

Different aspects of Dispute Boards in Latin America, UK and Middle East, with focus on their composition and implementation

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22 September 2022

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NEC Another Secondary Option – X29 – Climate Change

With the increased concerns surrounding climate change, NEC has introduced a new secondary option, X29 for inclusion in NEC4 contracts.

Option X29 has been introduced to reduce the impact of construction work on climate change, by allowing parties to:

1. Identify and set climate change requirements, including carbon emission targets;

2. Produce a plan for climate change for the Project Manager's approval and comply with this; and

3. Serve early warning notices on each other where matters may affect compliance with climate change requirements.

Where such provisions are to be incorporated, these need to be clearly referenced in the Contract Data.

For further information, please see: https://www.neccontract.com/news/final-version-of-x29-released

The Metropolitan Borough Council of Sefton v Allenbuild Limited [2022] EWHC 1443 (TCC)

Facts

The Claimant, the Metropolitan Borough Council of Sefton appointed the Defendant, Allenbuild Limited to construct a combined leisure centre and water theme park in 2005. Practical completion occurred in June 2017.

In November 2021, the Claimant issued an adjudication against the Defendant for defective works. The adjudicator's decision dated 17 January 2022 was in favour of the Claimant, ordering the Defendant to pay.

The Defendant issued a Notice of Dissatisfaction (NoD) regarding the adjudicator's entire decision on 7 February 2022, whilst the Claimant sought to enforce the adjudicator's decision by issuing a claim form on 9 February 2022.

The Defendant argued the dispute resolution procedure under the NEC2 contract was arbitration and therefore, a stay of any action to enforce the adjudicator's decision should be granted.

Issues

Can the adjudicator's decision be enforced, or should a stay of proceedings be granted?

Judgment

The Court dismissed the Defendant's application for a stay, and granted the Claimant's application to enforce the adjudicator's decision (ordering the Defendant to pay £2,204,217.13 plus interest), on the basis that:

1. Section 9 of the Arbitration Act 1996 states:

   "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter…

   (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

   However, enforcement of the adjudicator's decision is excluded from this and does not apply.

2. The notice of dissatisfaction was unclear as to the challenges made; it did not expressly state the validity of the adjudicator's decision was challenged and on what grounds.

For further information, please see: https://www.bailii.org/ew/cases/EWHC/TCC/2022/1443.html; https://www.legislation.gov.uk/ukpga/1996/23/section/9

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC)

Facts

The Claimant, Buckingham Group Contracting Ltd was a contractor appointed by the developer and Defendant, Peel L&P Investments and Property Ltd, to design and construct the production building and external works in Merseyside.

The construction works were governed by an amended JCT Design and Build Contract 2016 dated January 2018 ("the Contract").

Works were significantly delayed and a pay less notice was issued on behalf of the Defendant, setting out its intention to deduct liquidated damages from sums due to the Claimant, pursuant to clause 2.29A.1.2 of the Contract.

Clause 2.29A of the Contract states:

"2.29A .1 *If the Contractor fails to complete the works necessary to reach a Milestone Date the Employer may give notice to the Contractor that:*

> *.1 he requires the Contractor to pay liquidated damages at the rate stated Schedule 10 or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or*
>
> *.2 that he will withhold or deduct liquidated damages at the rate stated in Schedule 10 or at such lesser stated rate, from sums due to the Contractor.*

.2 If the Employer fixes a later Completion Date for the Milestone Date the Employer shall pay or repay to the Contractor without attracting any interest any amounts recovered, allowed or paid under this clause up to that later Completion Date.

.3 Without prejudice to the above, if notwithstanding a failure to reach a Milestone Date the Contractor achieves [the Completion Date] the Employer may at his absolute discretion pay or repay to the Contractor without attracting any interest any amounts recovered, allowed or paid."

The Claimant argued liquidated damages could not be deducted as the contractual provisions are void and general damages are capped to the amount stated in Schedule 10, a table containing a list of deductions.

