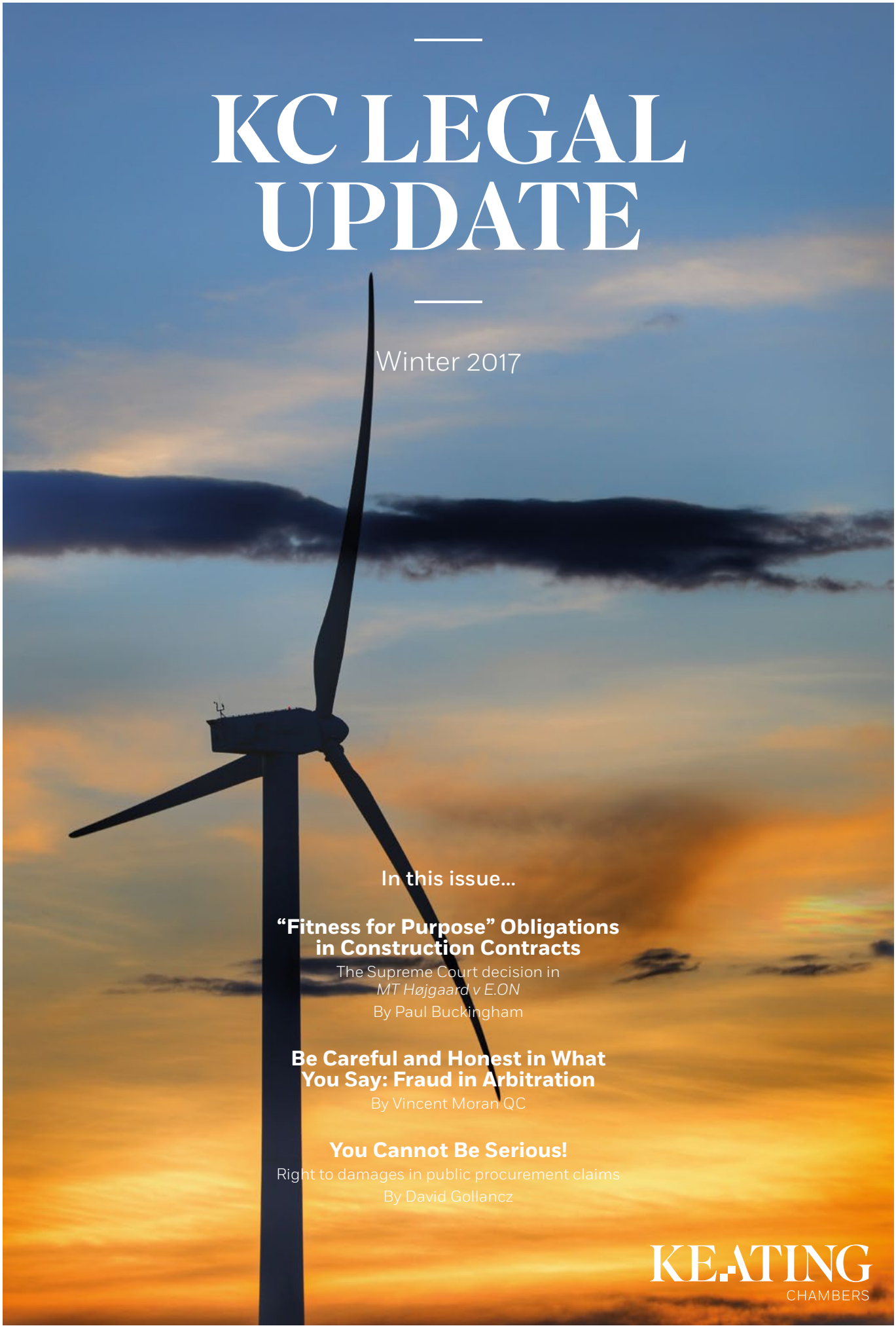


KC LEGAL UPDATE

Winter 2017

In this issue...

KEATING CHAMBERS

WELCOME

TO THE WINTER 2017 EDITION OF KC LEGAL UPDATE

In the spring of 2016, I was invited by the presidents of the three largest Professional Engineering Institutions, the ICE, IMechE and the IET (together representing some 70% of UK registered engineers) to undertake a review of UK professional engineering and to make recommendations for reforms.

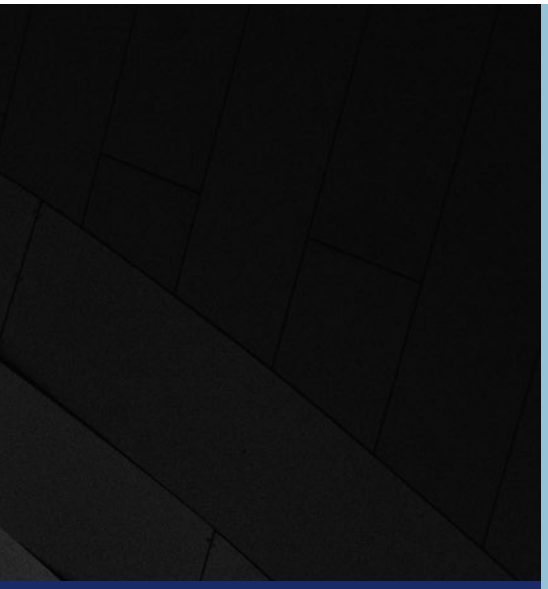
The review was carried out during 2016, and the report published at the end of the year. The debate as to its findings and recommendations continues both within the Institutions and in the wider profession. The need for major reforms is clear but the task of initiating them much more complex.

The UK engineering profession is comprised of 35 different institutions which qualify as well as represent their members, plus an over-riding regulating body, the Engineering Council, and other bodies too. This profusion is confusing, not least to would-be aspirants to the profession; and there has for some decades been a realisation that the Institutions must combine and re-structure their activities. The report recommends that the major institutions must take the lead in combining their activities, not necessarily through mergers but through progressive merging of functions so as to provide a broader field of qualification, allowing engineers post qualification to develop their specialist skills into new areas of technology and other fields, including management or even law. A useful model for the future shape of UK engineering is the Inns of Court, which were once specialised but for the last century, while maintaining their historical roots, have qualified barristers in all areas of law leaving them to develop later specialisms.

Another important area of reform and improvement is the promotion in schools of STEM studies (science, technology, engineering and maths) which is currently restricted to the 14-17 year age group but, in the view of many, needs to extend to nursery level in order to ensure that children are aware of the exciting fields open to them. Foremost among those missing out on career opportunities are girls, very few of whom are motivated to continue with science and maths beyond GCSE level. In virtually all of our rival economies, whether in Europe, the USA or the Far East, STEM take up greatly exceeds that of UK, leading to missed opportunities for both potential employers and trainees.

There is universal agreement that the engineering profession should speak with a strong voice but differing views on whose voice that should be within the 35 institutions. The Royal Academy of engineering is the voice to which the government presently turns but the merging of institutions would create an even stronger and representative voice for the profession and contribute to the enhanced standing of UK engineering, which is presently seen as enjoying a higher reputation abroad than at home.

John Uff QC



CONTENTS

YOU CANNOT BE SERIOUS!

by David Gollancz

David Gollancz reviews the right to damages in public procurement claims following the Supreme Court judgment in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd*

The Way We Were

Breach of the public or utilities procurement legislation is a statutory tort: a breach of a statutory rule which is intended to be enforceable by someone who suffers loss or damage as a consequence; in public procurement, the legislation expands the scope of causation to the risk of loss or damage. The Public Contracts Regulations 2006 (SI 2006/5) reg. 47C provided that:

> *"A breach of the duty owed [by a contracting authority to an economic operator] is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."*

The Public Contracts Regulations 2015 reg. 91, Utilities Contracts Regulations 2016 reg. 106 and the Concession Contracts Regulations 2016 reg. 52 say the same.

The remedies available vary according to whether proceedings are started before or after the contracting authority or utility (the "contracting entity") has entered into the contract. Start your proceedings before, and two consequences follow. First, the statute imposes the "automatic suspension": the contracting entity is prohibited from entering into the contract until either the parties have agreed that the suspension should be brought to an end, the court has made an order bringing the suspension to an end, or the matter has otherwise been settled. Second, the court has a very wide discretion as to the remedies it will order, including the setting aside of the award decision, an award of damages, or any other intervention which a court has power to make. But start proceedings after the contract has been entered into and the court can only award damages.

Until 2017, it was thought that, once breach and consequent loss or damage was proved, the successful claimant was entitled to damages as of right: the court could not conclude that the defendant had broken the rules and thereby caused the claimant loss (or damage) but that it should not have to pay any damages, for example because the defendant's breach was in some way forgivable. Contrast this to the position in judicial review, where the court always has a discretion as to whether to grant a remedy, whether in damages or otherwise.

That position was reflected in the Court of Appeal's judgment in *Matra SAS v Home Office*[1], where Buxton LJ said that the then-applicable procurement regulations

> *"Create[s] a private law, non-discretionary, remedy, because within the national legal order any remedy in damages necessarily has those qualities."*

The Long and Winding Road

Not any more. In *Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now called ATK Energy EU Ltd)*[2] a five-judge Supreme Court found that entitlement to damages in procurement claims is subject to the "*Francovich* conditions" (named for *Francovich v Italy*[3] (and developed in *Brasserie du Pêcheur SA v Germany*[4]). The *Francovich* conditions are that:

1 [1999] 1 W.L.R. 1646 2 [2017] UKSC 34 3 C-6/90) [1991] E.C.R. I-5357 4 (C-46/93) [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889

(i) the rule of law infringed must be intended to confer rights on individuals, and

(ii) the breach must be sufficiently serious, and

(iii) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party.

Conditions (i) and (iii) are to the same effect as the conditions governing statutory tort in English law. Condition (ii) however has no corollary in English private law. It is this second condition which, the Supreme Court has concluded, also governs the award of damages in public procurement claims.

The EnergySolutions/NDA case's road to the Supreme Court was a winding one. At first instance, the NDA sought to argue that under the 2006 Regulations, the court had discretion not to make an award of damages even though breach and loss were proved (the NDA also argued that, by not issuing proceedings within the standstill period, EnergySolutions had broken the chain of causation, but that argument failed and does not concern us here). The point was tried as a preliminary issue. Edwards-Stuart J found that there was no such discretion and that, once breach and causation were established, the claimant was entitled to damages. He said:

> *"I regard it as significant that the [European Court of Justice] emphasised the importance of compliance with the principle of equivalence*[5]*. In the context of English domestic law I am not aware of any situation in which an award of damages is discretionary, in the sense that damages may not be awarded at the discretion of the court even though the breach of duty and consequent damage have been proved. I am not aware of any concept in English civil law of a threshold of gravity of the breach (the "de minimis" rule apart) which must be crossed before damages can or should be awarded."*[6]

The NDA appealed; the Court of Appeal cited regulation 47A of the 2006 Regulations, which referred to a contracting authority's duty to comply (at paragraph (1)(a)(i)) with the Regulations and separately (at paragraph (1)(a)(ii)) to its duty to comply with "any enforceable EU obligation." Accordingly, the court considered that the Regulations set out both a mechanism for the enforcement of EU law rights under the relevant Directives[7], and a domestic law cause of action for breach of statutory duty. The former was subject to the *Francovich* conditions but, if the national law implementing the Directives provided a less restrictive remedy in damages than would be available if the *Francovich* conditions were applied, national law would prevail – regardless of whether the infringements in question were of directly effective provisions of the Directive only, or of the Regulations. Moreover English law does not require a breach of statutory duty to be "sufficiently serious" before the claimant is entitled to damages, and the principle of equivalence demands that the remedy of damages be no more difficult to obtain. Accordingly, the English court has no discretion as to making an award of damages to a claimant under the Regulations if it is shown to have suffered loss as a consequence of breaches of duty established against a contracting authority under the Regulations.

The Court of Appeal's judgment was delivered on 15 December 2015, while the first instance trial of liability in the case was under way before Fraser J. In May 2016 the Supreme Court gave the NDA permission to appeal; in July 2016 Fraser J gave his judgment on liability, finding the NDA liable for a number of breaches of the Regulations. The parties and court agreed that, rather than await the Supreme Court's judgment and then, if it were determined that breaches did have to be sufficiently serious, re-hear evidence, Fraser J should try the question whether the breaches he had identified in his July judgment were sufficiently serious to warrant an award of damages.

5 The EU law principle that domestic remedies for breaches of EU law must be no less favourable than those available for equivalent breaches of domestic law

6 Energy Solutions EU Ltd v Nuclear Decommissioning Authority [2015] EWHC 73 (TCC) §71

7 At the time, Directive 2004/18/EC, setting out the obligations on contracting authorities, and Directive 89/665/EEC as amended by Directive 2007/66/EC (the "Remedies Directive"), setting out the remedies available to economic operators for breach of those obligations

The parties submitted a long list of issues for determination: three "headline" issues, the third of which was divided into eight sub-issues; sub-issue (v) was divided into eight sub-sub-issues. Fraser J considered that two of the sub-sub-issues were matters for the Supreme Court alone. In relation to two others – whether and how the size or value of the contract in question, or the scale and complexity of the procurement, were to be taken into account in assessing the seriousness of a breach – he thought it "inconceivable" that the Supreme Court would not deal with them and refrained from doing so.

