HFW

CONSTRUCTION BULLETIN
MARCH 2024

Welcome to the March 2024 edition of our Construction Bulletin.

In this edition we cover developments in international construction law that may be relevant to all parties in the industry, as follows:

- Global offshore wind market and what the Asia-Pacific region can learn from European experiences;
- New options for EPCM contracting – key features of IchemE's recent Blue Book;
- The Paccar judgment and its impact;
- Whether a mistake in the drafting of a contract justifies rectification.

We also list upcoming events and webinars at which members of the construction team will be speaking over the next few months.

Nick Watts, Partner
nick.watts@hfw.com

ELLA WALLWORK
SENIOR ASSOCIATE
(AUSTRALIAN QUALIFIED) LONDON

"Whilst the more mature OSW jurisdictions have developed forms of contract for OSW projects, these are still based on the onshore form of the FIDIC Yellow Book."

OFFSHORE WIND: LESSONS FOR ASIA-PACIFIC?

In this article we consider the global offshore wind (OSW) market and look at what the Asia-Pacific Region (APAC) can learn from European experiences.

Where we stand

Europe, and the UK in particular, have led the world in the development of OSW (with over 100 operational OSW projects). The OSW market in the APAC region remains, however, in relative infancy. Forecasts from the Global Wind Energy Council predict that by 2032, 380GW of new OSW projects will be built, nearly half of which will be in APAC.[1]

Australia, traditionally a safe jurisdiction for foreign investment (and with a huge coastline) is an obvious location for future OSW projects. However, there are no Australian OSW projects close to commencing construction, and developers have experienced significant issues obtaining the necessary exploratory and feasibility permits. This led to uncertainty in Australia, resulting in other APAC jurisdictions (including South Korea, Taiwan and Japan) attracting investment to develop their own OSW capability.

In 2021 and 2022 the Australian Government introduced legislation and regulations that now form the foundation of Australia's OSW regulatory framework which will help the industry develop.

Lessons learned

Like any emerging industry, OSW in Europe has faced many challenges. HFW has observed the following issues that often give rise to delays and disputes:

- Non-standardised contractual arrangements (with ambiguous or improper risk allocation);
- Conflicting contractual and technical standards in the Contract and Employer's Requirements;
- Fast-tracked design leading to delays;
- Incomplete site data and unforeseen ground conditions impacting foundation and cable installation;
- Inadequate supply chain capacity (including vessels); and
- Defective turbine components and cables.

These issues were also observed by delegates at HFW's 2023 Annual OSW Conference.

Some of these issues have been addressed by the market more effectively than others. For example, developers now regularly enter into vessel and fabrication yard reservation agreements many years before a project commences.

How lessons learned may be applied in APAC

Adequate contractual regimes will play a vital role in avoiding or minimising disputes in OSW projects. Whilst the more mature OSW jurisdictions have developed forms of contract for OSW projects, these are still based on the onshore form of the FIDIC Yellow Book. In July 2023, FIDIC announced that it is preparing a standard contract specifically for OSW projects. Also in January 2023, the International Marine Contractors Association (IMCA) published useful principles and guidelines focused on challenges within OSW projects, and which are likely to inform FIDIC's OSW contract. These are welcomed initiatives which should benefit the APAC OSW market. Other considerations for APAC should include:

- Identifying the supply chain required to deliver OSW projects;
- Awareness of common technical and design failures such as the defective cable protection system;
- The use of innovative environmental conservationist technology such as "noise mitigation systems" (designed to protect marine life); and
- The use of planning and resource expertise from European projects.

ELLA WALLWORK
Senior Associate
(Australian qualified), London
T +44 (0)20 7264 8014
E ella.wallwork@hfw.com

Footnotes:

1. "Global Offshore Wind Report 2023", Global Wind Energy Council published 28 August 2023.

NEW OPTIONS FOR EPCM CONTRACTING

Last year, the Institute of Chemical Engineers (IChemE) published its Blue Book, a first of its kind standard form EPCM contract. This article explains the merits of the EPCM model of contracting and sets out some key features of the Blue Book.

Why contract on an EPCM basis?

Contractors are increasingly reluctant to take on the risk of EPC, or turnkey projects, involving contracts which require one contractor to design, build and deliver a project. Unstable trading conditions, caused by fluctuating materials prices amongst other things, raise the risk profile of an EPC project beyond what many contractors choose to bear.

An alternative is to use an EPCM model (i.e. Engineering, Procurement and Construction Management). Under an EPCM model, the employer engages a construction manager (the EPCM contractor) to coordinate the project. The employer contracts directly with its separate works contractors (procurement of which is likely to be handled by the EPCM contractor). The EPCM contractor may have some design responsibilities but does not itself carry out the works, and therefore is not liable for the quality of the works (save in respect of issues arising from its own mismanagement).

