KC LEGAL UPDATE

Spring 2023

In this issue...

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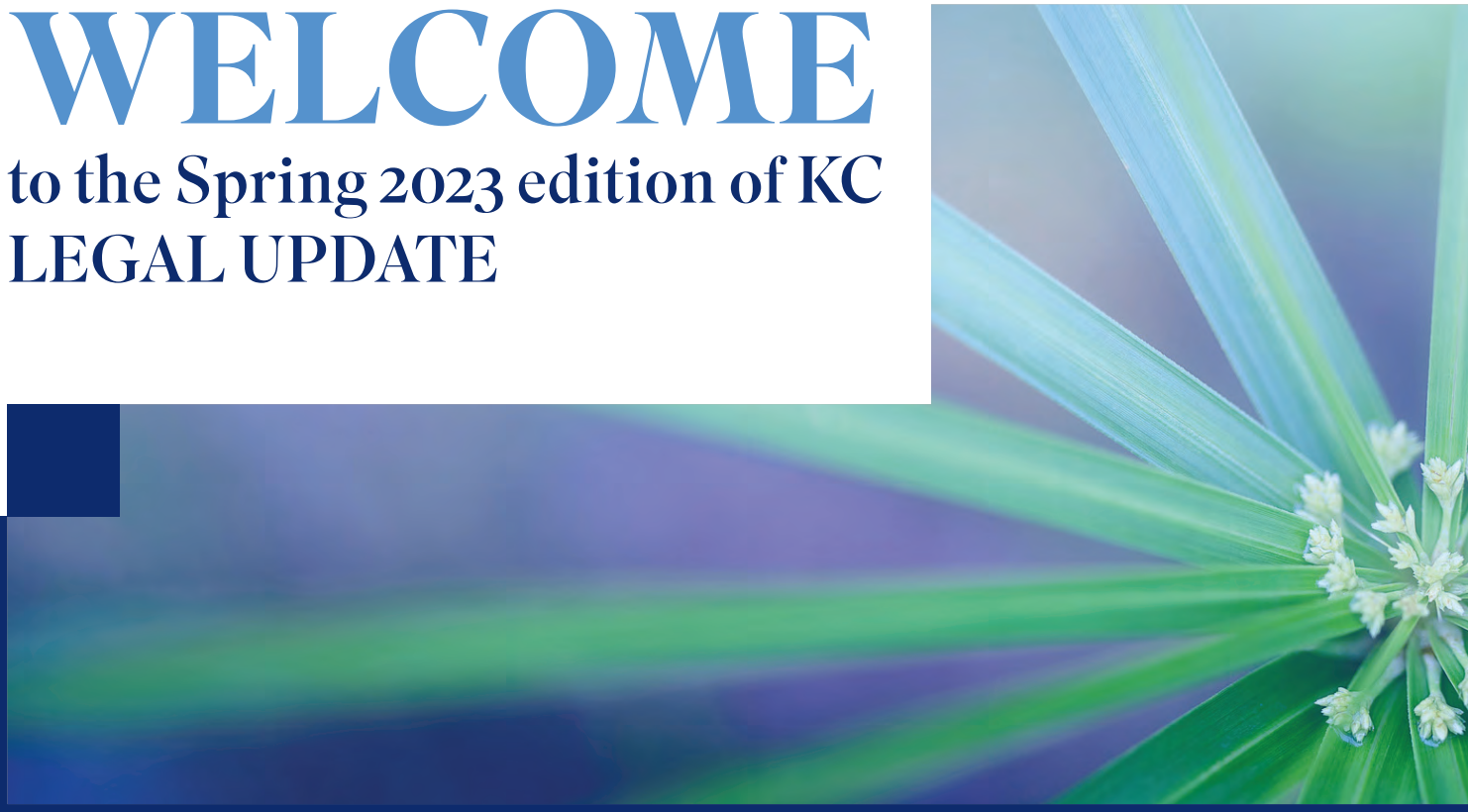
WELCOME

to the Spring 2023 edition of KC LEGAL UPDATE



We are delighted to bring you the first edition of Keating Legal Update for 2023, and we have started this year with a series of exciting announcements. We begin by congratulating Paul Buckingham KC and William Webb KC on their successful applications for silk. This is the first announcement of new King's Counsel in over 70 years and their appointments took effect following a ceremony on 27 March 2023. We would also like to extend our congratulations to Adam Constable KC on his appointment as Justice of the High Court effective from 13 March 2023. Finally, we were pleased to confirm the promotions of Will Shrubsall and James Luxmoore to joint Directors of Clerking, effective from 22 March 2023. Head of Chambers, Alexander Nissen KC commented: "I am confident that they will successfully bring their complementary skills and expertise to the role and we look forward to working with them for many years to come."

2023 is a big year in the construction disputes calendar with the SCL celebrating 40 years since its inception and the Technology & Construction Court (TCC) celebrating 150 years. Our members look forward to being involved in several events throughout the year to celebrate these milestone anniversaries. In celebration we have also launched a TCC150 podcast series where we discuss key cases that have come out of the TCC and how they have fared over time. The first episode in the series, featuring commentary from Alexander Nissen KC, Jennie Wild and Emma Healiss, can be found on our website, or wherever you get your podcasts.

Other recent podcast episodes include a discussion about gender equity hosted by our Head of Business Development and Marketing, Marie Sparkes, to mark International Women's Day. Marie spoke to Lucy Garrett KC, Alice Sims, Alison Crosland and Amy Barrie about the roles they play in Chambers, their journeys into the legal profession and the goal of gender parity at the Bar. Diversity and inclusion is a hugely important topic to Keating Chambers and we are constantly striving to ensure that we are at the forefront with our equal opportunities policies and outreach programmes. To that end we were thrilled to be shortlisted for two "Women & Diversity in Law" awards; the 'Social Mobility Initiative of the Year' Award for our new scholarship in association with Gray's Inn, and the 'Unsung Hero in a Leadership Role' Award for our COO, Alison Crosland. Our congratulations also go to Tom Owen for his well-deserved inclusion in The Lawyer's 'Hot 100' list for 2023.

