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

Inside this issue:

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Welcome to Issue 34

Jeremy Glover
Partner
jglover@fenwickelliott.com

Welcome to our latest edition of IQ which highlights issues important to international arbitration and projects.

This issue starts with a look at concurrent delay, with Edward Foyle considering what we can learn from the recent UK case of *Thomas Barnes v Blackburn*, while Shahed Ahmed explains how the issue is treated in the UAE.

Next, we look at several international arbitration developments, with Ben Smith and Oliver Weisemann discussing recent arbitration reform in Nigeria and Shahed Ahmed reviewing the enforcement of UAE judgments in England and Wales.

Jeremy Glover returns to the topic of Notices of Dissatisfaction (here under the NEC suite), with an unexpected Part 2 to his *previous article.* Then Sam Thyne discusses some of the changes that FIDIC introduced at the end of 2022 to the Second Edition of the Rainbow Suite.

Finally, Tajwinder Atwal reviews the question of without prejudice privilege focussing on the Privy Council's latest ruling in the case of *A&A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago*.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

Events

Partner Nicholas Gould will be speaking at the European International Contractors Group's Spring Conference, which runs from 27-28 April. Please *click here* for more information.

Partner Dr Stacy Sinclair will be speaking at the United Nations Economic Commission for Europe (UNECE) International PPP Forum in Athens, Greece from 3-5 May. Stacy will be covering digital transformation in public-private partnerships. *Click here* for further information.

Partners Jeremy Glover and Karen Gidwani are both taking part in panel discussions as part of London International Disputes Week. Jeremy will be joining the panel organised by 39 Essex Chambers to discuss 'Construction and the Climate: Building for the Future' on Tuesday 16 May. Karen will be joining speakers from McKinsey and 4 Pump Court to discuss challenges in the energy sector on Thursday 18 May. Registration details will be made available via *this link*.

For those in London, Fenwick Elliott will be hosting its next Construction Law Clinic on 14 June. The event is a chance to socialise with our team and ask any questions in an informal setting. For more details, please contact *events@fenwickelliott.com.*

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. To find out details of upcoming webinars please *click here* and select the 'webinar' drop down. To watch our previous webinars on demand, *click here*.

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digital design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (ssinclair@fenwickelliott.com). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

Concurrent delay – what is the right test?

Edward Foyle
Partner
efoyle@fenwickelliott.com

Shahed Ahmed
Associate
sahmed@fenwickelliott.com

Even relatively simple construction projects regularly suffer a whole host of delays to activities. For complex projects, the interface between delays to various sequences of works – and establishing which activity is the cause of critical delay (i.e. actually causes delay to project completion) – is extremely complex. Identifying which issues are critical requires sophisticated expert delay analysis and detailed input from factual witnesses. Invariably, this is an expensive – and time consuming – process.

In English law, it is generally accepted that, where a project suffers from a period of "concurrent delay", the contractor is entitled to an extension of time (such that the employer is not entitled to claim liquidated damages). However, the contractor is not entitled to recover from the employer its prolongation costs. However, as demonstrated by the recent judgment in *Thomas Barnes v Blackburn*, the meaning of "concurrent delay" may be more open to debate.

In contrast, there is no guidance in UAE law specific to the resolution of concurrent delay claims which will be decided under general legal principles, including good faith and concepts of fairness.

The meaning of "concurrent delay": true concurrency

A line of English lower court authorities established a very precise meaning for "concurrent delay", see *Royal Brompton Hospital NHS Trust v Hammond (No 7) (2001)*, *Adyard Abu Dhabi v SD Marine Services [2011]* and *Saga Cruises Ltd v Fincantiera [2016]*. Those cases make clear that true concurrent delay will only arise in the following circumstances:

- Two delay events (one a contractor risk, the other an employer risk) occur at the same time;
- The effect of those two events, in terms of overall delay to the project, are felt at the same time.

Unsurprisingly, the occurrence of true concurrent delay is rare. It should be distinguished from:

- A situation in which two events cause delay to a contractor's activities at the same time, but only one of those activities is on the critical path, such that only one event causes critical, or actual, delay; and, also

- A situation in which two events cause delay to critical activities at the same time, but although the effect of the delay event is felt at the same time, one of the events occurred prior to the other.

In the second example above, there is no concurrent delay due to the first-in-time principle. The essence of the first-in-time principle is that, by the time that the second event occurred, it could not cause any actual delay to the contractor's works because the contractor was already in delay anyway as a result of the first event. The example provided in *Royal Brompton*, and cited with approval in later cases, is where a contractor knows that it will be unable to progress works in a particular week because it has no workforce. The occurrence of inclement weather the following week (often an employer risk) will not be a concurrent cause of delay because the contractor was already unable to progress the works in that week in any event. Another frequently cited example is the late instruction of a variation by an employer, which would have pushed the completion date for the project if the contractor were not already delayed by reasons for which it was responsible.

The courts' emphasis on seeking to identify a single event that actually caused delay is consistent with the prevention principle: the employer

is only prohibited from levying liquidated damages where it has actually prevented the contractor from completing the works on time. If the contractor was already in delay, the prevention principle does not apply.

The first-in-time principle requires a relaxation of the "but for" test, the usual test for establishing factual causation of losses, as neither party can show that, but for the other party's delay, the project would have been completed on time. In many cases, parties may consider this arbitrary and the results unfair. For example, if the contractor is found to already be in delay (such that there is no finding of concurrency), an employer's late instruction to vary the works would not prevent the employer from claiming liquidated damages as a result of a failure to complete on time. This will be the case even if the contractor's works after the contractual completion date include the additional instructed works. It may be unlikely that, at the time of contracting, this was the parties' intention.

Thomas Barnes v Blackburn: the broader approach

In *Thomas Barnes v Blackburn*, the judge took a broader and more practical approach to considering whether delays caused by the contractor and employer were concurrent. The judgment is interesting for its conclusions as to what constitutes concurrent delay and also the judge's approach to identifying the cause of critical delays, which did not accept either party's expert's analysis and instead focussed on the witness evidence and contemporary documents.

The dispute related to delays to the construction of a bus terminal which had led the employer to terminate the contract. The contractor claimed that it had been unlawfully terminated and that it was entitled to a significant extension of time.

