged"* is coupled with and follows *"destroyed"*, indicating that either destruction or damage short of destruction is contemplated. This phrase is inappropriate to encompass the slow process of continuing corrosion.
- The contrasting wording of the Warranty refers to *"defect or damage"*. The Indemnity did not cover either defects or damage flowing from defects, undoubtedly because it was intended to impose liability where it did not arise under the Warranty (except in the case of destruction or damage).
- Further, even if unobservable corrosion could in principle have constituted damage within the terms of the Indemnity, it would only do so if it impaired the value or usefulness of the cables. There was no evidence or reason to believe that corrosion during the six days between execution and completion was in itself sufficient to impair the value or usefulness of either export cable.

The court therefore found that the Claimant was not entitled to the Indemnity under clause 8.2 of the SPA.

Rectification

In case the court's findings above proved to be wrong, the court also considered whether the Indemnity should be rectified to limit it to the period between execution of the SPA and completion. In light of the pre-contractual communications between the parties, and in particular the contemporaneous documents that were exchanged, the court found that the Defendants would have been entitled to an order for rectification of the Indemnity, had that been necessary.

Conclusions

While this case turns on the precise wording of the SPA, it demonstrates the potential issues that can arise from the drafting of an indemnity clause and the importance of absolute clarity in their drafting to avoid disputes about what they should cover.

This case illustrates that where the contract has been heavily negotiated between two experienced parties, the court is much more likely to focus its interpretation on the wording of the contract (and place less reliance on any background factors, such as *"business common sense"*). The court is therefore likely to focus on differences in wording with other clauses and making sure that clauses can be read together in such a way that they do not contradict each other or render another clause ineffective.

Say what you mean – The dangers of ambiguous vesting certificates

Vesting certificates may be required where specific goods or materials are stored off-site but, on payment, the title in such goods or materials passes to the paying party. In essence, vesting certificates evidence the transfer of ownership.

By Jane Robertson, Associate, Construction

They are often used where off-site or modular construction is involved and are likely to become more common as more projects involve elements of MMC.

Vesting certificates provide security should the provider of goods or materials become insolvent before the items are delivered to site. They assist by defeating third party claims of retention of title in respect of those goods or materials.

However, the drafting of such vesting certificates is important. The recent case of *VVB M&E Group Limited & VVB Engineering UK Limited v Optilan (UK) Limited* provides a reminder that the terms of vesting certificates must be clear, unambiguous and consistent with the underlying contract.

The background

As part of the Crossrail project, Value Realisations Limited **(VRL)** entered into a sub-subcontract with Optilan for the provision of telecommunications system upgrades to 12 of the Eastern Crossrail stations, such that the surveillance systems could be integrated with the Crossrail network.

Under the sub-subcontract Optilan was to procure some long-lead items. In order to secure payment for these items the sub-subcontract contained a provision for the goods to vest in VRL before delivery to site had taken place, *"with a view to securing payment under clause 60.1"* (clause 60.1 relating to interim payments).

Optilan issued vesting certificates for the long-lead items. The vesting certificates largely reflected the vesting provisions of the sub-subcontract but also included the following additional condition:

"...property in the materials shall unconditionally vest [in the transferee] upon receipt of the interim payment referred to above".

In the meantime, VRL was instructed to cease works under its subcontract with Costain (the contractor on the project). This instruction was subsequently passed down to Optilan. Following this, the parties worked towards establishing a final account.

Optilan made an interim application for payment, including for the long lead items under the vesting certificates. The payment certificate VRL issued in response included a value for these items but certified the net payment due to Optilan as 'nil'. VRL subsequently issued a pay less notice which increased the value attributable to the long lead items, but still resulted in a nil payment being due to Optilan.

Not long after the issue of the pay less notice, VRL went into administration. VRL's business and assets were acquired by VVB.

The dispute

The dispute between the parties was whether or not the long lead items had vested in VVB.

Optilan argued that vesting had not occurred because the conditions of the vesting certificates had not been met. Specifically, neither the payment certificate nor the pay less notice constituted *"receipt"* of any interim *"payment"*, as was required under the vesting certificate.

VVB argued that the requirement for *"receipt"* had been complied with as the value of the goods had been included in the pay less notice, even though that pay less notice had determined that no payment was due. Therefore, vesting took place at the time of service of that pay less notice.

The decision

The Court held that the terms of the vesting certificates were ambiguous as the additional wording included in the vesting certificate, referring to an unconditional vesting upon the receipt of the next interim payment, conflicted with the provisions which intended immediate vesting.

When faced with such an ambiguity, the Court is entitled to prefer the interpretation which is consistent with business common sense and reject other meanings. The exercise of interpreting the document involves consideration of its language against all the background reasonably available to the parties at the time they contracted with each other.