While avoiding any comment which might suggest a view as to whether sufficient seriousness was a requirement (although he did permit himself the observation that "There is a degree of artificiality in applying the dicta of the courts that consider discretion on the part of a Member State (or the EU), and comparing or applying it to discretion on the part of an authority conducting a procurement competition"), Fraser J considered what "sufficiently serious" meant. In doing so he relied principally on the judgments of the House of Lords in *R v Secretary of State for Transport ex parte Factortame Ltd (No.5*[8]*)*, and of the Court of Appeal in *Delaney v Secretary of State of Transport* [2015][9]. These cases establish a number of principles and a "multifactorial" approach to identifying whether a breach is sufficiently serious to entitle a claimant to damages. The principles can be summarised as:

(1) The test is objective: bad faith is a factor to be objectively considered;

(2) Moral culpability/egregious conduct/ flagrant misconduct not necessary;

(3) The weight to be given to each factor will vary from case to case, no single factor is necessarily decisive;

(4) The seriousness of the breach will always be an important factor; and

(5) Where the authority had minimal or no discretion, it will be easier for the claimant to prove sufficient seriousness of the breach.

The factors to be taken into account are:

(1) The importance of the principle which has been breached;

(2) The clarity and precision of the rule breached;

(3) The degree of excusability of an error of law;

(4) The existence of any relevant judgment on the point;

(5) The state of the mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily (ie whether there was a deliberate intention to infringe as opposed to an inadvertent breach);

(6) The behaviour of the infringer after it has become evident that an infringement has occurred;

(7) The persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and

(8) The position taken by one of the Community institutions in the matter.

It may be thought that it is difficult to reconcile the principle that the test is objective with the fifth, and possibly the third, of the factors.

Applying these principles and those of the factors which were applicable to the facts, Fraser J found that:

> *"Failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer, is in itself a sufficiently serious breach of the contracting authority's obligations to warrant an award of damages.*
>
> *Individual breach of obligations is sufficiently serious to warrant an award of damages if it is a breach of obligation in relation to a threshold requirement, or one that was designated "Pass/ Fail". Other breaches of obligation in relation to evaluation requirements are sufficiently serious if they would have affected the conclusion (whether individually or cumulatively) of the competition and which tenderer had submitted the most economically advantageous tender."*

It is suggested that in the great majority of procurement claims at least the second of these conditions, or factors, will be satisfied, and in most so will the first. Claimants usually allege that there has been a failure properly to carry out the evaluation of a tender, whether simply by reason of a flawed assessment or because there has been some inequality of treatment as between tenderers. It is suggested too that Fraser J's findings refer to the consequences, rather than the character, of the breach. That might look like a common-sense approach - a serious breach is one which has serious consequences – but it seems clear that the second *Francovich* condition, and the factors identified in Delaney, treat the seriousness of the infringement as a factor independent of the seriousness of the outcome. This is perhaps most clearly apparent in the concept of an "excusable" breach, which suggests that a breach with serious consequences may still not be sufficiently serious.

Fraser J's judgment was given on 16 December 2016. The parties settled but the NDA's appeal continued (EnergySolutions had now changed its name to ATK Energy EU Ltd.). The parties' positions were succinctly summarised by the Supreme Court. ATK contended that the Court should find that EU law required a remedy for any breach of the Regulations, not only when the breach was sufficiently serious; alternatively, that the question should be referred to the CJEU. The NDA sought to overturn the Court of Appeal's conclusion that the domestic law is less restrictive than EU law and confers a right to damages for any breach. The NDA also sought to establish that there should be a trial as to whether an award of damages may in the circumstances of this case be refused to an economic operator.

A Whole New World

On 11 April 2017 the Supreme Court gave judgment. The Court adopted the same approach as had been taken by the Court of Appeal in identifying two bases on which a claim might be advanced: breach of the Directive, and breach of the Regulations. As to the first, the Court agreed with the Court of Appeal, holding that the CJEU case law clearly established that claims under the Directive were governed by all three of the *Francovich* conditions. The fact that the cases held that a right to damages could not be made dependent on "fault" or "culpability" on the part of the contracting authority did not contradict the principle that a breach must be sufficiently serious. There was no doubt such as to require a reference to the CJEU.

As to the second basis for a claim, the Regulations, the Supreme Court also agreed with the Court of Appeal that it was open to a member state to introduce, in the domestic law transposing the Directives, less restrictive conditions on liability for damages. However the Court concluded that there was nothing in the Regulations to indicate that the Regulations conferred any wider entitlement to damages than the Directives. The Court held that the Public Contracts (Amendment) Regulations 2009 (SI 2009/2992), which transposed the amended Remedies Directive, had amounted to a "whole new package of substituted provisions", which amounted to a "new start, based on the Remedies Directive". The Explanatory Note, the Explanatory Memorandum and the Impact Assessment which had accompanied the

8 [2000] 1 AC 524

9 EWCA Civ 172, [2015] 1 WLR 5177

introduction of the 2009 Regulations had all emphasised the legislator's intention to avoid "gold-plating" the European law and to do the minimum necessary to transpose the Directive. Both provisions concerning damages, at regulations 47I(2) and 47J(2)(c), provided that the court "may" award damages, suggesting that damages did not necessarily follow a finding of liability. The Court concluded that the right to damages under the Regulations is subject to the requirement of sufficient seriousness.

"There is the possibility that a claimant who proves breach and causation will be left with no remedy, while the defendant will escape any sanction."

"Failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer, is in itself a sufficiently serious breach of the contracting authority's obligations to warrant an award of damages."

The Supreme Court's decision leaves us with two problematic questions.

First, it is difficult to see how the introduction of a condition of sufficient seriousness, as an element of the domestic tort, satisfies the requirement of equivalence.

Second, there is the possibility that a claimant who proves breach and causation will be left with no remedy, while the defendant will escape any sanction (other, perhaps, than an adverse award of costs). Once the automatic suspension invoked by the issue and notification of proceedings has been terminated and the defendant has entered into the contract, the claimant is confined to its remedy in damages. If the court then finds at trial that, although the defendant breached its obligations and the claimant thereby suffered or risked suffering loss or damage, the breach was not "sufficiently serious" – for example because it was "excusable", whatever that may turn out to mean - the claimant will be left with no remedy at all, and the defendant, although liable, will escape any sanction. Can it be said that such an outcome satisfies the purpose of the legislation? It might be thought that this would bear on the way in which the court deals with applications to terminate the suspension, for example by a greater willingness to order specific disclosure prior to deciding whether to terminate the suspension. A submission apparently along those lines was made in *Cemex UK Operations Ltd. v Network Rail Infrastructure Ltd.* [2017] EWHC 2392 (TCC). Coulson J said:

> *"Whilst I acknowledge that that part of the decision in* ***EnergySolutions*** *came as something of a surprise to procurement practitioners, the ramifications for bread and butter procurement disputes of the type with which this court is familiar are not yet clear, mainly because they do not feature in the judgments in the Supreme Court at all. However, there is nothing in those judgments to indicate that the court was making fundamental changes to the way in which the Regulations operate or the way in which the court polices procurement challenges. There is nothing in* ***EnergySolutions*** *which bears on the proper approach to an early application for specific disclosure."*

It may be that those remarks, especially coupled with Fraser J's findings in the December 2016 hearing in the EnergySolutions litigation, indicate that the court will resist attempts by the parties, on either side, radically to reinterpret the basis on which procurement claims are managed and determined. But it is suggested that the Supreme Court's judgment does make a fundamental change to the operation of the Regulations by introducing a third condition for the award of damages.

That position has been complicated with the 31 October 2017 judgment of the EFTA Court in *Fosen-Linjen AS*[10]. The EFTA Court, trying the same question, came to the opposite conclusion. The Court noted that the European Commission, in its comments, took the view that a condition from general principles should not be "re-imported" to the express terms of the Remedies Directive, and that *"any infringement of public procurement law should be followed up and should not be left unattended because the breach is not "sufficiently serious""*. The Court observed that it was desirable that breaches of public procurement law should be corrected before the contract takes effect, but in some cases the only remedy available to the claimant may be an award of damages. The Court also made a distinction between action in the exercise of public power (where, by implication, "sufficient seriousness" might be a requirement) and a commercial act, in this case the conclusion of a contract (*cf* Fraser J's comment on the artificiality of treating member state liability in the same way as the liability of an individual contracting authority). The EFTA Court concluded that sufficient seriousness was not a condition for the award of damages:

> *"A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the [Remedies Directive], provide that the other conditions for the award of damages are met, including, in particular, the condition of a causal link."*

The absence from the Supreme Court's judgment of any discussion of the difficulty it creates for the claimant who has to decide whether to pursue a claim for damages alone, or any comment on the concept of an excusable error of law, or on the relevance or otherwise of matters such as the scale or value of the contract in issue or the complexity of the impugned procurement, left open a wide field for doubt, which has grown wider still with the judgment in *Fosen-Linjen*.

10 *Fosen-Linjen AS v AtB AS* (Case E-16/16) (EFTA Court 2016/16)

"Fitness for Purpose" Obligations in Construction Contracts

The Supreme Court decision in *MT Højgaard v E.ON*

By Paul Buckingham

In a rare decision concerning a construction contract, the Supreme Court held that a "fitness for purpose" obligation contained within a schedule to a construction contract was to be given its natural meaning and effect, and that the warranty of fitness was not inconsistent with the other terms of the contract.

The ruling sets aside the decision of the Court of Appeal and restores an earlier judgment of the Technology and Construction Court, which had held that the fitness for purpose obligation required the contractor to achieve a result, namely that the foundations would last for 20 years. The case affirms the position that the courts are inclined to give full effect to the terms of a contract and to a requirement that a product complies with the contractual specification.

Background

The matter arose out of the construction of the Robin Rigg offshore wind farm, located in the Solway Firth on the North West coast of Britain. MT Højgaard ("MTH") was engaged as the design and build contractor for the foundations by the operator, E.ON Climate and Renewables ("E.ON"). The windfarm was to be built to the offshore code DNV-OS-J101, which included guidelines for the design of the grouted connection between the transition pieces and the monopiled foundations. One of the inherent characteristics of the code was that it provided for a probabilistic design, which did not guarantee performance. In other words, there was always an inherent risk that the foundation might fail if, for example, the 100 year wave came in the first operational year of the windfarm. This meant that there was always a risk of failure, albeit a very low risk (being in the range 10-4 to 10-5), which had to be allocated contractually between the parties.

However, in 2009, slippage of the transition pieces at the Egmond aan Zee windfarm led to the discovery of a fundamental problem within the code: the calculation of the axial strength for plain pipe grouted connections was overestimated by a factor of about ten, with the result that connections designed to the code were bound to fail (although this problem did not affect two UK offshore windfarms which had been designed using shear keys within the grouted connection).

In 2010, E.ON inspected the Robin Rigg windfarm, noted that slippage had occurred and notified MTH of a defect under the contract. The parties subsequently reached agreement on the cost of remedial works in the sum of €26.25 million, leaving it for the court to decide which of them should bear the cost.

Procedural History

In the Technology and Construction Court, Mr Justice Edwards-Stuart held that MTH had not been negligent in the design of the grouted connection but that it was nonetheless responsible for the cost of the necessary rectification work by reason of a breach of the "fitness for purpose" obligation within the contract with E.ON. MTH appealed.

The Court of Appeal allowed MTH's appeal, deciding that there was no 'fitness for purpose' obligation within the contract. It noted that the industry expected compliance with the well known J101 standard, but that it was also generally known that compliance with J101 did not

guarantee that the foundation would have an operational life of 20 years. It said that, whilst two paragraphs of the Technical Requirements at first sight constituted a 20 year warranty, all the other provisions of the contract pointed the other way, referring to a 'design life' and the requirement to exercise reasonable skill and care in the design of the foundations. The Court of Appeal considered that the paragraphs within the Technical Requirements were "too slender a thread" upon which to hang a finding that MTH had warrantied a 20 year lifetime for the foundations. E.ON appealed to the Supreme Court.

> *"The primary question which the court had to answer was whether the clause ... meant that MT Højgaard had warrantied a 20 year lifetime for the foundations, or that MT Højgaard only had to design with reasonable care and diligence."*

"Fitness for Purpose" Obligation

MTH's general obligations were set out in the Conditions of Contract as follows:

> ***"8.1 General Obligations***
> *The Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works:*
>
> *(i) with due care and diligence expected of appropriately qualified and experienced designers, engineers and constructors (as the case may require);*
> *...*
>
> *(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification using Good Industry Practice..."*

Within the Technical Requirements (which the parties agreed was the intended reference to the Specification in clause 8.1(x)), it stated that:

> ***"3.2.2.2 Detailed Design Stage***
> *The detailed design of the foundation structures shall be according to the method of design by direct simulation of the combined load effect of simultaneous load processes (ref: DNV-OS-J101)....*
>
> *The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."*

The primary question which the court had to answer was whether the clause 8.1(x), when read with clause 3.2.2.2 of the Technical Requirements, meant that MTH had warrantied a 20 year lifetime for the foundations, or that MTH only had to design with reasonable care and diligence following the design methodology in J101.

In giving the judgment of the court, Lord Neuberger was of the view that the natural meaning of paragraph 3.2.2.2 of the Technical Requirements involved MTH warranting either that the foundations would have a lifetime of 20 years or agreeing that the design of the foundations would be such as to give them a lifetime of 20 years. In those circumstances, he considered that there were only two arguments realistically open to MTH as to why the paragraphs should not be given their natural meaning, both of which were mutually reinforcing.