There are several other key events in our calendar this month, including our Keating Lecture in memory of Donald Keating which returned this year with a keynote from Lord Justice Coulson. For anyone who was not able to attend the lecture, Lord Justice Coulson has prepared a detailed paper on the same topic, which will be made available on our website. We also had a presence at Paris Arbitration Week 2023, including a hotly anticipated performance from Keating's band, Demolition, at Law Rocks in Paris. Keep an eye on our social media pages for further information on upcoming events.

In the meantime, we hope you enjoy this edition of Keating Legal Update which includes interviews with Rhodri Williams KC and Ben Graff, an article on construction adjudication in the UK from Philip Boulding KC, an article on the recent trends in PFI claims from Sean Wilken KC, an article on contractual construction from Isobel Kamber, and more!

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THE UK GOVERNMENT HAS ANNOUNCED THAT IT WILL BECOME A SIGNATORY TO THE SINGAPORE CONVENTION, BUT WHY IS THIS NECESSARY AND WHAT WILL IT ACHIEVE?

The United Nations Convention on International Settlement Agreements Resulting from Mediation
https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

By Rosemary Jackson KC

What is the Convention?

The Singapore Convention was adopted by the UN in December 2018, opened for signatures in August 2019 and was in force by September 2020. In order to engage the Convention States need to sign and then ratify, accept or approve it (see Article 11).

The intention is that It enables a party which has mediated an international commercial dispute to enforce a cross-border settlement agreement in any country that is a Party to the Convention without needing to commence an action for breach of contract. It can be seen as a sister to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Why is it needed?

It may not be immediately apparent that mediation (a voluntary and consensual process) requires the same support as arbitration (which can impose an award on an unwilling and uncooperative party to a contract containing an arbitration clause). In general, where parties have taken part in a mediation and reached an agreed settlement, they honour it. If they didn't intend to abide by its terms, why would a party execute a settlement agreement? I am not aware of any settlement agreement in any of my mediations that was not honoured. Buyers' remorse does not seem common. Quite the opposite, in fact.

It is likely that the benefits of the Conventions will be welcomed, not by those who willingly engage in mediation and know the benefits, but by those who are inexperienced or mistrustful of the process.

In UK domestic construction and engineering disputes, mediation has become embedded in the dispute resolution landscape. The market is mature and recognises the benefits of mediation in enabling the parties to eliminate the risks and costs of arbitrating or litigating, and shaping their own early compromise. The support of the courts by way of encouragement of mediation and adverse costs orders against those who unreasonably fail to mediate has helped to make mediation a welcome first port of call for many UK disputants.

The international arena is different. In many jurisdictions mediation is still relatively new. It may be that fear of unenforceability might dissuade disputants from embarking voluntarily on a mediation with parties half a world away, whose jurisdictions and customs are very different. Moreover, there is an increasing trend for multi-tiered dispute resolution clauses in construction and engineering contracts that include mediation as a voluntary or, sometimes mandatory, step on the way to arbitration. In my experience the latter are the disputes in which trust tends to be at its lowest. I have lost count of the number of times that each party to a contract-mandated international dispute has told me in our private pre-mediation videoconferences that, whilst they attend in good faith, they believe the other party is only box-ticking and has no intention to seek a settlement.

Contract-mandated mediation will bring the parties to the table but the absence of trust may prevent them from engaging with an open mind. It may feel pointless to them. I cannot be the only mediator to have experienced that sinking feeling when a mediation comes to an abrupt halt after the first offer, when things seemed to have been going so well. In hindsight it can be seen that the terminating party was really only going through the motions and was waiting until the point at which nobody could deny that they had engaged in mediation.

The positive message of the Convention in reinforcing mediation, and the knowledge that any resulting compromise can be relied on in bringing enforceable finality to the dispute, may free parties up to really engage with the process rather than ticking the box by turning up.

The UK Government's position

The UK Government has now sent a strong positive message of support for mediation and UK mediators by its decision

on 2 March to become a signatory to the Convention and put in place the necessary legislative and regulatory provisions, following a public consultation in February 2022. In a statement published by the Parliamentary Under Secretary of State for Justice (Lord Christopher Bellamy KC) it was recorded that:

> "The majority of the responses were in favour of the UK joining the Convention. In practical terms, many respondents noted that joining the Convention will mean that where it might be necessary to enforce a mediated agreement, having a direct route for enforcement would be preferable to the current practice of having to enforce by way of a breach of contract or following a court order. Respondents also generally agreed that becoming party would signal the UK's commitment to mediation, further enhance the UK's status as an attractive international dispute resolution hub, promote the UK legal sector and increase the credibility of UK-based mediators.
>
> "For these reasons, the Government has concluded that it is the right time for the UK to become a party to the Convention to provide for recognition and enforcement of international commercial mediation settlement agreements throughout the UK. This decision will be a clear signal to our international partners that the UK is committed to maintaining and strengthening its position as a centre for dispute resolution and to promote the UK's flourishing legal and mediation sectors".

The Convention was already in force and as at March 2023 it had 55 signatories, 10 of whom had ratified. The UK notified its willingness to sign the Convention without invoking either of the available reservations available under Article 8.1, which enable a Party (i.e. a State) to declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

It remains to be see to what extent other States may invoke one or other of the reservations. If reservation (b) is invoked, parties will need to opt in (probably in the settlement agreement itself) if they wish the Convention to apply.

When and to what does the Convention apply?

The Convention applies to enforcement of mediation settlement agreements by the competent authority (usually a court) of a State (including a regional economic integration organisation that is constituted by sovereign States – see Article 12) that has signed and ratified, accepted or approved it. The Convention refers to such bodies as States or Parties, whilst those who have entered into the settlement agreement are parties.

It applies to settlement agreements that are in writing and signed following a commercial and international mediation. Article 4 sets out the proof of this which is to be provided for enforcement purposes, which may include signature of the settlement agreement by the mediator or a document signed by the mediator indicating that the mediation took place.