On this basis the Court found in favour of VVB. No actual payment was required to be made to Optilan in order for the long lead items to vest.

The Court referred to the fact that the vesting certificates acknowledged the interim payment process. The Court therefore held that the vesting certificates recorded the agreement of VVB to include the values of the long lead items in the payment certificates which would then be addressed with other certified items and against payments previously made. This may result in a nil payment.

As such the Court held that the vesting of the long lead items was not conditional on the passing of a sum of money. It was sufficient that the materials were included within the pay less notice and were taken into account as part of the interim payment certification process. As the Court noted, the transfer of £1m of materials should not depend upon whether there is a net certification of £1 or one of zero.

Lessons learned

This case highlights the importance of ensuring that vesting certificates clearly reflect both parties' intentions as to when title is to transfer.

Parties should also be careful to ensure that the wording included in vesting certificates is clear and consistent with the underlying contract, and takes into account the payment certification process required in construction contracts by the *Construction Act 1996*. To that end, the courts will generally be prepared to step in and interpret any ambiguity in favour of the interpretation which makes business common sense.

How convenient is termination for convenience in Qatar?

A clause that gives a party the right to terminate a contract at their absolute discretion, is commonly referred to as 'termination for convenience' clause. Such right may be granted in favour of either (or both) parties. However, in a normal commercial context, it is almost always a right inserted by the client, for the benefit of the client.

By Glenn Bull, Senior Associate, Construction

Inclusion of termination for convenience clauses

In uncertain times, the prevalence of termination for convenience clauses often becomes more widespread. This is usually a result of two key factors:

1. There is greater hesitation by the client, fearful of what may occur over the term of the contract which may require them to abandon the project; and
2. A shift in market forces, whereby consultants are more desperate for work, giving the client a significant advantage in bargaining power.

It is these two factors that perhaps explain why the inclusion of termination for convenience clauses (even during the best of times) are so common throughout the Middle East. Firstly, there are a number of elements of increased uncertainty in the region. For example, the embargo against Qatar by several Middle Eastern countries (including its three closest geographical neighbours: Saudi Arabia, the UAE and Bahrain) is a recent example of how the political structure of the region creates an uncertain commercial environment. Secondly, as most major projects are procured by the state, there is a substantial inequality in bargaining power. As a consequence, the client has the ability to issue a tender on a 'take it or leave it' basis, and still will receive a multitude of commercial bids.

Qatar law

In Qatar, the inclusion of termination for convenience clauses are not only common in consultancy contracts, but are a right that exists at law. *Article 707 of Law No. (22) of 2004 Regarding Promulgating the Civil Code* **(Civil Code)** states as follows:

"The employer may withdraw from the contract and stop the work at any time prior to its completion, provided that the contractor shall be indemnified for all expenses incurred, all works completed, and any profit he could have made had the work been completed."

Firstly, as can often be the case with English analysis of Arabic law, the translation itself provides some uncertainty. The above translation is as published on Al Meezan (Qatar Legal Portal), yet the word *"withdraw"* (as shown in the first line) is perhaps misleading. In fact, the literal translation of this word in the original Arabic text is *"dissolve"*. To further add to the confusion, another translation of this Article of the Civil Code uses the word *"disengage"*. Whilst the words *"disengage"* and *"withdraw"* are relatively interchangeable, *"dissolve"* is quite different. These discrepancies make it difficult to have confidence in how this Article of the Civil Code is intended to apply.

In any case, Article 707 does not provide clients with a particularly enticing option when needing to get out of a contract, because exercising this right pursuant to Article 707 will entitle the consultant to recover its expenses and lost profit. As such, it is essentially akin to the client repudiating the contract, as it carries similar payment consequences.

FIDIC Model Services Agreement

This particular provision of the Civil Code therefore requires some special consideration when drafting a termination for convenience clause in a contract to be used in Qatar. It is also the case that international standard forms may not be sufficient in this regard. By way of example, clause 4.6.1 of the FIDIC Model Services Agreement 2006 (commonly used in Qatar) provides the following termination for convenience clause:

"The Client may suspend all or part of the Services or terminate the Agreement by giving at least 56 days' notice to the Consultant, and the Consultant shall immediately make arrangements to stop the Services and minimise expenditure."

Many lawyers reviewing such agreement on behalf of the client may initially be of the view that such clause gives the client a simple and convenient way to bring the contract to an end. However, if the contract does not address the amounts payable to the consultant upon such termination, does Article 707 come into play?

The question essentially comes down to whether or not terminating the contract for convenience pursuant to this clause 4.6.1 is deemed to be withdrawing/disengaging from the contract (or perhaps 'dissolving' the contract), pursuant to Article 707?