> *"... where different or inconsistent standards were imposed, the correct analysis was that the more rigorous or demanding of the two requirements must prevail..."*

The first argument was that the warranty would be inconsistent with the obligation to comply with J101. Lord Neuberger reviewed the approach of the English (and Canadian) courts and concluded that they were generally inclined to give full effect to a requirement that an item produced complied with the prescribed criteria on the basis that, even if the employer had specified or approved the design, it is the contractor who would be expected to take the risk:

> *"...even if the customer or employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed to work to a design which would render the item incapable of meeting the criteria to which he has agreed."*

He noted that compliance with J101 was stated in the contract to be one of *the "**MINIMUM** requirements" of E.ON* and concluded that, where different or inconsistent standards were imposed, the correct analysis was that the more rigorous or demanding of the two requirements must prevail (as the less rigorous standard could properly be treated as a minimum requirement):

> *"...if there is an inconsistency between a design requirement and the required criteria, it appears to me that the effect of para 3.1(ii) would be to make it clear that, although it may have complied with the design requirement, MTH would be liable for the failure to comply with the required criteria, as it was MTH's duty to identify the need to improve on the design accordingly."*

The second argument was that the operative paragraphs were *"too slender a thread"* upon which to hang such an important and potentially onerous obligation. Whilst the contract was long and multi-authored, Lord Neuberger did not believe that it altered the court's approach to the proper interpretation of the contractual documents:

> *"...the court has to do its best to interpret the contractual arrangements by reference to normal principles. As Lord Bridge of Harwich said, giving the judgment of the Privy Council in Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR 7, 14, "inelegant and clumsy" drafting of "a badly drafted contract" is not a "reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made", although he added that "the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention."*

Applying those principles, Lord Neuberger considered that paragraph 3.2.2.2 was clear in its terms in imposing a duty on MTH that the foundations would have a lifetime of 20 years. He was *"not impressed"* with the argument that it would be surprising that the operative obligation was in an essentially technical document, rather than being spelled out in the contract itself, nor was he persuaded by the argument that the operative obligation should not have been *"tucked away"* within the Technical Requirements. Lord Neuberger thought that it was *"scarcely surprising"* that a provision in the Technical Requirements addressing specific conditions at the detailed design stage included a provision of fitness for purpose.

> *"...parties would be well advised to ensure that the operative words are clear and unambiguous."*

He also did not see why this could be said to be an improbable or unbusinesslike interpretation that should be given no meaning:

> *"I accept that redundancy is not normally a powerful reason for declining to give a contractual provision its natural meaning especially in a diffuse and multi-authored contract (see In re Lehman Bros International (Europe) (in administration) (No 4) [2017] 2 WLR 1497, para 67). However, it is very different, and much more difficult, to argue that a contractual provision should not be given its natural meaning, and should instead be given no meaning or a meaning which renders it redundant."*

E.ON's appeal was accordingly allowed and the order of the TCC restored, holding that MTH had warrantied that the foundations would have a 20 year life.

Conclusions

It is typical in construction contracts, both domestically and internationally, for the purpose of the project to be defined in the technical requirements of the contract.[1] The Supreme Court has confirmed that there is nothing inherently wrong with allocating risk in this way, although parties would be well advised to ensure that the operative words are clear and unambiguous.

In addition, the Supreme Court has confirmed that in contracts of double obligation, whereby there is an express contractual performance warranty in addition to a requirement that the contractor complies with a particular specification put forward by the employer, that the more onerous of the obligations is enforceable, even where the defect is the result of the employer's specification.

1 see, for example, the approach in the FIDIC Yellow Book (1999 Edition) and the IChemE Red Book (2013 edition)

Be Careful and Honest in What You Say: Fraud in Arbitration

by Vincent Moran QC

Vincent Moran QC acted for the successful Claimant in *Celtic v Knowles*, the first reported decision under the 1996 Arbitration Act ("the Act") in the construction field setting aside or remitting an award in arbitration because it was obtained by fraud. In this article he lays out the background to the case and the implications of the TCC's decision.

Introduction

The Claimant ("Celtic") and the Defendant ("Knowles") had been involved in a long running arbitration arising out of a fee claim by Knowles ("the Arbitration") for services provided to Celtic in relation to various adjudication claims made against a third party, Devon County Council ("DCC"). The Arbitration was conducted pursuant to an "ad hoc Arbitration Agreement" between the parties and, in light of a Partial Award in the Arbitration, the fee claim (put at £1.2m) was capped in a maximum potential sum of £178k and was in any event, Celtic contended, subject to a complete defence of set off that will negate any potential recovery.

Celtic's application was to set aside a part of a further Interim Award, dated 6 September 2016, arising out of an interim application by Knowles pursuant to s39/47 of the Act for certain declarations relating to Knowles' conduct with DCC. Celtic's application was made pursuant to s68(2)(g) of the Act, on the basis that Knowles deliberately (or recklessly) misled the Arbitrator when making the s39/47 application by adducing false evidence as to its behaviour in connection with claiming its outstanding fees from DCC, instead of from Celtic.

Celtic's Case

Celtic's case was as follows:

a. Knowles made its s39/47 application to the Arbitrator for a number of declarations, including ones to the effect that, in accordance with the terms of the ad hoc Arbitration Agreement, (i) it had withdrawn/extinguished certain historic invoices previously served by Knowles on DCC in respect of part of its alleged fee/payment entitlement against Celtic, (ii) it had provided a Deed of Indemnity and Waiver, and (iii) it was no longer pursuing DCC for the previously invoiced sums.

b. In support of its application, Mr Rainsberry and Knowles made representations and adduced evidence to the effect that Knowles (i) had withdrawn/extinguished its historic invoices served on DCC, (ii) had not issued further invoices for the relevant sums, (iii) considered itself bound by the Deed of Indemnity and Waiver, and (iv) was no longer pursuing DCC for these sums.

c. These representations were misleading in light of the content of recent prior correspondence ("the March 2016 Correspondence") – which, to the contrary, showed that Mr Rainsberry/Knowles (i) had not withdrawn/extinguished the invoices, (ii) had re-claimed (and effectively re-invoiced) the sums previously the subject matter of the 'withdrawn' invoices, (iii) did not consider itself bound by the Deed of Indemnity and Waiver, and (iv) were still claiming these sums direct against DCC.

d. The Court could conclude that it was likely that Knowles deliberately misled the Arbitrator in the above respects having regard to (i) the immediate background leading up to the s39/47 application, (ii) the content of the March 2016 Correspondence, (iii) the failure of Mr Rainsberry/Knowles to bring this correspondence to the Arbitrator's attention, (iv) the incredible explanation provided by Mr Rainsberry for his conduct and (v) the absence of any other evidence to support Mr Rainsberry's 'explanation'.

e. Even if Mr Rainsberry's explanation for the March 2016 Correspondence was accepted, it is clear that he deliberately misled the Arbitrator in respect of the matters referred to above (or was at least reckless).

The Law

Section 68 of the Arbitration Act 1996 provides that:

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:*
> *...*
>
> *(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;"*

An award may therefore be set aside if either (i) it was obtained by fraud or (ii) the award, or the way it was procured, is contrary to public policy – although the Courts have interpreted these limbs consistently.[1] Where the allegation is fraud in the production of evidence, an applicant must make good the allegation by the production of cogent evidence of fraud by a party to the arbitration that was not available at the time of the award and would have had an important influence on the result.[2]

Section 68(2)(g) of the Act is not concerned with an innocent failure to provide accurate evidence or proper disclosure, but with extreme cases in which there is "*dishonest, reprehensible or unconscionable conduct*"[3]. Fraud must be established to the heightened burden of proof as discussed in *Hornal v Neuberger Products Ltd* [1954] 1 QB 247, *Re H Minors* [1996] AC 563 and *The Kriti Palm* per Rix LJ at paragraphs 256-259.

Background

The Arbitration was concerned with fee claims arising under three separate fee agreements made between the parties regarding the adjudication of certain disputes with DCC (referred to as Adjudications 6, 7 and 8). At the start of their relationship, the parties entered into a Deed of Assignment which, Celtic contended, made Knowles' entitlement to payment of fees contingent upon receipt by Celtic of the proceeds of the Adjudications against DCC.

Knowles interpreted the Deed of Assignment as giving it a right to make claims for its alleged outstanding fees to third parties that owed Celtic money and first made direct claims for payment of such sums from DCC after the decision in Adjudication 6. This led DCC to seek an injunction and declarations in relation to the anticipated claim by Knowles/Celtic for the said Adjudication 6 sum – and, on 14 February 2014, the TCC made an Order declaring, amongst other matters, that the Adjudicator did not have jurisdiction to order the payment of sums to Knowles.

After the further decision in Adjudication 8, to the effect that DCC pay Celtic a sum of money (on 3 and 7 February 2014), Knowles again served invoices on DCC claiming an entitlement to be paid directly by DCC in relation to its outstanding fees – and in spite of the TCC decision dated 17 January 2014. DCC refused to pay these sums and Knowles thereafter commenced the Arbitration on 19 March 2014 seeking payment of some of its alleged Adjudication 8 fee entitlement. The Arbitration was by the ad hoc Arbitration Agreement subsequently expanded to include the disputes connected with Knowles' fee entitlements in respect of Adjudications 6 and 7 as well.

Knowles' interim application, which was the subject matter of the s68 application, included a request for declarations in respect of the fulfilment of certain conditions of the ad hoc Arbitration Agreement.

Declaration 1 was sought in the following terms:

> *"A declaration that Knowles has complied with paragraph 3 of the Arbitration Agreement as it has withdrawn its invoices served on Devon County Council."*

Paragraph 3 of the ad hoc Arbitration Agreement stated:

> *"That Knowles will withdraw* ***and extinguish*** *its invoices served on Devon County Council" (my emphasis).*

The Arbitrator's determination on this matter on 6 September 2016 found that Knowles had withdrawn and extinguished those invoices which it had previously issued against DCC by the issue of the credit notes referred to above.

Declaration 2 was sought in the following terms:

> *"A declaration that Knowles has complied with paragraph 4 of the Arbitration Agreement in that it has provided an indemnity in favour of DCC indemnifying the latter against Knowles pursuing sums owed by DCC to CBE under an assignment in favour of Knowles dated 19.11.10."*

Clause 4 of the Ad Hoc Arbitration Agreement (which Knowles' Declaration 2 is seeking to cover) states):

> *"THAT Knowles will provide an indemnity in favour of Devon County Council in the matter of the Celtic BioEnergy Ltd assignment in favour of Knowles* ***and that it will not pursue Devon County Council for such sums as are owed by Devon County Council*** *" (my emphasis).*

The Arbitrator's determination on this matter on 6 September 2016[4] found that Knowles had complied with the terms of paragraph 4 of the ad hoc Arbitration Agreement in that (i) it had provided a form of indemnity and waiver in favour of DCC in a form which was agreed with Celtic, and (ii) Knowles did not retract its agreement to the Deed of Indemnity in the letter dated 27 November 2014.

Developments after the Interim Award

Celtic obtained information in the March 2016 Correspondence to the effect that Knowles had misled the Arbitrator in relation to Declarations 1 and 2 set out above. In particular, it was clear from Knowles' letter to DCC of 16 March 2016 that Knowles were continuing to seek payment from DCC at that time, on the premise that they were entitled to do so pursuant to the Deed of Assignment.

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1 see Russell on *Arbitration* (24th edn) at paragraphs 8-112; Merkin *Arbitration Act 1996* (5th edn) at pages 315-317)

2 (see Russell on *Arbitration* (24th edn) at paragraphs 8-112 to 8-118; *Double K Oil Products v Nestle Oil Oyj* [2009] EWHC 3380, per Blair J at paragraphs 33-35)

3 see *Chantiers De L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 per Flaux J at paragraphs 55-61; *Profilati Italia SrL v Paine Webber* [2001] 1 All ER 1065; *Gater Assets Ltd v Nak Naftogaz Ukrainy* [2008] EWHC 237 at [39]-[40]

4 at 1/26/221-224

However, the position and submissions taken by Knowles before the Arbitrator were to exactly the opposite effect i.e. that it had withdrawn and extinguished its invoices to DCC, had not issued a further invoice, was not still pursuing such a claim and had provided (and not retracted) a valid DOIW to and in favour of DCC which it was still content to abide by. No indication was provided on the part of Knowles in the March 2016 Correspondence that it was withdrawing or changing this stance as to its existing entitlement to and demand for payment as previously communicated in the earlier correspondence.

Celtic's case was that Knowles and Mr Rainsberry had therefore misled the Arbitrator by asserting:

a. In relation to Declaration 1, that they (i) had *withdrawn and extinguished* its invoices, thereby removing its alleged claim/entitlement to be paid direct by DCC and the associated bar to payment of proceeds by DCC into the stakeholder account, and (ii) had not re-issued or reclaimed or pursued the same from DCC - at a time when the Knowles claim had been re-asserted, re-invoiced and not finally withdrawn by virtue the March 2016 Correspondence.
b. In relation to Declaration 2, that the Defendant had (i) provided the required Deed of Indemnity, (ii) not revoked the same, and (iii) not pursued DCC direct for the relevant sums.

Knowles denied that there had been any possible deceitful misrepresentations on its part.

Importantly, however, Knowles did not suggest that it had simply forgot to mention the March 2016 Correspondence during its s39/57 application – by an oversight or carelessness – and did not deny that the March 2016 Correspondence, on its face, completely contradicted the position it had taken previously on Declarations 1 and 2 before the Arbitrator. Initially, Mr Rainsberry's only explanation offered was that (i) Knowles had been intending to elicit an acknowledgment from DCC that it would rely upon the Deed of Indemnity (because the Celtic had previously argued that an impediment to any settlement between it and DCC was the objections raised by DCC to the Deed of Waiver and Indemnity dated 18 July 2014), and (ii) in any event the correspondence was irrelevant.