A large part of the contractor's extension of time claim related to 133 days' delay to concrete topping works caused by the need for remedial works to steel frames in the roof beams in the hub area of the terminal due to deflection issues for which the employer was responsible. The contractor claimed the delays to concrete topping caused day for day critical delay to completion, such that it was entitled to a 133-day extension of time and to recover its costs incurred in this period of delay.

The employer's position was that the contractor was only entitled to an extension of time of 27 days in respect of the delays to concrete topping works on the basis that, (among other things) for a large part of the 133-day period, roof covering works were on the critical path and were delayed by the contractor by 57 days, and also that the contractor had delayed commencing the concrete topping works by 12 days once they had been approved by the employer.

The judge found that the contractor was entitled to an extension of time of 119 days, being the 133 days' delay caused to concrete topping works less 12 days' delay in commencing works once approved. However, the judge considered that the contractor was in concurrent delay for much of this period and so awarded the contractor only 27 days' prolongation costs.

The judge did not seek to define "concurrent delay" beyond stating that there must be *"an effective cause of delay"* for which the employer was responsible. The judge did not consider the particular meaning given to "concurrent delay" in the line of authorities explained above *(Royal Brompton, Adyard,* and *Saga)*, or whether "true concurrent delay" was required in order to establish an entitlement to an extension of time, nor did he provide detailed analysis of when a delay event becomes "an effective cause" of delay.

The judge found that both the roof coverings and the remedial works to the hub structural steel were on the critical path. The contemporary documents showed that the contractor's works on the roof coverings were delayed by its failure to source scaffolding and subcontractors. The judge's key consideration in concluding that both these issues were effective causes of delay appears to have been that, throughout the 133-day period in which the employer's remedial works to the hub steelworks delayed the commencement of concrete toppings, the contractor could not have known how long those remedial works would take to complete. The contractor should, therefore, have carried out all works available to it, including the roof coverings, in order not to delay completion when the hub steel remedial works were resolved.

The judge reasoned that, since resolution of both issues was essential for progression of the works, neither party could dismiss the delays for which they were responsible as irrelevant. The fact that, as it happened, the delays to the hub remedial works not only began before the delays to the roof coverings but also ended after the contractor's issues with the roof coverings had been resolved did not, in the judge's analysis, mean that the roof covering delays were not a concurrent cause of critical delay.

Considered against the background of *Adyard* and other authorities, the finding of concurrent delay is surprising. The logic used is, effectively, the "but for" test, which, as noted above, *Adyard* and other authorities made clear was to be relaxed in the context of concurrent delays. However, many consider the practical approach taken by the judge, and the conclusion that the employer not be required to pay the contractor's prolongation costs when the contractor was itself in delay, fair. Whilst there may be further factual issues that were not reported in the judgment, it would appear from the case report that a strict application of the first-in-time principle (as established in *Adyard*) would not have had the same regard to contemporary documents and would have produced the same result.

It is often stated that courts should take a common-sense approach to determining the real causes of delay, based on an analysis of the parties' experts' analysis and examination of

the contemporary records. However, what constitutes common sense is ultimately a matter of subjective opinion. In practice, it is difficult to establish the point at which a judge or arbitrator's common sense should override established principles such as the first-in-time principle. This tension will result in unpredictable outcomes and continue to cause uncertainty for parties facing or advancing delay claims. However, the following messages are clear from *Thomas Barnes v Blackburn*:

- First, contemporary documents recording the delays throughout the project are a key part of any delay claim, over-reliance on after the event programming analysis is not sufficient. Ultimately, to succeed, parties require credible delay analysis which must be supported by the contemporary record.
- Second, given the large number of interface issues on construction projects, it can be difficult to predict, during the course of the works, which issues a court or arbitrator may later conclude were the causes of delay. Therefore, in the event that a contractor's activities are delayed by the employer, it must nevertheless continue with its works – so as to avoid any later argument of concurrent delay (which may or may not find favour with a judge).
- Finally, delay claims are fact intensive, and rarely easy to resolve.

Thomas Barnes v Blackburn may provide encouragement to parties seeking to argue concurrent delay (and thus either relief from LDs or no liability to pay prolongation costs). It should not do so. Each judgment turns on its facts and the principles in the *Adyard* line of authorities are well established.

Concurrent delay in the UAE

As noted above, there is no guidance in UAE law specific to the resolution of concurrent delay claims. Concurrent delay claims will be decided under general legal principles, including good faith and concepts of fairness.

Accordingly, where there is a finding of concurrent delay, rather than follow the English law approach (of allowing a contractor an extension of time but not to recover its prolongation costs), a UAE court (or arbitrator) is likely to apportion liability for concurrent delay under the UAE Federal Law No. (5) of 1985 (the **"Civil Code"**). In addition to good faith (in Article 245), relevant provisions of the Civil Code include Article 291, which provides for the apportionment of liability where two or more parties are responsible for damage, and Article 290 which provides the court with flexibility to reduce a damages award if the claimant is also responsible for the loss suffered.

If a period of concurrent delay is apportioned 50/50, it would be reasonable to anticipate that the contractor will get only half the extension of time requested, but will also be able to recover its prolongation costs in the period of extension of time allowed. In turn, it would be reasonable to expect that, for the period in which no extension of time has been allowed, the contractor will be liable to pay liquidated damages. The two claims (prolongation and LDs) will then be set off.

There is also no definition of "concurrent delay" under UAE law, but because UAE law is less prescriptive and allows more discretion, it is arguable that a UAE court would not apply the "first-in-time principle" (per *Adyard* and other English authorities) and would instead focus on achieving a "fair" result. The provisions above, and others such as abuse of rights (Article 106) and unjust enrichment (Article 318), allow the UAE courts to assess the relative impact of the causes of delays and, thereafter, apportion liability for concurrent delay as it deems fair. If the court considers the two causes of delay to be of equal causative impact, the court would be likely to share liability between the parties equally. In considering how effective an issue is in causing delay, the court is unlikely to be influenced by strict principles. It is unlikely that a court would allow an employer to charge liquidated damages where it is responsible for an issue that would prevent the contractor from completing the works were the contractor not already in delay.