One view is that by exercising the right pursuant to clause 4.6.2, the client effectively withdraws from the contract, and as a consequence, Article 707 comes into effect. This would result in the Contractor being entitled to recover its costs and loss of profit as the FIDIC Model Services Agreement does not provide any further information about what is payable upon termination for convenience. As Article 707 does not conflict with the contract, it can be argued that it essentially provides guidance to the parties as to what is payable in that scenario.

The argument contrary to this interpretation is that terminating for convenience pursuant to an explicit term (such as clause 4.6.2) is an active measure taken by the client to bring the contract to an end, rather than withdrawing from (or dissolving) the contract pursuant to Article 707. In that case, it would only be liable for the services performed up to the date of termination. In my view, this argument is the more persuasive.

Drafting for termination for convenience

However, with conflicting views and uncertainty in the law, there are ways to avoid this risk and draft appropriate conditions for contracts used in Qatar. Most simply, the contract can be explicit about what is (and what is not) payable in the event of the contract being terminated for convenience. Article 707 is not mandatory, therefore if the contract is states that loss of profit is not payable upon termination for convenience, the potential impact of Article 707 is immediately tempered. This recommendation is not limited to Qatar, as any contract, used in civil or common law jurisdictions benefits from improved certainty and explicitly stated rights.

Effect on the tender process

As the Middle Eastern markets mature, the prevalence of termination for convenience clauses may become less common. This is because, despite the level of comfort it gives the client (particularly during uncertain times such as we are experiencing now), a termination for convenience clause will have an impact on the outcome of the tender.

There is no doubt that consultants bidding for a significant volume of services must account for the risk posed by a condition that allows the client to terminate at any moment, for any reason. This is particularly the case where recruitment of staff, purchase of specialised equipment and other mobilisation costs are substantial.

The consultants who critically take this information into account will tend to be those who can be more selective about the risks they are willing to bear in order to secure the engagement. As a consequence, the inclusion of such provisions could result in the client losing the most qualified and competent consultants through the tender process.

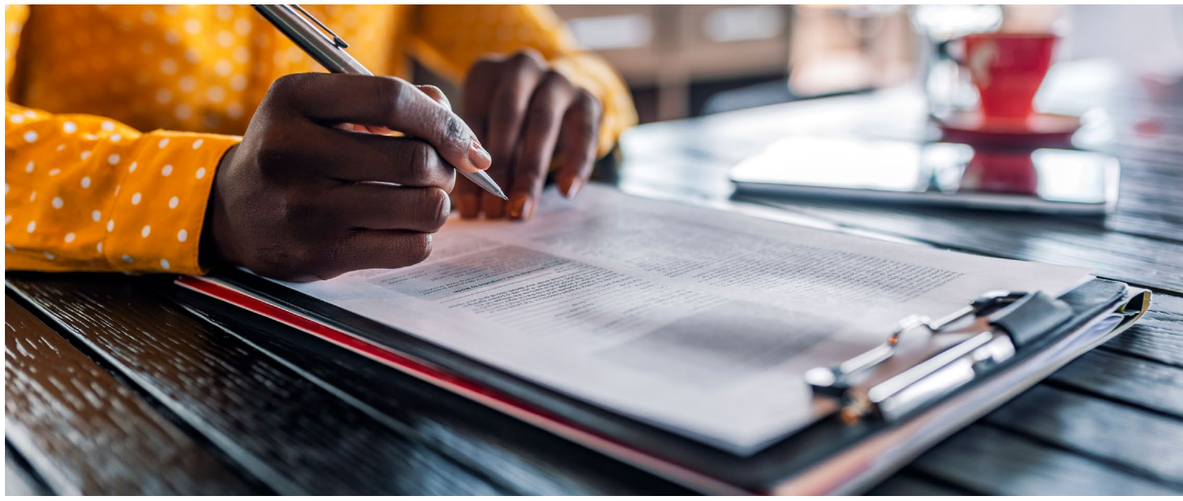
This is not to say that termination for convenience has no place in contracts, but there are ways to mitigate its impact on the tender.

Firstly, the client can impose specific circumstances as to when it may exercise the right to terminate for convenience. If there are particular events that the client is fearful would have an impact on the need for the services (such as an embargo or a pandemic), it may reserve a right to terminate the contract in these specific instances only. By limiting the extent of its right to terminate, it will reduce the consultant's risk, particularly where such matters are limited to events that:

1. are not within the complete control of the client; and
2. have a relatively a low likelihood of occurring.

Secondly, the client can include in its termination for convenience clause, provisions that 'share the pain' if the right to terminate is exercised prior to a particular percentage of the works have been completed. This way, the client is disincentivised to terminate the contract for convenience, and the consultant is assured that part of its cost will be recovered if such right is exercised. Both the disincentive and the ability to recover part of the costs reduce the consultant's risk which should reflect in a reduced contract price.

