KC LEGAL UPDATE

Spring 2016

In this issue...

KEATING
CHAMBERS

WELCOME

TO THE SPRING 2016 EDITION OF KC LEGAL UPDATE

Our new Head of Chambers, Marcus Taverner QC, makes his bow in that capacity to the KC Legal Update readership in this, the first Issue of 2016. All will wish him well and most of us will echo feelingly his observation that "we live in exciting times".

The announcement of the referendum on the UK's membership of the EU has dominated conversation in most business sectors in Q1 and the debate looks set to continue at least until the outcome is known at the end of Q2; possibly well beyond.

Adopting a scrupulously even-handed position, Simon Hughes QC and David Gollancz consider some of the factors which are likely to inform the 'Brexit' debate when it is carried on by those in the construction industry. Simon and David draw attention to EU regulation of public sector contracting and to the Utilities Contracts Regulations 2016 and Concessions Contracts Regulations 2016 which will come into force before the day of the vote. They memorably describe the procurement regulations as post-Brexit candidates for the guillotining of "the unloved children of our unhappy affair with Mme Europa" but conclude that, whatever the result on June 23rd, there is no prospect of an unregulated environment, since the UK is bound by its World Trade Organisation and Government Procurement Agreement obligations.

In the meantime and looking forward, we have to deal with existing EU regulation. The Public Contracts Regulations 2015 have been in force for just over a year and Simon Taylor focusses on this latest stage of regulation of public sector contracting. Whether the European Commission's aim of greater flexibility, for example, in relation to pre-tender engagement, assessment of eligibility and the introduction of 'dynamic purchasing systems' will actually influence votes is doubtful, but these procedures will govern for the foreseeable future and Simon's expert analysis is timely.

Also in force since last year is the so-called Brussels I Recast Regulation on jurisdiction and the recognition of judgments in civil and commercial matters. The Regulation has been applied recently by the Technology and Construction Court in a joint tortfeasors case involving the UK and Italy and by the Commercial Court in a double insurance case involving the UK and the US. Veronique Buehrlen QC, a bi-lingual former member of the European Commission's Legal Service, offers her views on the approach of the English judiciary to this latest version of the Brussels Regulation.

Exciting times, too, on the domestic front. One of the assets of this publication lies in being able to offer analysis by counsel who appeared in the cases which make the news and make the law. Our two remaining articles certainly fit that description.

A candidate for the title of 'most talked about case of 2016' appeared in the first six weeks of the year, in the Commercial Court's decision of *Cofely Ltd v Anthony Bingham and Knowles* [2016] EWHC 240 (Comm). Vincent Moran QC, who represented the claimants in the successful application to remove an arbitrator for apparent bias under s.24 of the Arbitration Act, considers the implications of that decision. They are, on any view, far-reaching and embrace the conduct of appointing bodies, disclosure obligations of candidates and the behaviour of the arbitrator; the reverberations will be heard for some time to come.

In a quite different way, the Court of Appeal (CA)'s judgment in *Wilson & Sharp Investments v Harbour View Developments* [2015] EWCA Civ. 1030 will have significant consequences for employers and insolvent contractors and their legal relationship under the Housing Grants Construction and Regeneration Act 1996. Krista Lee, who appeared in the successful appeal by the employer in the CA against the dismissal of its application to injunct a winding-up petition by the contractor, points out that the contractor in financial difficulties is now in an increasingly weak position in seeking enforcement of a payment decision via summary judgment. As a result of the interpretation of s.110(11) of the Act, 'pay now-litigate later' may apply to everyone except those in the most desperate need of it.

'Exciting times' may not be exactly the same as the 'interesting times' of the apparently apocryphal Chinese curse but we hope that the content of this Issue reflects something of the momentous nature of recent and current developments.

Professor Anthony Lavers
Director of Research & Professional Development

It is now over 4 months since I picked up the baton as Head of Chambers. It could be said to be a cliché, but it truly is a privilege. Becoming involved in the day to day running of Chambers has allowed me even more contact with the wonderful array of motivated and high quality professionals who make up our membership.

Keating is now representing clients in more and more international jurisdictions. We are increasingly instructed by the the best solicitors and consultants in the world and in respect of the highest value and most prestigious projects. The type of international disputes in which we are now involved is also developing fast. We have more energy, infrastructure, ship building and offshore work than ever before.

As important to us is the domestic market. We are involved in a wide array of UK based disputes. Our barristers represent clients from the smallest sized disputes through to the largest and most complex. In the bigger cases, junior members of chambers are frequently working together with our more senior members. We act in all forms of alternative dispute resolution as well as in the TCC, the Commercial Court and the Appellate Courts. These cases are not just construction and engineering, but include more and more professional negligence and insurance related disputes too.

Declan, our CEO, has been in harness for just over 2 years. In that short time he has revolutionised the clerks' room and developed it into an efficient and well organised machine. We now have the very welcome additions of Holly Gavaghan as Business Development Director and Marie Sparkes who leads our marketing department. We have also recruited our first ADR Clerk, Claire Thomas, who is responsible for clerking full time arbitrators and mediators. Behind the scenes, I have become more involved in and have a fuller understanding of those who successfully keep the administrative machine working. With their help, we are about to embark on a large refurbishment contract of our building at 15 Essex Street. Can you imagine drafting the terms of that building contract? We hope you will like the result of the project once it is completed.

To sum up – we live in exciting times.

Marcus Taverner QC

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BREXIT

With the June referendum fast approaching, it is impossible to ignore the heat and, to some lesser extent, the light, surrounding the debate over "BREXIT". Simon Hughes QC and David Gollancz consider the implications of withdrawal from the EU on the construction industry and procurement legislation.

by Simon Hughes QC and David Gollancz

A recent survey undertaken by accountants Smith & Williamson suggested that as many as 85% of companies asked operating in the construction and real estate sectors thought that withdrawal from the EU would be damaging for the UK economy. That said, many have commented on the fact that the construction industry overall has not taken a definitive position either way. That will, no doubt, reflect the wide range of personal and political opinions concerning the BREXIT issue, together with the reality that nobody on either side of the debate can sensibly predict what life will be like in 20 years time, in the construction sector or more generally. Again, the relatively low-key approach of the construction industry probably reflects the fact that, even with increasing opportunities overseas, the UK construction industry is one of the most domestically focused sectors in the UK.

It is not the purpose of this piece to argue a position either way, and certainly it must be emphasised that Keating Chambers takes no stance on the BREXIT issue. However, the sort of factors which the industry, and construction professionals, will no doubt be mulling over during the coming months probably include the following:

- "Red tape": The suggested association between UK membership of the EU and the increase in rules, regulations and "red tape" is a well-publicised one. UK construction is subject to an awful lot of regulation emanating from Brussels. The 'Cutting Red Tape Review', which was launched on 2 December 2015 has been specifically targeted at giving "*...housebuilders and smaller construction businesses a powerful voice as part of our £10 billion deregulation drive...*" (Business Secretary, Sajid Javid at the launch). Areas which have been targeted by the Task Force have included: road and infrastructure rules for new housing developments; environmental requirements (particularly EU rules such as the Habitats Directive); and rules that affect utilities (electricity, gas, water and broadband infrastructure). It might be said that this sort of activity illustrates how reform and the reduction of "red tape" is happening with the UK still in the EU; on the other hand, there will be those who will argue that reform could go much further post-BREXIT.

- *Market Access:* A major unknown is the question of the terms on which trade/investment would take place between the UK and its current EU partners in a post-BREXIT world. Arguably, the uncertainty – see the current jitters experienced by sterling – might be worth the permanent outcome either way. Certainly, if BREXIT happens, the construction industry would expect the Government to fund the transport and urban regeneration projects which have, at least in part, found the EU to be a source of funding and inward investment.

- *Free movement of labour/cost of labour:* Questions of immigration/net migration which feature in the BREXIT debate have many facets. One possible construction industry perspective is that the influx of labour, particularly from Eastern Europe, over the decade, has provided a useful supply of skilled and semi-skilled labour. Some would argue that restrictions on access to labour, which may well be the deliberate result of a BREXIT, will drive increases in costs and therefore prices.

- *Wider Economic Impact:* Those who argue that BREXIT will have a major negative impact on the UK economy argue that the process has already begun – evident reluctance to invest in some quarters pending the referendum, and the weakening of sterling over the past few months, coupled with occasional stories in the Press about how the BOE in gathering reserves to 'support sterling' in the [anticipated] immediate aftermath of BREXIT. In terms of other information and predictions on this subject, the CBI has estimated that leaving the EU would, on a conservative basis, have a negative net impact on the UK economy in the order of £78 billion annually. Others have been more pessimistic still. However, on this aspect, opinions and analysis are divided. In a report produced recently by the think tank Open Europe, it has been suggested that UK GDP could be 2.2% lower in 2030 if Britain leaves the EU and fails to strike a deal with the EU or follows a path of protectionism. In a best case scenario, however, under which the UK manages to enter into liberal trade arrangements with the EU and the rest of the world, Britain could be better off by 1.6% of GDP in 2030. The report concluded that the realistic range of outcomes was somewhere between 0.8% permanent loss to GDP in 2030 and a 0.6% permanent gain in GDP in 2030. Figures all very much dependent on the policy mixes which are assumed.