Further, the court may find an alternative basis to allocate liability, if it considers it fair and reasonable to do so given the facts and the impact that it considers the various events had on the contractor's works. It is not constrained to apportion liability on a 50/50 basis.

Practical considerations

Delays are one of the biggest, if not the biggest, risks for construction projects. Parties must, therefore, be aware of how liability for delays is treated under their contracts' governing law. For example, for the reasons given above, parties to construction contracts governed by UAE law (and likely other civil law systems) should be aware that UAE law's approach to both assessing whether there is concurrent delay and determining the liability that flows from concurrent delay is markedly different from English law (and likely many other common law systems). Where construction projects subject to UAE law are delayed, each party should ensure that it is not responsible for any delays to its own activities so as to avoid any risk that some liability for the project's delay will be apportioned to it, as the risk of both concurrent delay being found and liability for that delay being shared between the parties is greater under UAE law.

Finally, given the frequency with which concurrency issues arise in delay claims, parties may wish to consider agreeing in their contracts (whatever their governing law) whether the first-in-time principle must be satisfied for concurrency of delay to arise, or whether the "but for" test should apply (which parties may consider fairer). Specifying the relevant test in contracts should provide parties with greater certainty. This is particularly so in the context of disputes under laws other than English law, or where the dispute is likely to be resolved by contractual or statutory adjudication, as these are forums in which there may be a greater tendency for concurrent delay to be found than in the courts.

Arbitration reform in Nigeria

Ben Smith
Senior Associate
bsmith@fenwickelliott.com

Oliver Weisemann
Trainee
oweisemann@fenwickelliott.com

In May of last year, the Nigerian Senate passed the Arbitration and Mediation Bill 2022 (the **"2022 Bill"**), representing the most significant reform of its arbitration law in over thirty years (assuming it is not affected by the upcoming general election.[1] The legislation it replaced, the Arbitration and Conciliation Act 1988, based on the 1985 edition of the UNCITRAL Model Law on International Commercial Arbitration (the **"1988 Act"**), has come under significant criticism in recent years.

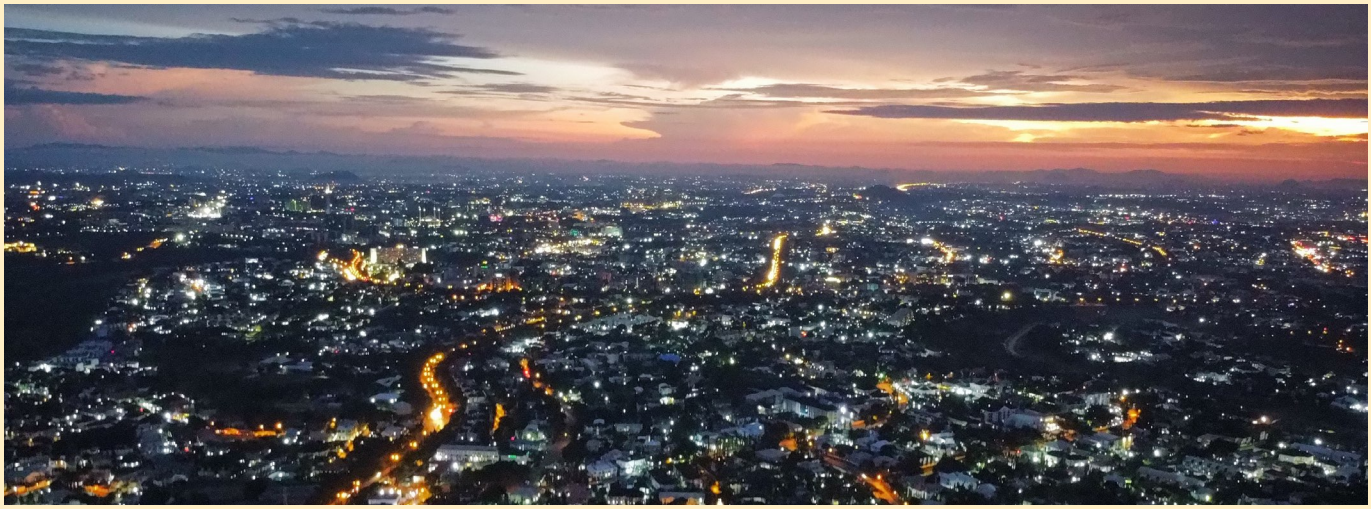
Criticisms of the 1988 Act

A particular point of criticism has been the lack of provisions for interim relief in support of an arbitration, as under the 1988 Act, only an arbitral tribunal may grant interim relief, and this is only in respect of a pending arbitration.[2] This lacuna has occasionally caused issues for parties seeking injunctive relief before the Nigerian courts, as illustrated in the case of *NV Scheep v MV S Araz (2000)*[3], where the Nigerian Supreme Court refused to grant an injunction on the basis that it considered that, for the court to be able to do so, the substantive dispute concerned needed to be before the court for determination.

The 1988 Act has also been criticised for the lack of guidance it contains on emergency arbitrators and the enforceability of emergency arbitrators' orders being entirely silent on the point. In relation to absent definitive guidance, it has been suggested that the enforceability of the orders of an emergency adjudicator remained in doubt, raising questions concerning the compatibility of this aspect of the Arbitration Act with the New York Convention, to which Nigeria is a signatory.[4]

Furthermore, the 1988 Act has attracted criticism by way of its lack of provisions dealing with limitation. This issue became apparent by way of the case of *City Engineering Nig Ltd v FHA*[5], where the Court determined that the limitation law of Lagos state not only applied to the arbitral award in question; it applied from the date of the cause of action, rather than the date of the award.[6]

Many of the above are common criticisms of the older arbitration laws on the continent, which are now undergoing reform. Prior to reform in 2021, the applicable arbitration provisions in Ethiopia faced similar criticism concerning the lack of interim measures and the extensive power of the courts to review (and even revise) arbitral awards and rule on the arbitral tribunal's jurisdiction.[7] Similarly, a lack of interim measures was a point of criticism of the pre-reform arbitration regimes in both Tanzania[8] and Sierra Leone.[9]



In contrast, the position in respect of the New York Convention is less consistent, as while Ethiopia and Sierra Leone have come under criticism for not acceding at all before doing so in 2020[10], some states such as Nigeria and Tanzania have been contracting states for over fifty years[11] and have only garnered limited criticism concerning the extent to which their national laws give effect to the convention.