Celtic's primary case was that the evidence established, to the required standard, that Mr Rainsberry/Knowles deliberately misled the Arbitrator by presenting false evidence to the effect that (i) the relevant invoices had been withdrawn and extinguished, (ii) Knowles had not issued further claims/invoices, (iii) Knowles considered the Deed of Indemnity as still binding on it and the parties generally, and (iv) Knowles was no longer pursuing DCC direct for payment.

Alternatively, even if Mr Rainsberry's explanation of his real motive for writing the March 2016 Correspondence is accepted, nevertheless the evidence shows that he deliberately misled the Arbitrator. In fact, on analysis, the issue of Mr Rainsberry's subjective intention in respect of the March 2016 Correspondence does not exculpate him or Knowles for providing inconsistent evidence to the Arbitrator and/or failing to disclose the March 2016 Correspondence or its content.

Objectively construed, Celtic contended that it was abundantly clear (and would have been clear, or should have been clear, to Mr Rainsberry) from the March 2016 Correspondence that Knowles, as matter of fact, made (and were still making) a further positive claim to be entitled, by alleged reason of the Deed of Assignment, to payment directly from DCC of the Adjudication 8 Sum. Mr Rainsberry/Knowles therefore must have known that it was untrue to suggest the contrary to the Arbitrator as part of its s39/47 application – whether or not there was some ancillary or hidden purpose in acting in this way toward DCC in March 2016.

Alternatively, whether guilty of deliberate deception or recklessness, this conduct amounted to dishonest, reprehensible and unconscionable conduct within the meaning of s68(2)(g) of the 1996 Arbitration Act.

The Court's Decision

The Court found that:

a. The threshold for any challenge under s.68 was high.

b. It was not sufficient to show that one party had inadvertently misled the other, however carelessly. There had to be some form of dishonest, reprehensible or unconscionable conduct that had contributed in a substantial way to obtaining the award.

c. There might be cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g).

d. To establish that there had been a substantial injustice, the applicant had to show that the true position, or the absence of the fraud, would probably have affected the outcome of the arbitration in a significant way[5].

e. Mr Rainsberry had deliberately misled the Arbitrator as alleged by Celtic and that the Interim Award should therefore be remitted back to the Arbitrator for further consideration.

f. This conclusion would have been reached whether or not Mr Rainsberry's explanation had been accepted.

g. The parts of the award challenged were to be remitted to the Arbitrator for reconsideration[6].

Specifically in relation to Declaration 1, Jefford J held:

> *"50. It seems to me clear that extinguishing an invoice must mean that the claim on which the invoice was based is extinguished…*
>
> *52. Although that correspondence initially made no references to the invoices themselves, the sums claimed were those invoiced. At the conclusion of Knowles's exchanges with DCC, the claims had not been withdrawn and were still extant…*
>
> *53. The omission of any reference to the March correspondence by Knowles was, therefore, utterly misleading. It created the impression that by issuing the credit notes in 2014, the claims had been extinguished when Knowles had, just months earlier in 2016, been making the same claims."*

Her Ladyship remarked after quoting from the cross-examination of Mr Rainsberry:

> *"95. This evidence or argument had not been mentioned in Mr Rainsberry's witness statement. It evaded the issue and had all the hallmarks of having been concocted to advance a case that a letter that claimed money and threatened legal proceedings if that money was not paid was not, in fact, a claim, because Mr Rainsberry knew full well, and knew at the time of the application to the arbitrator, that a letter that made a claim against DCC was inconsistent with Knowles having extinguished its claims against DCC and inconsistent with its not pursuing DCC for payment, and ought to have featured in the arbitration……*

5 see paras 65-70, 104 of Judgment.

6 paras 90-91, 98, 105-1.

"Celtic's primary case was that the evidence established, to the required standard, that Mr Rainsberry/Knowles deliberately misled the Arbitrator by presenting false evidence..."

98. Against this background I have no hesitation in concluding that the failure to draw this correspondence to the attention of the arbitrator was deliberate. I cannot accept that Mr Rainsberry did not recognise that it was relevant to the issues of whether the claims had been extinguished or whether Knowles had not pursued DCC for payment. Nor can I accept that Mr Rainsberry did not know that these were relevant issues. The failure to disclose the March correspondence created a wholly misleading impression...

99. I have already said that I do not find his explanation for the March correspondence credible but, even if I had accepted it, I would still have been unable to accept that Mr Rainsberry thought the correspondence irrelevant."

And, in relation to Declaration 2, Jefford J *held:*

"57. In coming to his conclusion as to whether Knowles had given a waiver as required under paragraph 4, the arbitrator considered that he had to take into account whether Knowles had retracted its agreement to the waiver. He did so and concluded that they had not and that, therefore, the condition in paragraph 4 had been complied with.

58. In fact, Knowles' demand for payment from DCC was completely inconsistent with acceptance that the first Deed of Waiver was valid and, on its face, only consistent with Knowles adopting a position that it was for some reason not valid (as DCC had feared)...

60. It is therefore hardly surprising that CBL's case on this application is that the failure to tell the arbitrator about this correspondence was completely misleading and amounted to fraud. CBL's primary case was that Knowles' misled the arbitrator deliberately; its alternative position was that Knowles did so recklessly...

74. The letter dated 16 March 2016 claimed payment of the same sums as had been invoiced, together with a further sum, with the threat of legal proceedings if the sums were not paid. Thus Knowles had pursued DCC for payment after the date of the first Deed of Waiver and, even if the claim and the threat were not pursued, they were never withdrawn. It is no answer to say that the letter did not say what it said because Mr Rainsberry did not really mean what he said...

79. The March correspondence on its face started with an aggressive demand for payment that flew in the face of the first Deed of Waiver...

94. Mr Moran QC posed the same question in relation to paragraph 4 of the arbitration agreement (which provided that Knowles would not pursue DCC):

"Q: If it were a letter of claim, it would be a breach, wouldn't it?
A: No
Q: Well, can you just explain that? If [it] were claiming the adjudication 8 sums and pursuing DCC direct, how would that not be a breach of paragraph 4 of the ad hoc arbitration agreement?
A: This letter is not a letter of claim. If a different letter existed which was a letter of claim, that could be a breach of 4. But a different letter doesn't exist."

As to the requirement under s68(2)(g) to show substantial injustice before an award will be remitted:

"109. It seems to me that where the key issue is one that would potentially be affected by the material not put before the arbitrator it must follow that CBL have suffered a substantial injustice – namely the wrong result. In any event, the arbitrator made a costs order against CBL which must have been affected by the outcome of the application...

115. I will, therefore, remit the parts of the award that are challenged to the arbitrator so that he can consider his award in possession of the full facts."

Although it was not necessary to consider Celtic's alternative case in recklessness, Jefford J concluded:

> *"101. …Neither party was able to identify any case in which a court had decided one way or the other whether recklessness as to the truth of a statement could amount to fraud within the meaning of s.68(2)(g). High Court Approved Judgment: Celtic -v- Knowles 31.*
>
> *102. Mr Moran QC's position was simple. In the civil context, fraud can be equated with or could require no more than the tort of deceit. The elements of the tort of deceit are (a) a representation which is (b) false and (c) dishonestly made and (d) intended to be relied upon and in fact relied upon. As Rix LJ put it in The Kriti Palm [2006] EWCA Civ 1601 at [256]:*
>
> > *"As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross. The standard direction is still that of Lord Herschell in Derry v Peek (1889) 14 App Case 337 at 374: "First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proven when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless of whether it be true or false."*
>
> *103. Accordingly, a false statement recklessly made would be a dishonest statement in the civil context (if not the criminal). As a matter of legal analysis, there is considerable force in that submission. It does not, however, sit entirely easily with the references in the authorities to "reprehensible and unconscionable" conduct. As I said above the authorities are unclear as to whether dishonest conduct and reprehensible or unconscionable conduct are to be regarded as distinct types of conduct or whether they are synonymous. If they are synonymous, that tends to suggest that "dishonesty" in this particular context involves something more than recklessness.*
>
> *104. These comments – and they are no more than that – are more consistent with what I have called the synonymous reading of the different types of conduct. It seems to me, without deciding the point, because it is unnecessary for me to do so, that there may be cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g) if there is some other element of unconscionable conduct…"*

Implications of the Decision

On one level, given the fact sensitive nature of s68 applications, the wider significance of this decision is difficult to predict.

However, it is suggested that the case emphasises the following:

a. The willingness of the Court in clear cases to interfere with arbitral proceedings;

b. The need to be careful when making representations to and adducing evidence before arbitral tribunals;

c. The possible need to produce, or at least take account of, relevant correspondence or documentation even if no specific order for disclosure has been made in relation to the specific application or hearing.

Perhaps the most startling feature of the case is that it represents an unusual willingness of a Court to make a finding of fraud in a civil context. This may encourage other parties on other cases to more frequently allege that tribunals have been 'deliberately misled'.

Further, there was an interesting question of law raised in the case – namely whether 'recklessness' as to whether representations are true or not was sufficient to establish 'fraud' for the purposes of s68(2)(g0 of the AA 1996. Although, given the finding on deliberate dishonesty, it was not necessary for the Court to consider this aspect of Celtic's case the Court did appear to give support to that proposition; albeit with the caveat of "*if there is some other element of unconscionable conduct…*".

It is respectfully suggested that this may have been too restrictive an analysis. It is not entirely clear why an application under s68(2)(g) of the Act, based merely upon recklessness, should require some other element of unconscionable conduct.

The authorities appear to have interpreted the required element of 'fraud' to include "*dishonest, reprehensible or unconscionable conduct*". Knowingly making a representation without caring whether it be true or not is a form of dishonesty (in the law of deceit) or, it is suggested, should be considered by itself as amounting, at the very least, to a form of 'unconscionable conduct'.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported Case Summaries

Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735

Halsbury is a property developer, Adam an architectural practice. Halsbury retained Adam to provide designs in relation to the construction of 200 homes in Norfolk. The appointment incorporated RIBA conditions which provide for interim payments, payment notices and pay less notices. They also provide that the client can terminate on reasonable notice and for the architect to submit a termination account. Following a dispute, Halsbury ended the appointment. Adam therefore submitted its account in respect of the work done. Halsbury did not issue a pay less notice or pay the fees claimed but instead made complaint about Adam's performance. In adjudication it was held that in the absence of a pay less notice Halsbury was bound to pay the sum applied for.

Halsbury referred the matter to the TCC for determination in Part 8 proceedings. Adam commenced its own proceedings to enforce the adjudicator's decision. Edwards-Stuart J held that there was no contractual requirement for a pay less notice against a termination account but that in any event the contract had been repudiated by Halsbury so that Halsbury had discharged itself from the obligation to serve a pay less notice.

The Court of Appeal rejected the argument that the judge should not have embarked upon an inquiry into whether the contract was repudiated in a Part 8 hearing that was also the summary judgment hearing to enforce the adjudicator's decision. The appeal nonetheless succeeded on the basis that (1) irrespective of the terms of the RIBA appointment, the Housing Grants Construction and Regeneration Act 1996 as amended attaches to final payments as well as interim payments, and (2) whether or not the appointment had been repudiated by Halsbury, there had been no acceptance. Adam had simply submitted its claim for payment of its fees, i.e. a contractual entitlement.

Justin Mort QC represented the appellant.

—

R v The Lord Chancellor [2017] EWHC 2667 (TCC)

This was the last in a series of claims brought against the LSC (Legal Services Commission) relating to the 2010 round of tenders for legal services contracts. The claimant had bid for an immigration services contract in London along with over 400 other firms. However, it did not provide an answer to 4 out of 7 scored questions and failed to score enough marks to gain a contract. It later claimed that the defendant should have allowed it to clarify its tender by filling in the missing answers and rescored its response. The claimant argued that a duty to clarify arose under *Tideland Signal v Commission* [2002] ECR II-3781 and that the defendant breached the equal treatment principle in its treatment of other tenderers. Proceedings were issued in the Administrative Court in November 2010 and only reached trial (in the TCC) in October 2017. There was no oral testimony. The Judge assessed the extensive disclosure, submissions and evidence in reaching his conclusions.

The claimant lost completely. The Judge found that the defendant was not obliged to do anything more than take the claimant's failure to answer the relevant questions at face value and that it treated other tenderers in the same situation in precisely the same way. The claimant tried to show that clarifications made by the defendant in relation to other parts of the procurement were comparable and gave rise to a breach of the equal treatment principle. It failed on the basis that these were not 'comparators' and that to treat them as comparable would bring the procurement process to a grinding halt. It would require the defendant to provide disclosure to every aggrieved tenderer of its treatment of every other tenderer on every aspect of the procurement process. In the Judge's words, "the claimant's comparison marathon became an exercise in futility."

The Judge addressed the absence of any evidence to support a damages claim, the "abysmally slow and haphazard fashion" in which the claim had been conducted and the disregard shown by the claimant to orders of the court and CPR. When considering costs, the Judge also took into account the evidence of unjustified personal attacks made by the claimant against various employees of the defendant by way of actual and threatened complaints to the BSB and SRA and the application to bring contempt of court proceedings a month prior to trial which was later withdrawn.

The claim was dismissed and the claimant was ordered to pay the defendant's costs of the action, with costs after March 2013 assessed on an indemnity basis.