The dispute must have been international. Article 1 provides that:

> "This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:
>
> (a) At least two parties to the settlement agreement have their places of business in different States; or
>
> (b) The State in which the parties to the settlement agreement have their places of business is different from either:
>
> (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
>
> (ii) The State with which the subject matter of the settlement agreement is most closely connected."

It will be interesting to see whether challenges will be made where only one party has a place of business different from (b)(i) or (ii).

The dispute must be commercial, not personal, family, employment or inheritance (Article 2).

It arguably does not apply to conciliation, or any other process in which the mediator has power to make a settlement proposal that becomes binding if neither party objects, as the Convention requires that the mediator must lack the authority to impose a solution upon the parties (Article 2.3).

The Convention does not apply where the settlement can be already be enforced. Article 3 excludes:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Enforcement

The Convention can be used as a shield as well as a sword. Where the Convention applies, Article 3 provides that:

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

If a party applies to the competent authority, then as long as the subject matter is capable of settlement by mediation and enforcement is not contrary to public policy, the settlement agreement will be enforced unless one of the criteria in Article 5.1 is satisfied:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms;

or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

It is apparent from (d) that the parties to a settlement can opt out of the Convention but that opt-out will need to be expressed in the settlement agreement. It will not suffice to put the opt-out in the mediation agreement.

Whilst (e) and (f) may strike fear into the hearts of mediators, the bar is set high by the causative test that the breach or non-disclosure affected the complaining party's decision to enter into the settlement agreement. It is notable that the breach and non-disclosure only make the settlement unenforceable under the Convention. No remedy against the mediator is provided.

What next?

It will be difficult to judge whether the Convention leads to more international commercial mediations taking place, or more settlements in those mediations. The growing popularity and familiarity of mediation means that there is likely to be increased take-up even without the Convention.

If there are settlement agreements that are not honoured and they come before the courts pursuant to the Convention, it is reasonable to expect that lawyers acting for parties resisting enforcement will leave no stone unturned. Just as with applications to stay proceedings because contract-mandated mediation has not taken place, expect ingenuity and argument.

On the whole, however, the decisions of States to become Parties is bound to be seen as a positive step, bathing mediation in the warm glow of approval and demonstrating governmental support for the still-young mediation profession in the signatory States and the benefits that mediation brings to business. Mediation is growing up.

REPORTING AND MONITORING: RECENT DEVELOPMENTS IN PFI CLAIMS

By Sean Wilken KC

Historically many of the claims arising from Private Finance Initiative ("PFI") projects have been about the state of or financing of the asset: how was it built, how was it maintained and who pays for what. These claims are slowly becoming ones about the state of and liability for the asset on handback. A recent trend, however, is claims which are not about the actual asset but what has been said and done about the performance of the PFI arrangement – claims which turn on the reporting and monitoring of performance. These claims have their own particular difficulties and pitfalls for all parties.

The starting point is that PFI contracts were intended to be self-reporting – the Project Company and the other entities in the supply chain – construction and Facilities Management contractors – were supposed to report their own failings to the public sector body notionally running the PFI. This was to be done in a series of monthly reports. The public sector body would then check the report and dispute it, if appropriate, by reference to the Dispute Resolution Procedure in the PFI arrangement. The reports were to cover the state of the asset – which should have been apparent. The reports were also to cover the day to day performance and then the reporting of performance by reference to either supposed Service Level Standards or Key Performance Indicators ("KPI"). Where the performance or reporting were deficient, Deductions from the amounts paid under the PFI would then notionally be levied by the public sector body.

This concept was novel to all of those involved. Historically, contractors have not been renowned for reporting their own defective performance. Further, when the asset left the public sector, those involved with the asset would, under the Transfer of Undertakings (Protection of Employees) Regulations, usually transfer with it. The result is that the public sector would be stripped of the staff and expertise required to monitor the performance and reporting under the PFI. Allied to that,

many parties viewed the PFI as akin to a simple contract to manage the asset once built or renovated. Thus, the focus was on whether the asset had defects, was clean and properly maintained. The focus was not on the much softer service provision in relation to reporting and monitoring.

Recently, however and due in part to the changing economic climate in relation to PFI, public sector bodies have begun to realise that there may be a significant monetary advantage to them (by way of Deductions reducing the amounts otherwise payable) in focusing not only on current but also historic reporting and monitoring. This focus has revealed numerous quirks in the PFI arrangements which in turn can and do create difficulties for all those concerned.

In general terms,[1] there are three drafting issues and one operational issue that are commonly found. I take each of them in turn.

Structurally, the provisions relating to defects in the PFI asset are usually relatively easy to locate. Thus, where a defect renders an area of the asset unsafe or unusable, recourse is had to Unavailability which is usually defined and sits plainly within the Payment Mechanism ("PayMech") with the associated formulae for calculating Deductions. Those involved in PFI disputes are now relatively comfortable with these provisions which have been debated since the early 2000's. The provisions relating to monitoring and reporting are not so straightforward. As set out above, the PFI style of monitoring and reporting was new and this is reflected in the drafting. Often the requirements in relation to the requisite reports are grafted on or into elements of the payment procedure in the main body of the PFI contracts or as extra elements to the PayMech. The results are very often that the requisite reports are not defined or only have an ad hoc definition. Further, there are usually inconsistences and contradictions between the monitoring and reporting requirements and the rest of the PFI contracts. Opportunities for *Chartbrook*[2] type arguments based on errors in drafting abound.

This structural problem becomes more acute when one turns to the benchmarks against which performance, monitoring and reporting are to be judged. Often there are no provisions as to what is to be in any given report or how the format and contents of the report are to be agreed or then judged. Obviously, if there are no provisions, given the levying of Deductions is penal (in financial not legal terms, Deductions are very unlikely to be a penalty as a matter of law), an attempt to levy will inevitably be met by an uncertainty defence. Thus, it will be said, if the public sector body wishes to levy, the terms under which it seeks so to do must be sufficiently clear and certain. If they are not, then no Deduction can be made.