- *Securing access to the existing [EU] market:* An important consideration – and a further unknown in the whole equation – is that extent to which the UK's current access to the huge market contained within the EU will continue after a BREXIT. '...The Germans will still want us to buy their BMWs...' represents at least one formulation of the argument that trade relations will be little altered if the UK left the EU. For the construction industry – and, in particular, in that part of the sector which comprises the supply of professional services and sophisticated technology and equipment – access to the market, and the terms of that access, will be an important consideration. As with other aspects of the finely balanced BREXIT debate, a major factor here is the uncertainty which may result during the period of any prolonged trade negotiations. Recent potential parallels, such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, have a rather doubled-edged quality. The European Commission suggests that the impact of CETA will be to remove 99% of customs duties with an expected Euro 12 billion increase for Europe's GDP. This all looks very promising for similar arrangements between a post-BREXIT UK and the EU. However, negotiations towards what has become CETA were launched on 6 May 2009 in the Canada-EU Summit in Prague. This, in turn, came after the Canada-EU Summit in Ottawa on 18 March 2004 where leaders agreed to a framework for a new Canada-EU Trade and Investment Enhancement Agreement (TIEA). So, these things can take some time. The construction industry, as with other vital sectors, will be looking very carefully at whether periods of uncertainty and possible stagnation will be the result of wholesale renegotiation.

"Rules relating to the procurement of construction and engineering projects are likely to experience, at the very least, a facelift, if BREXIT becomes a reality."

Rules relating to the procurement of construction and engineering projects are likely to experience, at the very least, a facelift, if BREXIT becomes a reality.

Prior to the adoption of the Public Services Contracts Regulations 1993 (followed in 1995 by the Works Contracts Regulations), transposing Directives of what was then the European Community, there was no domestic legislation in the UK governing procurement by public bodies or utilities. At the time of writing, public procurement is governed by the Public Contracts Regulations 2015 (the "PCR 2015"), the Defence and Security Public Contracts Regulations 2011 and the Utilities Contracts Regulations 2006 (to be superseded in April 2016 by the Utilities Contracts Regulations 2016). In April 2016, barring any unforeseen events, the Concessions Contracts Regulations 2016 will come into force. In addition to the EU law implemented by these Regulations, the PCR 2015 include in Part 4 purely domestic legislation, implementing reforms proposed by Lord Young of Graffham, intended to improve SME and VCSE access to public contracts.

The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 impose obligations on NHS procurers, additional to those imposed by the EU legislation.

Notwithstanding recent reforms by the European Commission intended to streamline, simplify and flexibilise (really) procurement, the EU law is widely seen in the UK as hampering commercially effective public procurement and interfering with legitimate domestic policy making. The difficulties created for procuring bodies by the legislation and the EU case law fall into three broad categories: contracts must be competed even when the contracting authority has no wish to carry out a competition (for example, because it knows which contractor it wants to appoint – in the case of local authorities, this will usually be a local business); it is in practice all too easy innocently to breach the stringent requirements of equal treatment and transparency, and employing the resources required to get it right is expensive; the effect of the legislation is too often that contracts are awarded to the tenderer who can write the best tender (or make the most generous promises) rather than the one who can actually do the best job or deliver the best value[1]. To these objections, commercial entities ("economic operators") would add the excessively burdensome processes entailed in first qualifying for and then submitting a tender. In short, procurement law is not loved; governments of all colours have implemented it reluctantly.

One might therefore reasonably expect that Brexit would see the procurement regulations amongst the first to be wheeled through the streets to the legislative guillotine, the unloved children of our unhappy affair with Mme. Europa. It may well be that the legislation would be revoked but it is suggested that that would not be the end of regulation of public and utilities procurement in the UK.

First, the UK is a member of the World Trade Organisation ("WTO") and a signatory to the Government Procurement Agreement[2] ("GPA"), which is of similar effect, as to principles, to the EU procurement regime (the EU is a single signatory, and the US and a number of other third countries are also signatories). Article XVIII of the GPA requires signatory states to institute timely, effective, independent, transparent and non-discriminatory domestic review systems which permit suppliers to challenge breaches of the GPA and/or the national legislation giving effect to the Agreement. A domestic review body must have the authority to implement remedial measures and/or to order compensation for the loss or damage suffered by a supplier, and the power to order rapid interim measures to preserve a supplier's opportunity to participate in relevant procurement activities. If the UK were to leave the EU, it would have to comply with these GPA requirements; these need not replicate the very detailed procedural prescriptions of the EU legislation but their effect would be broadly similar[3]. Article XX of the GPA provides that signatory states can start WTO proceedings against a state which fails to meet its obligations.

Secondly, 25 years of procurement legislation have established equal treatment of economic operators and transparent conduct of procurements as a commercial and legal norm. For many years the English court resisted the imposition of any such requirements as a matter of public law[4] but, in more recent cases, that resistance has become at least more nuanced[5]. In a recent case before the Judicial Committee of the Privy Council it was said that "*there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment*"[6]. It is not clear whether the Committee adopted that proposition or merely recorded that it was common ground between the parties to the dispute before it; but it is submitted that it is an unexceptional statement. The contrary position – that public bodies should be at liberty to treat tenderers unequally and unfairly – is repugnant to ordinary public law principles[7]. It follows that the processes by which contracts are awarded should itself be amenable to review which, in turn, imposes in practice a requirement of some transparency about how decisions are made.

While public bodies (and utilities) and economic operators alike may complain about the burdens imposed by the EU legislation, and the counter-commercial outcomes to which it can give rise, it is thought that domestic economic operators would not welcome the prospect of a wholly unregulated tendering environment. The UK would be obliged, pursuant to the GPA, to institute a degree of regulation and to provide remedies. If it failed to do so other signatory states (including the EU itself) would be likely to initiate WTO proceedings against the UK pursuant to Article XX. Brexit would provide an opportunity to put in place a simpler regulatory system, but it would not mean the end of procurement regulation.

The factors which feed into the "in/out" equation are many and complex, and their analysis does not admit any easy answers. The construction and engineering industry is a vibrant and vitally important sector, and we will all no doubt be looking very closely at possible impacts and scenarios, on both sides of the debate, over the coming months.

1 See Cranston J's observation in R *(Greenwich Community Law Centre) v Greenwich London Borough Council* [2011] EWHC 3463 (Admin), para 61

2 https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

3 There is an argument for saying that the GPA is a more commercially sympathetic regime than the EU legislation

4 *R (Gamesa Energy UK Ltd.) v National Assembly for Wales* [2006] EWHC 2167 (Admin)

5 *Law Society of England and Wales v Legal Services Commission* [2010] EWHC 2550 (Admin)

6 The Central Tenders Board and another (Appellants) v White (trading as White Construction Services) (Respondent) (Montserrat) [2015] UKPC 39

7 In this connection see *R v LB Enfield ex p. T F Unwin (Roydon) Ltd.* (1989) 46 BLR 5 and *R v LB Islington ex p. Building Employers' Federation* (1989) 45 BLR 45.

Removing an Arbitrator for Apparent Bias

by Vincent Moran QC

Vincent Moran QC represented the successful Claimant in *Cofely Ltd v Anthony Bingham and Knowles Ltd* [2016] EWHC 240 (Comm), an application for the removal of an arbitrator on the ground of apparent bias. In this article he discusses the findings and implications of the case.

Background

In this case the Claimant ("Cofely") sought an order that the First Defendant ("the Arbitrator") be removed from an ongoing arbitration between Cofely and the Second Defendant ("Knowles") pursuant to section 24(1)(a) of the Arbitration Act 1996 ("the Act"), on the grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality.

Knowles had acted as claims consultants for Cofely in relation to a concession agreement for energy services to the Olympic Park and Westfield Shopping Centre developments and in an adjudication of time and money disputes arising out of the same. Disputes also arose between Cofely and Knowles about the adequacy of the advice and services provided by Knowles and about fees alleged by Knowles to be due from Cofely.

Knowles commenced arbitration proceedings against Cofely, applying to the Chartered Institute of Arbitrators (CIArb) for the appointment of an arbitrator and specifically requesting the Arbitrator - whose appointment was subsequently confirmed by the CIArb, despite Cofely's objection to it at the time.