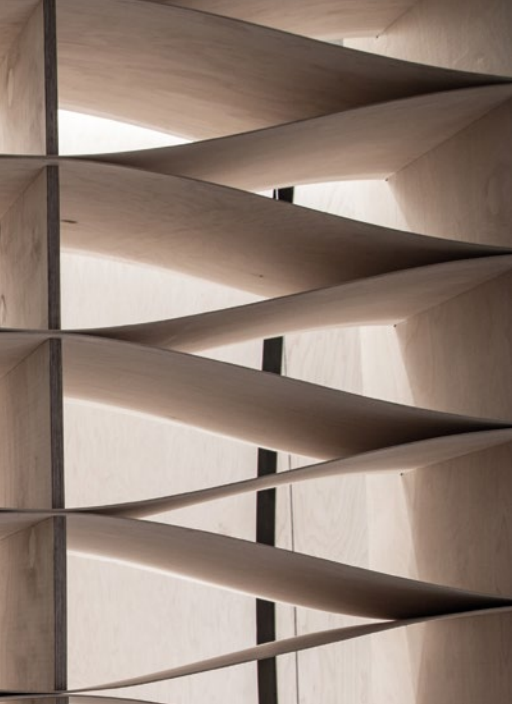
Simon Taylor represented the defendant.

—

Bernhards Sport Surfaces Ltd v Astrosoccer 4 U Ltd [2017] EWHC 2425 (TCC)

The claimant (Bernhards) applied to enforce an adjudication decision against the defendant (Astrosoccer). The adjudication concerned sums due pursuant to a payment notice, against which no pay less notice had been given.

21 days before the enforcement hearing, the defendant's solicitors issued an ultimatum to the claimant's solicitors to mediate, failing which the defendant would



enter insolvency prior to the enforcement hearing. Further correspondence ensued from the defendant's solicitors, which the court described as "*breathtakingly rude*", "*threats*" and "*plainly, part of the intention to misuse the Insolvency proceedings*". 18 days before the enforcement hearing, the defendant issued in draft a notice of intention to appoint and administrator (NOI). 7 days before the enforcement hearing, the defendant issued and filed a NOI with the Companies Court.

This imposed a moratorium on the continuation of the enforcement proceedings, unless the claimant obtained the court's permission. The claimant applied under rule 43(6)(b) of the Insolvency Act 1986, to be heard concurrently with the enforcement application. Shortly prior to the hearing, the defendant entered into a number of transactions regarding the structure, assets and interests of the defendant company.

The court was satisfied that the service of the NOI was "*entirely bogus*" was simply an attempt to avoid payment of the adjudicator's decision. The court granted the claimant's application for permission to continue. Having done so, the court also granted the claimant summary judgment to enforce the adjudicator's decision because no pay less notice had been issued against the notified sum.

Tom Owen represented the claimant.

—

MT Højgaard v E.ON & Another [2017] UKSC 59 BLR 477

The Supreme Court held that a 'fitness for purpose' obligation contained within a schedule to a construction contract was to be given its natural effect and that it was not inconsistent with the other terms of the contract. The ruling sets aside the decision of the Court of Appeal and restores an earlier judgment of the Technology and Construction Court, which held that the fitness for purpose obligation required the contractor to achieve a result, namely that the foundations would last for 20 years.

The case affirms the position that the courts are generally inclined to give full effect to a requirement that a product complies with the contractual criteria.

John Marrin QC and Paul Buckingham represented the appellants.

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125 OBS & Another v Lend Lease Construction & Another [2017] EWHC 25 (TCC)

Redevelopment took place of 125 Old Broad Street, a prestigious 26-storey office building in the City of London. The defendants were engaged to install glass cladding, but between 2008 and 2012 there were 17 spontaneous failures, some of which saw glass falling to the pavement below. The cause of these failures was the presence of volatile nickel sulphide within the glass which had not been adequately remedied by heat soaking. The defendants argued that their only obligation under the contract was to supply glass which had been adequately heat soaked and that, having done so, the risk of the failures had been accepted by the claimants. The claimants, by contrast, submitted that the contractor was subject to various discrete obligations relating to the quality and suitability of the glass cladding.

Stuart-Smith J held that the contract did impose separate and discrete obligations on the defendant in addition to the obligation to heat soak, including that the glass was to have both a design life and a service life of 30 years. On the basis of both statistics and reports from the suppliers of the glass, Stuart-Smith J also held that a substantial proportion of the glass had not been soaked in accordance with the requirements of the contract.

Stuart-Smith J held that the decision to reglaze the building was reasonable and that the cost to do so was recoverable from the defendants. The claimants were also entitled to recover other costs such as loss of rental whilst the defendants occupied part of the building as a site office, management costs, and costs paid to third parties arising out of damage to the building and local businesses.

Calum Lamont represented the claimants. Adam Constable QC and Sarah Williams represented the respondents.

—

Imperial Chemical Industries Ltd (ICI) v Merit Merrell Technology (MMT) [2017] EWHC 1763 (TCC)

ICI had engaged MMT on an amended NEC3 form of contract to carry out steelwork at its new paint manufacturing plant. The scope of work was increased to incorporate pipework and associated welding. At a late stage ICI changed its management team; the new comers had a different approach to the meaning and requirements of the contract, resulting eventually in ICI expelling MMT from site, alleging defective welding and failure to remedy defects.

These events gave rise to a number of adjudications, which in turn gave rise to three earlier sets of court proceedings, and two reported judgments on enforcement. Of these adjudications, two had been so-called smash and grab adjudications, ie the enforcement by MMT of payment notices (one over £7 million and one over £1 million) in circumstances where the employer had omitted to serve a valid pay less notice.

The issues previously adjudicated now fell to be litigated in these proceedings. This judgment was concerned with the determination of issues of principle. The principal issues at trial were (a) the extent of MMT's NDT obligations, and the quality of welding required, in circumstances where the parties had agreed not to use radiographic testing of welds (as would have been required by the relevant BS), (b) which party had repudiated the contract, and (c) whether ICI was entitled to a re-valuation of ICI's interim account and subsequent re-payment in circumstances where (on MMT's case), ICI had deliberately frustrated the re-valuation and re-payment processes provided for by the contract by its repudiation of the contract. In particular, MMT contended, ICI had declined to operate the generous termination provisions provided in the NEC3 form, because, it was argued, at that stage (ie before the first smash and grab adjudication) a final account process was likely to show ICI as a substantial debtor. In contrast by the time of the trial, that is to say two smash and grab adjudications later, ICI saw itself as a substantial creditor.

In the comprehensive judgment of Fraser J he provides useful guidance on a number of procedural and evidential issues, including as to (i) disclosure and (ii) expert evidence, as well as helpful analysis of the NEC3 form, contractual termination contrasted with repudiation, and the role of the project manager. MMT's case prevailed on almost every point, and MMT duly obtained 95% of its costs on an indemnity basis. But the real interest in the judgment is in relation to ICI's claim for a revaluation of the account which claim the judge upheld, against MMT, commenting in passing at [204] that there was now "real doubt" as to whether *ISG v Seevic* was correctly decided. The Court of Appeal (Jackson LJ) has refused MMT permission to appeal saying "the judge's decision was plainly correct".

Justin Mort QC represented the defendant.

TEN YEARS *in the Life of* CONSTRUCTION LAW:

The View from London 2006–2016

by David Thomas QC

David Thomas QC reviews a decade of construction law.

Introduction: the Nature of Change

It is a characteristic feature of common law systems, of course, that change generally requires judicial pronouncements. In construction law, equally obviously, many of these arise from disputes over buildings, during or after their construction. There is thus a degree of linkage between what happens in the industry and developments in the law and this article will refer to some of the landmarks of the built environment as well as landmarks in the legal environment which they have helped to produce, during the decade which is the 'review period'.

Developments in Statute

Not every aspect of English construction law is governed by decisions of the courts, however; statute plays a part. Usually, that part derives from more general legislation impacting upon construction. The Consumer Rights Act 2015 and the Public Contracts Regulations 2015 are both examples of this, albeit in very different ways. The Consumer Rights Act has to a large extent replicated and in some respects extended previous legislation, notably the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, in the context of business to consumer contracts where, for example, some additional remedies are available to purchasers, such as the right to have the defective supply of a service repeated[1] or the price reduced[2]. The Public Contracts Regulations 2015 largely replaced earlier subsidiary legislation[3] and apply to the procurement of public works, services or supplies with a value in excess of financial thresholds[4] which are subject, as before, to periodic change.[5] These Regulations accomplish the introduction into English law of the latest EU Public Sector Procurement Directive,[6] furthering the long-established regime governing procedures for tendering, tender evaluation and award of contracts in the public sector and which has continued to offer opportunities for challenges by unsuccessful tenderers. Apart from the diverse impacts which they have on construction contracting, the only other common feature of these recent statutes is that they are both derived from European Directives. Whether and to what extent they will survive the proposed repeal of EU-based legislation, following the UK's referendum decision in June 2016 to withdraw from the European Union, remains to be seen. A key to prediction may lie in their respective purposes. The Consumer Rights Act[7] is aimed at protecting the position of individual citizens doing business with commercial entities, whereas the whole raison d'être of the prescriptive rules governing public sector procurement is to secure equal access and competition within the European single market.

Apart from other subsidiary legislation like the Construction (Design and Management) Regulations 2015,[8] there was one major foray by the UK Parliament into legislative reform which was wholly construction-specific. This was the Local Democracy Economic Development and Construction Act 2009 (the LDEDC Act), which substantially amended the equally infelicitously named Housing Grants Construction and Regeneration Act 1996 (the HGCR Act). It is now more than 20 years[9] since the earlier statute created a system for the mandatory adjudication of construction disputes and provisions governing payment under construction contracts, as the UK government sought to respond to official criticisms of the problems created by poorly-managed conflict and sclerotic cash-flow. Generally speaking, the HGCR Act is regarded as having been successful[10] in addressing these chronic ailments and indeed statutory adjudication has been adopted in other, principally common law, jurisdictions (see below).

However, there were a number of perceived deficiencies in the HGCR Act, some of which had encouraged challenge in the courts to adjudicators' decisions, and the LDEDC Act was intended to remedy some of the most apparent.[11] It is now no longer necessary for a construction contract to be written for the legislation to apply, although the force of this reform was somewhat diluted by the continuing requirement for the adjudication provisions to be in writing.[12] The insistence of the courts, in line with Parliament's intention to produce decisions which are binding pro tem, on granting enforcement even where the adjudicator had made obvious errors and had created serious practical problems;

1 Consumer Rights Act 2015 s 55.

2 Consumer Rights Act 2015 s 56.

3 The Public Contracts Regulations 2006.

4 £106,047–£164,176 for services; £4,104, 394 for works contracts.

5 Introduced on January 2016 and in force until December 2017, when they will be reviewed.

6 Directive 2014/24/EU.

7 The Consumer Rights Act 2015 enacted the Directive on Consumer Rights (2011/83/EC).

8 Replacing their 2007 predecessors in regulating responsibility for health, safety and welfare in design and management of construction projects; known as the CDM Regulations.

9 Though only some 18 years since the HGCR Act came into force in April 1998.

10 Research on experience of adjudication at least until 2015 has been reported by Glasgow Caledonian University's Adjudication Reporting Centre.

11 On coming into force on 1 October 2011 in England & Wales and 1 November 2011 in Scotland.

12 Under s 107 of the HGCR Act as amended.

13 Under s 108 of the HGCR Act as amended.

the LDEDC Act introduced a 'slip rule' by which clerical and typographical errors in the decision can be corrected.[14]

Predictably, parties had sought to evade the application of the adjudication provisions by incorporating into their contracts so-called 'Tolent clauses',[15] burdening the other party with all the costs of referral, irrespective of the outcome. Such pre-allocation of costs is now ineffective unless made in writing after the notice to refer is served.[16] The LDEDC Act also strengthened the HGCR Act payment provisions by improving the right of suspension of work for non-payment and taking further action against conditional payment in the form of pay-when-paid/pay when-certified-clauses.

Developments in Standard Form Contracts

Because the industry, both in the UK and internationally, is so committed to the use of standard form contracts, changes in the major suites must also be regarded as developments in construction law, subject to the reservation that the legal effect of the provisions may have to await consideration by the courts before being regarded as established.

That it would be impossible or even useful to track all the changes which have taken place to the main standard forms in ten years is self-evident. That impossibility can be demonstrated merely by reference to the dominant domestic forms of contract in the UK, namely, those produced by the Joint Contracts Tribunal (JCT). In 2006, JCT had recently introduced its 2005 suite, with over 70 documents. In 2007, it introduced the Constructing Excellence form[17] with the intention of encouraging collaborative working. But the introduction of the LDEDC Act 2009 (see above) alone necessitated the preparation of an entirely new suite and JCT 2011 became the then current edition. And as this article goes to press, at the conclusion of the review period, the year-long roll-out of JCT 2016 will be coming to completion, incorporating references to the principles of Building Information Modelling (BIM), to the provisions of the CDM Regulations 2015[18] and of the Public Contracts Regulations 2015 (see above). If there is a challenger to JCT's historic dominance of the UK standard form marketplace, it is unquestionably the Engineering and Construction Contract published by the Institution of Civil Engineers (ICEC) whose third edition is known ubiquitously as NEC3 (New Engineering Contract). In the decade under review, NEC3 has been used on many high-profile projects, starting with the Channel Tunnel Rail Link and then, with more mixed success, on Heathrow Airport's Terminal 5, whose launch in 2008 was dogged by early teething troubles.