It is expected that as the market continues to mature throughout the Middle East, these, and other methods will be more commonly adopted, replacing a blanket right to terminate for convenience.



Decennial liability in the Middle East: What is it and does insurance cover it?

Decennial liability exists in many countries, and is enshrined in the relevant Civil Code of many civil law jurisdictions, such as France, Egypt, the United Arab Emirates (UAE), Oman, Qatar, Bahrain and Saudi Arabia.[i] These statutory provisions impose 'strict liability', that is, liability arises without the claimant having to prove fault or causation. In other words, a presumption of liability is created.

By Niel Coertse, Senior Associate, Construction

When does it apply?

The liability arises if the subject matter of the contract in question is the construction of a structure (ie/ a building or a fixed installation) with an intended installation life of 10 years or more, where the plans are drawn-up by an architect or engineer to be carried out by a contractor. The contractor and the supervising architect or engineer are jointly and severally liable to the employer for a period of ten years (as the name suggests) from the date of delivery of the works in respect of serious structural defects or collapse.

However, Bahrain is unique in that even though its Code refers to decennial liability generally, the liability is specified to extend only to 5 years as opposed to 10, so it is not really decennial at all. Contractually therefore, we have seen an increase in the extent of the liability being imposed on design consultants when carrying out projects in the Kingdom, taking it from 5 to 10 years.

Public interest

The underlying philosophy is that it is in the public's interest that structures are structurally sound. The argument supporting this philosophy is that the designer and contractor are best placed to deliver an outcome consistent with this objective.

Considering the significant element of public interest, decennial liability is mandatory and cannot be limited or avoided even by way of express contractual provisions between the parties. By way of example, Article 715 of the *Qatari Civil Code 22 of 2004* provides the following:

"Any clause intended to exempt the engineer or the contractor from the guarantee or to limit such guarantee shall be deemed null and void".[ii]

This position is mirrored in the following laws: Article 882 of the *UAE Civil Code*; Article 620 of the *Bahraini Civil Code*; Article 697 of the *Kuwaiti Civil Code*; Article 636 of the *Omani Civil Code*; to some extent in Article 76 of the *Government Tenders and Procurement Law of Saudi Arabia*.

Where liability arises, the employer's remedy is recovery of the monetary damages required to compensate it for the total/partial collapse of the structure, i.e. the substantiated costs of rectifying or replacing the structure. It is not possible for the contractor or supervising architect or engineer to contract out of or limit this decennial liability. However, where the role of the architect is to simply prepare plans and not to supervise their execution, the architect is only liable for defects in the plans.

Does insurance cover it?

Despite the mandatory nature of the law, it is nevertheless possible to mitigate the risk by means of indemnities and, in particular, indemnities in the form of insurance.
The table below sets out a summary of the types of insurance policies generally available, as well as their respective pitfalls and gaps: **(see table on page 13)**

With the table in mind, the following should be noted in respect of decennial liability insurance and the residual risk in the Middle East:

- In practice, the residual risk is retained by designers (including engineers) and contractors;
- It may not be easy to convince an employer to incur the cost of a large insurance premium to cover this risk i.e. if the employer wants it, then it is generally asked to pay for it;
- Conversely, designers and contractors consider that the likelihood of the risk eventuating is in fact low. Claims of a decennial liability nature are rare in the Middle East region and, in the case of designers in particular, professional indemnity insurance will cover all but most the unusual cases in which decennial liability type issues arise; and
- A limited pool of insurers will be willing to accept such a risk, even under a bespoke product that is a derivative of an inherent defects cover.

By way of comparison, in some jurisdictions, such as France, decennial liability insurance is compulsory. However, it is inherently expensive and insurers may be invasive to the point of interfering: for example, appointing inspectors to monitor the design and construction. The prohibitive cost and potential for monitoring can make decennial liability insurance unattractive for both designers and contractors.

External cause

Notwithstanding the effect of the strict liability, it may be possible to argue that the building failure is attributable to an external cause. In practical terms, it is the very existence of the defect or building collapse which establishes the liability and this cannot be avoided unless the contractor or designer can establish the existence of an external reason for the failure.

So, when defending a claim and the contractor or designer raises the external cause argument, they are not denying the existence of the liability but rather are seeking to invalidate the causal link between the liability and the damage caused.[ii]

In this way there is a limited defence available against a decennial liability claim, and the onus is on the contractor or designer to clearly demonstrate that the damage arises from an external cause.

