cg | consults
engineering

INSIGHTS

Insights is a monthly newsletter from CG Engineering Consults with news in engineering, contract management and dispute resolution.

Issue 05 - August 2023

Dispute Resolution

Issue 05 - August 2023

The Jurisdiction and Powers of an Arbitrator

Introduction

"Jurisdiction precedes powers, and the exercise of powers by an arbitrator presupposes the inherence of jurisdiction."

Whereas the two terms jurisdiction and power are often used interchangeably, they can be defined differently. While statute clearly identifies a large range of the arbitrator's powers, it does not similarly identify the scope of his jurisdiction.

The Sources of Jurisdiction and Powers of an Arbitrator

The arbitrator's jurisdiction and powers emanate from a number of different sources. These include:

- The Arbitration Agreement: This may be incorporated into a contract between the parties which refers disputes and differences between the parties to arbitration. Alternatively, the contract between the parties may make reference to a document containing an arbitration clause, thereby incorporating that clause.

- Statute, i.e., an Act of Parliament: The Arbitration and Conciliation Act, 2000, is Uganda's main law on arbitration. Various provisions of the Act on jurisdiction are dealt with later. Certain other statutes may provide specifically for arbitration of disputes.

- The Common Law: This is relevant in that the Arbitrator is bound by the authority of decided cases of the Court of Appeal and High Court, in that order of precedence. These are known as "precedents" and may be cited to an arbitrator. They declare the law regarding, amongst other things, the limits of his jurisdiction or powers.

- The Custom of the Trade: In certain trades, rules and procedures have developed over the years for the settlement of disputes. These are common in the commodities markets, such as the coffee industry, where "Look and Sniff" rules apply. An Arbitrator's jurisdiction and powers in a commodities dispute in which peculiar customs of the trade commonly apply, will be bound by the rules (including those on jurisdiction and powers) peculiar to that trade.

Jurisdiction

This is the legal or other authority or right over something. It is the scope, validity, legitimacy or authority to preside over or adjudge upon. The term derives from the Latin jus dicere (to declare the law), and [a court's] function of declaring the law is its distinctive attribute. An arbitrator's jurisdiction is derived from the consent of the parties. **Thus, an arbitrator has no jurisdiction in the following situations:**

- Where there is no binding agreement to arbitrate. For example, a dispute arises between parties for, say, supply of equipment. Their agreement has no arbitration clause. There can be no arbitration of that dispute, unless the parties subsequently enter into an "ad hoc" agreement to arbitrate.

- If the arbitrator has not been validly appointed. A valid appointment of an arbitrator would be constituted by the parties complying with the following

  i. the prescribed procedures for his appointment e.g., "each party appoints an arbitrator within 21 days", or a provision requiring each party to consent to the appointment of one arbitrator.

  ii. the appointment of the arbitrator by the prescribed appointer e.g., the Chartered Institute of Arbitrators, the Chief Justice, Uganda Institution of Professional Engineers etc.

  iii. the appointee meeting the prescribed qualifications e.g., "an experienced engineer with a legal qualification"; but not fitting into the prescribed disqualifications, e.g., "must not be a shareholder in any company which is a subsidiary of, or associated with, any of the parties".

- In cases where the claimant has no arguable claim and hence no real dispute to submit to arbitration see e.g., where a money claim is wholly admitted by a respondent who wishes to pay at a later date.

- If the issue in dispute is not an issue which was contemplated in the agreement to arbitrate as the subject of a reference. For example, Leases in commercial buildings in Uganda and Kenya commonly have an arbitration clause for disputes regarding rent review. In such a lease, a dispute arising in regard to painting or restoration works, or on rent payment, is not within the scope of the arbitration clause.

- If an arbitrator acts beyond the scope of the authority vested in him by the arbitration agreement. For example, if he grants a relief which was not requested or which he is statutorily disentitled to grant, such as an order that affects a third party.

Kompetenz-Kompetenz

However, an arbitrator is vested with an unusual statutory jurisdiction. It arises only if his jurisdiction is challenged by a party. This is the competence to decide and rule on his own jurisdiction. It is commonly called the **doctrine of Kompetenz-Kompetenz (See Section 16, ACA, 2000).**

It stipulates that the arbitral tribunal may rule on its own jurisdiction as well as ruling on any objections with respect to the existence or validity of the arbitration agreement.

Powers

The arbitrator's powers are the means, capacities and tools which he possesses to ensure that when he exercises his discretion in a particular way, the parties will comply with his directions. His powers are distinct from his duties. His duties define the minimum which the arbitrator himself must do. His powers define the maximum which he can compel the parties to do. Therefore, the courts have no inherent general power to direct him what to do or not to do, unless what he is doing or has done is manifestly unfair or contrary to natural justice.

The extent of the arbitrator's powers is, mainly, determined by the agreement of the parties. The agreement may vest the arbitrator with powers by virtue of:

- Its express terms;
- The implied terms (in particular, terms implied by the custom of a particular trade); terms of a professional institute or trade body, incorporated into or adopted by the contract (e.g. the CIArb Rules or Rules of the Chamber of Commerce & Industry); or
- Terms incorporated into the agreement by statute.