NEC3's high-point to date was undoubtedly the triumphant delivery of the London 2012 Olympic facilities, crucially on time and with very modest levels of incidence of disputes. NEC3 is not uncontroversial. Its tone is set by the agreement of the parties to 'act in a spirit of mutual trust and co-operation'[19] but its unique 'present tense' drafting style was the subject of judicial criticism in Anglia Water Services Ltd v Laing O'Rourke Utilities Ltd,[20] where Mr Justice Edwards-Stuart said that 'no doubt this approach to drafting has its adherents within the industry but… from the point of view of a lawyer, it seems to me to represent a triumph of style over substance'. ICE somewhat dramatically abandoned its traditional form of engineering contract in favour of NEC3 in 2009, but this was resuscitated in an updated form in August 2011 as the Infrastructure Conditions of Contract (ICC)[21] under the auspices of the ACE[22] and CECA.[23] However, on any view, the period 2006–2016 has seen a significant growth in the use of NEC3 on major projects in particular and this looks set to continue.[24]

The more specialist suite produced by the Institution of Chemical Engineers (IChemE) comprises five contracts used extensively in process and water industries. An international version was launched simultaneously in London and Mumbai in 2007 and new domestic versions were produced in the UK in 2013. If added to these are the latest edition of the most used Institution of Mechanical Engineers (IMecE) form,[25] amended versions of the Association of Consultant Architects' specialist partnering forms[26] and the innovative CIOB contract,[27] it can be seen that the standard forms marketplace has changed widely, and in some cases, very significantly.

14 Within five days of the delivery of the decision.

15 From the case of Bridgeway Construction Ltd v Tolent Construction Ltd [2000] CILL 1662.

16 Under s 108 of the HGCR Act as amended.

17 JCT/CE 2007.

18 See n8 above.

19 Core Clause 10.1.

20 [2010] EWHC 1529 (TCC).

21 Not to be confused with the ICC (International Chamber of Commerce) Model Turnkey Contract for Major Projects 2007.

22 Association of Consulting Engineers.

23 Civil Engineering Contractors Association.

24 For a detailed commentary on NEC3, see David Thomas QC, Keating on NEC3 (Sweet & Maxwell 2012).

25 MF/1 2014.

26 PPC 2000 Amended 2013 International edition 2007.

27 Chartered Institute of Building Contract for use with complex projects 2013.

"It is now no longer necessary for a construction contract to be written for the legislation to apply, although the force of this reform was somewhat diluted by the continuing requirement for the adjudication provisions to be in writing."

Developments in Case Law

As with statutes, some of the cases influencing the development of construction law have not themselves concerned construction; this has been especially so in the law of contract.

One of the last decisions of the House of Lords before its transformation into the Supreme Court was Chartbrook Ltd v Persimmon Homes Ltd.[28] This was also something of a swan-song for Lord Hoffmann, who provided a seminal re-appraisal of the role of evidence of pre-contractual negotiation in the interpretation of commercial agreements in the light of the 'four corners' doctrine. In Rainy Sky SA v Kookmin Bank,[29] a shipbuilding case, the new Supreme Court held that ambiguity of contractual clauses would be resolved by reference to the interpretation most consistent with business common sense, while in the leasehold case of Arnold v Britton[30] the deciding factor was said to be what a reasonable person having all the background knowledge available to the parties would have understood the contractual language to mean. Marks & Spencer v BNP Paribas,[31] also a leasehold case, offered an important contribution to answering the crucial question as to when a term can be implied into an agreement; it had appeared that the courts were moving towards the implication of terms as an integral part of contract interpretation, but the Supreme Court has now indicated that it must be proved that the term is necessary to make the contract workable or internally coherent.

28 [2009] UKHL 38.
29 [2011] UKSC 50.
30 [2015] UKSC 36.
31 [2015] UKSC 72.

"NEC3's high-point to date was undoubtedly the triumphant delivery of the London 2012 Olympic facilities, crucially on time and with very modest levels of incidence of disputes."

Perhaps the most dramatic example of a non-construction decision with significant implications for construction has been the Supreme Court case late last year of Cavendish Square Holding BV v Makdessi,[32] in which the landmark authority of Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd[33] and with it the whole foundation of the law of liquidated damages was reconsidered, fittingly after exactly a century, at the highest appellate level. The case, heard together with an appeal concerning parking fees[34] which raised similar issues, arose from the forfeiture of very large sums accruing in addition to the basic sale price of a company, as a result of breaches of restrictive covenants by the vendor. The court had to consider whether this offended against the rule against penalties. In the result, the forfeiture[35] was upheld, but the dicta of the members of the Supreme Court went far beyond the disputes before them. Previously, according to Dunlop, the test for the validity of a liquidated damages clause or equivalent[36] was that it had to be based on a 'genuine pre-estimate of loss'. A clause which, by contrast, was intended to put the offending party, typically a contractor or supplier, in terrorem would be a penalty and thus invalid. Since Makdessi, the true test as to what amounts to a penalty will be 'whether the impugned provision… imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'. While it is still very early to predict the exact effect of this re-setting of the law in favour of using secondary contractual obligations to penalise and therefore inhibit breaches of primary obligations, it is safe to say that, while such provisions must still be proportionate, it will be harder than previously to mount challenges to them, which will typically benefit employers vis-à-vis contractors.

So far as construction-specific cases are concerned, there have been many hundreds decided since 2006; the specialist Technology and Construction Court (TCC) produces judgments which are loaded onto Bailii[37] at an average rate of over 80 per year. While some are heavily fact dependent and others atypical, certain familiar themes have been observable during that time.

First among these is, predictably, delay and all its attendant complexities: concurrency, the prevention principle and the global pleading of extension of time claims. Few delays can have been more damaging to national prestige, as well as commercial interests, than that which afflicted the new Wembley Stadium. The FA Cup Final in May 2006 was to have been a show-piece occasion for the new arena; that fixture had to be held instead at another National Stadium – in Cardiff. The Football Association eventually received the keys to Wembley in March 2007. The fractious relationships between (many of) the parties on site were then carried over into bitterly contested litigation (and other forms of dispute resolution) involving contractors Multiplex[38] and numerous other parties, principally sub-contractors. The popular media focussed on criticisms by the then Mr Justice Jackson of the parties' conduct during the litigation: the 550 ring-binders of documents, the £1m photocopying bill and some £22m of costs overall. The litigation produced judgments on a whole range of construction law subjects, including valuation of variations, the effect of an entire agreement, crystallisation and scope of a dispute and repudiatory breach. But the most significant[39] Wembley case was Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd[40] between main contractor and communications sub-contractor. Jackson J applied the prevention principle, holding that legitimate actions of the employer (or, as in this case, main contractor) could still constitute acts of prevention. The judgment contained extensive consideration of the so-called Gaymark[41] principle from Australia's Northern Territory, by which failure to claim entitlement to extension of time could lead to time going at large and the loss of the liquidated damages remedy. In the years since 2008, the courts have continued to struggle with both prevention and concurrency and to Multiplex has been added (inter alia) Steria v Sigma,[42] Adyard Abu Dhabi v SD Marine Services[43] and Walter Lilly v Mackay.[44] Unsurprisingly, the Society of Construction Law has added to its Delay and Disruption Protocol in July 2015 its Rider No 1, trying to bring back to delay and analysis 'a common sense perspective' and to assimilate the case law developments. Walter Lilly v Mackay was also notable for the treatment by Mr Justice Akenhead of the global claims issue, which had been extensively canvassed by the Scottish courts in John Doyle Construction v Laing Management[45] and then in City Inn v Shepherd.[46] Walter Lilly confirmed the English courts' disinclination to follow Scotland down the route of apportionment between concurrent causes, but the practice of pleading claims globally has become part of the UK construction industry's approach to delay (and other) disputes, both north and south of the border, albeit subject to necessary protection of the right of the defendant/respondent to know the case it has to meet.

32 [2015] UKSC 67.

33 [1915] AC 847.

34 Parking Eye Ltd v Beavis [2015] UKSC 67.

35 And the parking fee in Beavis.

36 Neither Makdessi nor Beavis actually concerned liquidated damages.

37 The British and Irish Legal Information Institute provides free access to judgments at: www.bailii.org.

38 In Multiplex Constructions (UK) Ltd v Cleveland Bridge (No 6) [2008] EWHC 2220 (TCC).

39 The author makes this point in all modesty, having appeared as counsel in the case; the extent of its subsequent citation confirms it.

40 [2007] BLR 195

41 Gaymark Investments v Walter Construction (1999) NTSC 143

42 [2008] 118 Con LR 177

43 [2011] EWHC 848 (Comm).

44 [2012] EWHC 1773 (TCC)

45 [2004] BLR 295.

46 [2010] BLR 473.

47 [2006] EWHC 1771 (TCC).

Not all the themes of the construction case law have been claims-related. Reference has already been made to challenges of the award of public sector contracts by disappointed tenderers under the EU procurement regulatory regime. Another quite different phenomenon which has led to disputes and litigation from the contracting process is the use, and indeed abuse, of letters of intent. In 2006, in Cunningham v Collett & Farmer,[47] His Honour Judge Coulson (as he then was) had warned that 'letters of intent are used unthinkingly in the UK construction industry and that they can create many more problems than they solve'. The ten years since then have seen the point emphasised repeatedly. The problem is that whereas previously letters of intent had no legal effect, they are now used to induce the contractor [48] to mobilise and commence work. Such usage all too often involves uncertainty about the meaning of the instrument used: whether it is contractual or not, and if it is what its content might be. That uncertainty reached a high-point – or low-point – in the case of RTS Flexible Systems v Molkerei Alois Müller GmbH.[49] The Technology and Construction Court had held that a letter of intent used was contractually binding but that its content must be implied, without reference to the MF/1 form of contract which the parties had failed to sign. The Court of Appeal held that the letter of intent had no contractual effect. The Supreme Court, reversing this, found that it was contractual, but that the content could be ascertained by incorporating provisions of the unsigned MF/1 Contract. The situation has been exacerbated by the apparently increasing tendency of the industry to use letters of intent as substitute construction contracts. In Trustees of Ampleforth Abbey v Turner and Townsend,[50] the defendant project managers were held to have been professionally negligent in allowing construction to proceed under a series of letters of intent issued to the contractor while the JCT Contract lay unsigned. The effect was that the employer did not have the protection of liquidated damages when the contractor was in delay.

Another long-running practice which has obliged the courts to re-examine principle to provide guidance is the use of net contribution clauses, especially in agreements for the supply of professional services, in an attempt to mitigate the effect of the doctrine of joint and several liability. The Scottish courts' willingness to enforce these devices where possible has been notable during the last decade[51] and this has more recently been taken on by the Court of Appeal with a distinctly sympathetic view of a poorly-drafted clause which was nevertheless found to serve its protective purpose, in the case of West v Ian Finlay Associates.[52]

"Walter Lilly confirmed the English courts' disinclination to follow Scotland down the route of apportionment between concurrent causes, but the practice of pleading claims globally has become part of the UK construction industry's approach to delay (and other) disputes."

In addition to these examples of areas of especially significant activity, a flavour of the kind of issues typically handled by the Technology and Construction Court during this period can be obtained from the author's study of its reported decisions for 2014.[53] Obviously, a proportion of the TCC's work is routine, such as the enforcement of adjudication decisions, and cannot be said to contribute much to the development of the substantive law where the emphasis is on procedure. However, each year of the review period has seen TCC decisions adding to understanding of construction law principles and their application.

48 And sub-contractors, suppliers and consultants.

49 [2010] UKSC 14.

50 [2012] EWHC 2137 (TCC).

51 In Langstane Housing Association v Riverside Construction [2009] CSOH 52 and Scottish Widows Services Ltd v Harmon [2010] SLT 1102

52 [2014] EWCA Civ 316.

53 David Thomas QC, 'A year in a modern specialist court' (2015) 10(2) CLInt.

"FIDIC is now coming into greater contact with the English legal system than was the case ten years ago."

The Future

Prediction of legal trends is always somewhat hazardous, especially in a common law system where only the chance occurrence of issues coming before the courts, a fortiori the appellate courts, provides an opportunity for judicial development of principle. In certain areas of construction law, this difficulty must currently be acute. Those areas concerned with public sector procurement which have been subject to extensive coverage by EU Directives and to the jurisdiction of the European Court of Justice stand to be affected, perhaps profoundly affected, by withdrawal from the European Union. It is almost impossible to predict what those effects may be.

Paradoxically, it is in the international sphere that certain observations about the likely course of events can be safely attempted.

It has been explained above that the English domestic forms of contract have undergone a number of changes during the review period. The same is true of the FIDIC forms of contract. To the 1999 'Rainbow' suite have been added during that time the DBO Gold Book[54] in 2008, the MDB Pink Book[55] in 2010 and the new Sub-Contract[56] in 2011. By 2017, the long-awaited new edition of the Yellow Book[57] should have appeared; in it FIDIC is expected to address criticisms relating to its time bar provisions and perhaps to adjust parts of its dispute resolution machinery. It has been suggested that the Gold Book offers some indicators as to FIDIC's current thinking. Also making an appearance should be a Test Edition of a specialist tunnelling contract: a new departure for FIDIC.

FIDIC is now coming into greater contact with the English legal system than was the case ten years ago. In 2014, the TCC decided not only the celebrated Obrascon[58] case on the Yellow Book from Gibraltar but Peterborough City Council v Enterprise Managed Services[59] on the Silver Book from a public sector solar energy project in provincial England. The importance of FIDIC generally can be expected to increase, although some of its supporters regard NEC3 as a credible challenger internationally.