Following a Partial Award to Knowles of £1 million, Cofely made its own application for a Partial Award on procedural issues; but then, in the light of the decision in *Eurocom Ltd v Siemens Plc*, Cofely's solicitors sought information from Knowles and the Arbitrator regarding the Arbitrator's prior record of appointment as adjudicator and arbitrator by Knowles/its clients.

In *Eurocom*, Ramsey J. held, of course, that there was a "*very strong prima facie case*" that Knowles had manipulated the process for the appointment of RICS adjudicators, which had resulted in the appointment of the Arbitrator.

After Knowles provided some of the requested information, but before the Arbitrator had provided any, a hearing was called by the Arbitrator on an issue that had not been raised by either party, namely 'whether the tribunal was properly constituted'.

At the hearing, leading counsel for Cofely sought to obtain answers to the outstanding request for information from the Arbitrator and, in particular, details of the proportion of his income resulting from Knowles related appointments in the previous 3 years, or an indication that no answers would be forthcoming.

The Arbitrator did not provide the requested information at the hearing. Subsequently, but only in response to a request from Knowles, the Arbitrator did provide details of the amount and proportion of his income that was generated from 'Knowles related' appointments.

The law

Section 24(1)(a) of the Act provides as follows:

> "*(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—*
>
> (a) *that circumstances exist that give rise to justifiable doubts as to his impartiality*;"

Section 73 of the Act states:

> "*(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—*
> .....
> *(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection*"

Circumstances which engage s24(1)(a) are an irregularity within the meaning of s73(1)(d) and therefore the right to object may be lost if the conditions referred to in that section are satisfied.

As to s24 of the Act:

a. The common law test for apparent bias is reflected in s24;

b. The test under section 24 is whether there is a real possibility of bias (see *Laker Airways v FLS Aerospace* [199] 2 Lloyds Rep 45, per Rix J at 48; *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at paragraphs 21-29; and *Sierra Fishing Co & Others v Farran & Others* [2015] EWHC 140 (Comm), [2015] Lloyds Law Reports per Popplewell J at paragraph 51);

c. More particularly, it is whether "*the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*" (see *Porter v Magill* [2002] AC 357 per Lord Hope at paragraph 103; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, per Lord Hope at paragraphs 1-3);

d. Such a fair minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way in which the legal profession operates in practice (see *Rustell v Gill & Dufus* [2001] 1 Lloyd's Law Reports 14; *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528; *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at paragraphs 21-29);

> ***"What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."***

e. In the context of alleged apparent bias on the part of a Court, Lord Bingham summarised the question as follows in *Davidson v Scottish Ministers* [2004] UKHL 34 at paragraph 6: "*What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.*";

f. The fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias (see *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at paragraph 62; Arbitration International, Volume 27, Issue 3, page 442; *Fileturn Ltd v Royal Garden Hotel* [2010] TCC 1736, [2010] BLR 512 at paragraph 20(7)];

g. The Arbitrator's explanations as to his knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer would need to consider when reaching a view as to apparent bias (see *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23; *Paice v Harding* [2015] EWHC 661, [2015] BLR 345, per Coulson J at paragraphs 46-51);

h. If there is a real ground for doubt, this should be resolved in favour of recusal (see *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at 25).

As to s73 of the Act:

a. 'Forthwith' means 'as soon as reasonably possible';

b. It is necessary to address the sets of circumstances relied upon by a claimant separately;

c. Different circumstances may engage s24(1)(a) individually or in combination;

d. In the former case, the right to object is not lost unless s73 is satisfied in relation to each set of circumstances;

e. In the latter case, the right to object cannot be lost unless s73 applies to sufficient of the circumstances, so that what is left is cumulatively insufficient to engage s24(1)(a);

f. In the case of cumulative grounds, it is only at the point that the separate matters, considered together, generated the required grounds for a s24 application that s73 should be applied;

g. A party does not take part in an arbitration for the purposes of s73 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute;

h. A party may "*continue to take part*" by silence or inactivity in the face of a right to object which subsequently becomes available to him;

"In effect, the Arbitrator had sought to pre-empt the information-gathering process by pressurising Cofely into accepting that there was no issue to be explored. This conduct demonstrated a lack of objectivity and an increased risk of bias by reason of unconscious bias toward favouring Knowles."

i. See generally *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2005] Lloyds Law Reports, Vol 1, 324; *Sierra Fishing Co & Others v Farran & Others* per Popplewell J at paragraph 66 and 73; *Rusal v Gill & Duffus* [2000] 1 Lloyds Rep 14 at paragraphs 20-21.

Guidelines

Rule 3 of the CIArb Code of Professional and Ethical Conduct for Members (October 2000) (at page 10 of Exhibit PAT2) states:

> "*Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.*"

The IBA Guidelines on Conflicts of Interest in International Arbitration (at pages 11-40 of Exhibit PAT2) also provide relevant guidance applicable to domestic arbitration at General Standard 2 – Conflicts of Interest (page 19); General Standard 3 – Disclosure by the Arbitrator (pages 20-21); 'Orange list' definition (page 32); Orange list 3.1.3 (page 36); and Orange list 3.1.5 (page 37).

The recently amended ICC "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (22 February 2016) also emphasise the need to consider whether "*The prospective arbitrator or arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm*" (see new and amended paragraphs 17-24).

It is suggested that the disclosure obligation should be followed where there is any doubt as to the relevance of the information and the manner in which an arbitrator discharges this obligation can be relevant to the issue of apparent bias.

The decision

The Court held that five of Cofely's seven grounds provided evidence of apparent bias for the purposes of s.24(1)(a). Over the last three years, 18 per cent of the Arbitrator's arbitral and adjudication appointments and 25 per cent of his income were derived from cases involving Knowles, either as a party (3 occasions) or as party representative (22).

The Chartered Institute of Arbitrators' "*acceptance of nomination*" form required disclosure of "*any involvement, however remote*" with either party over the last five years. It was found that acting as arbitrator or adjudicator in previous cases involving one of the parties was "*involvement*" for the purposes of the Code of Practice. It was immaterial that the appointments might have been made by an appointing body rather than by the party itself.

"The evidence also suggested that Knowles influenced appointments positively or negatively as a matter of general practice..."

The evidence also suggested that Knowles influenced appointments positively or negatively as a matter of general practice by putting forward the name of its chosen representative or a list of potential appointees whom it considered inappropriate, or by identifying required characteristics that would only be shared by a small pool of people – such as in this case "*QS and barrister*". It was particularly significant that it had an appointment "blacklist" whereby arbitrators could fall out of favour depending on their conduct. It was also held that it had been reasonable for Cofely to enquire into the nature of the relationship between the Arbitrator and Knowles and that it had done so courteously and appropriately; but that the Arbitrator had responded evasively. In avoiding addressing these requests and "*effectively cross-examining Cofely's counsel ... aggressively and in a hostile manner" the Arbitrator was "descending into the arena in an inappropriate manner*".

In effect, the Arbitrator had sought to pre-empt the information-gathering process by pressurising Cofely into accepting that there was no issue to be explored. This conduct demonstrated a lack of objectivity and an increased risk of bias by reason of unconscious bias toward favouring Knowles.

The Court concluded that, if the Arbitrator's resignation was not forthcoming, an order for his removal would therefore be made.

Therefore, the key concerns of the Court appear to have been (i) the proportion of income derived from Knowles related referrals, (ii) the implications of the decision in *Eurocom* and (iii) the way the Arbitrator reacted to Cofely's questions of him – and, in particular, the way a 'hearing' and 'ruling' was made and conducted.

As to the proportion of income point, the Court did not consider it relevant that most were from third party appointment processes: "*On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern*".
As to *Eurocom*, the key points were that:

a. Until becoming aware of this decision, Cofely were unaware of any reason to question the potential degree, nature and significance of the Arbitrator's relationship with Knowles;

b. It was held there was a "*very strong prima facie case*" that fraudulent misrepresentations had been made by Knowles to assist in getting the Arbitrator appointed as the (adjudicator) tribunal in previous disputes involving Knowles as claimant or representative of a claimant;

c. Evidence in the case in fact suggested that this was a general practice of Knowles (and in particular Mr Giles who is the individual acting on behalf of Knowles in the current dispute) – see paragraph 40 of the decision.

d. The objective observer would therefore discern a risk that the Arbitrator may be influenced by the risk of going on the Knowles "*black-list*" if he fell out of favour with them.

As to the Arbitrator's reaction to being questioned about his relationship with Knowles, it was highlighted that the Arbitrator still did not recognise the relevance of the relationship information or the need for any disclosure and that his lack of awareness itself "*demonstrated a lack of objectivity and an increased risk of unconscious bias*".

Finally, it was held that s73 was not engaged, as the relevant conduct did not occur until after March 2015 and because Cofely was not in a position to decide whether there were grounds for objection until that information gathering was complete.