Practical considerations

It is unlikely that a party will be able to fully mitigate against the risks of decennial liability unless it takes out a fully-fledged and costly decennial liability insurance policy. As a consequence, parties may try to include a net contribution clause in the agreement, as well as negotiating a cap on liability to limit overall exposure and liability. A net contribution clause has the potential to significantly reduce a party's decennial liability. It states that where two or more parties are each jointly liable for the same loss or damage, the liability of each party will be limited to the amount which is just and equitable, having regard to each party's responsibility for the default: effectively, that amount which would be apportioned to that party by a court.

It is important when undertaking works in the Middle East that designers, engineers and contractors are made aware of their liability and insurance requirements. This is the case even if the proper law of the contract is not the law of the country where the site is situated. Decennial liability will overrule foreign choice of law clauses in a contract if decennial liability exists by law in the country where the site is located. Contractual remedies such as the defects liability period are additional remedies which do not replace the decennial liability.

Insurance	Gaps/not covered	Note
Standard forms of liability insurance covering construction activities, such as contractors' all risk, professional indemnity and latent or inherent defects policies.	These policies are not intended to provide decennial liability cover and do not, in general, do so.	These products can be confused with decennial liability insurance, especially if they are marketed as having some of the characteristics of decennial liability cover, or a 'decennial' label is attached.
Decennial liability endorsement on a contractors' all risk insurance policy	Does not typically extend cover to include the applicable statutory decennial liability risk.	See note above. In addition such endorsements can be expensive in the Middle East region.
Professional indemnity insurance.	Typically provides cover for a consultant against negligent errors and omissions, but not for all liabilities imposed by law (such as decennial liability).	A defining characteristic of decennial liability is that no evidence of negligence or breach of duty by a consultant is required, so professional indemnity cover may fall short of fully protecting an insured from this risk.
Inherent defects insurance (typically procured on behalf of a building owner).	Not a suitable form of cover for protecting a consultant or a contractor from decennial liability. Most such policies exclude, for example, damage caused by ground conditions, a risk explicitly falling within the scope of decennial liability.	Rare to see designers taking out this cover or policy in the Middle East region.
Decennial Liability Insurance	Specifically designed to cover decennial liability.	Generally expensive in the Middle East region and generally not adopted as there is no legal requirement in the region to take out and maintain the cover.

[i] Article 76 of the Government Tenders and Procurement Law of Saudi Arabia.

[ii] Note that all quoted extracts from the region's laws and judgments have been translated from the official Arabic and should be treated with appropriate caution. Furthermore, although the statutory provisions and judgments referred to bring greater clarity to many issues, doubt remains as to the courts' likely approach to some key issues and, indeed, to many issues on any given set of facts. In particular, in the absence of a system of binding precedent, care is required not to place excessive reliance on judgments, particularly those that do not form part of a line of consistent decisions.

[ii] This is in line with the Article 287 of the UAE Civil Code which was also referred to in Dubai Cassation No. 290/1990 dated 3 August 1991.

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Apparent bias in arbitrations: The importance of disclosure for arbitrators

The right to a fair trial and / or the right to have your claims heard and carried out in accordance with the rules of natural justice, is a fundamental tenet of litigation throughout the world.

By Michael O'Connor, Partner, Construction

Two of the principles that sit behind these tenets include:

- There should not be any bias and / or apparent bias from the individuals deciding the outcome of the case
- There should not be a conflict of interest between those advocating your case with those parties they are advocating against

Four years ago, there was a spate of decisions in the English Courts which considered these principles in the context of UK Adjudications and Arbitrations.

Those cases confirmed that the test under English law, was as set out in *Porter v Magill*, of whether:

"a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

More recently, the English Courts have had to consider the position of potential conflicts of interests of experts, when it granted an injunction preventing a party from appointing an expert in an ICC arbitration on the basis that there was a potential conflict.

Now, a recent decision by the International Centre for Investment Disputes resolution (ICSID) Annulment Committee has looked at the roles and relationships between experts, arbitrators and advocates and the potential for conflicts of interest that can arise.

Background

Eiser Infrastructure Limited and Energia Solar Luxembourg (Eiser) brought claims against Spain alleging regulatory reforms it had implemented fell foul of the Energy Charter Treaty, the energy industry international investment agreement. Eiser claimed €256M in damages.

In May 2017, the three-panel arbitral tribunal decided unanimously in favour of Eiser and ordered Spain to pay €128M in damages.

Shortly after the award, Spain requested an annulment of the decision on the basis that Eiser's appointed tribunal member (Dr Stanimir Alexandrov) had failed to disclose a 15-year working relationship with Eiser's appointed expert (Mr Carlos Lapuerta). Mr Lapuerta worked for the firm the Brattle Group. Due to his failure to disclose this relationship, Spain alleged that Mr Alexandrov had violated his obligation of independence and impartiality.