The TCC itself looks likely to continue the growth of its international work. Over the past three years, a significant number of cases have come from projects outside England and Wales: including Dubai, Saudi Arabia, Nigeria, Gibraltar, Scotland and most recently a mining case from Sierra Leone,[60] a dispute from the oilfields of Iraq[61] and a group action relating to a pipe-line in Colombia.[62] In the last-named, Mr Justice Edwards-Stuart wisely observed that 'large scale civil engineering and infrastructure projects routinely give rise to public benefit and private detriment, whether they be in the Cotswolds or the Andes'. And therein lies an indicator as to the TCC's growing attraction to international business as a forum for major construction and engineering disputes: there is no substitute for experience, technical expertise and efficient case management.

International arbitration lies outside the scope of this article but the indications are that London as an arbitral centre and English law as a neutral choice will continue to thrive. The Queen Mary International Arbitration Survey in 2010[63] found that 'certainty' and 'respect for freedom of contract' made English law the leading neutral choice for counsel of international corporations. Those virtues obtain also in construction law and are likely to militate against sudden and violent reversals during the next decade.

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54 Conditions of Contract for Design Build and Operate Projects.

55 Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition).

56 Conditions of Sub-Contract for Construction.

57 Conditions of Contract for Plant and Design-Build.

58 Obrascon Huarte Lain SA v Attorney-General for Gibraltar [2014] EWHC 1028 (TCC) upheld by the Court of Appeal at [2015] EWCA Civ 712

59 [2014] EWHC 3193 (TCC)

60 Dawnus Sierra Leone v Timis Mining Corp [2016] EWHC 236 (TCC)

61 Lukoil Mid East v Barclays Bank plc [2016] EWHC 166 (TCC).

62 Re Ocensa Pipeline Group Litigation [2016] EWHC 1699 (TCC).

63 Choices in International Arbitration, Queen Mary University of London 2010

Arbitrating in Mauritius

by Abdul Jinadu

Mauritius is positioned in a geographic "sweet spot" between Africa and Asia and it sees itself as providing a gateway for investment into Africa from the Far East, the Middle East, the Indian sub-continent and also from Europe. Abdul Jinadu discusses arbitration in Mauritius from the perspective of counsel.

Given the explosion of arbitral centres in Africa in recent years (Kigali, Lagos, Nairobi and now potentially centres in South Africa opening up with the imminent passage of the new International Arbitration Act), Mauritius has faced, and will continue to face, stiff completion as it seeks to establish itself as the preeminent destination for arbitrations on the continent.

There are two fundamental areas where Mauritius has an advantage over most of its competitors. The first is practical. Mauritius has a well developed infrastructure which makes it attractive as a venue for arbitration. Mauritius also has excellent hotels and conference centres which serve as excellent venues for arbitrations, and good secretarial support is available. In addition, there are good transport links with Dubai, Nairobi and Johannesburg less than 5 hours away by air and multiple flights a day are available to all of the major hubs. Equally important is that Mauritius offers good security.

The second fundamental advantage that Mauritius has is a system of law which is fully supportive of international arbitration and which goes out of its way to attract international arbitration to the island.

Basics of Mauritian Arbitral System[1]

Mauritian law is a hybrid system of law, which draws its inspiration from France and from England. The Mauritian International Arbitration Act 2008 ("the IAA") was promulgated by the Parliament of Mauritius on 25 November 2008, and came into force on 1 January 2009. The IAA is based on the UNCITRAL Model Law as amended in 2006. Following a review of the performance of the IAA in the years following its promulgation, it was amended with effect from 1 June 2013 by the International Arbitration (Miscellaneous Provisions) Act 2013 ("IA(MP)A").

Other important legislative provisions include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (as amended in 2013) (the "New York Convention Act") and the Supreme Court (International Arbitration Claims) Rules 2013 (the "Rules of Court").

The IAA is the cornerstone of an extensive programme which has seen the establishment of a permanent branch of the Permanent Court of Arbitration of The Hague ("the PCA") in Mauritius, and the launch of the LCIA-MIAC Arbitration Centre, an independent arbitral institution founded in cooperation with the London Court of International Arbitration.

The IAA establishes two distinct and entirely separate regimes for domestic arbitration and for international arbitration. It covers only the latter.

The IAA is based on the UNCITRAL Model Law on International Commercial Arbitration as amended by UNCITRAL in 2006 ("the Amended Model Law"), as expressed by the UNCITRAL Secretariat in 1985. The provisions of the Amended Model Law have been incorporated within the IAA itself (rather than in a separate schedule). In order to assist international users, a Schedule (The Third Schedule to the IAA) has been prepared setting out where given Articles of the Model Law have been incorporated in the IAA.

The IAA provides that all Court applications under the IAA are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. This is designed to provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists. Section 42(1A) of the IAA allows a single Judge of the Supreme Court, sitting in Chambers, to make an order for interim measures in the first instance, but the application is returnable before a panel of three Judges. The Supreme Court has published Supreme Court (International

1 Based on the on the Mauritian International Arbitration Act Handbook

"Mauritius has a well developed infrastructure which makes it attractive as a venue for arbitration."

Arbitration Claims) Rules 2013 ("the Rules") for arbitration business. Each of the three Supreme Court Judges must be one of six specialist "Designated Judges" who will hear all matters under the IAA and for enforcement of international arbitral awards, and who receive specific training in the field of international arbitration.

Importantly, and in a significant departure from the rules usually prevailing in court proceedings in Mauritius, the Rules expressly provide for a general rule (subject to adaptation by the Court) that the losing party in an arbitration claim shall pay the actual (i.e. not nominal) legal costs of the prevailing party.

The IAA adopts a unique solution in that the vast majority of the functions which would traditionally have necessitated court assistance and, in particular, all appointing functions (and the ultimate rulings on challenges to arbitrators) under the IAA are given to the Permanent Court of Arbitration at The Hague (the "PCA"). Further, in order to ensure that the PCA is able to react swiftly in all Mauritian arbitrations, the Government has negotiated and concluded a Host Country Agreement with the PCA pursuant to which the PCA appoints a permanent representative to Mauritius, funded by the Government, whose tasks consist inter alia of assisting the Secretary-General of the PCA in the discharge of all his functions under the IAA, and of promoting Mauritius as an arbitral jurisdiction within the region and beyond.

In order to avoid satellite litigation and delays, all the decisions of the PCA are final and cannot be appealed or challenged in any way. A party which considers itself to have been wronged by a decision of the PCA cannot challenge it, be it before the national courts or in any other way; the only possible remedy being a challenge to any award rendered subsequently by the arbitral tribunal on the ground that the decision of the PCA has given rise to one of the grounds of annulment set out in section 39 of the IAA (equivalent to article 34 of the Model Law). For example, if the PCA has appointed an arbitrator without paying proper regard to qualifications required of the arbitrator in the arbitration clause, the aggrieved party may seek to challenge the award on the ground that "the composition of the arbitral tribunal ... was not in accordance with the agreement of the parties". It cannot challenge the decision of the PCA itself.

"This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe."

Specific measures have also been taken for the simplified incorporation of arbitration clauses into the memorandum and articles of association of Mauritian Global Business Licence (GBL) companies, in order to foster possible synergies between an established and major sector of activity (the financial services sector) and the development of international arbitration in Mauritius. The provisions relating to incorporation of arbitration clauses into the Constitutions of these companies were simplified and clarified by the amendments made by the IA(MP)A in 2013.

In order to facilitate the reading of the IAA for international users, a schedule was created (the third Schedule to the IAA), which states in which articles of the IAA the various articles of the Model Law have been incorporated. The IAA makes specific provision to allow shareholders of GBL companies to include an arbitration clause in the constitution of the company providing that any dispute arising out of the constitution of the company shall be referred to arbitration under the IAA.

The aim of subsection 3(6) of the IAA was to provide an option to the shareholders of GBL companies to arbitrate their disputes under the constitution of the company in circumstances where the only forum for the resolution of such disputes had thenceforth been the Mauritian Courts.

In line with the Amended Model Law, the IAA does not link international arbitration in Mauritius with any given arbitral institution, or with any institutional rules. The aim of the IAA is to make Mauritius a favourable jurisdiction for all international commercial arbitrations, whether such arbitrations arise under ad hoc arbitration agreements, or under institutional rules such as those of the International Chamber of Commerce or the London Court of International Arbitration. In particular, foreign parties will only choose to arbitrate in Mauritius if they

can be guaranteed that their contractual wish to arbitrate – and not to litigate – their disputes will be respected, and that the Mauritian Courts will not intervene in the arbitral process, save to support that process and to ensure that the essential safeguards expressly provided for in the IAA are respected.

The IAA expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitrations in Mauritius.

This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe. Section 2A (formerly Section 3(8)) is of great importance. It enacts Article 5 of the Amended Model Law and enshrines the principle of noninterventionism.

Scheme of the IAA

Part I of the IAA sets out preliminary matters, including the usual provisions as to short title (i.e. the short title of the IAA) and interpretation (which sets out defined terms).

The main operative provisions defining the scope of application of the IAA are found in Part IA of the IAA. In addition to the provisions contained in the body of the IAA, parties have been given the choice of "opting into" one or more of the provisions set out in the First Schedule to the IAA. This "opt in" formula has been used for provisions (in effect determinations of preliminary points of Mauritius law, appeals on points of Mauritius law, consolidation, and joinder) which certain parties may consider as useful for their arbitrations, but which are too controversial for inclusion into the "normal regime" for international arbitrations in Mauritius without the express prior agreement of the relevant parties. It is for the parties to select which, if any, of the provisions of the First Schedule they wish to opt into.

Part II of the IAA contains the provisions relating to the initiation of arbitral proceedings and general provisions relating to the arbitration agreement, the seat of the arbitration, and consumer protection.

Part III of the IAA contains the provisions relating to the arbitral tribunal including appointments of, and challenges to, arbitrators, and the jurisdiction of the tribunal.

Part IV of the IAA contains the provisions relating to interim measures.

Part V of the IAA contains the provisions relating to the conduct of arbitral proceedings.

Part VI of the IAA contains the provisions relating to the Award, including applications for setting aside of awards and recognition and enforcement.

Part VII of the IAA contains miscellaneous provisions relating inter alia to the constitution of the Supreme Court for matters covered by the IAA, and appeals to the Privy Council.

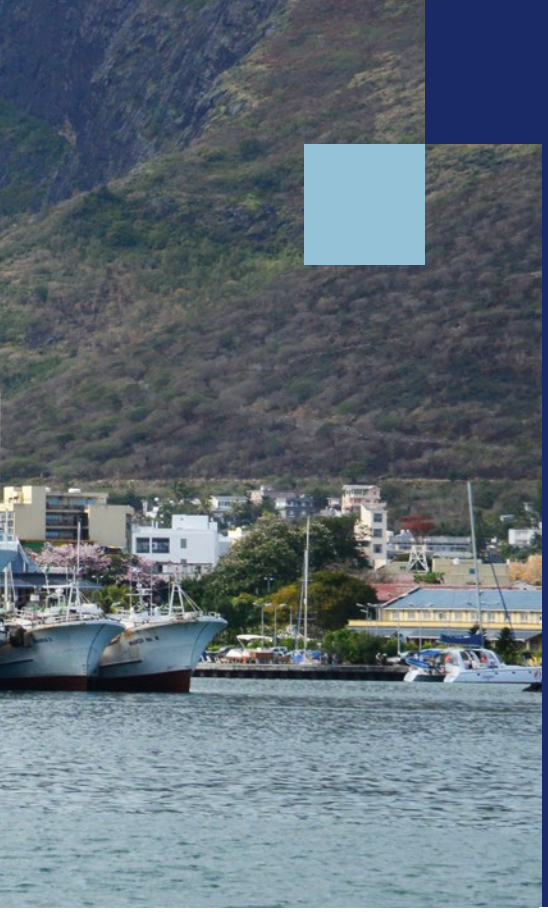
The First Schedule to the IAA sets out the specific provisions which parties are free to "opt into", as explained above.

The Second Schedule to the IAA sets out Model Arbitration Provisions for GBL Companies, the aim of which is to facilitate the adoption by GBL companies of arbitration agreements in their constitutions. The Third Schedule to the IAA contains a table showing the corresponding provisions of the IAA and of the Amended Model Law.

The New York Convention is already part of Mauritius law, having been enacted through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 ("the New York Convention Act"). Section 43 makes a number of consequential amendments to that Act.

LCIA/MIAC

In July 2011, the Government of the Republic of Mauritius, the LCIA and the Mauritius International Arbitration Centre Limited (MIAC) entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre.



"This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe."

Adopted to take effect for arbitrations commencing on or after 1 October 2012, the LCIA-MIAC Arbitration Rules provide that:

> *"Where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA-MIAC Arbitration Centre ("LCIA-MIAC"), or by LCIA-MIAC, the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules (the "LCIA-MIAC Rules") or such amended rules as LCIA-MIAC and the Court of the LCIA (the "LCIA Court") may have adopted hereafter to take effect before the commencement of the arbitration (the "Arbitration Agreement")."*

Conclusion

The prospect of South Africa updating its international arbitration legislation in the very near future and making a serious attempt to attract international arbitration business has the potential of changing the landscape in respect of African arbitration. However, Mauritius has a number of advantages which should allow it to achieve its aim of becoming one of the principal arbitration centres serving African disputes

CAJAC:
A NEW INTERNATIONAL ARBITRATION CENTRE

by Dawid Welgemoed

With the first international meeting of Chinese African Joint Arbitration Centre being held in Cape Town in late November 2017, Dawid Welgemoed documents how and why it was established, and comments on the impact it will have on arbitration in South Africa.