Have the criticisms been addressed?

These points, among others, have been addressed in the newly passed 2022 Bill; for example:

- The new provisions now mirror those of the UNCITRAL Model Law on International Commercial Arbitration as updated in 2006.[12] This change broadens the Tribunal's powers to permit it to issue interim relief throughout the proceedings.
- The courts are now also able to avail of powers to grant interim measures protection, provided the seat of the arbitral proceedings is in Nigeria.[13]
- The 2022 Bill addresses the uncertainty surrounding emergency arbitrators with provisions establishing the right of a party to apply for or challenge the appointment of an emergency arbitrator and the procedure for doing so (setting a target of two business days following receipt of the application).[14] It also establishes procedures for challenging the appointment of an emergency arbitrator and determining the seat of the emergency arbitration.
- The 2022 Bill retains the applicability of the existing Limitation Acts while, crucially, providing that, where proceedings to enforce or challenge an arbitral award are brought, the calculation of the limitation period is to exclude the dates between the date of commencement and the date of the award.[15]
- The 2022 Bill has also removed misconduct of the arbitrator as grounds for challenging an arbitral award.

These changes go to significant lengths to address the criticisms previously levied at arbitration process under the 1988 Act. Parties should feel more secure in the knowledge that the courts of Nigeria possess more comprehensive powers to protect their interest in ongoing proceedings and should be less likely to refuse to enforce or permit a challenge to an arbitral award.

Innovative provisions

Third-party funding

The 2022 Bill also appears to increase the attractiveness of Nigeria as a seat of arbitration. It expressly permits third-party funding of arbitration proceedings and introduces provisions for the disclosure of third-party funding and security for costs against third-party funders. This may signal the beginning of a broader trend of adopting legislation to facilitate third-party funding in Africa, as following the lead of jurisdictions such as Hong Kong and Singapore, both Nigeria and Sierra Leone have adopted such provisions within the last year.[16]

Award Review Tribunals

A novel provision of the Bill is the introduction of the option for parties to agree to have challenges to the award heard by an Award Review Tribunal. The Tribunals will be constituted of the same number of arbitrators as the original arbitral tribunal and will have exclusive jurisdiction to review challenges to the Award.[17] The Bill also provides that an award affirmed by an Award Review Tribunal may only be set aside by the courts on grounds of not being arbitrable under Nigerian law, or incompatibility with public policy.

Arbitration and reform on the continent of Africa

The reforms taking place in Nigeria are part of a broader pattern of arbitration reform throughout Africa, with Ethiopia, Tanzania and Sierra Leone[18] having been the latest nations to modernise their arbitration regimes. Common themes include:

- An increase in deference to the jurisdiction of the arbitral tribunal;
- Improved interim measures;
- A decreased scope to challenge said jurisdiction; and
- A reduction in the national courts' ability to hear challenges to or refuse to enforce arbitral awards.

Where required, significant steps have been taken to fully embed the New York Convention into the national framework. Further, the recent reforms have been used to strengthen arbitral institutions in these states, with both Tanzania and Sierra Leone establishing arbitration centres intended to aid in the administration of arbitration and advise on arbitration policy as part of their reforms.[19]

This may be due in part to the increase in arbitrations taking place across Africa. In a 2022 survey conducted by SOAS[20], 89 percent of respondents involved in Construction and Infrastructure agreed that activity in the field was on the rise. 36 percent of respondents expressed a preference for arbitration as a dispute resolution mechanism, the single most popular response, significantly more popular than dispute boards, mediation and the local courts. Further, respondents expressed a strong preference for the use of the law of African states as the applicable law in an arbitration, 78 percent preferring this to foreign law. In the African context, Nigeria is a popular seat for arbitrations, Lagos coming second in a 2020 SOAS survey.[21]

Comment

The appetite for international arbitration in Nigeria, and Africa more generally, is evident, and the consensus is that arbitration is on the rise on the continent. The recent efforts of governments like the governments of Nigeria, Tanzania and Sierra Leone to ensure their arbitration regimes cater to this effectively is a welcome development.

The 2022 Bill represents a crucial step forward in this regard in eliminating provisions that have historically underpinned core criticisms of and influenced preconceptions (rightly or wrongly) about Nigeria's arbitration regime and incorporate innovations. The true impact of its provisions naturally remains to be seen, but the 2022 Bill may well be the key to enable Nigeria to unfold its true potential and embed itself as a leading arbitration hub on the African continent.

[1] Mediation and Conciliation Bill 2022

[2] Is the Nigerian Arbitration and Conciliation Act suitable to construction disputes? A critical analysis | International Bar Association (ibanet.org)

[3] Messrs. N. v Scheep & Anor v the M. V. "Araz" & Anor (SC 167 of 1996) [2000] NGSC 3 (08 December 2000); | NigeriaLII

[4] See footnote 2

[5] City Engineering Nigeria Ltd v Federal Housing Authority [1997] NGSC 1

[6] Enforcement of Arbitral Award in Nigeria - The Time Factor - Lexology

[7] A review of recent efforts to modernise commercial arbitration practice in Africa | International Bar Association (ibanet.org)

[8] Ibid.

[9] World Arbitration Update: Legal Developments in Sub-Saharan Africa - Africa's Blooming - Kluwer Arbitration Blog

[10] Contacting states » New York Convention

[11] Ibid.

[12] Mediation and Conciliation Bill 2022, ss 19 et seq

[13] Mediation and Conciliation Bill 2022, s 19

[14] Mediation and Conciliation Bill 2022, s 16

[15] Mediation and Conciliation Bill 2022, s 34

[16] The Arbitration Act 2022 (Sierra Leone), ss 79-80

[17] Mediation and Conciliation Bill 2022, s 56

[18] Arbitration Act, 2022 (Act 18 of 2022) | Sierra Leone Legal Information Institute (sierralii.gov.sl)

[19] Sierra Leone Arbitration Bill 2022 passed - The Patriotic Vanguard

[20] SOAS Arbitration in Africa 2022 Survey Report.pdf

[21] Microsoft Word - 2020 Arbitration in Africa Survey Report v4 EO [FINAL 29.06.20].docx (soas.ac.uk)

Shahed Ahmed
Associate
sahmed@fenwickelliott.com

Enforcement of UAE judgments in England & Wales: recognition of reciprocity

A recent English judgment enforcing a UAE judgment may have paved the way for clarity on the enforcement of UAE judgments in England and Wales.