Implications of the decision

Although such cases are obviously fact specific, it is suggested that there are issues of more general concern and interest arising out of the decision:

a. The relevance to the issue of apparent bias of a tribunal's prior history of referrals from or involving one or other of the parties.

b. The irrelevance of the fact that some or all appointments may be through appointing bodies (rather than direct appointments).

c. The irrelevance of the distinction between a party itself acting as a claimant/referring party in prior referrals and merely acting as a legal representative of the claimant.

d. The possible threshold for when previous involvement becomes disclosable: although no general guidance was provided, the existing authorities suggest that as little as 5% of income over previous 3 years might trigger a disclosure obligation and that 10% or more generally will.

e. The importance when considering this question of any wider disclosure obligation that may be assumed during the appointment process itself (under relevant institutional rules or a declaration).

f. The importance of how the tribunal reacts to and deals with enquiries made of its existing or historic involvement or relationship with one of the parties or its legal representative.

g. The appropriateness of the (apparently common) practice of seeking to influence (both positively and negatively) the appointment process, both in arbitration and adjudication.

h. The danger that robust tribunal conduct, that might seem appropriate in the context of adjudication, undermines the apparent fairness of the arbitral process.

i. The need for a tribunal to veer on the side of caution in providing early disclosure of all matters, however remote, which could have a bearing on the issue of apparent bias.

j. The possible need for appointing bodies to review their procedures – especially where a referring party names a preferred tribunal or a name is objected to by the defendant.

k. The possible need for appointing bodies to keep their panels under review.

Finally, in a (to date) unreported part of the decision, the Court also found in relation to the existing Partial Award in the case that, in spite of the fact that no criticism was made of it or the Arbitrator's conduct at the relevant time, the Court did not have jurisdiction under s24 of the Act to confirm that the Partial Award should necessarily stand in light of the removal of the Arbitrator – and that this matter would be for any replacement arbitrator to consider under the apparently wide powers conferred by s27(4) of the Act.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported case summaries

Counted 4 Community Interest Co v Sunderland City Council [2015] EWHC 3898 (TCC)

The defendant Council undertook a procurement exercise for the provision of substance misuse treatment and associated services. The claimant, an incumbent provider of the services, submitted a tender which was not successful. The claimant alleged that the tender process was carried out unlawfully for the purposes of the Public Contracts Regulations 2015, specifically in respect of a conflict of interest (Regulation 24) and in making significant errors in evaluation and scoring of the tenders. The effect of the claimant's challenge was to suspend the process of awarding the contract under Regulation 95 and the Council applied under Regulation 96 for this suspension to be lifted.

The Court applied the two-stage approach, as to (i) whether there was a serious issue to be tried and (ii) where the balance of convenience lay. On the facts, the alleged conflict of interest, involving the appointment of the contract manager for the existing contract as an evaluator, was arguable. It could not be said that the scoring allegations were hopeless, especially as no evidence from the Council was produced to support the Council's case in this regard and the defence had only recently been served, meaning that the claimant could not address the points of substance at this stage. Accordingly, there were serious issues to be tried.

The public interest factor was an important consideration in deciding balance of convenience. The Court rejected the Council's evidence that there was a pressing need based on safety for the new supplier of the service to take over, finding that the claimant was continuing to provide a satisfactory service. The Court also considered that the Council had not itself shown great urgency in the conduct of the tender.

Damages would not be an adequate remedy for the claimant, since the loss of the current contract would result in the break-up of most of its skilled and dedicated work-force due to TUPE. On the basis of the Claimant's undertaking to meet any additional management costs caused, the judge held that the automatic suspension would continue until trial.

Simon Taylor represented the defendant
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Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352 (TCC)

This was an adjudication enforcement case where the claimant contractor had agreed to carry out the design, supply and erection of steel work on a site in Manchester for the defendant employer. Some of these works related to power generation and were therefore not construction operations within the meaning of the Housing Grants, Construction and Regeneration Act 1996.

Severfield submitted an interim application for £3.7m which did not distinguish between the works which were construction operations and those which were not. Duro failed to serve an employer's payment notice or a pay less notice. Duro assessed the sum due as £361,351.39. Severfield then referred the matter to adjudication. Severfield was unsuccessful in its attempt to enforce and discontinued the action, then issuing a new version of the claim, valued at £1.4m, which did not include non-construction operations, and applied for summary judgment on this sum.

Coulson J refused the application. He stated that the new version of the claim was in fact a new claim, not a new iteration of the December application, and therefore Severfield could not rely on Duro's failure to serve notices in respect of the December application to enforce. Even if the new version of the claim was treated as essentially the December application, it was nevertheless defective as it failed to state the correct sum as the notified sum, in that the application stated £3.7m but the sum now sought was £1.4m. The employer's liability was only for the notified sum.

Adrian Williamson QC represented the defendant
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Van Oord UK Ltd v Allseas UK Ltd [2015] EWHC 3074 (TCC) and [2015] EWHC 3385 (TCC)

Allseas UK Limited ("AUK") was engaged as the principal contractor in a project to lay onshore and offshore gas pipelines forming part of the Total Laggan-Tormore Development at Sullom Voe, Shetland. Van Oord UK Limited and SICIM Roadbridge Limited, acting as a joint venture ("OSR"), were engaged by AUK for the onshore works.

The works in respect of the 30" diameter gas export pipeline were substantially delayed and OSR sought additional payment through change orders under the contract and/or as damages for breach in respect of delay, disruption and additional costs. AUK counterclaimed for most of the payments made on account.

OSR made three principal claims based on:

(i) The discovery of deeper peat than indicated in a tender survey in the south section of the works;
(ii) Lock-outs imposed by owners of existing pipelines arising out of the failure by AUK to obtain temporary crossing permissions and delay in obtaining permanent proximity agreements;
(iii) Additional supervision costs incurred as a result of AUK's delay in delivering a free issue 55 tonne beach valve and housing.

In relation to the deeper peat claim, Coulson J held that the sub-surface conditions were not different to those described in the contract documents, even if they were they reasonably could have been foreseen by an experienced contractor and, in any event, the ground conditions did not substantially modify the scope of work or contract price. In relation to the lock-outs, OSR had not made out liability in respect of the temporary crossings but AUK did fail timeously to obtain the necessary agreements for the permanent crossings. Admissions made by AUK in correspondence when agreeing payments on account were not a binding acceptance of contractual liability. With the exception of permanent crossings, OSR's notices were out of time and were not made under the correct article of the contract. Further, with the exception of the permanent crossings, for the vast majority of the relevant periods, the delays and disruption were not due to the deeper peat or the lock-outs, but Sicim's own default. Finally, the evidence of OSR's expert quantum witness was entirely worthless and the evidence of AUK's quantum expert was generally to be accepted. In respect of the beach valve claim, the rates already paid were inclusive of supervision such that no further sum was due.

In the separate costs judgment [2015] EWHC 3385 (TCC), Coulson J held that AUK's Part 36 offer was properly construed as a defendant's Part 36 offer and not a claimant's Part 36 offer. An order for indemnity costs was appropriate as OSR ought to have known from the outset it had a hopeless claim. However, the order would not extend to the £1.3 million paid to AUK's claims consultants, which was an astonishing sum and there might be issues as to the recoverability of some or all of those costs.

Finola O'Farrell QC, Michael Stimpson and Jennie Wild represented the claimants
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Seeney v Gleeson Developments plc [2015] EWHC 3224 (TCC)

The Defendants (developers) carried out works to a property in which the Claimants claimed a legal interest. The Claimants sought a declaration that part of the Defendants' counterclaim for additional payment arising from variations to the property, up to 1 September 2011, had been compromised in an exchange of emails. The emails had referred to solicitors preparing a settlement contract. No such settlement contract was ever drawn up. The Court considered whether execution of a formalised settlement agreement was a condition precedent to a binding compromise. The Court found that it was not a condition precedent. The references in the emails to a formalised agreement were for the purposes of recording the compromise and not as a condition precedent to a binding settlement. The hearing raised issues of contractual formation, conditions precedent and admissibility of evidence.

Tom Owen represented the defendants
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John Sisk and Son Ltd v Duro Felguera UK Ltd [2016] EWHC 81 (TCC)

Sisk was engaged as civil engineering contractor by Duro for works at a Combined Cycle Power Plant. Following a dispute over payment, an adjudicator valued the work done by Sisk at $£36 million and awarded Sisk some £10 million. Duro sought to resist Sisk's enforcement of this decision on the ground that there were breaches of natural justice by the adjudicator and wrongful delegation of his decision-making function.