Introduction

The Belt and Road initiative is the short form for the "Silk Road Economic Belt and the 21st Century Maritime Silk Road." It is a development strategy for the next fifty years set in train by China's current head of state, President Xi Jinping, who took office in 2013. Its focus is cooperation between Eurasian countries, primarily those countries comprising the land based Silk Road Economic Belt and those along the ocean bound Maritime Silk Road. Under the Belt and Road initiative, in 2016, Chinese state-owned entities had spent US$1,3 Billion in Africa.

Inevitably, as history dictates, there will be conflicts in commercial transactions.

The FOCAC legal forum is an important part of FOCAC (Forum of Chinese African Cooperation). Established in 2009, the legal forum has been successfully held in Egypt, China, Mauritius, Zimbabwe, Angola and South Africa, which totals six successful forums with gradually improved mechanisms, more and more diversified content, increasingly pragmatic cooperation and continually growing impact. Of particular significance is article 2.4.4 of the Beijing Action Plan (2013-2015) which was adopted at the fifth ministerial conference of FOCAC, and mentioned that China and Africa *"agree to ...an increased cooperation in the fields of.... and the mechanism of non-judicial settlement of disputes."*

> *"The forum for Chinese African cooperation adopted the "non judicial resolution of disputes" as a fundamental principle in the investment of China in Africa."*

In 2015, Ministers and Heads of State of 50 African countries and China issued the "Johannesburg Action Plan" in which they committed themselves to establishing CAJAC, the Chinese Africa Joint Arbitration Centre. The initial impetus for CAJAC, and specifically setting out CAJAC Johannesburg, came from the Chinese Law Society which in 2012 contacted the Arbitration Foundation of South Africa to assess whether it might be possible to establish CAJAC's first African centre. In June 2015 this initiative was endorsed by Beijing by way of the Beijing Consensus.

In December 2015, the heads of state of China and 50 African states adopted the "Johannesburg Action Plan". This is a comprehensive document. The forum for Chinese African cooperation adopted the "non judicial resolution of disputes" as a fundamental principle in the investment of China in Africa. At the sixth forum of Chinese African cooperation meeting, the Johannesburg Action Plan had been adopted.

The Forum of Chinese African Cooperation Johannesburg Action Plan (2016-2018) is a far-reaching document. It envisages economic cooperation in the areas of agriculture and food industry, industry partnering, infrastructure development, energy and natural resources, the ocean economy, tourism, trade and finance. In addition, it anticipates social development cooperation in the form of medical care, education and human resources development, exchanges of experience on poverty eradication strategies, science and technology cooperation and knowledge sharing. Further, it foresees cultural cooperation and people to people exchanges. In fact the principles envisaged in the Chinese Africa Cooperation extends to virtually all spheres of social and economic wellbeing.

"Under CAJAC the aim is for matters to be disposed of quickly which is not possible in the national courts."

The Development of the CAJAC

In the section of the Action Plan devoted to law and justice the signatories thereto agreed to set up the Chinese African Joint Arbitration Centre. The factors which impelled the establishment of CAJAC are obvious:

- China invests heavily in Africa.
- The inevitable conflicts following the vast span of activities envisaged by the Johannesburg action plan created the need for mutual cost-effective and speedy mechanisms for the resolution of commercial and construction disputes.
- In the absence of a forum like CAJAC, parties will have to resort to local courts or arbitrations such as the ICC, the International Court of Arbitration or the London Court of International Arbitration.

Typically parties to the Chinese African Cooperation Initiatives would prefer to enter the CAJAC arbitral process as the parties are entitled to select at least one member of the arbitral panel, and that panel has a neutral independent chair. The parties can then expect to receive a fair hearing; proceedings in a national court where one of the litigants is a national of the state in question might not enjoy the same credibility. In addition, under CAJAC the aim is for matters to be disposed of quickly which is not possible in the national courts. In China, judges and arbitrators are expected to distil the key issues in a matter and to ask the parties to focus on those. While there may be some cross-examination, it is limited to key issues as identified by the judge or arbitral panel. Proceedings rarely last for more than a day, only evidence strictly necessary to the key issues is presented orally and the emphasis is on the relevant documents. There is however no process of discovery and parties have to put up documents supporting their cases as part of their statement of claim in the reference. Whilst the risk of disputes is inevitable in doing business abroad, the consensus between the Chinese and African parties was that arbitration was the way to go. CAJAC is devised to fill this space. Currently the CAJAC panel includes retired judges of the Constitutional Court including a retired Chief Justice, retired judges from the Supreme Court of Appeal and leading senior advocates.

Arbitration Rules

Cases accepted by CAJAC Shanghai will apply the Shanghai International Economic and Trade Arbitration Commission Arbitration Rules. The Rules incorporate the advanced ideas and practices of other principal international arbitration institutions and stipulate joint appointment of arbitrators by multiple parties, joinder of third party and consolidation of arbitrations which will match the parties' needs for convenience and efficiency.

Arbitration awards rendered by CAJAC Shanghai and CAJAC Johannesburg will be globally recognised and enforced in accordance with the New York Convention. The Arbitration Foundation of Southern Africa is one of Southern Africa's leading arbitral institutions specialising in the resolution of mercantile and commercial disputes. It provides fully administered services including specialised case managers. At any one point it has an active case portfolio of some 350 matters involving disputes with combined quantum run into millions of rands. AFSA deals with disputes throughout Southern Africa.

Model Arbitration Clause

The Model arbitration clause as envisaged by CAJAC Johannesburg and CAJAC Shangai reads as follows:

> *"Any dispute arising from or in connection with this Contract shall be submitted to*
>
> - *China Africa Joint Arbitration Centre Johannesburg ("CAJAC Johannesburg")*
> - *China Africa Joint Arbitration Centre Shanghai ("CAJAC Shanghai")*
>
> *for final and binding resolution in accordance with its arbitration rules.*

The Future

It is intended that CAJAC centres will open in Nairobi, Lagos, the OHADA countries and Egypt. Johannesburg CAJAC opened for business on 14 July 2016.

It is clear that the establishment of CAJAC in Africa will create a shared jurisprudence and provide vital legal service in support of China African trade and investment.

TCC Guidance Note on Procedures for Public Procurement Cases

Public procurement cases provide unique challenges to litigants and the Courts. The 10 day standstill period and 30 day limitation periods, coupled with an imbalance of information as between challenger and Authority, as well as applications to lift the automatic suspension of contract award, means they often require urgent hearings at a very early stage.

The Technology and Construction Court has introduced a Guidance Note on Procedures for Public Procurement Cases, which is Appendix H to the TCC Guide. The aim of the Guide is to provide guidance for parties on the management of such claims, and applies from 17 July 2017.

The bulk of the Guidance is focussed on how the parties should interact before any action has been commenced, on confidentiality at all stages of the litigation and upon the accommodation of non-parties whose interests are engaged by the litigation.

Pre-Action Process and ADR

There is often great urgency in commencing proceedings in procurement cases due to the 10 day standstill period after a contract has been awarded. The following pre-action process is recommended:

1. The potential claimant should send a letter before claim to the contracting authority which:
    a. identifies the procurement process to which the claim relates;
    b. explains the grounds then known for the claim;
    c. requests any information sought from the contracting authority;
    d. suggests the remedy required;
    e. makes any request for an extension to the standstill period and/or request not to enter into the contract for a specific time and/or request not to do so without a specified period of notice to the potential claimant; and
    f. proposes an appropriate, short time limit for a response.

2. The contracting authority should:
    a. promptly acknowledge receipt of the letter before claim;
    b. give notice of its solicitor's details;
    c. indicate whether the standstill period will be extended and, if so, by how long;
    d. provide any information as soon as possible to which the claimant may be entitled; and
    e. send a substantive response within the timescale proposed, or as soon as practical thereafter.

3. Having exchanged correspondence and information, the parties should continue to make appropriate and proportionate efforts to resolve the dispute without the need to commence proceedings.

The parties are expected to act co-operatively and reasonably in dealing with all aspects of the litigation, including requests for extensions of time, amendments following disclosure, and in providing one another with information including the information referred to in Regulation 84 of the Public Contract Regulations 2015 (as amended). Indeed, the aim should be to avoid the need to issue proceedings simply to obtain early specific disclosure.

Alternative Dispute Resolution is encouraged, and the court may order a stay of proceedings, create time in the timetable, or make an ADR order in appropriate cases.

Confidentiality

Many procurement disputes will feature confidential information (such as documents submitted as part of tenders) and so the Guidance provides extensive advice to parties and the court relating to maintaining confidentiality during any disclosure exercise. Confidential documents should be marked as "Confidential", and it is recommended that such materials are provided on coloured paper so that their status is immediately apparent.

It may be justified for documents (including pleadings or statements) to be provided in a redacted form. A schedule should be produced which provides justifications for any redactions. At an appropriate stage the court should be provided with an unredacted (but clearly labelled) copy of the document.

Confidential materials may most appropriately be passed through the allocated judge's clerk and, further, where necessary, a party can request the Court gives an order restricting inspection of court files, whilst providing redacted versions

available for public inspection. The relevant paragraphs of the Guide (27 – 31) were cited with approval by Mr Justice Coulson in *Bombardier Transportation Limited v Merseytravel* [2017] EWHC 575 (TCC). The Judge was commenting on a draft of the Guide at that date, but there have been no changes to those paragraphs in the published version.

If confidentiality rings are established to facilitate the disclosure of confidential information, with the court's focus being on who should be admitted to the ring and the terms of the undertakings which any member of the ring may be required to give. In respect of clients and internal lawyers this should be done at an early stage. The range of factors which the court will consider includes the role and responsibilities of the person; the extent of the risk that competition will be distorted as a result of disclosure to them; the extent to which that distortion can be avoided or controlled by the terms of the disclosure; and the impact of any restrictions on that individual.

The terms of the undertakings will generally preclude the use of the material other than for the purposes of the proceedings and prevent disclosure outside the ring. They will also control the storage and copying of the material, and direct its return or destruction at the conclusion of the proceedings. Additional terms are suggested to account for possible concerns relating to competition, including undertakings not to be involved in future procurements for a period of time.

There is also the suggestion that two-tier confidentiality rings may be used, where employees within the ring are provided with more limited materials (for example, technical material but not pricing information) than external representatives.

There is specific guidance on applications to lift suspensions.

Suspension Lifting Applications

The Guidance is clear that the court can lift the statutory suspension that prevents the contracting authority from entering into the contract in question, and it is anticipated that any such application will be brought on expeditiously. That said, however, it is recognised as important that the respondent should have enough time to submit evidence and for any evidence in reply to be provided.

Recent case law (*Alstom v London Underground*) provides guidance as to the timing of applications to lift the suspension and applications for disclosure; in general terms, it is better for early disclosure (if sought) to be given in advance of the hearing of an application to lift the automatic suspension. Where the suspension is lifted only in appropriate cases will a stay of such an order be given. The stay will typically be 1-2 working days, allowing the Court of Appeal to set a timetable.

The Guidance also covers various other aspects of litigation.

Institution of Proceedings

The Claim Form and the Particulars of Claim must be served within 7 days after the date of issue, and provision is made for pleadings containing confidential information to be lodged with the court in both a non-confidential and confidential format.

Judicial Review

If the claimant has decided that it is also necessary to bring judicial review proceedings, the Guidance makes clear that the case will be heard and managed together with the TCC proceedings by a TCC judge who is also a designated judge of the Administrative Court. It is open for the TCC judge, having considered the claims, to either direct that the case will be heard by a TCC judge or, if appropriate, transfer the case to the Administrative Court.

CMC

It may be appropriate for an early CMC to be held so that decisions can be made related to issues like fixing trial dates or specific anticipated applications.

Cost Budgeting

Given the uncertainty or speed of proceedings it may not be possible for realistic costs budgets to be prepared, and so it is recommended that claimants write to the court before or at the same time as applying to fix the CMC and apply for an order that the parties need not serve costs budgets within the normal time frame.

Specific or Early Disclosure

Given the obvious importance of early disclosure in enabling claimants to properly plead their case, contracting authorities are encouraged to provide their key decision making materials at a very early stage. The issue of disclosure will also be considered at the CMC.

The importance of disclosure was recently highlighted by Coulson J in *Alstom Transport UK Ltd v London Underground Ltd and another* [2017] EWHC 1406 (TCC). Often contracting authorities will seek to argue that the claimant has failed to show a serious issue to be tried, and the court must be astute to prevent contracting authorities from gaining an unfair advantage by giving only limited disclosure and then relying on the absence of such documents or evidence when pleading its defence or when making an application to lift the automatic suspension.

Interested Parties

Often the successful bidder will wish to be involved in proceedings between the contracting authority and an aggrieved tenderer and the Guidance expressly accounts for this by confirming that its interests can usually be considered and addressed by the court without it being necessary for the interested party to become a full party to the proceedings. The Guidance recommends that the interested party be put on notice of the proceedings and be provided with pleadings and supporting evidence, and then it is for that party to apply to be represented (if it so wishes) in writing as soon as practicable. In *Cemex UK Operations Limited and v Network Rail Infrastructure Limited* [2017] EWHC 2392 (TCC) the Court held that a non party to the litigation whose interests were engaged could be made an interested party for the purpose of specific applications.

Trial and Judgments

Consideration should be given to confidentiality in terms of what may be reported and who should be present in the courtroom. As much of the trial as possible should be open to all who wish to attend, and any restrictions should be legitimate, fair and proportionate.

Much the same themes underlie the Guidance's approach to judgments, which will be handed down as open documents save in the most exceptional circumstances, though confidential information will be contained in a separate schedule.

The Guidance Note was drafted by a working group of the Procurement Lawyers' Association, chaired by Sarah Hannaford QC and Fionnuala McCredie QC of Keating Chambers, with extensive input from TCC Judges both current and retired.

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