In 2020, the English High Court in *Lenkor Energy Trading DMCC (**'Lenkor'**) v Irfan Iqbal Puri (**'Mr Puri'**) (**'Lenkor case'**)* decided to enforce a Dubai First Instance Court judgment that was issued back in 2017.

Mr Puri was the sole shareholder and managing director of a Dubai-based entity, IP Commodities DMCC (**'IPC'**). Pursuant to a Tripartite Agreement for the sale and purchase of gasoil between Lenkor, IPC and a third-party buyer, Mr Puri signed two cheques as security on behalf of IPC. A dispute arose in respect of the transaction and Lenkor was successful in arbitration proceedings against IPC. As IPC had failed to satisfy the arbitral award, Lenkor encashed the cheques. The cheques bounced resulting in Lenkor launching criminal and civil Dubai court proceedings against Mr Puri. The Dubai courts (including the Dubai Court of Appeal and Court of Cassation) ultimately found in favour of Lenkor and ordered Mr Puri to pay circa AED123m.

In 2019, Lenkor made an application to the English courts for recognition, at common law, of the Dubai First Instance court judgment. Mr Puri resisted the application on the basis that such recognition would be contrary to public policy on the following grounds:

1. Illegality: the underlying transaction was illegal, which tainted the cheques and the claim to recognise the judgment;
2. Piercing the corporate veil: the Dubai court judgment ran counter to well-recognised principles of English law, i.e., Mr Puri was being made personally liable for the debts of IPC; and
3. Interest: the rate of 9% was exorbitant.

The English High Court rejected Mr Puri's arguments:

1. Illegality: the Dubai judgment is only impeachable on the ground that its recognition would be contrary to public policy, which was not the case here. The Dubai judgment did not in any event have to confront the illegality issue as it was based on the legal consequences of signed cheques that subsequently bounced. Even if it was permissible to look at the underlying transaction, illegality would not have been decisive of the case;

2. Piercing the corporate veil: whilst English law would not have imposed personal liability on Mr Puri; this is because it does not have a statutory provision equivalent to the Dubai Commercial Transactions Law. This does not follow that English public policy would be offended by recognising the judgment; and

3. Interest: the amount of 9% closely reflected the equivalent rates in England so to characterise it as a penalty was unrealistic.

Ultimately, summary judgment was ordered in favour of Lenkor, and the High Court's decision was subsequently upheld by the English Court of Appeal.[1]

Following the above, on 13 September 2022, the UAE Ministry of Justice (**'MoJ'**) issued a circular to the Director General of the Dubai Courts and, by specific reference to the *Lenkor* case, requested the Dubai courts to take steps to confirm the principle of reciprocity (in other words, to enforce English judgments).

Taken from an unofficial translation, the circular states, amongst other things:

> *"Further, Article (85) of the Implementing Regulations of the Civil Procedure Code amended in 2020 states that judgments and orders rendered in a foreign country may be enforced in the State under the same conditions prescribed by the law of the said country. Legislation does not require that a treaty on legal assistance be in place for enforcement of foreign judgments, and these judgments may be enforced in the State on the Principle of Reciprocity.*
>
> *We find that this principle is met given that English courts have enforced a judgment rendered by Dubai Courts under a final judgment handed down by the High Court of Justice in UK in Lenkor Energy Trading DMCC V. Puri (2020) EWHC 75 (WB) (Lenkor), which is a judicial precedent and a binding principle for all English courts according to their judicial system."*

Conclusion

This represents a significant step for companies operating in both the UK and UAE. It is likely to give judgment creditors more confidence to seek enforcement of English court judgments in the UAE and vice versa. This is particularly given the MoJ has proactively requested the Dubai courts to confirm the principle of reciprocity. The circular is, however, only addressed to the Dubai courts, so whether the Abu Dhabi courts will adopt a reciprocal approach is yet to be seen.

Additionally, if reciprocity is consistently recognised between the UK and UAE, it may also encourage – or in some cases, force – parties to settle any disputes between them. This is because the parties may well be more concerned that their overseas assets would be susceptible to enforcement, which may not have been the case previously.

There is perhaps one further note of caution. The MoJ circular is non-binding, and the UAE courts maintain the discretion to consider, amongst other things (e.g., jurisdiction, public policy), whether the *Lenkor case* does, in fact, demonstrate reciprocity from the English courts. This can be subjective, and because there is no concept of judicial precedent in the UAE, it is likely to result in inconsistent approaches taken by UAE courts (as we have seen, on occasion, with the recognition of foreign arbitral awards). As such, one should consider carefully when seeking enforcement of an English judgment in the UAE. Subject to any limitation considerations, it may be wise to first wait and see if the UAE courts adopt a consistent approach of reciprocity.

Finally, reciprocity alone will not suffice for UAE courts to enforce English judgments. The conditions stipulated under Article 85 of Cabinet Resolution No. (75) of 2021 concerning the UAE Civil Procedure Law must also be verified before any order of enforcement is granted by the UAE courts. In other words, parties seeking to enforce an English judgment in the UAE should factor in all elements of enforcement, and not just reciprocity.

[1](2020) EWHC 75 (WB) & [2021] EWCA Civ 770

Jeremy Glover
Partner
jglover@fenwickelliott.com

Notify now or forever hold your peace - Notices of Dissatisfaction under FIDIC and NEC: Part 2

When I drafted my article for the previous edition of IQ, which can be accessed *here*, I did not have a Part 2 in mind. My conclusion was clear on the valuable reminder from the recent English court cases about the need for care when drafting any Notice of Dissatisfaction (or "NOD"). If you do not, there is a real risk that a failure to follow the contract will result in the decision or determination in question becoming binding, something which will apply to challenges both to the merits and any jurisdictional objection. Well, we have a saying in the UK, that you wait ages for one bus and then two or three come along together.