Further, when one is talking about benchmarking against a KPI, if KPIs are present at all, KPIs will usually be in the very detailed schedule that covers the entirety of the works and services to be provided under the PFI. The difficulties that then arise are often ones of omission – the contractual puzzle lacks pieces or the necessary links. There is a further problem, however, of demarcation. The works and services will be provided by a construction contractor and a Facilities Management contractor. Liability for and financing of those services may – but not always will – be passed through the Project Company. Where one is talking about construction versus management, demarcation may be less of a problem. Monitoring and reporting, however, can and do apply across all works and services provided by all the parties making demarcation a live issue – one that was rarely properly addressed in the contracts.

Thus, at the basic level of structure and drafting, there are difficulties that can render any claim problematic.

The second main area is the question of retrospectivity. Again with Unavailability, at least for the mid to later generations of PFI, it is reasonable to expect there to be caps on the ability to levy Deductions retrospectively for historic alleged failures. Thus, there are often provisions that Deductions for defects can only be levied for (n – 1) or (n – 2) – that is for one or two months before the month for which an invoice is being presented. There may also be financial caps imposing a financial limit on the amount of Deductions in any given period. Such explicit caps are often missing in the case of monitoring and reporting Deductions. This in turn has triggered some public sector bodies to issue claims for monitoring and reporting for the entire life of the project. Quite apart from questions of proof and limitation, this type of claim often fails to notice that there may be temporal caps in either the KPIs themselves or in the provisions that allow audits of past performance under the PFI arrangement.

The third main area is what the content of any given report is to be and who decides. As set out above, the contracts are often silent on the detail as to that which should be in any given monthly report. Thus, there is a debate as to whether it is the Project Company (and the associated contractors) or the public sector body that decides. The initial answer to that debate can often be found in the invoicing provisions. These often provide for an initial invoice with the associated reports to be presented to the public sector body. In crude terms, the public sector body is then given a choice to dispute or to pay. It seems sensible that if the public sector body finds the reports wanting, it is at this stage that a complaint would be made. Historically, in many cases, this did not happen. Further and ultimately, however, the complaint would have to be resolved by adjudication. It remains very much an open question as to whether an Adjudicator could decide what should be in any given report (or KPI) and if they could against what benchmark that decision would be made.

This last issue over uncertainty links to the operational issue. PFI contracts often leave the precise scope of the KPIs and the reports to the parties' agreement. That, in a long term contract, can seem sensible but experience shows that in many cases the parties have simply forgotten or been unable to reach agreement. Therefore, unless precise arrangements are made for the process of agreement or what happens in default of agreement, the parties are left with an agreement to agree. Tritely agreements to agree are unenforceable. The result will be that there are no enforceable benchmarks permitting the levying of Deductions.

Looking at the current landscape of PFI claims, it is very unlikely that monitoring and reporting Deductions claims will become less of a feature. Further, as much turns on the precise wording of the contract at issue, it is unlikely that, other than setting out views on the general themes, consideration and resolution of monitoring and reporting Deductions by a court will assist across the industry. It is therefore reasonable to assume that monitoring and reporting will remain a historic, current and future problem for all parties to PFI arrangements.

1 Much will turn on the generation of PFI arrangement at issue and its particular wording – these, however, are the general themes.

2 Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [14]

WE WERE PLEASED TO WELCOME RHODRI WILLIAMS KC TO KEATING CHAMBERS IN OCTOBER 2022.

Rhodri has advised on and been involved in litigation concerning all aspects of public procurement, including application of the Teckal exemption, framework agreements, central purchasing bodies, service concessions, the competitive dialogue procedure and remedies. A longstanding expert in the field, Rhodri is described in the legal directories as a "very shrewd tactician" and an "advocate with strong powers of persuasion".

Welcome to Keating, Rhodri! Can you tell us what influenced your move?

The principal element to my practice has long been what is now referred to as Retained EU law and, in particular, public procurement law. For a number of years, the centre of gravity of my former chambers was moving away from this area of law and I was attracted by the opportunity of joining the strong team of procurement specialists which exists at Keating Chambers, one of the pre-eminent sets in the field of public and utilities procurement law. It is so important to be part of a proactive team of likeminded professionals who thrive in the same area of law as I practise. At Keating, I have achieved that.

You represented the successful appellants in *Brent LBC v Risk Management Partners Ltd & London Authorities Mutual Ltd & Harrow LBC* [2011] UKSC 7 (the first ever case concerning public procurement to be heard before the Supreme Court), can you tell us a bit more about that case?

This was indeed the first time the Supreme Court had been called upon to decide a public procurement case. Although the case involved a number of procurement and local government *vires* issues before the High Court and the Court of Appeal, the appeal to the Supreme Court was on the correct interpretation of the so-called *Teckal* principle in relation to in-house and quasi in-house procurement (established by the CJEU in case *C-107/98 Teckal Srl-v-Comune di Viano [1999] ECR I-8121*) in relation to the provision of public indemnity insurance services. The case involved reference to and interpretation of a wealth of decisions by the CJEU in Luxembourg and how the various principles should be applied in United Kingdom domestic law. Many of these principles have now, of course, been codified in the Public Contracts Regulations 2015.

How has the procurement Bar evolved since you first started practising in the area?

The procurement Bar has changed significantly since I first returned from Brussels to practise in this field at the Bar of England and Wales over 25 years ago! The implementation of the Remedies Directive 2007/66/EU in 2009 and, in particular, the advent of the automatic standstill provisions in what are now the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016, have completely changed the prospect of litigation being commenced by aggrieved tenderers and thus the volume of cases being brought before the High Court (principally the TCC). Previously, there was a dearth of procurement cases which actually made it to court and my practice largely consisted of paperwork and oral and written advice. Now there is much more litigation and many more practitioners in this exciting and fast-moving field of law.

What is the most interesting case that you have worked on to date?