Contracting options?

Until last year, none of the major suites of construction contracts included a standard form for EPCM contracting. Parties were left with no choice but to draft their own contracts – generally by heavily amending a standard form professional services contract. Although an EPCM contractor is providing professional services, it is a broad role with features that are not adequately covered by a standard professional services contract.

The result was contracts that included convoluted and lengthy amendments, adding legal complexity and risk.

What are the features of the Blue Book?

The Blue Book is intended to be suitable for use in any jurisdiction. It was prepared with process plants in mind, but it is likely to be appropriate for most performance-based contracts.

The latest addition to the IChemE suite places considerable emphasis on collaboration between contracting parties. There is an express duty on parties to cooperate and to deal with one another fairly, openly and in good faith.

That focus on cooperation and collaboration permeates the contract, and especially the dispute resolution clauses which emphasise ADR. Parties are required to endeavour to avoid disputes and to attempt in good faith to negotiate settlement of any dispute that does arise. If a dispute is not resolved by initial negotiation, the Blue Book makes clear that parties may mediate.

The Blue Book is designed to be used alongside the rest of the iChemE suite of contracts. It broadly aligns with those contracts, albeit not completely – the heavily ADR-focused dispute resolution provisions, for example, are a new feature of the Blue Book.

Other options for EPCM contracting?

In 2022 FIDIC convened a task group to develop an EPCM contract, and it was originally expected to be published by the end of 2023. As at the end of Q1 2024, it is yet to be made available.

EILIDH DOBSON
Associate, London
T +44 (0)20 7264 8234
E eilidh.dobson@hfw.com

EILIDH DOBSON
ASSOCIATE, LONDON

"The Blue Book is intended to be suitable for use in any jurisdiction."

BEYOND PACCAR

JOSHUA COLEMAN-PECHA
SENIOR ASSOCIATE, DUBAI

"The complexity of Paccar lies in its effect. It will, no doubt, cause funders and their clients to review past, present, and future funding agreements (in relation to both matters before the English courts and English seated arbitration)."

The majority UK Supreme Court judgment in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28, 26 July 2023, *(Paccar)* has come as a surprise.

Until now, the litigation funding industry assumed that Litigation Funding Agreements (LFAs) were not Damages Based Agreements (**DBAs**), and, therefore, not impacted by relevant legislation.

The *Paccar* judgment has reversed this understanding, by concluding that LFAs entitling funders to payment based on the level of damages recovered are unenforceable: (i) if they are used to fund opt-out collective proceedings before the Competition Appeal Tribunal (**CAT**); or (ii) "**unless they comply with the DBA regulatory regime**" [Emphasis added].

What are DBAs?

Section 58AA(4) of the Courts and Legal Services Act 1990 (CLSA) states that a DBA will be unenforceable unless it complies with the requirements of the Damages Based Agreements Regulations 2013 (**DBA Regs**).

Section 58AA(3) of the CLSA states that:

> *"(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or* **claims management services** *and the recipient of those services which provides that [...]*
>
> *(ii)* **the amount of that payment is to be determined by reference to the amount of the financial benefit obtained**..." **[Emphasis added]**.

The CLSA refers to Section 419A of the Financial Services and Markets Act 2000 (as amended) (FSMA) (which derives from Sections 4(2) and 4(3) of the Compensation Act 2006 (CA)) for the definition of a *"Claims Management Service"*:

> *"Claims Management Services" include "advice or other services in relation to the making of a claim"*; and *"other services"* includes the provision of *"financial services or assistance"*.

The Judgment

What was the question before the Supreme Court?

> *"The specific issue for determination is whether litigation funding agreements ("LFAs") pursuant to which the funder is entitled to recover a percentage of any damages recovered constitute "damages-based agreements" ("DBAs") within the meaning of the relevant statutory scheme of regulation ("the DBA issue"). This depends on whether litigation funding falls within an express definition of "claims management services" in the applicable legislation, which includes "the provision of financial services or assistance". If the LFAs at issue in these proceedings are DBAs within the meaning of the relevant legislation, they are unenforceable and unlawful since they did not comply with the formal requirements for such agreements."*

In order to determine whether the LFA in question was a DBA, the judgement addressed the following questions:

Q: Is litigation funding a Claims Management Service?

A: Yes.

Q: Do Sections 4(2) and 4(3) of the CA inform the question as to what constitutes a Claims Management Service ?

A: Yes.

Q: Is subordinate legislation, such as the DBA Regulations, a permissible aid to interpretation of primary legislation, such as the CA?

A: No.

Q: Does the Jackson Review or Association of Litigation Funders' Code of Conduct 2011 affect the interpretation as to what constitutes a Claims Management Service?

A: No.