During the annulment proceedings, the panel noted that:

- Dr Alexandov had been appointed as arbitrator in four cases in which the Brattle Group had been instructed as the experts by the party that appointed him as arbitrator.
- In two of those cases, Mr Lapuerta was the appointed expert and three of those cases proceeded at the same time as the arbitration involving Spain.
- In a further eight cases, Dr Alexandrov had been appointed counsel where the client had engaged the Brattle Group as expert.
- In three of those cases, Mr Lapuerta was the testifying expert.

In analysing the issues, the committee asked itself the following questions:

1. Whether the right to the independence and impartiality of an arbitrator is a fundamental rule of procedure;
2. Whether there had been a departure from a fundamental rule of procedure;
3. Whether the lack of impartiality or independence on the part of Dr. Alexandrov may have had a material effect on the Award and thus amounts to a serious departure from a fundamental rule of procedure.

Unsurprisingly, the committee decided question 1 in the affirmative. It went further and stated that:

"the arbitrator has a duty not only to be impartial and independent but also to be perceived as such by an independent and objective third party observer. This duty includes the duty to disclose any circumstance that might cause his reliability for independent judgment to be reasonably questioned by a party."

This statement is similar to the test set out above in *Porter v Magill*.

"a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

On question 2, the Committee decided that Dr Alexandrov's decision or failure to disclose the *"relationship"* with Mr Lapuerta deprived Spain the opportunity to challenge him about that *"relationship"* and deprived Spain the benefit of an independent and impartial tribunal.

They concluded that based on an objective assessment of the facts, it was apparent that Dr Alexandrov lacked impartiality.

On question 3, the Committee concluded that despite there being a three person panel, they considered that there was the opportunity and at least expectation that Dr Alexandrov would have held discussions with the other panel members and had the opportunity to influence the decision process during the course of their deliberations.

On that basis, the Committee decided that Dr Alexandrov's views could have had a material bearing on the opinions of the panel and that the Committee could not exclude that possibility.

Having considered these issues, the Committee concluded that the undisclosed *"relationship"* could have had a material effect on the award and the non-disclosure was sufficiently serious to warrant an annulment of the award.

Analysis

Due to the very nature of the professions of counsel and experts, it is inevitable that relationships will be formed and counsel and experts may find themselves acting for the same client on multiple matters.

Where those individuals also act as arbitrators, or adjudicators there is the prospect that they could well find themselves in a similar situation to which Dr Alexandrov and Mr Lapuerta found themselves. This is particularly the case where disputes arise in very discreet areas and there is a limited number of professionals operating in those areas.

Although nothing untoward was alleged, it was the fact that there was non-disclosure of the relationship that the committee considered raised the prospect that there could be apparent bias and could jeopardise the enforceability of any award made by the arbitral panel / adjudicator.

This of course had serious implications for Eiser. It had a €128M award annulled and it was ordered to pay the costs of the annulment proceedings and Spain's legal costs totalling just over USD$4M.

Whilst all cases must be judged on their particular circumstances, decisions as to whether there has been bias or apparent bias will be decided on what a fair observer would consider.

Experts, arbitrators and counsel need to consider very carefully before accepting an instruction whether there is a potential conflict of interest and / or the *"relationships"* they have with the professional advisers involved in the arbitration and whether that could give rise to a potential conflict of interest.

It seems that given the significant risk that non-disclosure of such *"relationships"* could lead to findings of apparent bias and the annulment of decisions, arbitrators, experts and counsel should err on the side of caution and disclose such *"relationships"*. It is not inevitable that there will be a finding of a conflict of interest and full and frank disclosure of these relationships allow the parties an opportunity to investigate and question such matters and make informed decisions on the potential risks.

Labour compliance without tears: Modern slavery, Boohoo and the construction industry

If the summer of 2020 is remembered for anything other than lockdown, social distancing and the search for a vaccine, it may be for the anti-racism protests around the world, triggered by the controversial death of George Floyd in police custody. This provoked angry protests and the tearing down of statues of slave traders from previous centuries. These scenes were reminders of how the evils of the historical slave trade are remembered (particularly among BAME communities) and continue to provoke strong revulsion today.

By Paul Henty Partner, Construction

Although slavery was abolished and outlawed by the UK in 1833, the phenomena of slavery and human trafficking have continued, in a clandestine form, both here and abroad. It is estimated that there are around 48 million people globally living in conditions of slavery today, with up to 13,000 in the UK. *The Modern Slavery Act 2015* **(MSA)** has been enacted to help address the problem.

The focus on forced labour was intensified further this summer when a *Sunday Times* investigative report revealed modern slavery in the supply chain of Boohoo plc, a listed UK company. The scandal is discussed below. Whilst it would be easy for those in the construction trade to dismiss the relevance of the Boohoo saga to their own business, I explain below why that attitude could prove a costly mistake. I also explain how the law has changed, what this means for construction businesses and the steps they can take to protect themselves from this pervasive problem.