And so, on 9 January 2023, another decision case about NODs, *Ravestein B.V. v Trant Engineering Ltd* [2023] EWHC 11 (TCC), was released by the Technology & Construction Court. Trant had engaged Ravestein to carry out certain engineering works under an amended version of the NEC3 form. Clauses W2.3(11) and W2.4(2) provided that an adjudicator's decision would be final and binding unless, within four weeks of the decision, one of the parties served a NOD setting out that it was dissatisfied with a matter decided by the adjudicator and that it intended to refer that matter to the tribunal.

On 11 April 2021, an adjudicator ordered Ravestein to pay Trant some £455k plus VAT. Ravestein did not pay. The next day, on 12 April 2021, Ravestein issued two e-mails addressed to the adjudicator and copied to Trant. In the first e-mail, Ravestein stated that: *"we do not accept this adjudication and your jurisdiction in this case, therefore we do not recognition your ruling."* In the second, Ravestein said that the adjudicator was not entitled to make any rulings and stated that, if they did not withdraw the ruling, their solicitor would file a request to reverse the ruling.

Ravestein commenced arbitration proceedings on 27 October 2021. The parties agreed that the arbitrator should first decide whether or not a valid Notice of Dissatisfaction had been served. It was not in dispute that, if Ravestein had not given a valid Notice of Dissatisfaction, the adjudicator's decision had become final and binding and could not be the subject of a further dispute resolution process. The arbitrator held that the April email was not a valid NOD, in that it did not contest the underlying decision. The NOD was:

> *"clearly a reference to the jurisdictional challenge. Nothing is said as to the correctness of the Decision."*

Ravestein issued an application for permission to appeal the arbitrator's award pursuant to section 69 of the 1996 Arbitration Act. The key question for the court was whether the arbitrator's conclusion was obviously wrong or open to any serious doubt.

HHJ Kelly made it clear that:

> *"Objections as to an adjudicator's jurisdiction, if they are to bar enforcement of the award, have to be made in enforcement proceedings. Questions which relate to the merits of the dispute must be dealt with in arbitration. The courts strive to uphold adjudication and arbitration awards."*

The Judge went on to confirm that the threshold of being obviously wrong is a high one and the correct legal test for this type of case was that adopted and applied correctly by the arbitrator here, namely:

> *"(1) that the notice requires the identification of the matter which*

the party disputes and that he intends to refer the matter to the tribunal;

(2) it was not sufficient simply to notify the other party that you do not accept that the adjudication decision is final and binding;"

Here, the wording used by Ravestein in the email was not sufficient, objectively read, either to identify the matter about which Ravestein was dissatisfied as including a dispute on the merits, nor that there was an intention to refer the matter to arbitration.

Conclusion

Ravestein had argued that the only requirement of the NOD here was to communicate to the other party that it did not accept the adjudicator's decision as being final and binding. The court here confirmed that this was not the case. On the contrary, a valid NOD under the NEC Form must set out the grounds on which the decision was disputed to make it clear that it was not simply a jurisdictional challenge that was being made, but that there was a challenge to the underlying correctness of the adjudicator's decision.

Clause W2.4(2) of the NEC Form here provided that:

"(2) If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision." [My emphasis]

Clause 21.4.4(b) of the FIDIC 2022 update which also requires that the NOD must be given within 28 says, says something very similar:

"(b) this NOD shall state that it is a Notice of Dissatisfaction with the DAAB's Decision and shall set out the matter in Dispute and the reason(s) for dissatisfaction."

So, the court would have reached a similar conclusion had the FIDIC form been being used.

Sam Thyne
Associate
sthyne@fenwickelliott.com

Updating the FIDIC Rainbow Suite: the 2022 changes

In November, at the 2022 FIDIC Users Conference, reprints of the 2017 Red, Yellow, and Silver Books were announced along with an accompanying updated FIDIC 2017 Contracts Guide. In addition to new amendments, the 2022 reprints include two previously issued errata published by FIDIC in December 2018 and June 2019, making the reprints the definitive issue of the 2017 second editions.

The 2022 amendments were developed in response to industry feedback with the aim to clarify and improve the 2017 text and support its increased use. The amendments themselves are a mix of minor corrections, useful clarifications and new more substantive changes, including the replacement of definitions. They make changes to the General Conditions, along with the DAAB agreement and DAAB procedural rules.

In this article, we look at the changes relevant to disputes. First changes around the Engineer's determination process and definition of Dispute and Claims, then amendments made to the DAAB process.

Disputes and Claims

Two of the most significant changes are:

- Clarifications around "matters to be agreed or determined"; and
- Amendments relating to the definition of Disputes.

Sub-clause 3.7 of the Red Book (3.5 in the Silver Book) sets out the procedure that applies "[w]henever [the] Conditions" require the Engineer or Employer to agree or determine matters or Claims under the Contract. Previously the "matters" were not expressly stated, but the reprint lists each paragraph under which the Engineer is to agree or determine a matter, which assists in more user-friendly administration of the contract. Flowing from this amendment, the definition of "Claim" has been amended to exclude matters to be agreed or determined set out in the 3.7 list, making Claims (requests or assertions for entitlement) separate from the defined list of matters the Engineer or Employer agrees or determines.

The reprints have also made changes to the definition of "Dispute". This change reflects the amendment to "Claim" and the list of matters to be agreed or determined. However, whilst the broad principle of the clause remains the same, (i.e. for something to be in dispute, it must have gone through the determination process and then be subject to a Notice of Dissatisfaction), FIDIC have introduced the concept of deemed Disputes in Sub-Clause 21.4. The reprints now provide circumstances which can be referred straight to the DAAB without the need of a Notice of Dissatisfaction. These include:

- Where there is a failure by the Employer to pay the Contractor within 42 days after the expiry of the payment period, or to comply with a determination to make payment by the Engineer/Employer or DAAB;
- Where the Contractor is entitled to receive financing charges under Sub-Clause 14.8 (Delayed Payment) but does not receive payment thereof from the Employer within 28 days after his request for such payment; or
- Where a Party has given:
  - a Notice of intention to terminate the Contract under Sub-Clause 15.2.1 [Notice] or Sub-Clause 16.2.1 [Notice] (as the case may be); or
  - a Notice of termination under Sub-Clause 15.2.2 [Termination]. Sub-Clause 16.2.2 [Termination]. Sub-Clause 18.5 (Optional

Termination) or Sub-Clause 18.6 [Release from Performance under the Law] (as the case may be).

and the other Party has disagreed with the first Party's entitlement to give such Notice.