Q: Are all Litigation Funding Agreements also Damages Based Agreements?

A: Not necessarily. Whether an LFA is a DBA will depend on whether it falls within the definition of a DBA, as set out in Section 58AA(3) of the CLSA.

Paccar's Breadth of Impact

Funders' considerations include: (i) whether *Paccar* applies to their business and disputes they have funded or might fund; and (ii) consider how their LFAs can comply with the DBA Regs in the future.

What is Paccar's jurisdictional scope of effect?

If the LFA is governed by English law and the dispute is before an English Court (or English seated arbitration) then we consider it clear and logical that *Paccar* will apply.

In a case before the English Courts, where the underlying contract is governed by a non-English law, the English Courts usually hear that case based on expert evidence of the foreign law.

How a non-English court would hear a case where the underlying contract is governed by English law would be a matter for the procedural rules of that court.

Does Paccar impact funding of arbitral disputes?

It is unclear under English law the extent to which the laws regarding third-party funding of cases before an English court are applicable to arbitration. Without judicial guidance on this point, most arbitration practitioners have adopted a conservative interpretation, and have applied the English law regarding third-party funding to English-seated arbitration. (*See Diag Human SE and Mr Josef Stava v Volterra Fietta* [2022] EWHC 2054 (QB)).

Past LFAs, Current LFAs, and funding of future disputes

Practically, we consider that *Paccar's* impact falls into three categories: (i) funded disputes that have concluded, where the LFA is considered to be a DBA and was in breach of the DBA Regs; (ii) funded disputes that are ongoing, where the LFA is considered to be a DBA and is in breach of the DBA Regs; and (iii) future funded disputes that will go before the English courts or are English-seated arbitration.

Conceivably, the most complex situation will be cases where an award or settlement funds have been distributed, and now, following *Paccar*, the applicable LFA is considered to be a DBA and the funds have been distributed in breach of the DBA Regs. It may be that there is a fiduciary responsibility on parties (e.g. Boards of Directors or Liquidators) to consider whether they should seek recourse against their third-party funder.

However, claimants may find it very difficult to pursue claims against their funder. They may instead file claims against law firms who advised them on the meaning and content of their LFA. Law firms should be considering their possible exposure to this type of claim and notifying their insurer.

In cases that are ongoing, parties are going to have to review the LFAs that govern their funding relationships. Looking forward, the DBA Regs are not overly onerous. Broadly, their conditions make good sense.

How does Paccar impact the litigation funding industry more widely?

As we have already noted, *Paccar* only certainly applies to cases before the English courts, and probably to English seated arbitration.

Some words in the dissenting judgment of Lady Rose in *Paccar* should be referred to on this topic. Quoting Ms Dunn, chair of the Association of Litigation Funders:

> *"These consequences will extend to all or most litigation funding agreements that have been agreed since litigation funding began in England and Wales. This would be massively damaging both for the administration of justice in relation to the existing cases which involve funding by litigation funders, and the future access to justice of parties who would otherwise have employed litigation funding agreements to fund their cases."*

Conclusion

Paccar is a relatively simple case:

- it has not created new law, it is a clarification and restatement;
- litigation funders are offering a claims management service;
- crucially:
  - if a LFA determines the payment to the funder *"by reference to the amount of the financial benefit obtained"* then that LFA is a DBA;
  - that LFA / DBA must comply with all procedural steps required for a DBA to be enforceable; and
  - any LFA where the return is calculated based on a percentage of the damages or settlement is caught. Any LFA where the return is on a 'ratchet' calculated by reference to the quantum of damages is also likely to be a DBA.

The complexity of *Paccar* lies in its effect. It will, no doubt, cause funders and their clients to review past, present, and future funding agreements (in relation to both matters before the English courts and English seated arbitration). We anticipate that it will lead to a number of disputes brought by parties who were formerly clients of litigation funds against those funds.

For example, the matter of *Therium Litigation Funding v Bugsby Property* [2023] EWHC 2627 (Comm), where the English High Court has granted Therium (a litigation funder) a freezing order against its client (Bugsby), where Bugsby refused to pay Therium following an award of damages on grounds that the LFA between Therium and Bugsby was no longer valid pursuant to the judgment in *Paccar*.

JOSHUA COLEMAN-PECHA
Senior Associate, Dubai
T +971 52 237 5948
E joshua.coleman-pecha@hfw.com

STEVANA CHAGHOURY
ASSOCIATE, SYDNEY

"Proving or defending rectification cases is difficult, time consuming and costly."

TO ERR IS HUMAN, BUT DOES A MISTAKE JUSTIFY RECTIFICATION?