Appearing in the CJEU was always an interesting experience, going back to early but important procurement cases such as *Uniplex (UK) Ltd-v-NHS Business Services Authority [2010] ECR I-817*. However, away from procurement, in the field of public and administrative law and local government law, I have enjoyed representing the Welsh Government on many occasions and, previously, the National Assembly for Wales (now Senedd Cymru) in a number of cases. In particular, on the first reference to the Supreme Court under section 112 of the Government of Wales Act 2006 in *Attorney General-v-National Assembly for Wales Commission [2012] UKSC 53*, in which the Court was called upon to rule in a constitutionally important case on the competence of the National Assembly for Wales to pass legislation in the field of local government byelaws. This was, as far as I know, also the first time Welsh was used in the Supreme Court!

What do you think the most important skills are for a leading silk in your field?

As with all significant litigation, whilst a full understanding of the law applicable in any case is essential, the ability to absorb and marshal large quantities of documentation and information is a very important skill. The vast majority of cases are, of course, decided almost entirely on their particular facts!

What are the main challenges that clients are currently facing?

The principal challenge over the last few years (apart from the pandemic!) has been the far-reaching consequences of the decision of the United Kingdom in 2016 to leave the EU. Procurement law (and indeed other areas of my practice such as State aid law (now Subsidy Control law)) has now ceased to be EU law based and has been separated from its origins found in the general principles of EU law deriving from the Treaty of Rome and, subsequently, the Treaty on the Functioning of the EU. This means that the relevance of and access to a wealth of decisions by the Court of Justice and the General Court of the EU in the field of public procurement is becoming less important, with the consequence that advising clients on the probable outcome of procurement disputes is becoming more of a challenge. Whilst it is virtually inconceivable in the light of its obligations under the GPA and the TCA that the United Kingdom would seek to abolish its procurement regimes altogether (and return to the situation of the early 1990's), its recent Public Procurement Bill 2022 has demonstrated that procurement law going forward may be very different.

What do you enjoy most about the cases you work on?

I very much enjoyed the application of what was EU law to our domestic law of England and Wales. As a former linguist, the analysis of various language texts of legislation and caselaw at the EU level was particularly interesting to me. I still very much enjoy the application of the current procurement regime to factual situations as they present themselves in tender disputes and I envisage that this will continue. Outside of procurement law, I am interested in the advent and application of an ever-diverging body of Welsh law and the prospect, however remote, of a separate legal jurisdiction for Wales in my professional lifetime. We shall have to wait and see!

Outside of the law, what are your other interests or passions?

Sport: rugby (only watching these days) & snooker; mountain walking (particularly in Eryri and the Brecon Beacons).

And finally, how have you found your first few weeks at Keating?

I have found Keating Chambers to be remarkably well run and everyone working here to be incredibly friendly and accommodating in helping me to settle in. This has been very important to me, since I had not previously moved chambers for over 20 years!

CONTRACTUAL CONSTRUCTION: THE TENSION

By Isobel Kamber

When the courts are faced with questions of contractual construction there remains a tension in the approach they should take. As Sir Lewison said in his 7th Edition of The Interpretation of Contracts, there is a tension between *"a decision of the Supreme Court which had emphasised the primacy of the contractual language over background facts on the one hand, and the repeated statements that contractual interpretation is an iterative exercise which requires consideration of the commercial consequences of rival interpretations"*[1] ("the Tension").

This article serves to highlight the existence of the Tension in the court's approach to contractual construction in light of the recent case of *Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited*[2].

This article was originally published by Thomson Reuters in the online Practical Law Construction Blog, December 2022.

1 Lewison, The Interpretation of Contracts, 7th Edition, page
2 [2022] EWHC 2372 (TCC)

What is the Tension?

In order to understand what the Tension is, readers must understand the history of the series of judgments on contractual construction. So, in short it goes like this:

Starting in **1998** – Lord Hoffman gave his leading judgment in *Investors Compensation Scheme v West Bromwich Building Society*[3] (page 912H); this was cited for many years as the leading judgment for the interpretation of contracts.

In his judgment, Lord Hoffman formulated five principles for contractual construction, which he said replaced the *"old baggage of 'legal' interpretation"*[4]. Principles four and five are discussed below:

(1) The fourth principle distinguished the meaning of a document and the meaning of its words. He said:

   a. Language is a matter of dictionaries and grammar.

   b. Meaning is what a reasonable person would have understood the words to mean against the relevant background.

   c. The relevant background "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even … to conclude that the parties must, for whatever reason, have used the wrong words or syntax".

(2) Hoffman's fifth principle builds upon the fourth. He said:

   a. The natural and ordinary meaning of the language is no more than a reflection of the commonsense proposition that people mean what they say in formal documents.

   b. However, if the background suggests something went wrong with the words or syntax, then the law may attribute a different intention to them.

There has been various academic comment on Lord Hoffman's judgment in ICS, arguably the most relevant to explaining the Tension was that of Lord Sumption in a lecture made to Keble College, Oxford. He said:

"What did Lord Hoffmann mean by suggesting that something might have gone wrong with the words? He clearly did not have in mind a case where the text got garbled in the word processor or the verb had been accidentally omitted. Looking through his seductive prose, what he actually appears to have meant is that the background may be used to show that the parties cannot as reasonable people have meant what they said, so that the court is entitled to substitute something else. Lord Hoffmann does not spell out how we are to discover what else they meant if it was not what they said. But the only plausible answer to that question is that the parties are taken to have intended whatever reasonable people would have intended even if it is not a possible meaning of the words"[5].

Moving on to between **2009 to 2011** - there was a series of case-law refining and developing Lord Hoffman's *ICS* judgment. Drawing on *Rainy Sky SA v Kookmin Bank*[6]; the discrepancies between its Court of Appeal and Supreme Court judgments are key to highlighting the Tension.

(1) Beginning with the dispute itself, this concerned the scope of a bank guarantee given in connection with a shipbuilding contract. The guarantee covered the repayment of **certain** advance instalments of the contract price should the ship fail to be delivered. The question for the court to decide was: which kinds of advance instalments were covered?