Issues

1. Were the contractual provisions for liquidated damages valid?

2. Was the amount for general damages capped?

Judgment

The Court held:

1. The contractual provisions for liquidated damages were valid and enforceable, as the intentions of the parties to deduct sums for delay was clear; and

2. Liability for general delay damages is not capped under the Contract, as the wording of clause 2.29A does not suggest this. The rates for liquidated damages and the cap are expressed as percentages, but do not limit liability.

For further information, please see: https://www.bailii.org/ew/cases/EWHC/TCC/2022/1842.html.

Children's Ark Partnerships Limited v Kajima Construction Europe (UK) Limited (1) and (2) Kajima Europe Limited [2022] EWHC 1595 (TCC)

Facts

The Claimant engaged the Defendant to design, construct and commission a hospital.

Clause 56 of the Contract stated that any dispute which arises out of or in connection with the Contract shall be resolved in accordance with Schedule 26 (Dispute Resolution Procedure). Clause 68 of the Contract also stated that 'subject to the provisions of the Dispute Resolution Procedure' the Courts of England and Wales had exclusive jurisdiction to hear any dispute which arose.

The Dispute Resolution Procedure broadly provided:

1. A dispute shall be referred to the 'Liaison Committee'.

2. If the dispute cannot be resolved in accordance with this procedure, then proceedings can be issued in the High Court.

The members of the Liaison Committee were made up from the Claimant and the Hospital Trust the Claimant was to develop the hospital for. No provision in the Contract was made to allow the Defendant to have a member(s) on the Liaison Committee.

The Defendant made an application to strike out the Claimant's claim form on the basis that they did not comply with the Contract's dispute resolution provisions.

Judgment

The Judge held that clauses which obliged parties to enter into Alternative Dispute Resolution before they start court proceedings do not need to be clearly expressed as a condition precedent. The Judge disagreed with the finding of O'Farrell J in the case of Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] BLR 576 in relation to an ADR clause needing to be a condition precedent in order to allow a Court to order a stay. The Court has an inherent jurisdiction to stay Court proceedings for the purpose of ADR if the clause in the Contract creates a mandatory obligation and if it is 'enforceable'. 'Enforceable' meaning it satisfies the other aspects of O'Farrell J's test in 'Ohpen".

However, the Judge found that the Dispute Resolution Provision in the Contract was a condition precedent. The reasons being:

1. The Court must ascertain the objective meaning of the language used by the parties to express their agreement;

2. The words 'condition precedent' do not need to be used, as long as the language makes it clear the ADR provision needs to be complied with before you issue proceedings;

3. The right to commence Court proceedings is subject to compliance with the DRP.

The Judge referred to the case of Holloway v Chancery Mead Ltd [2007] 117 ConLR 30 and the requirements for a valid ADR clause (namely, the clause must be certain that it applies (1), the process for selecting a party to resolve the dispute should be defined (2) and the process should be certain (3)). The Judge held the DRP did not comply with the requirements because:

1. The process the Liaison Committee must follow is not certain;

2. As a result of this uncertainty, there is no mandatory commitment to engage in any specific ADR procedure;

3. The Contract does not make it clear how a dispute is referred to the Liaison committee;

4. The DPR does not make it clear if the Liaison Committee's decision affects the Defendant (as it is arguable that the 'parties' refer to the Claimant and the Hospital Trust but not the Defendant); and

5. It is unclear when the dispute will be resolved by the Liaison Committee (and when the condition precedent may be satisfied).

The Judge held that the lack of clarity and certainty around the DRP in the Contract meant the DRP is not a legally enforceable precondition to start Court proceedings.

Although, as the Judge comments, the DRP was 'unusual and surprising', indicating this case is pertinent to its specific facts, it reinforces the need to ensure any dispute resolution procedure you may include in your contract must be in line with the Holloway requirements and, most of all, is sufficiently certain.

For more information, please review:
https://caselaw.nationalarchives.gov.uk/ewhc/tcc/2022/1595/data.pdf