These are, of course, areas where disputes often arise and this amendment may assist in a fairer administration of the Contract, preventing what may be a legitimate entitlement being disregarded due to failure to strictly comply with notice provisions.

The DAAB Process

There have been amendments both to the DAAB Sub-clauses, Agreement, and procedural rules.

Sub-Clause 21.2, which applies where the parties fail to agree a DAAB member, has been amended to make the President of FIDIC the default appointing entity (rather than an entity nominated by the parties). This is more of a clarification, however, as the Contract Data states that, unless an appointing entity is stated, the default is the FIDIC President.

Under the DAAB Agreement, previously, DAAB members had to agree that they had not been employed by the parties in the 10 years prior to the signing of the DAAB Agreement. This period has been reduced to five years in the reprint. While relaxing a period of impartiality may raise eyebrows, this brings the FIDIC requirements more in line with other institutions, such as the IBA Guidelines, who specify three years as the period between previous service to a party. Further, it should open the door for a wider range of DAAB members to be nominated on panels.

Finally, the reprints make several amendments to the DAAB Procedural Rules with a focus on online meetings, which have become a feature over the last three years. However Procedural Rule 3 still stresses that site meetings and hearings should only be held on-line in exceptional circumstances, a sign of the value that FIDIC attaches to in-person meetings form a dispute avoidance point of view.

Conclusions

The other amendments include changes to the definition of "Exceptional Events" in Sub-Clause 18.1 to make it clear that they, indeed, had to be exceptional, amendments to the taking over provisions in Sub-Clauses 10.2 and 10.2, and clarifications to the interim payment provisions at final payment stage in Sub-Clause 14.13.

It bears mentioning that the changes will not automatically apply to 2017 FIDIC contracts already on foot. If parties want to use the amended provisions, they will have to specifically amend their current contracts to incorporate them.

Given the 18-year gap between editions, it is helpful that FIDIC are continuing to consider how the Rainbow Suite can adapt with the times. The 2022 reprints are a good balance of keeping true to the original intent of the 2017 text, while offering clarification which will help its longevity.

A further example of adapting with the times is FIDIC's update to the *'Advisory Notes to Users of FIDIC Contracts Where the Project Uses Building Information Modelling Systems'*. In the 2022 reprints, FIDIC has updated the description of Building Information Modelling (BIM) and now includes references the ISO 19650 and 12006 series of standards. The advisory note states that FIDIC Contracts do not require a particular form of BIM Protocol, or other BIM documents, but one suitable example is the Information Protocol published by the UK BIM Framework. Given the importance of technology in today's construction and engineering industries, we look forward to further developments of this advisory note and the work of FIDIC's newly formed Digital Transformation Committee.

We also look forward to future updates which see FIDIC incorporate changes into the contracts which reflect the challenge set out in their Diversity & Inclusion Policy. FIDIC aim for their contract documents to promote gender equality and diversity both in contract provisions and in the documentation that flows from the contract, such as letters between parties, dispute board engagement and engagement of subcontractors and suppliers.

Without prejudice privilege: guidance from the courts

Tajwinder Atwal
Trainee
tatwal@fenwickelliott.com

The recent Privy Council[1] case of *A&A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago (Trinidad and Tobago)*[2] provides guidance on without prejudice privilege.

Under most common law jurisdictions, the without prejudice rule prevents communications from being put before court as evidence if there is a genuine attempt to settle a dispute.[3] It can be useful as it encourages parties to engage in settlements out of court. The purpose behind the rule is to enable parties to speak openly knowing that any admissions they may have made to settle the matter may not be used against them if the settlement discussions do not go ahead. However, it is important to remember that whether a document is considered without prejudice or not is a matter of its substance rather than form, and by merely including the words *"without prejudice"* alone will not mean the communication is within the ambit of without prejudice privilege. Further, as the parties learned in this case, the context (in this case contractual) within which the document was produced will also be relevant.

The Appellant, A&A Mechanical Contractors and Company Ltd (**"A&A"**), is an engineering and construction firm working primarily in the oil and gas industry. The respondent was Petroleum Company of Trinidad and Tobago (**"Petroleum"**), a state-owned oil company in Trinidad and Tobago.

In October 2003, by way of an Invitation to Bid (**"ITB"**), Petroleum invited various contractors to bid to perform steelworks relating to the strengthening of Petroleum's platform. In December 2003, A&A submitted its tender to carry out the work stipulated in the ITB for TT$26,800,000. A&A was the successful bidder and entered into a contract with Petroleum in September 2004.

Importantly, Clause 7 of section 5.1 of the ITB provided in relation to alterations and variations:

> *"[The respondent] may at any time during the progress of the Work make alterations in or additions to or omissions from the Work or any alterations in the kind or quality of the materials to be used therein and if [the respondent] shall give notice thereof in writing to the [appellant] and the [appellant] shall alter, add to or omit as the case may require and the value of such extras, alterations, additions or omissions shall in all cases be agreed between [the respondent] and the [appellant] the amount thereof shall be added to or deducted from the Contract price as appropriate. No variation shall be made to the Work stipulated without prior written approval of [the respondent's] authorised representative. Failure to observe this condition may at the sole discretion of [the respondent] result in non-payment for the unauthorised Work."*

The works were completed by A&A in early 2006 and Petroleum paid the original contract price. However, the parties disputed the amount and value of additional work carried out. As a result, a meeting took place in May 2008, where A&A contended that, *"it was agreed that various items of additional works were variations and that agreed valuations were attributed to each of them."* After this meeting, Petroleum sent a letter in June 2008 ("the June 2008 letter"), which noted the matters that the parties had agreed. In respect of each variation, it also included the amount claimed, the agreed amount and a description of the variation. In November 2008, A&A replied and then in April 2009 Petroleum sent a further reply, by a letter headed "*without prejudice*". There were several variations that had not been agreed on; therefore, it was

[1]The Judicial Committee of the Privy Council is the highest court of appeal for a number of Commonwealth countries, crown dependencies and United Kingdom oversea territories.