(2) The Defendant argued **not** all of the advances were covered. The language of the provision, on its face, supported this view and the Court of Appeal agreed. In the judgment Patten LJ said that any other view was *"in real danger of substituting our own judgment of the commerciality of the transaction for that of those who were actually party to it"* (paragraph 51).

(3) Despite this, the Supreme Court reversed the decision on the ground that it was not necessary to show that the apparent meaning of the contract was absurd or irrational. It was enough that there was no plausible reason

3 [1998] 1 W.L.R 896

4 Investors Compensation Scheme v West Bromwich Building Society, page 912G

5 Lord Sumption, A Question of Taste: The Supreme Court and the Interpretation of Contracts, page 7

6 [2011] 1 W.L.R. 2900

why the guarantee should have been for less than the full amount of the advances.

(4) Lord Clarke, in his leading judgment for the Supreme Court, said:

> *"the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other"* (paragraph 21).

As with *ICS*, Lord Sumption commented on *Rainy Sky* in the same Keble College, Oxford lecture referenced above. He said:

"Lord Clarke, in his leading judgment, emphasised that the object was to understand rather than override the language. But his reasoning points the other way. Because, in the absence of an explanation, the court thought it objectively more reasonable that there should be full guarantee than a partial one, it followed that the words which pointed to a partial one did not really represent the parties' intentions"[7].

Moving to **2015** – it was in this year that the Supreme Court handed down judgment in the case of *Arnold v Britton*[8]. In this case, despite the natural meaning of a clause producing, what was deemed a *"grotesque result"*,[9] due to a different economic climate to the one the contract was produced in, the Supreme Court declined to depart from the natural and ordinary meaning of the words. This was the case Lewison says the Supreme Court, specifically, Lord Neuberger *"stressed the importance of the words of the contract, and what appeared to be their primacy over surrounding circumstances or business common sense. This led to the widespread perception in lower courts that Arnold v Britton heralded a return to more conventional principles of interpretation"*[10].

However, in **2017**, despite the widespread perception of the effect of *Arnold v Britton*, the leading case of *Wood v Capita* was realised, in which the Supreme Court failed to accept that Arnold represented any kind of retreat from the approach to interpretation described in *ICS*, or even, *Rainy Sky*.

In a nutshell, the Tension is the question of which approach to contractual construction the courts should adopt. Should the courts:

(1) Give primacy to the contractual language of a provision over the surrounding circumstances or business common sense (Arnold v Britton); or

(2) Give primacy to the repeated statements that contractual interpretation is an iterative exercise which requires consideration of the commercial consequences of rival interpretations (Rainy Sky; Wood v Capita)?

The approach to contractual construction according to *Solutions 4 North Tyneside Limited v Galliford Try Building 2014?*

Despite the Supreme Court's objections to the existence of the Tension; I consider the recent case of *Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited* as exemplary to identifying that there is a debate about the most appropriate approach to adopt when faced with a question of contractual construction.

In this case, the parties sought a series of declarations from the court in relation to the interpretation of various contractual provisions. The outcome in relation to the declarations is not important for the purposes of this article; it is Eyre J's remarks on contractual construction which are interesting. He said:

1. Following *Wood v Capita*[11], the approach to be taken in general terms to questions of contractual construction is to seek to ascertain the intention of the parties by reference to the language used when seen in context (paragraph 74).

7 Lord Sumption, A Question of Taste: The Supreme Court and the Interpretation of Contracts, page 8

8 [2015] A.C. 1619

9 Lord Sumption, A Question of Taste: The Supreme Court and the Interpretation of Contracts, page 13

10 Lewison, The Interpretation of Contracts, Ch. 1

11 [2017] UKSC 24

2. However, when a party seeks a declaration as to the proper construction of a contractual provision in the abstract of the commercial consequence of a particular alleged breach, the Court should adopt a cautious approach on whether to grant the declarations by:

    a. Exercising care in what it regards as commercial sense and to the consequences envisaged. Specifically, it must not re-write the contract to protect one side from having made a bad bargain or entered a commercially foolish arrangement (paragraph 76).

    b. Recognising that in the absence of breach, there is a risk that in choosing competing interpretations, the Court will end up re-writing the contract. This is because, in these circumstances there is a heightened risk that the Court will be making the contract different from that which was agreed (paragraph 76).

Does *Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited* illustrate the existence of the Tension?

As to point (1) above; Eyre J's reliance on *Wood v Capita*, where the Supreme Court confidently denied the existence of any tension, might to some readers suggest there is no tension in the approach to be taken to contractual construction.

However, I consider point (2) above to expel that thought. Eyre J adopts the position that contractual language, when clear, should be adopted even if it leads to the contract being a *"bad bargain or a commercially foolish arrangement"* (paragraph 76). As such, whilst not denying the importance of commercial sense and context, Eyre J certainly re-highlights the importance of the *Arnold v Britton* approach to contractual construction in that care should be taken not to re-write a contract even if the consequences seem commercially foolish or a bad bargain. However, unlike in *Arnold v Britton*, where the clause equating to a commercially nonsensical result was expressed in clear language; in this case, the Claimant's interpretation as to the meaning of the provisions at issue, equated to an unusual and wasteful arrangement and Eyre J said that if *"such were the parties' intention one would have expected it set out in clear terms"* (paragraph 88).

In light of this, going forward, it will be interesting to see what approach the courts take to contractual construction, when faced with circumstances where, unlike this decision, the commercial consequences of a particular construction of a contractual provision are not so obvious. However, in the meantime, Eyre J has made clear that the Tension does exist, despite the Supreme Court's objections.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

InHealth Intelligence Limited v NHS England [2023] EWHC 352 (TCC) (20 February 2023)

The Defendant conducted a procurement process for the NHS in England and had launched a procurement competition in which the Claimant, InHealth Intelligence Limited ("InHealth"), intended to participate. Bidders were required to lodge bids online via an e-portal. InHealth had attempted to submit a bid prior to the tender deadline but, as a result of an error in uploading two of its documents for one of the Lots, and having not finalised its bid for submission until just before the deadline, was unable to do so. An employee of the Claimant uploaded a document that formed part of the Claimant's bid on to the e-portal but in the wrong place. When he tried to upload it to the correct place, the e-portal would not permit the same document to be uploaded in two locations. The employee sent a message via the e-portal six minutes before the deadline asking for help. The message was acknowledged 52 minutes after the deadline, but the matter was not resolved.