Duro had submitted 'threshold' challenges to the adjudicator's jurisdiction. The adjudicator concluded that these were not made out and proposed an agenda for meetings and submissions. Duro requested the adjudicator to resign on the ground that he had reached his decision on jurisdiction without allowing Duro to respond to new arguments by Sisk. Duro also challenged the adjudicator's 'internal' (substantive) jurisdiction on the grounds (i) that the parties had reached a binding agreement on the value of the works, (ii) that Sisk's claim was out of time under a contractual time-bar, (iii) that Sisk had not issued invoices , which were a condition precedent to payment, and (iv) that the adjudicator could not produce a valuation of certain items when his obligation was to produce a cumulative valuation of the works taking everything into account.

The adjudicator gave a non-binding opinion that these points should be rejected for the purposes of deciding whether he had jurisdiction and so could continue with the adjudication. Duro argued that this amounted to a pre-determination of issues on the part of the adjudicator. The court held that in the circumstances known at the time the matter came to court, which was the correct test, the adjudicator had not gone about reaching his decision with a closed mind. Duro also argued that the adjudicator had acted improperly in instructing a self-employed construction consultant to assist him, which they contended was improper delegation of part of the decision-maker's role. The court held that the assistant had worked as a data handler in producing spreadsheets and general administration. It also accepted the adjudicator's adoption of Sisk's argument on the remeasurement of the works concerning the provision of concrete. Summary judgment for enforcement of the adjudicator's decision was granted.

Simon Hughes QC and Matthew Finn represented the defendant
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Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd and Regorco Ltd [2016] EWHC 76 (TCC)

The claimant, CML, had acquired a warehouse which was the subject of a warranty given by the ground-works sub-contractor, later known as Regorco. Mitchell was the design and build contractor for the project. The hearing concerned two preliminary issues:

(i) Whether a requirement by Regorco that any claim in relation to an alleged defect had to be notified within 28 days was incorporated into its sub-contract with Mitchell; and
(ii) Whether, if it was, it would be considered unreasonable within the meaning of the Unfair Contract Terms Act 1977 (UCTA).

On the facts, the court decided that a hand-written amendment to Mitchell's standard terms was insufficient to incorporate into the sub-contract Regorco's requirement that alleged defects had to be notified within 28 days.

Had the time-bar provision been so incorporated, it would have been held to be unreasonable for the purposes of ss.3(2) and 11 of UCTA. Applying the UCTA Schedule 2 guidelines as to the meaning of 'reasonableness', the judge held that because of the likely circumstances in which ground-works defects manifest themselves: "*it was not reasonable to expect, at the time when the sub-contract was made, that compliance by Mitchell with the 28 day time limit imposed … would, in most cases at least, be practicable*".

Marcus Taverner QC and Calum Lamont represented the claimant
Justin Mort QC represented the second defendant
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by Simon Taylor

THE PUBLIC CONTRACT REGULATIONS 2015 THE KEY POINTS

A key requirement of the UK membership of the European Union is the commitment to fair and transparent public procurement. On the eve of a referendum on Europe, Simon Taylor considers the effect of the Public Contracts Regulations 2015 (the 2015 Regulations), which came into force on 26 February 2015.

New rules now in force

The procurement regulations are based on European Union ("EU") free movement principles, designed to achieve a single market for goods and services and to prevent public bodies discriminating in favour of their national champions. The 2015 Regulations implement the latest EU procurement directive - Directive 2014/24/EU in England and Wales (the Directive).

The new rules apply to any procurements commenced after 26 February 2015. Contract awards following procedures commenced before that date are still subject to the old rules (the Public Contracts Regulations 2006).

There are exceptions to this basic rule. Mini competitions conducted after 26 February 2015 under a framework agreement concluded or tendered prior to 26 February 2015 are subject to the old rules. In addition, certain NHS procurements are also subject to the old rules until 18 April 2016 (which is the cut off date for implementation of the Directive).

This article relates to the public sector rules - there are also EU directives relating to utility procurement and concessions that are due to be implemented into UK law by April 2016 .

How have the EU rules been implemented?

There is a certain degree of discretion exercised by national governments in implementing EU directives and the UK Government has made policy choices which tend to preserve maximum flexibility for UK public bodies. For example, the UK could have made certain voluntary grounds for excluding bidders at pre-qualification (PQQ) stage mandatory, but chose not to (*e.g.* where there are "sufficiently plausible indications" that the bidder has entered into agreements with other economic operators aimed at distorting competition such as, for example, bid rigging). In other words, they have left this choice to the procuring body rather than mandating that in all such circumstances a bidder must be excluded.

Aside from these policy choices, the UK implementation policy has been to 'copy out' the text of the Directive into the 2015 Regulations – even to the extent that the regulations in the 2015 Regulations are numbered the same as the equivalent provisions in the Directive. This 'copy out' approach should avoid the problems which have arisen in the past of UK procurement regulations being challenged in the courts on the basis that they are inconsistent with the underlying EU directive (though in at least one case, the copy out has mistakenly inserted an "or" where an "and" should have been – see Regulation 72(1)(b)). In any cases of inconsistency, the Directive trumps the UK regulations by virtue of the sovereignty of EU law.

The disadvantage of 'copy out' is that EU drafting, often a compromise between different positions taken by various member states, is sometimes opaque. Any oddities and ambiguities have therefore been embraced by the 2015 Regulations. Guidance issued by the Crown Commercial Service ("CCS"), the part of the Cabinet Office responsible for procurement, tends in these cases to acknowledge the ambiguity without committing to a view as to what it means. For example, the Directive and 2015 Regulations (at least arguably) do not require either "sub-central" authorities (such as local authorities) or authorities conducting light touch tenders (for example, social care services) to hold a standstill period following the award decision (because the tender may be advertised using a periodic indicative notice and a standstill period is not required under Regulation 87 and 86(5)(a) where the contract can be awarded without the publication of a contract notice). The relevant CCS guidance acknowledges that the position is unclear but recommends that a standstill period is followed. There are still therefore a number of provisions in the 2015 Regulations which will lend themselves to judicial interpretation.

What is different about the new rules?

Public bodies in the UK have been subject to procurement regulations for some time. Why the need for change?

The European Commission, which oversees enforcement of the procurement rules (along with national courts) and also formulates EU legislative policy, has sought with Directive 2014/24/EU to achieve a number of objectives, including:

- Greater flexibility in procedures to ease red tape.
- Codifying existing case law into new provisions.
- Promoting small and medium sized enterprises ("SMEs") and the social and environmental agenda.
- Improved governance and record-keeping.

Flexibility

Greater flexibility has been achieved in a number of ways.

There are new specific provisions on **pre tender engagement** which make it clear that public bodies can engage with the market prior to going out to tender, provided they take steps to ensure that this does not distort competition. Pre tender engagement is a useful means for authorities to gain insights from the supplier side on their plans and also raise interest in the procurement. While favouring local companies is strictly against the rules, pre tender engagement may, in practice, be a means of helping local businesses to acquire the knowledge and skills necessary to bid on equal terms with larger providers.

Also relevant to the planning stage, there are new specific provisions on **lots**. These are in part designed to encourage authorities to consider breaking contracts up into smaller pieces so as to enable greater access for SMEs. However, the provisions also make it clear that authorities are permitted to limit the number of lots that may be awarded to each bidder provided the criteria for doing so are clearly stated in the tender documents.

The process of assessing the **eligibility** of a supplier to bid, and its financial and economic standing and capability (the "PQQ stage"), has also undergone an overhaul. The 2015 Regulations and the standardised PQQ issued by the CCS seek to introduce a more streamlined process which in particular avoids the need to collect a large amount of evidence from bidders at the early stage of the process. The grounds for exclusion have been updated and expanded and now include, for example, the discretion to exclude a bidder on the basis of "*persistent deficiencies in the performance of a substantive requirement under a prior public contract ... which led to early termination ... damages or other comparable sanctions.*" However, a tick box approach is followed whereby, provided bidders provide reassurance at PQQ stage that none of the grounds for exclusion are present and that the relevant selection criteria are met (as to finance and capability), they need not be required to provide evidence of this until the end of the process, if and when successful. A new "European Single Procurement Document" has been developed with a view to harmonising the requirements and establishing a database of evidence that can be referred to by public bodies.

There are specific new provisions relating to circumstances in which an authority may consider that a bidder which has previously failed to meet eligibility criteria may 'self-clean' by taking appropriate

"Many of the substantive procurement rules have been adjusted as a result of the latest round of reforms and an understanding of these is essential for any practitioners in the area."

measures to address its problems and show its reliability (Regulation 57(13)).

One of the areas often criticised in the past is that authorities have been limited in their ability to take into account **bidder past performance** and to take up references. The new rules make clear that, at selection stage, authorities may require evidence of experience by suitable references from prior contracts and the CCS's standard PQQ asks bidders to provide information on three contracts to demonstrate relevant experience.