[2]A&A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago (Trinidad and Tobago) [2022] UKPC 39.

[3] Some civil law countries do not recognise the without prejudice rule at all, and special care may need to be taken, for example entering into a formal agreement to ensure that negotiations remain confidential and that any without prejudice negotiations are not to be referred to in future court or arbitral proceedings.

suggested there should be a further meeting to resolve this. However, both parties did not agree on the remaining variations, and, by April 2009, A&A wrote to Petroleum stating that they retracted all previous offers and concessions. A&A then started proceedings and claimed the amount agreed in the June 2008 letter.

Petroleum's counsel put the June 2008 letter before the High Court and used it in their cross examination but later objected to the use of it during the cross examination of Petroleum's project manager by A&A's counsel on the basis that letter was part of without prejudice correspondence.

At first instance, the judge came to the decision that the June 2008 letter was not subject to without prejudice privilege. They reached this decision stating:

> *"The meetings which led to the [respondent's] letter of 23 June 2008 and the letter are important for setting out what was agreed between the parties as additions or variations. It was a necessary process to finalise the payments due. The purpose of the meetings was exactly for the purpose of agreeing what was to be paid. No without prejudice designation could therefore be attached to the 23 June 2008 letter. These were not negotiations being undertaken for the settlement of a disputed claim but rather an integral step in the process of finalising the payments. Without these meetings and process final payments could not be met."*

However, the Court of Appeal (Republic of Trinidad and Tobago) disagreed with the High Court and submitted that the June 2008 letter did attract privilege. They extracted serval statements from authorities and based on this reached the conclusion:

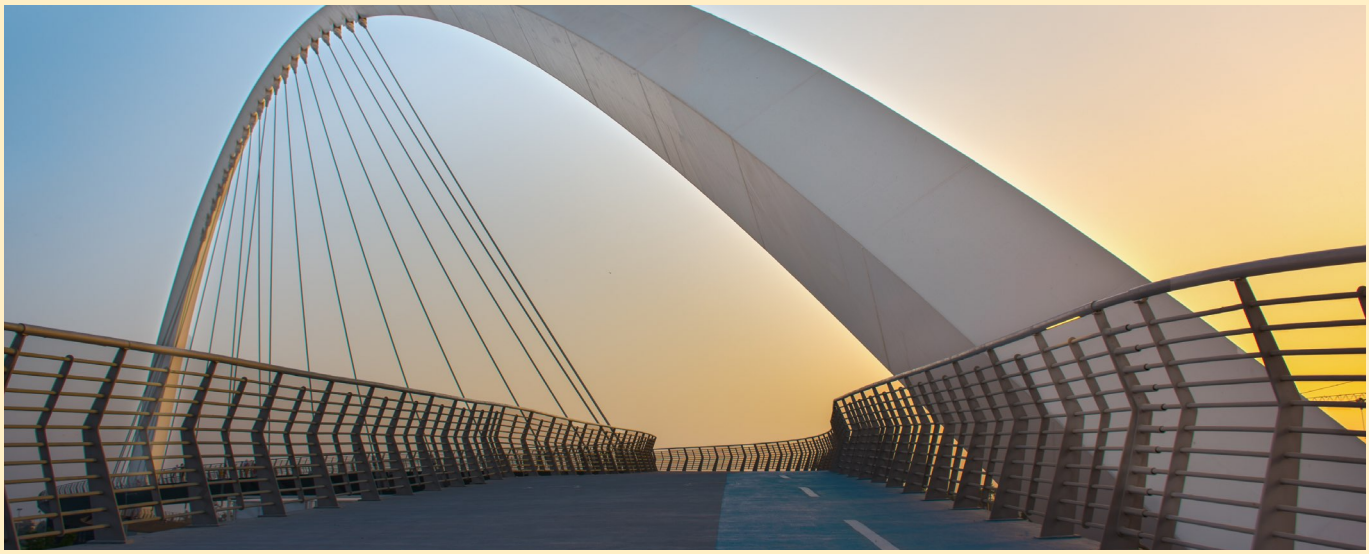
> *"... that differences had arisen between the parties in relation to the variations claimed by the [appellant] and counterclaims of [the respondent]. There were meetings between the parties genuinely aimed at a settlement or compromise of their differences ... In those circumstances the June letter, in my judgment, is a without prejudice communication and accordingly is privileged and inadmissible. The Trial Judge therefore should not have relied on it to arrive at his award in respect of all the other variations."*

A&A then appealed this decision and the Privy Council had to decide whether the Court of Appeal was correct to find that the June 2008 letter was without prejudice and inadmissible.

The Privy Council ruled that the June 2008 letter was not subject to without prejudice privilege and, therefore, admissible because the agreements determined in a meeting was part of the process under clause 7. The Board came to this decision for the reasons set out in paragraphs 67 to 74 for the following reasons:

- The contractual obligation under clause 7 imposed an obligation on the parties to be involved in a process so they could reach an agreement on the value of the variation. As opposed to seeking to settle, this was an ongoing process and, therefore, different from negotiations.
- The agreements that were reached in the May 2008 meeting, which were accordingly recorded in the June 2008 letter, were part of the process to conclude the value of work under clause 7 of the contract.
- A reasonable person would appreciate that the parties' joint intention of reaching an agreement is an open process.
- They also considered that the use of the letter during cross examination amounted to an unequivocal waiver of any without prejudice qualification.

This case shows that a document being *"without prejudice"* is a matter of substance over form. If correspondence is, indeed, for the purposes of settlement, it is best to include "without prejudice" and be consistent with it. However, it is important to ensure that the correspondence is, in fact, made in a genuine attempt to settle with the other party, otherwise a party may risk that communication becoming admissible before the court. Simply using the words *"without prejudice"* may not always be enough.



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Edited by
Jeremy Glover
Partner
jglover@fenwickelliott.com
Tel: + 44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

Fenwick Elliott LLP
Office 1A, Silver Tower
Cluster i, Jumeirah Lakes
Towers
PO Box 283149
Dubai

www.fenwickelliott.com