Obstacles to the Appointment of an Arbitrator

Written by International Construction Team

Airports Authority of Trinidad and Tobago v Jusamco Pavers Ltd[1] is an under reported FIDIC Yellow Book 1999 case. It considers: (1) delay in commencing arbitration, (2) replacement of the Engineer, and (3) whether an Engineer's determination is a pre-requisite to commencing arbitration.

Background

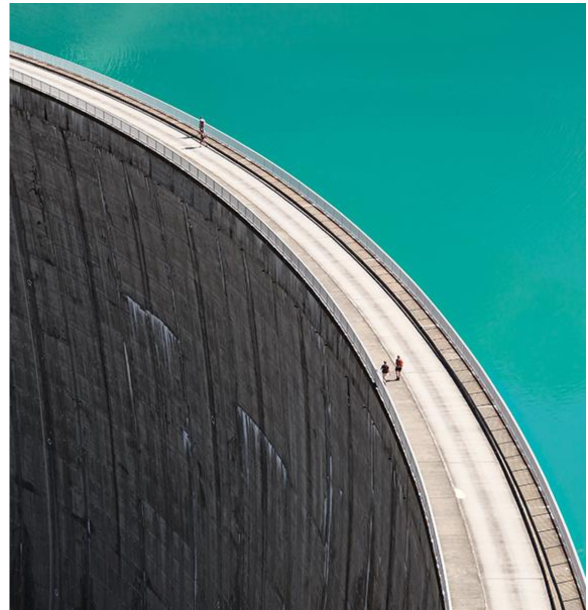
The parties entered into a FIDIC 1999 Yellow Book contract for the £165 million rehabilitation of the airport in Trinidad and Tobago and an upgrade of the Perimeter Road and Fence. The Employer was the Airports Authority of Trinidad and Tobago (AATT) and Jusamco Pavers Limited (JPL), the Contractor. Unusually, the Engineer named in this contract, Mr Varma Joadsingh, was an employee of AATT's.

In November 2011, Mr Joadsingh appointed Mr Derek Hamilton of C&H Associates Limited as the resident engineer, pursuant to clause 3.2 of the Contract. Mr Joadsingh suddenly left AATT's employ shortly thereafter. JPL recognised the authority of the resident engineer, Mr Hamilton as the *de facto* Engineer in Mr Joadsingh's absence.

A taking over certificate for part of the works was handed to AATT on 31 January 2012 and the remaining works were taken over on 18 April 2012. The Defects Notification Period was 365 days from the taking over of each part.

On 12 March 2013, AATT notified the Contractor, Jusamco Pavers Ltd (JPL), of defects on the asphalt paving works. Although it was the Engineer's duty to notify JPL of any defects, these were accepted by JPL two weeks later, on 26 March 2013, without any question of AATT's authority to notify JPL of them. JPL said it was fully committed to rectifying its defects.

Unusually, the retentions were released shortly afterwards on 3 May 2013, but despite the ostensible completion of both parties' contractual obligations,



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the parties continued to work together to fix the defects between March 2013 and October 2015.

Turning Point

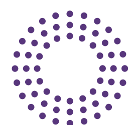
There was a turning point in October 2015. AATT was advised to commence arbitration proceedings to preserve its contractual rights, although it wished to continue negotiation with JPL. AATT sent a letter of claim to JPL on 6 October 2015 which was followed two days later by a notice of arbitration.[2]

In response, JPL changed its position and stated that its obligations to rectify defects were limited and that most of the items which AATT wanted rectified were not its responsibility, despite having accepted responsibility for them earlier.

In late August 2015, AATT engaged Trintoplan to replace Mr Joadsingh as the Engineer, pursuant to clause 3.4 of the Contract, as Mr Hamilton had not been involved with the project following the taking over of the works. In November 2015, after service of the notice of claim and the notice of arbitration, AATT

[1] *Airports Authority of Trinidad and Tobago v Jusamco Pavers Ltd* CV 2018-02353

[2] It is noted that in the standard form of the 1999 FIDIC Yellow Book, before proceeding to arbitration, the parties must refer the dispute to a Dispute Adjudication Board. This does not seem to have been mentioned and the writer presumes the Contract must have been amended to allow the parties to proceed directly to arbitration, although this is not explicitly mentioned in the case.



asked Trintoplan to make a clause 3.5 determination in relation to the notices of claim and arbitration.

JPL contested Trintoplan's authority, stating that the appointment had not been made properly and that the Contract had been completed in any event.

Nevertheless, a draft determination was released by Trintoplan in November of 2016, with JPL again contesting Trintoplan's authority and stating that Mr Joadsingh had not been properly replaced and so remained the true Engineer.

Trintoplan issued its final determination in December 2016, finding that there were defects and that JPL was liable for them. An addendum followed in February 2017, setting out the quantum. In mid-2017, a replacement contractor carried out the works.

AATT decided it had to proceed to arbitration and in early October 2017, asked JPL to agree on an arbitrator. By reply, JPL reiterated that Trintoplan did not have authority and that it did not recognise AATT's belated claim. It also alleged that there was no recognised dispute.