Even at award stage (when bidders are assessed against qualitative and price criteria relating to their bid proposals rather than their experience), authorities are now expressly permitted to use criteria which assess the "*organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.*"

Flexibility has also been introduced into certain permitted procurement procedures, including **dynamic purchasing systems** ("DPS"). DPSs are a quick and effective means of procuring commodity products or services from a broad range of potential suppliers. Similar to frameworks, the DPS's main differentiating feature is that the group of providers is constantly evolving as any suitable provider can apply to join during its life. All DPS members are entitled to bid for each individual requirement. Unlike the old rules, the new DPS provisions no longer require a contract notice to be published in the Official Journal ("OJEU") each time a new requirement is tendered. This may result in the DPS mechanism being used far more often than previously.

The new rules also make it easier for public bodies to rely on the negotiated procedure, though it is not yet clear whether this will make any practical differences in complex tenders to the use of competitive dialogue under the old rules.

Codification

The new rules helpfully codify case law in a number of areas.

Regulation 12 of the 2015 Regulations introduces detailed rules on when an **in house contract** (for example, to a subsidiary of the authority or a shared service provider owned by a number of authorities) may be awarded without a tender. These rules codify *Teckal* (Case C-324/07) and subsequent cases, including *Commission v Germany* (Case C-480/06), which permits certain "horizontal" cooperation arrangements between authorities with the aim of ensuring that the public services they have to perform are provided for the purpose of achieving common objectives.

Regulation 72 sets out circumstances in which modifications to contracts made during their term are permissible without triggering a duty to retender. These provisions are based on *Pressetext* (Case C-454/06), which defined when a "*material*" contract change gives rise to a new contract, as well exemptions in the 2006 Regulations based on additional works and services. Regulation 72 also provides a new 'safe harbour' where relatively small changes in contract value are agreed.

Regulation 69 seeks to codify case-law (*SAG ELV* C-599/10) on **abnormally low tenders** by introducing a positive duty to investigate and require explanations (of costs, manufacturing or technical processes and compliance with legal duties, such as environmental regulations) where the tender appears abnormally low. Unhelpfully, neither the Directive nor the 2015 Regulations define what an abnormally low tender is (see comments of Akenhead J in *NATS v Gatwick Airport Limited* [2014] EWHC 3728 (TCC)).

There are other examples of codification in the 2015 Regulations, including a wider range of **permissible award criteria** to include social or environmental criteria which are linked in a broad sense to the subject-matter of the contract (Regulation 67) and provisions on clarifying bids (Regulation 56(4)).

While the codification does introduce some welcome clarity, it does not, as might be expected, remove all legal uncertainty. Issues will remain as to what kind of contract extensions are permitted by Regulation 72, whether and when an authority may or must exclude what it considers to be an abnormally low tender, and what kind of inter-authority cooperation arrangements are permissible in markets where private and public operators regularly compete.

Social and Environmental Agenda

There is no doubt that there is an increased focus in the procurement rules on encouraging fair market access to smaller companies. There are specific new provisions, for example, relating to subcontractors and the provisions on lots and pre-tender engagement are designed in part to help SMEs. As for the social and environmental agenda, there is greater flexibility, as indicated above, as to permissible award criteria.

There are also limits on the financial thresholds that may be imposed at PQQ stage, so as to ensure that the bar is not placed unnecessarily high (Regulation 58(7)).

Governance

Of great significance is the new provision on record keeping at Regulation 84.

This requires authorities to keep records which are sufficient to justify all decisions taken during a procurement procedure relating to negotiations and dialogue, communications with bidders, and selection and award. This should, in theory, avoid the position that commonly arises where authorities have very little contemporaneous evidence to explain their scores and process, making it difficult to defend controversial decisions later when challenged (see, for example, *Geodesign v Environment Agency* [2015] EWHC 1121 (TCC)). It should also reduce the need for extensive specific disclosure applications and lead to greater transparency in tender processes.

Other novelties

There is a special "light touch" regime for a range of (previously Part B) services, such as educational, social and healthcare services. This regime does not require adherence to all the detailed requirements of the 2015 Regulations (though it is not entirely clear which apply and which do not).

There are also additional rules relating to below threshold contracts (save for the light touch regime threshold which is €750,000, the new thresholds are similar to the old ones). These rules arise as a result of the "Lord Young" proposals and are not required by the EU Directive. There are also certain payment terms requirements which have been introduced which are, again, not imposed by the EU.

Conclusion

Many of the substantive procurement rules have been adjusted as a result of the latest round of reforms and an understanding of these is essential for any practitioners in the area.

The rules are longer and more detailed than before, so cannot be said to be a simplification. But they do have the merit of bringing together in one place a set of rules that were previously harder to access, and in many areas do introduce more streamlined and sensible procedures.

The evidence so far does not, however, suggest that there will be any shortage of disputes and this area of practise is likely to remain lively. Quite what will happen if there is a vote for Brexit come June is anyone's guess. However, any international trade agreement which replaces the EU is likely to entail commitments on how public money is spent and procurement law is probably one of those areas of EU intervention where, if it didn't exist, you would need to invent it.

Simon Taylor
3 February 2016

BRUSSELS I RECAST: JURISDICTION AND CLAIMS FOR CONTRIBUTION

by Veronique Buehrlen QC

Veronique Buehrlen QC considers how the English courts have applied the Brussels I Recast Regulation in two recent claims for contribution, one between joint tortfeasors and the other arising in the context of double insurance.

On 10 January 2015, Regulation (EU) 1215/1212 on jurisdiction and the recognition of judgments in civil and commercial matters (otherwise known as Brussels I Recast, here "the Regulation") came into force, replacing Council Regulation (EC) No. 44/2001, long since referred to as Brussels I. Many of the provisions remain the same and, indeed, Recital 34 of the Regulation makes clear that the provisions should be interpreted in the same way as their earlier incarnation. In short, the general rule ("fundamental principle") has long been, and continues to be, that claims must be brought against individuals or companies in civil and commercial actions in the courts of the Member State in which the defendant is domiciled (see Article 2 of Brussels I, now Article 4 of the Regulation).

There are, however, certain derogations from the general principle where a claimant may establish that the courts of another Member State has jurisdiction. The rationale for these is that, in certain instances, there may be a particularly close connection between certain types of dispute and the courts of a Member State other than those of the state where the defendant is domiciled. The connection may well then aid the administration of justice e.g. in gathering evidence. A typical example might concern a car accident that takes place in England but the driver at fault lives in Germany. The derogations are now set out at Article 7 of the Regulation (formerly Art. 5 of Brussels I). They include the two most often quoted grounds for special jurisdiction in the case of claims which are "*matters relating to a contract*" (Art. 7(1)) and those that are "*matters relating to tort, delict or quasi-delict*" (Art. 7(2)).

In the last 12 months, two cases have come before the English courts, one before the TCC and the other before the Commercial Court, raising key issues as to the application of what are now Articles 7(1) and 7(2) of the Regulation to contribution claims.

The first, *Iveco SpA & Iveco Ltd v Magna Electronics Srl* [2015] EWHC 2887 (TCC), was concerned with claims for contribution under the Civil Liability Contribution Act 1978 in relation to damage caused by lorries manufactured by Iveco SpA to various commercial premises in the UK. In short, the vehicles incorporated a grid heater relay system designed and manufactured by Magna Electronics which was known to overheat. There were three incidents of fire damaging a number of commercial premises.

Iveco SpA settled claims brought against them by the owners of the commercial properties and then brought proceedings against Magna Electronics, a company domiciled in Italy, claiming contribution on the grounds that Magna Electronics were joint tortfeasors. On Magna Electronics' application to strike out the claims on grounds that the English courts had no jurisdiction, Edwards-Stuart J held that the claim against Magna Electronics for negligence, in (among other matters) failing to ensure the vehicles were free from defects, was "*a matter relating to tort, delict or quasi delict*" thereby opening the gateway to the application of Art. 7(2) of the Regulation in respect of the contribution claim, by which:

> "*A person domiciled in a Member State may, in another Member State, be sued:*
> *(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*"

In so doing, the judge relied on the judgment of Jackson J (as he then was) in *Hewden Tower Cranes Ltd v Wolkrann GmbH* [2007] 2 Lloyd's Rep 138, in which it was held that a claim for contribution between joint tortfeasors (following the collapse of a tower crane during the construction of an office block at Canary Wharf) fell within Article 5(3) of Brussels I – what is now Article 7(2) of the Regulation.