The Claimant brought proceedings under the Public Contracts Regulations 2015, challenging a decision by NHS England (the Defendant) that it not be permitted to submit a late bid to deliver CHIS services across four Lots, covering the Greater Manchester, Midlands and East of England regions (the value of the contracts together totalling over £100 million).

InHealth challenged the design and operation of the portal, the requirement that bidders submit a single bid covering all four Lots (rather than separate bids for each Lot), and the refusal by NHS England to permit it to submit a late bid or to consider those documents which it had uploaded (but not submitted) via the portal.

Following an expedited timetable and a four-day trial, the High Court found in NHS England's favour and dismissed the claim in its entirety.

Rhodri Williams KC represented the Defendant.

A & V Building Solutions Ltd v J & B Hopkins Ltd [2023] EWCA Civ 54 (27 January 2023)

James Frampton acted for the Respondent, J&B Hopkins, in this appeal to the Court of Appeal which raised important issues as to when and how a Part 8 claim can be used as a defence to an unfavourable adjudicator's decision which has not been complied with.

The Respondent was successful in dismissing the appeal on Ground 1, with the Court agreeing that the Part 8 claim was not an abuse of process because of the failure to comply with the adjudicator's decision.

The appeal was, however, successful on Ground 3, with the Court deciding that, based on the bespoke payment provisions of the subcontract, the payment application was valid.

On the unusual circumstances of the case, including that the appeal was largely academic given that by the time the appeal was heard J&B Hopkins had been successful in a further adjudicator's decision commenced by A&V on the final account and that the Appellant's argument on Ground 3 was not run at first instance, James was also successful in securing no order as to costs of the entire proceedings (including the appeal) for his client.

James Frampton represented the Respondent.

LDC (Portfolio One) Ltd v (1) George Downing Construction Ltd and (2) European Sheeting Ltd. [2022] EWHC 3356 (TCC) 23 December 2022

The case concerned re-cladding and associated remedial works to address fire safety and water ingress issues in relation to the external wall construction of three high rise tower blocks operated by the Claimant (LDC), as halls of residence in Manchester. The blocks were constructed in 2007 and 2008. The First Defendant (Downing) was the main contractor, and the Second Defendant (ESL) was a specialist subcontractor responsible for the external wall construction, including the cladding and rainscreen works. At the time of the hearing, ESL had entered Creditor's Voluntary Liquidation and was not represented.

In October 2021, LDC and Downing reached a settlement for the sum of £17,650,000 in full and final satisfaction of LDC's claims against Downing. At the trial, LDC sought judgment against ESL in the sum of £21,152,198.87 for the cost of remedial works and loss of income; Downing claimed against ESL for an indemnity and/or contribution in relation to the settlement in the sum of £17,650,000 together with reasonable legal costs.

Veronique Buehrlen KC (Sitting as a Deputy High Court Judge) held that ESL was liable for i) defects in the composite cladding elevations which led to water ingress; and ii) fire barrier and fire stopping defects.

Paul Bury represented the Claimant.

Sudlows Ltd v Global Switch Estates 1 Ltd [2022] EWHC 3319 (TCC) (21 December 2022)

The Claimant contractor, Sudlows Ltd ("Sudlows") brought a Part 7 claim against the Defendant employer, Global Switch Estates 1 Ltd ("Global") to enforce a decision of an adjudicator ("Adjudicator 6") dated 9 September 2022 ("Adjudication 6") that Global should pay Sudlows £996,898.24 plus VAT. The part 7 claim was resisted by Global.

Global brought Part 8 proceedings against Sudlows: first, for a declaration that, in making his decision, Adjudicator 6 acted in breach of natural justice by finding that he was bound by certain findings made by an earlier adjudicator ("Adjudicator 5") in a previous adjudication ("Adjudication 5"); and second, to obtain enforcement of alternative findings made by Adjudicator 6 which would not be in favour of Sudlows but Global, to the extent that Sudlows would have to pay Global £209,053.01 plus VAT, interest and fees.

The underlying contract between Sudlows and Global was in JCT Design and Build 2011 form. The work relevant to these proceedings involved getting high-voltage cables through ductwork under a road. When Sudlows pulled the cables through the ductwork, one of the cables was damaged. Another set of cables was duly provided and pulled through by a different

contractor. Sudlows then refused, it was alleged, to terminate, connect and then energise those cables or to assist Global in doing so. The result of the impasse was an ongoing delay in the completion of the cabling work and thus the enablement of the power to be supplied to the Site.

The two adjudications concerned claims by Sudlows for extensions of time (EOTs) for delays associated with the cabling work, one up to 18 January 2021 and the other from 19 January 2021.

The court held that the adjudicator's decision as to his jurisdiction was clearly wrong because it had not raised the same or substantially the same dispute as that raised in the previous adjudication. Reasons for this included that, although the event was the same, the periods were different and as new and material evidence had become available. The court also held that the adjudicator's alternative findings could be enforced as he intended they should be if his jurisdictional decision was wrong.

The case is subject to appeal to be heard in June 2023.

Alexander Nissen KC represented the Defendant.

Energy Works Hull v M+W [2022] EWHC 3275 (TCC) (20 December 2022)

Under an EPC contract, the Defendant, MW High Tech Projects UK Limited ("M+W"), agreed to design and build an energy-from-waste plant in Hull for the Claimant, Energy Works (Hull) Limited ("EWH"), for £153,897,518. The plant was intended to process and then gasify refuse-derived fuel ("RDF") in order to generate a sustainable source of electricity.