AATT applied to the Court for the appointment of an arbitrator. JPL contested the application, claiming (amongst other arguments which have not been covered in this article) that AATT had inordinately delayed in pursuing the claim, that the Engineer's determination had to be produced before a notice of arbitration was served and that regardless, the Engineer had not been correctly appointed.

The application was heard by Justice James Aboud.

Delay in Commencing Arbitration

JPL argued that delay, whether inordinate or not, must be a factor in determining whether or not to grant a discretionary remedy, relying on a passage from *Commonwealth Affairs v Percy Thomas Partnership and Kier International Limited*.[3] It argued that in this instance, the delay caused prejudice because the notice of arbitration was served in October 2015, more than 4 years after AATT took over the runway works in September 2011, meaning it could no longer pursue its subcontractors for sums owed to AATT. The limitation period in Trinidad and Tobago is 4 years from the date on which the action accrues.

The Court ultimately found that there was no inordinate delay, principally because the parties were attempting to amicably resolve matters for years and in particular, the fact that JPL had appeared to accept responsibility for the defects. Aboud J pointed out that between 2013 and October 2015, JPL voluntarily agreed to do the work, lessening any urgency for AATT to act.

In relation to the 4-year limitation and any prejudice caused to JPL, Aboud J doubted that any prejudice had been caused, stating that JPL had not contacted any of its subcontractors, tried to pursue any claims or call any witnesses. He pointed out that if JPL had been carrying out remedial work for three years, it would be well aware of what its costs were.

Perhaps contractors alleging prejudice caused by an inability or difficulty in recovering sums from other parties should submit evidence that they have attempted to recover such monies, rather than merely pointing out the fact that it could be an issue.

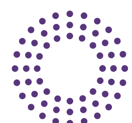
Replacement of the Engineer

Clause 3.4 of the Contract says that when replacing an Engineer, at least 42 days' notice must be given to the Contractor with details of the name, address, and relevant experience of the intended replacement Engineer. The clause then goes on to say that if the Contractor raises a reasonable objection as to the new Engineer's appointment, the Employer cannot appoint that person. The clause is silent as to the position if the Contractor raises an unreasonable objection as to the new Engineer's appointment.

In this case, AATT advised that Trintoplan would replace Mr Joadsingh, giving JPL only 14 days to agree, or confirm disagreement. JPL disagreed with the appointment within 7 days but did not raise any concerns or issues about Trintoplan's qualifications, a point which was noted by the Court.

Aboud J voiced strong scepticism as to JPL's reasons for contesting the appointment, believing that JPL likely suspected that the Engineer had been appointed as a precursor to arbitration, and that this was the reason it contested Trintoplan's appointment. He even

[3] *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership and Kier International Limited* [1998] 65 ConLR 11 at para 128



said that JPL would probably have objected to a report from Mr Hamilton as well, simply to avoid such a report.

Although he does not make a binding ruling, preferring to leave this issue to the arbitrator to determine, Aboud J makes it clear that he considers that in the event an unreasonable objection is made, it is open to the Employer to engage the new Engineer, notwithstanding that objection.

Is the Engineer's Determination a Pre-requisite to Bringing a Claim?

JPL further argued that clause 3.5 [Engineer's determination] of the Contract is a precondition to issuing a notice of arbitration. That is, JPL argued that following the Employer's claim in accordance with clause 2.5 [Employer's Claims], an Engineer's determination had to be issued in respect of that claim before the right to proceed to arbitration arises.

In no uncertain terms, Aboud J rejected this argument, stating that it is not a condition precedent to have the Engineer's determination before commencing arbitration. The Engineer's determination is a temporary fix for the dispute and would be superseded by the arbitration determination anyway.

Although this case indicates that there is no reason for waiting for Engineer's determination before proceeding to arbitration, in an earlier case from Trinidad and Tobago,[4] it was found that it was necessary to comply fully with clause 2.5 [Employer's Claims] or risk "*the back door of set-off or cross claims [being] as firmly shut to it as the front door of an originating claim*" In that case, it was suggested that an Employer has no claim at all until all parts of clause 2.5 have been complied with – that is, the notice, the particulars and also the Engineer's 3.5 determination. Employers would be well advised to complete the 2.5 process before advancing claims or counterclaims.

Conclusion – Points to Take Away

This case provides some valuable indications as to how a Court might approach certain procedural issues.

1) A court is unlikely to, and in this case did not, find that the delay between the official conclusion of the Contract and the commencement of arbitration is inordinate where the delay is due to parties engaging in discussions to resolve matters amicably. In relation to whether or not prejudice would be caused as a result of any delay, it would be wise for a contractor to pursue any claims it may have against its subcontractors in a timely manner, or risk the Court finding that no prejudice was caused to it or that such rights had been waived.

2) This case also helps clarify that where a Contractor refuses the appointment of a replacement Engineer without reasonable objection, a Court is likely to find that the Employer is justified in proceeding with the appointment despite such objection.

3) The effect of an Engineer's determination is also interesting. Given the temporary nature of a 3.5 determination, this Court found that there was no need to await an Engineer's determination once submitted to him before commencing arbitration, although given the previous decision in Trinidad and Tobago, an Employer should comply with all parts of clause 2.5, including the Engineer's determination before pursuing any claims or counterclaims.

[4] NH International (Caribbean) Limited v National Insurance Property Development Company 2015 UKPC 37