> ***"English courts have categorised claims for contribution between joint tortfeasors as falling within Article 7(2), not by reference to the nature of the cause of action for contribution but by reference to the nature and substance of the underlying liability of the alleged joint tortfeasors to the victim"***

An interesting feature of these two decisions is that the English courts have categorised claims for contribution between joint tortfeasors as falling within Article 7(2), not by reference to the nature of the cause of action for contribution (here statutory claims under the Civil Liability Contribution Act 1978) but by reference to the nature and substance of the underlying liability of the alleged joint tortfeasors to the victim i.e. the liability of the designer and manufacturer of the crane to the victims of the accident in *Hewden* and the liability of the supplier of the grid heater systems to the owners of the damaged premises in *Iveco*.

In *XL Insurance Company SE v Axa Corporate Solutions Assurance* [2015] EWHC 3431 (Comm. Court), the second case concerned with the application of Brussels I Recast to a claim for contribution, HHJ Waksman QC (sitting as a judge of the High Court) did not follow the *Hewden* approach of looking at the nature and substance of the underlying liability, albeit to determine whether the claim was a matter relating to a contract (i.e. within the Article 7(1) jurisdictional gateway). In the XL case, the claim was for contribution arising out of alleged double insurance following the Chatsworth rail disaster in California in 2008.

> ***"in the case of a claim for contribution for double insurance the underlying liability to the victim is not founded in tort but in contract"***

Briefly, double insurance arises where A is insured by two or more insurers in respect of the same risk. The insured can recover the whole of his loss against either insurer, but under English law the paying insurer will be entitled to recover a contribution from his "co-insurer". In this instance, the right to claim contribution is recognised in equity and in some instances by sections 32 and 80 of the Marine Insurance Act 1906. However, unlike the joint tortfeasors cases, in the case of a claim for contribution for double insurance the underlying liability to the victim is not founded in tort but in contract. It arises and is governed by the terms of the insurers' respective policies of insurance. That, HHJ Waksman QC held, did not make the matter one relating to a contract within the meaning of Article 7(1) and therefore did not open that jurisdictional gateway for XL.

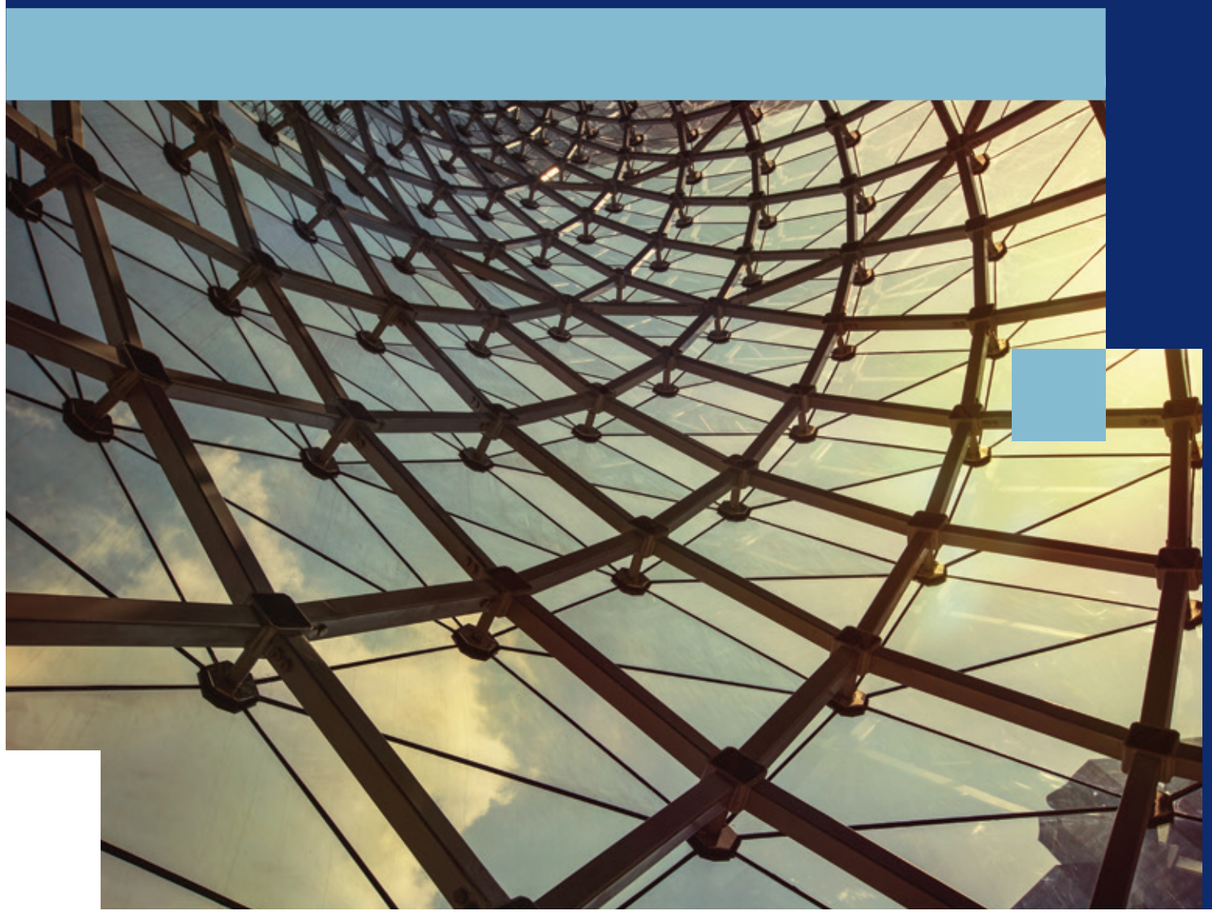
Hewden and *Iveco* fell to be distinguished since these cases were concerned with joint tortfeasors who were liable to the underlying claimant (i.e. victim) in tort and not co-insurers. The judge went on to hold that the claim for contribution was not "*a matter relating to tort, delict or quasi-delict*" within the meaning of Article 7(2) of the Regulation on the grounds (among others) that the claim did not involve a wrongful act or "harmful event" – Axa as co-insurer not having committed any kind of wrong for the cause of action to arise. A key issue for continuing debate (the matter is now on its way to the Court of Appeal) is whether Article 7(2) pre-supposes some form of wrongful conduct or not.

The approach in *Hewden* and *Iveco* is attractive as, by focussing on the place where the underlying harmful event occurred, the courts can justify the attribution of jurisdiction to the courts of a Member State other than those of the defendant's place of domicile for reasons relating to the sound administration of justice, such as the gathering of evidence, and the result is that jurisdiction is allocated to the appropriate forum.

The Plight of the Insolvent Contractor

by Krista Lee

Following her success in the Court of Appeal in *Wilson & Sharp v Harbour View*, Krista Lee discusses the increasing difficulties faced by an insolvent contractor in enforcing its rights to payment under the HGCRA.



One of the aims of the 'pay now, litigate later' philosophy of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") was to keep money moving throughout the construction industry, so that contractors and subcontractors were not unnecessarily forced into insolvency. The system of payment notices, withholding notices, adjudication, followed by summary judgment, works well to get contractors paid if they are healthy and solvent. However, since the enactment of the HGCRA, both the enforcement of adjudicators' decisions and the enforcement of interim payment obligations have become increasingly difficult if the contractor is insolvent or in serious financial difficulties. To these contractors, the HGCRA is of less assistance in getting payment.

The High Point for Contractors/ Subcontractors

The high point for contractors seeking to enforce payment of interim payment obligations in the Technology and Construction Court (TCC) and the Chancery Division (ChD) is represented by the decisions in *Macob Civil Engineering Ltd v Morrison* [1999] CLC 739 and *Re A Company* (No 1299 of 2001) [2001] CILL 1745.

In *Macob*, the sub-contractor was due c. £300,000 under an interim payment certificate. On non-payment, it referred the matter to adjudication and then sought enforcement of the adjudicator's decision in the TCC. Dyson J stated that adjudication was intended to be a speedy mechanism for settling disputes and should be enforced, whether the decision was wrong on the facts or on the law. He stated that the normal procedure for enforcing a decision would be an application for summary judgment.

In *Re A Company*, the sub-contractor was due c. £10,000 under an interim payment certificate. He sought to force the contractor to pay by serving a statutory demand and threatening to wind it up. The contractor applied to the ChD for an injunction to restrain winding up on the grounds that it had a cross claim based on defects. The contractor was unsuccessful. Under the HGCRA, the payment was due and not subject to set-off. Further, the evidence in support of the cross claim was "*meagre*". However, the main finding of the judge was that the contractor was unable to satisfy the test that he had been unable to litigate his cross claim. Under the HGCRA, the contractor could have litigated his cross claim by way of adjudication, even in the 3 months since the statutory demand. The judge refused to restrain the winding up petition and the contractor was forced to pay the subcontractor to avoid a petition to wind up.

Non Enforcement in favour of insolvent payees

Therefore, the way was open for interim payment obligations to be enforced routinely and speedily by way of adjudication and summary judgment or by the threat of winding up petitions.