In recent years, breakthroughs and advancement in new age technology have revolutionised the way parties negotiate contracts. As platforms such as Microsoft Teams and Zoom continue to grow in popularity, it has become increasingly common for parties to negotiate contractual terms in real time via a shared screen. Unfortunately, this does not eliminate the risk of a mistake in drafting a clause in an agreement. This is particularly relevant in the construction context, where stakeholders often engage in negotiations for major projects which typically involve a review of hundreds of pages of terms, together with extensive project specifications.

Rectification is available, subject to discretionary matters, where the provisions of a document fail to give effect to an agreement, or a shared common intention, due to a mistake the parties shared. The mistake can extend to whether the language used, on its true construction, has a different meaning to that which the parties intended.[1] Such situations can cause commercial absurdity or lead to a party taking on more onerous obligations than it contemplated.

Where rectification is based on a common mistake, the actual common intention of the parties needs to be established by convincing proof.[2] That said, the standard of proof remains the civil standard. The actual intention is the subjective intention of the parties, viewed objectively, having regard to the parties' conduct. Correspondence and conduct positively establishing the parties' actual agreement is strong evidence of the parties' intention.[3]

It is the decisionmaker, as distinct from a mere negotiator, whose intention is to be attributed to a corporation.[4] In the context of a multinational corporate group, it would be necessary to establish that authority has been delegated to locally based executives.

There will undoubtedly be a difference between the parties, and often, a party will rely on the literal construction of a text. The Court or Tribunal will sift through the evidence to determine whether at the time of execution of the written instrument the parties had a continuing common intention, and that the written instrument was to conform to that "agreement". It must be shown that the written agreement did not conform to that common intention because of a common mistake.[5]

For the last decade, the judgement of Lord Hoffman in *Chartbrook*[6] has caused controversy. His Lordship pointed out at [59] that *"the common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been."* This approach has provided scope for a party to argue rectification in the circumstances where there is some uncertainty as to the parties' state of mind.

The dictum of Lord Hoffman has not found favour in Courts of Australia and England.[7] The Australian position remains that the evidence must establish by clear and convincing proof that the parties had a common belief as to the meaning of a term.

Proving or defending rectification cases is difficult, time consuming and costly. The lesson learnt is for parties and their legal teams to maintain meticulous internal records and use clear and precise language in inter-partes correspondence, particularly during the course of negotiating critical commercial terms.

STEVANA CHAGHOURY
Associate, Sydney
T +61 (0)2 9320 4618
E stevana.chaghoury@hfw.com

Footnotes:

1. *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 and *Rydelar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603).
2. *Fowler v Fowler* (1859) 45 ER 97.
3. *Newey v Westpac Banking Corp* [2014] NSWCA 319 at [173].
4. *Fonterra Brands (Aust) Pty Ltd v Bega Cheese Ltd* (2021) 159 IPR 494; *Perpetual Ltd v Myer Pt Ltd* [2018] VSC 2; cited in *Fonterra at* [79]
5. *Simic v NSW Land and Housing Corporation* [2016] HCA 47 at [107]; *Slee v Warke* (1940) 86 CLR 271 at 281, *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336.
6. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.
7. *Seymour White Constructions Pty Ltd v Oswald Brothers Pty Ltd* [2019] 99 NSWLR 317 at [14]; *FSH Group Holdings Ltd v GLAS Trust Corporation Ltd* [2020] 2 WLR 429

UPCOMING EVENTS & WEBINARS

International Disputes Week

3 - 7 March

Riyadh

Speakers: James Plant, Slava Kiryushin

4th Annual Floating Wind Europe Conference

5 - 6 March

Berlin

Speaker: Richard Booth

Construction Law for Surveyors Conference

Adjudication - What is the savvy way to handle "smash and grab" adjudications, either claiming money or defending against it?

30 April

London

Speaker: Richard Booth

HFW/Secretariat Seminar

7 May

Riyadh

Speakers: James Plant, Slava Kiryushin and Conrad Bromley (Secretariat)

Adjudication Society Event Hosted by HFW

Use of Expert and Factual Witnesses in Adjudication Processes

30 May

London

Speaker: Richard Booth

UKA International Construction Adjudication & Arbitration Conference 2024

5 June

London

Speaker: Richard Booth

LIDW24 Event

Winds of Change: The Challenges, Developments and Future of off-shore wind disputes

5 June

Speaker: Richard Booth

Australian Wind Energy Conference

Is it Remotely Possible? Managing Program Risk Exposure on Solar & Storage Projects

9 - 11 July

Melbourne

Speaker: Alex McKellar

Informa Construction Law Summer School

9 - 13 September

Cambridge

Speaker: Michael Sergeant (Chairing Day 2)

9th International Arbitration & ADR Summit

13 November

Riyadh

Speaking: James Plant, Slava Kiryushin

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our construction capabilities, please visit hfw.com/Construction

hfw.com

Americas | Europe | Middle East | Asia Pacific