Contract Management

Issue 05 - August 2023

Disruption Claims for the Contractor under the 1999 FIDIC Forms of Contract

Introduction

Disruption claims presented by the Contractor relate to loss of productivity in the execution of particular work activities. Because of this disruption, these work activities are not able to be carried out as efficiently as reasonably planned in the Work Programme.

It is important to remember that the Programme is one of the most important tools for the Engineer and the parties to the contract during the whole course of the Works. The Programme as referred to in Sub-Clause 8.3 is far more than a simple bar chart. It shows the intended order and duration of all activities which are necessary in order to complete the Works. It shall also include all resources needed for each activity. It is a management tool which must be updated regularly. Disruption events such as piecemeal site access different from that planned in the work programme under subclause 8.3*[Programme]* can have a direct effect on the works by reducing productivity.

The lost productivity will result into financial loss in carrying out the impacted work activities. However, not all lost productivity is subject to compensation. The Contractor may recover compensation for the disruption only to the extent that the contract permits or if there is an available cause of action at law.

How can Contractors prepare effective Disruption claims?

As set out in Hudson's Building and Engineering Contracts, 11th Edition: "The governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if his rights have been observed." As such, the burden of proof to show these actual costs incurred by the Contractor lies with the Contractor. Therefore, the onus is on the Contractor to prepare an effective claim for costs due to Disruption.

It is universally recognised that the evaluation of the additional costs arising out of loss of

It should be noted that disruption is not merely the difference between what actually happened and what the Contractor planned. The Contractor should be able to demonstrate the lost productivity and hence the additional loss and expense over and above that which would have been incurred were it not for the disruption events for which the Employer is responsible. The measure of disruption is the difference between the production that could have been achieved without disruption, and the production achieved as a result of the disruption.

The starting point according to the SCL Protocol for any disruption analysis is to understand what work was carried out, when it was carried out and what resources were used. For this reason, record keeping is just as important for disruption analysis as it is for delay analysis. The onus of proof of the fact that the disruption led to financial loss remains with the Contractor. *This was already established in AMEC Building Ltd v. Cadmus Investments Co Ltd (1997) that ". . . it is for [the contractor] to demonstrate that he has suffered the loss which he is seeking to recover . . . it is for [the contractor] to demonstrate, in respect of the individuals whose time is claimed, that they spent extra time allocated to a particular contract. This proof must include the keeping of some form of record that the time was excessive, and that their attention was diverted in such a way that loss was incurred. It is important, in my view, that [the contractor] places some evidence before the court that there was other work available which, but for the delay, he would have secured, but which, in fact, he did not secure because of the delay; thus he is able to demonstrate that he would have recouped his overheads from those other contracts and thus, is entitled to an extra payment in respect of any delay period awarded in the instant contract."*

In making a claim for disruption, therefore, a Contractor needs to satisfy certain basic principles. Firstly, he has the burden of proof to establish the following:

- That an event entitling him to make a claim for disruption, be it either a 'relevant matter' under the express provisions of the contract and/or a breach of contract, has occurred.

- That the party against whom he is making the claim is factually liable for that event

- That the party against whom he is making the claim is legally liable for that event.

- That the event has caused him to incur loss.

- The quantum of the loss

In properly evaluating the claim, the Contractor is required to do the following:

a) Identification and an analysis of each of the operations claimed to have been disrupted. It is not sufficient to simply state that the execution of the works has been disrupted

- The cause and the manner in which disruption has occurred should be established.

- The figures for the anticipated output, the resources planned and the time required to achieve the completion of the disrupted operations as calculated in the tender have to be shown to be achievable.

- The effects of any inefficiency on the part of the disrupted party in carrying out the works should be properly calculated and its effect included in the calculations of disruption suffered.

- The number of hours actually logged in the time sheets for the disrupted operation has to be shown to be accurate.

In order to illustrate the effects of disruption and/or loss of productivity it may be necessary to establish that a planned orderly timing and sequence of events was affected by causes within the employer's control to the extent that the contractor was prevented from carrying out the work in the planned orderly timing and sequence. The planned sequence may not be that which was envisaged at tender stage.

Additionally, it is important, therefore, to distinguish between **prolongation costs** (costs of overrun beyond the contract completion date) and **disruption costs** (costs arising as a result of delays and/or disruption caused by the employer whether, or not, such delays caused completion to be delayed beyond the contract completion date).

Conclusion

Whereas it is accepted universally that preparation of disruption claims can be challenging for contractors, it can be done. Contractors need to be keen on keeping contemporary records and following contractual provisions that require action of the Engineer for example as provided in Subclause 20.1 [Contractor's Claims]. The Contractor should also be keen on using the Work Programme as a flexible document that should reflect progress or delay of activities and the causes of such delay. This can enable the preparation of an effective disruption cost claim by a Contractor.

CG Engineering Consults is a company that deals in engineering design, claims consultancy, and dispute resolution.

Edited By;

Gavamukulya Charles, MCIArb, AICCP

AICCP ASSOCIATE

Contact Us

+256 704 341 970 /+256 772 47 32 55
@consults_cg
cgengineeringconsults@gmail.com
www.cg.co.ug


cg consults
engineering
www.cg.co.ug