However, these remedies are not so readily available where the contractor seeking payment is in liquidation, subject to some other insolvency process, or is in severe financial difficulties.

> *"No payment obligation under the HGCRA should be able to avoid the effect of the insolvency legislation."*

In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, the Court of Appeal (CA) confirmed that a contractor in liquidation could not enforce an adjudicator's decision. Lord Justice Chadwick decided that where the payee was insolvent, the rules of insolvency set-off in r4.90 of the Insolvency Rules 1986 applied. No payment obligation under the HGCRA should be able to avoid the effect of the insolvency legislation. In the circumstances, the payer could avoid payment if it had a claim to set-off. Chadwick LJ concluded:

> "*...where there are latent claims and cross claims between parties, one of which is in liquidation, it seems to me that there is compelling reason to refuse summary judgment...*"

The ratio in *Bouygues* could have been limited to cases of liquidation and where there was evidence of cross claims in an amount equivalent to the amount due. However, the TCC has given *Bouygues* a far wider application, to the detriment of contractors in financial difficulties.

The TCC has largely not been concerned with establishing the strength of the employer's cross claim, but more concerned with the provisional nature of interim payment obligations and adjudicators' decisions and protecting an employer from paying out to a contractor who may be unable to make repayment if the adjudicator's decision or valuation is reversed. The only employer who has been considered unworthy of such protection is the one whose non-payment has contributed to the contractor's financial difficulties.

Thus, the TCC has refused to enforce adjudicators' decisions where the contractor is in administrative receivership (*Rainford House Ltd (in administrative receivership) v Cadogan Ltd* [2001] EWHC 18 (TCC)), or subject to a company voluntary agreement (*Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC)); where the payee is in administration (*Straw Realisations (No. 1) Ltd v Shaftsbury House (Developments) Ltd* [2011] BLR 47); where a winding up petition is pending (*Harwood Construction Ltd v Lantrode Ltd*, 24 Nov 2000 (TCC)); and where the payee is in severe financial difficulties, though not subject to any formal insolvency process (*JPA Design & Build Ltd v Sentosa (UK) Ltd* [2009] EWHC 2312 (TCC)). In none of these cases did the rules of insolvency set-off apply.

The contractor in financial difficulties, who is arguably most in need of receiving prompt payment, is therefore becoming increasingly unwelcome in seeking enforcement at the doors of the TCC.

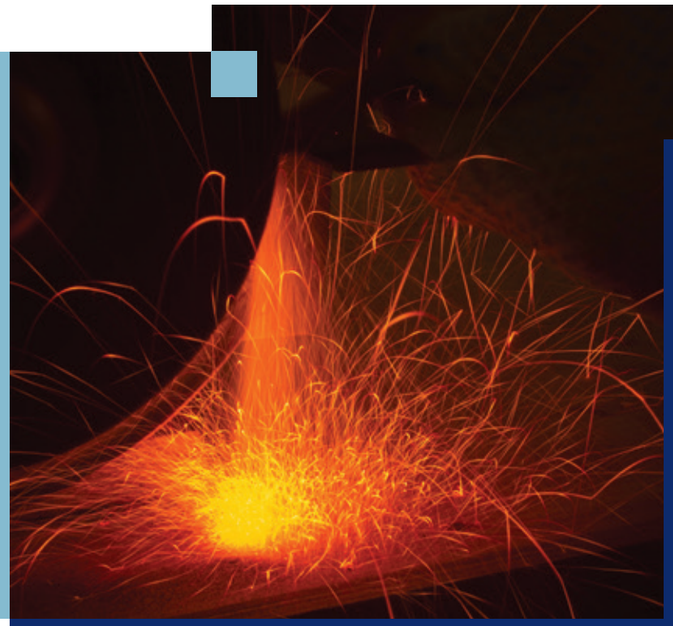
Melville Dundas and HGCRA 1996 s110(11)

A further nail was hammered into the coffin of the insolvent contractor by the House of Lords in *Melville Dundas (in receivership) and others v George Wimpey UK Ltd* [2007] UKHL 18. In this case, the House of Lords upheld a contractual clause, which permitted the employer to withhold any further payment if the contractor became insolvent (i.e. entered administrative receivership, administration or insolvent liquidation).

This judgment in favour of employers has now been included in the HGCRA at s111(10):

> "[The obligation to pay the notified sum on or before the final date for payment] *does not apply in relation to a payment provided for by a construction contract where- (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and (b) the payee has become insolvent after the* [period for serving a pay less notice]."

The effect of this section is that an employer can include a term in a building contract that states that, if the contractor becomes insolvent, no further payments shall be payable. This



means that, if the contractor becomes insolvent, the employer will be discharged of its liability to make any payments that have already become due and payable. Put another way, an employer will be in breach of contract if he does not pay the notified sums (and does not issue a pay less notice). However, that breach will disappear if at any time thereafter the contractor goes into liquidation.

The cynical reader will observe that an employer may refuse to pay a contractor in financial difficulties, thereby forcing the contractor into liquidation. At that point the employer will be discharged from any of its earlier interim payment obligations. The employer is still ultimately liable for any sums properly due on a final account basis; but will be in a better negotiating position against a liquidator seeking a speedy rather than full recovery.

(The provisions of s111(10) are of course supplemental to s113 of the HGCRA, which already enabled employers to operate pay when paid clauses where the contractor was insolvent.)

Wilson & Sharp v Harbour View Developments Ltd [2015] EWCA Civ 1030

The potentially wide reaching effects of s111(10) were demonstrated on the facts of *Wilson & Sharp*.

Wilson & Sharp were employers who owed their contractor (Harbour View) c. £1m by way of interim payments. Wilson & Sharp had serious complaints with regard to the valuation of the works, but failed to serve pay less notices. Harbour View suspended performance for non payment and 3 months later the building contract was terminated. However, Harbour View did not commence adjudication proceedings to obtain payment. The reasons for this are unclear, but one might speculate that Harbour View knew it had severe financial difficulties and was aware of the problems that it was likely to face on enforcement.

In any event, after 7 months of non-payment and several months of trying to negotiate payment terms, Harbour View decided to adopt the alternative course of enforcing payment by threatening to wind up Wilson & Sharp for non payment. *Re A Company*, after all, suggested that this would be a safe route where the employer (as here) had not made any efforts to adjudicate his purported cross claims. Wilson & Sharp applied for an injunction to restrain the winding up petition.

At first instance, the judge adopted the same approach as in *Re A Company*. He was strongly impressed by the fact that the interim payments were due under the HGCRA and Wilson & Sharp had admitted this on several occasions. Having rehearsed the 'pay now, litigate later' philosophy, he spent little time in considering the cross claims, before concluding they were a 'put up job'. The judge's view was unaffected by the fact that Harbour View was insolvent, had failed to get creditors to accept CVA proposals and had convened a meeting the following Monday to resolve whether or not to enter liquidation.

By the time the matter came before the Court of Appeal, Harbour View was in liquidation.

Furthermore, since the high point of *Re A Company*, there had been two significant changes. First, s111(10) had been enacted. Secondly, a company was no longer prevented from relying on a cross claim that he had failed to litigate by way of adjudication (or other legal proceedings) (*Popely v Popely* [2004] EWCA Civ 462). This second factor had been the subcontractor's trump card in *Re A Company*.

Both of these changes meant that Harbour View could not succeed in enforcing payment by threatening a winding up petition. Harbour View's building contracts included the JCT provisions which stated that on insolvency (liquidation, administration or administrative receivership) Wilson & Sharp were no longer obliged to make any further payments in respect of interim payment that had already become due and payable. By the time of the hearing, Harbour View was in liquidation and it did not matter that the interim payment obligations had become due 2 years previously or that Harbour View had only become insolvent 7 months after termination of the building contracts. Accordingly, the underlying debts were no longer due and had been extinguished. Harbour View no longer had any grounds for presenting a valid winding up petition. The same conclusion should have been reached at first instance, since the reality of the situation was that Harbour View were almost inevitably going into liquidation within a few days thereafter.

The second factor meant that Wilson & Sharp were not prejudiced by the delay in presenting their cross claims and not litigating them for almost 2 years. Instead, as is more usual in the ChD, the Court of Appeal considered that this was a typical construction dispute, which should be tried in the TCC and not the insolvency courts.

Conclusion

Both Chancery Division practitioners and TCC practitioners complain that the other do not understand their respective specialisms. Few construction lawyers can profess a specialism in insolvency and chancery lawyers are only too keen to refer matters to the construction courts. Nevertheless, with regard to the enforcement of interim payments and adjudicators' decisions, both the ChD and TCC have arrived at the same result. Neither is willing to embrace a pay now litigate later philosophy in favour of a contractor or subcontractor in severe financial difficulties.

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