What is the Boohoo scandal?

Boohoo is an online fashion retailer, which largely targets the 16-30 female demographic. It owns popular lines such as PrettyLittleThing, Karen Millen and Nasty Gal. The *Sunday Times*' undercover investigation revealed a garment supplier within the Boohoo supply chain, Jaswal Fashions, was paying its factories workers £3,50 per hour, considerably less than the UK minimum wage of £8.42 (for workers over 25). Jaswal's Leicester based workforce had also been required to work throughout the COVID-19 lockdown period without social distancing measures.

The impact on Boohoo's business was immediate and adverse. A number of electronic platforms – notably Amazon - announced that they would cease selling Boohoo's goods. Boohoo's share price fell by around 23% on the day of the announcement.

Boohoo responded, saying it was shocked and appalled by the reports of modern slavery in its supply chain. It emphasised that Jaswal was a sub-supplier rather than a direct supplier to its business. Ms Levitt's terms of reference were announced at the end of July 2020.

Why does Boohoo matter to the construction industry?

Whilst construction and fashion are worlds apart, they share certain common features making them prone to modern slavery and human trafficking. These include the labour intensive nature of the work, the complexity of supply chains and a large number of foreign workers involved in output, who have either migrated to the UK or supply goods and services from overseas. In construction, the reliance on migrant workers is accentuated by a shortage of labour generally (both skilled and unskilled) and a need for workforce flexibility.

The construction sector ranks sixth in terms of UK industries most affected by slavery. Press reports in recent years have highlighted its vulnerability. For example, a BBC undercover investigation revealed in December 2019 the ease with which an unscrupulous contractor could hire an Eastern European construction crew available for work for seven consecutive days without a break for as little as £4.50 per hour.

Internationally, there have been serious documented incidences of forced labour in infrastructure projects, including the Qatar 2022 World Cup. Qatari project leaders are reported to have imported labourers from poorer Asian countries such as Nepal and Indonesia. Amnesty International alleges that workers were in some cases tempted to Qatar with false promises of office jobs, only to find they had fallen prey to *"bait and switch"* and been forced to work on construction sites. They could not leave easily, as employers would remove their passports and departing the territory would require an exit visa. Concerns were also raised of workers being forced to operate in extremely hot conditions without adequate protection. Several deaths on site were reported.

Changes to UK law and the fight against slavery

The MSA went some way to strengthen the law against modern slavery within Britain. The Act consolidated slavery related offences in a single statute and increased penalties for infringements. It was accompanied by the creation of the office of Anti-Slavery Commissioner which in itself has raised the profile of slavery and trafficking.

The Act reflected a recognition that combating slavery was not the role of government exclusively. For that reason, Section 54 of the MSA introduced an obligation for businesses above a certain size (£36 million annual turnover) to publish an annual statement disclosing the steps they took to ensure there was no slavery or trafficking present within their organisation or supply chain.

The MSA has been backed up with enforcement measures. Prosecutions have been brought against gang-masters accused of controlling forced labourers. In 2018, two successful prosecutions were brought after forced labourers were found to be working on housing construction sites and for a demolition contractors. Raids at addresses where Eastern European site workers have been held by gangmasters have also culminated in convictions for ringleaders in other cases. The Metropolitan Police told *Construction News* in 2019 that there has been a significant increase in allegations of labour exploitation and modern slavery in the construction industry.

What can construction businesses do to protect against the risk?

Construction businesses need to steer clear from allegations of forced labour or trafficking for many obvious reasons. First and foremost, the business ought to care about how it is perceived by its customers and the public at large. The effect of a prosecution could be devastating. Regulation 57 of the *Public Contracts Regulations 2015* also entitles public bodies to debar companies from public contract tenders if they have infringed the MSA (e.g. through failing to disclose as required under S 54 MSA).

Having an effective compliance program can certainly help minimise the risk and preserve the reputation of your business. The following are key steps that can form part of such a program:

- **Conduct a thorough risk assessment:** A good risk assessment will help you identify those areas of your business which could be weak spots and to take appropriate steps to avoid exposure. Projects overseas, for example, may be a risk if these are being carried out in jurisdictions with high incidences of slavery.
- **Get to know your supply chain:** Ask sub-contractors about their hiring practices and also their own standards and auditing practices. In the case of Boohoo, the problem arose from a supplier of a supplier. Similarly complex supply chains exist in construction projects but this does not relieve businesses from their responsibility to understand whether they are indirectly supporting or facilitating slavery.
- **Ask labour agencies relevant questions:** Labour agencies are known to be a source of risk. Rogue intermediaries can entrap vulnerable workers by forcing them to take debt connected to placements (e.g. travel or visa costs) and removing their travel documents. A responsible business must ask agents about their labour sourcing practices and the terms of engagement with workers.
- **Exercise on-site vigilance:** For example, consider keeping a record of workers on site. Ensure you are aware of contractors. Ensure posters are available in several languages warning staff about the dangers of slavery and help to anyone who is a victim. Random spot checks of labourers on-site are also a useful means of detecting potential problems.
- **Train your staff:** As the *"eyes and ears"* of the organisation, it is imperative your people are trained to spot red flags which may indicate workers are the victims of slavery. That could include, for example, groups of workers who appear dishevelled, unable to speak English and/or reluctant to engage with outsiders.
- **Internal governance:** Have in place clear policy documents, underlining the support of the highest levels of management for anti-slavery compliance. Staff must be aware of a *"zero tolerance"* culture in order to ensure they do not unwittingly engage contractors or source labourers who are a risk. Appropriate reporting structures should be in place (possibly a whistle-blower hotline) to ensure that staff are able to report. They should also be reassured that they will not face sanctions for making a report

in good faith which ultimately proves unfounded.

- **Negotiate appropriate contractual provisions:** An effective compliance strategy will require the buy in from suppliers. Include clauses within your agreements with them to compel them to co-operate with your compliance efforts (by providing responses to information requests, for example).
- **Have a protocol to assist investigating authorities:** Would you know what to do if the police attended one of your sites to pursue reports of slave labour? Procedures should be in place to ensure the company's rights are protected while co-operating with an investigation. Given the potential reputational damage, the organisation is likely to have some shared interest in getting to the bottom of the origins of the report.
- **Satisfy disclosure requirements:** These include ensuring that the business publishes an annual slavery and trafficking statement where required to do so under the MSA. It should also be prepared to fulfil reasonable information requests from customers carrying out their own supplier due diligence measures.

This list provides a useful roadmap of an effective slavery compliance strategy. Successful implementation of many of these steps will often be assisted by professional advisers. An outsider – particularly one with the requisite expertise – may be better placed to identify vulnerabilities in the practices of a business with regard to its procurement and hiring strategies. Too often, an organisation can become blinded to its own faults.

Aside from minimising the risk of enforcement action, there are other benefits to an effective compliance program. For example, the company may itself become subject to a slavery audit by one or more of its customers, who will expect it to show clear evidence of a commitment to compliance, appropriate levels of monitoring and ethical labour practices, both within the organisation and its supply chain. Falling short of these expectations could result in the loss of client relationships. On the other hand, clients may be impressed by efforts made to avert the occurrence of forced labour and this could enhance confidence for future collaboration.

Conclusion

Warren Buffett, CEO of Berkshire Hathaway, once advised his workers: *"If you lose money for the firm I will be understanding. If you lose reputation I will be ruthless."* The reputation of any business can take decades to build but be demolished in a day. A failure to adhere to responsible governance and ethical hiring practices is one rapid and sure-fire method for tarnishing the good-standing of a corporation, perhaps irreparably.

Construction has a number of features which make it inherently vulnerable. Tight margins, a need for labour flexibility and the shortage of labour (which may soon be exacerbated by a "no deal" Brexit) number amongst them. Unfortunately, in the court of public opinion these provide no defence to a charge of being complicit in modern slavery. The Boohoo experience illustrates how brightly the spotlight will shine on any incidence of modern slavery, wherever it occurs. Construction businesses cannot afford to allow Boohoo's fate to become their own. They should take proactive steps to ensure that it does not.

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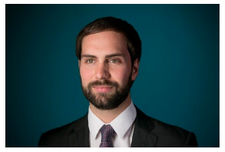

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About the Construction, Engineering & Projects group

We are a large team of over 40 specialist lawyers, based in 11 locations across the UK, Europe, the Middle East and Asia, enabling clients to access the full range of the firm's skills and expertise, both in the UK and internationally. The team includes dual qualified barristers and solicitors, engineers, and accredited mediators and adjudicators.

Our Construction, Engineering & Projects group provides the full range of dispute and transactional services for large scale construction and engineering projects, in the UK and internationally.

We act for a wide range of clients, but with a particular emphasis on:

- major contractors
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Our core transactional legal experience include advising on all forms of construction and engineering contracts and associated documentation, insurance arrangements, and all related financial security (such as bonds, guarantees and warranties).

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- mediation and dispute avoidance

We focus our dispute resolution strategy on maximising the net recovery for our clients when bringing claims, and minimising or extinguishing their exposure when defending them.

Our full-service approach ensures that an appropriate strategy can be adopted to achieve our client's priorities throughout the lifetime of a project. Our aim is to provide a personable and highly responsive specialist service.

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