Almost 11 months after the contractual date for completion, the gasifier plant had still not been commissioned and work had been suspended. EWH purported to terminate the EPC contract pursuant to clause 44.1(c), or alternatively at common law. The principal issue in the main proceedings was whether EWH was entitled to terminate the EPC contract or M+W was entitled to an extension of time such that EWH's notice took effect as a termination for convenience.

EWH sought damages from M+W and M+W Group GmbH in the sum of £131,362,885.23. M+W counterclaimed for a final payment alleged to be due in the sum of £24,395,158.94. EWH's claim included the sum of £9,943,504.40 in respect of alleged defects in the works. In the event that M+W was found liable for the defects, it sought a contribution from the Third Party, Outotec, who, in turn, denied liability and counterclaimed for unpaid sums totalling US$16,857,314.86.

It was held that EWH had validly terminated, and M+W was not entitled to an extension of time. Consequently, EWH was entitled to liquidated damages for delay and damages upon termination. Further, EWH was entitled to damages in respect of some of its defect claims. Contribution claims in respect of those defect claims, made by M+W against Outotec, were successful in part. Outotec was successful in its counter-claim for unpaid milestone payments.

William Webb and Thomas Saunders acted for the Defendant.

Adrian Williamson KC and Paul Bury acted for the Third Party.

Northumbrian Water Ltd v Doosan Enpure & Anor [2022] EWHC 2881 (TCC) (14 November 2022)

In this case the claimant applied for summary judgment to enforce an adjudicator's decision and the defendant joint venture companies (JV) applied for the proceedings to be stayed pursuant to the Arbitration Act 1996 s.9.

The Claimant engaged the JV under the NEC3 Engineering and Construction Contract Option C to design and construct upgrades for a water treatment facility. Both parties agreed to use Option W, which stated that disputes would be referred to an adjudicator whose decision would be binding unless revised by an arbitration tribunal and enforceable as a contractual obligation under cl.W2.3(11). If a party was dissatisfied with the adjudicator's decision, they could take the matter to arbitration. Disputes emerged between the parties in relation to cost overruns, work delays, and quality concerns. The claimant terminated the contract, which the JV contested, asserting that the claimant was in repudiatory breach, which it accepted. The disputes were referred to adjudication, and the adjudicator ruled in favour of the claimant. The JV gave notice of its dissatisfaction with parts of the adjudicator's decision and expressed an intention to refer those matters to arbitration for final determination.

The Claimant argued that the adjudicator's decision was binding and enforceable as a contractual obligation unless revised by the arbitration tribunal. Since there was no challenge to the adjudicator's jurisdiction or breach of natural justice, there was no defence to a summary judgment application. The JV contended that it was entitled to a s.9 stay because the enforcement claim was a dispute related to the contract that must be referred to arbitration and that the adjudicator's decision's enforceability was a matter for the arbitration tribunal.

O'Farrell J refused the application. The Court held that, since the JV participated in the adjudication without raising any jurisdiction challenge, it was too late for them to do so, and they were considered to have waived that right. Furthermore, while the JV's failure to pay the adjudicator's awarded sum constituted a dispute under s.9, the notice of dissatisfaction did not include any jurisdiction or natural justice breach challenges. Consequently, the adjudication decision was final and binding concerning those matters. The JV lost the right to challenge the adjudication decision's validity in court or arbitration but retained the right to refer the underlying disputed issues to arbitration following its notification. Therefore, the adjudication decision's effectiveness was not a matter to be referred to arbitration under the contract, and s.9 was not engaged.

Justin Mort KC represented the Defendants.

Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30 (2 November 2022)

This was an appeal by a property developer against a decision that it was no longer possible for a planning permission it held to be implemented and that further development under that permission would be unlawful.

In 1967, planning permission was granted for the construction of 401 houses, based on a plan outlining the layout of homes and connecting roads. Between 1996 and 2011, the local planning authority approved six additional permissions for specific areas of the site, which were implemented. However, only 41 houses were built, and none followed the 1967 plan. In 2017, the authority instructed the developer to halt all work, as the later developments had made the 1967 permission unfeasible; for instance, houses were built where roads were meant to be, and a road was laid where a row of houses was planned. The developer sought a declaration that the 1967 permission was still valid and could be completed. The High Court determined that the later developments had made the 1967 plan physically impossible, and the Court of Appeal upheld this decision.

The developer argued that the case was different from the Pilkington v Secretary of State for the Environment [1973] 1 W.L.R. 1527 ruling, which stated that if two permissions were granted for the same site and one was implemented, the other could not be lawfully executed if it was rendered impossible by the construction. The developer claimed that this case was not based on abandoning the right to develop land, the 1967 permission allowed for the construction of any subset of the planned buildings, and the additional permissions were variations of the 1967 permission, making the varied 1967 permission still valid and feasible.

The Supreme Court held that the Pilkington decision could not be attributed to abandonment, and there was no legal basis for abandoning a planning permission. Furthermore, the 1967 permission was an integrated scheme that could not be separated. While three of the six later permissions were considered variations of the 1967 permission, the actual development under them significantly deviated from the 1967 plan. The construction authorized by the later permissions had rendered the 1967 permission physically impossible to carry out.

Charles Banner KC and Matthew Finn represented the Appellant

UKRAINE, ROGUE STATES AND IMPUNITY – POSSIBLE ROUTES FOR RECOVERY[1]

By Sean Wilken KC
KEATING CHAMBERS

&

Ben Brandon
MISHCON DE REYA

As the war in Ukraine comes to the end of its first year, legal and media attention is beginning to move towards reconstruction and how it can be funded.[2] Due to the indiscriminate way in which Russia has waged war in Ukraine, there has been massive civilian infrastructure damage. Reconstruction will be lengthy and expensive. Unsurprisingly, given the global reach of Russian capital before the war, the debate has begun to focus on how Russian assets held outside of Russia, in particular sanctioned assets, could be used to fund reconstruction. This article considers that issue – not only in the sanctions context but also in the context of other legal methods of recovery: it also considers the linked issue of the threat posed by rogue states to the international legal order.

Discussions on the recovery of assets, whether sanctioned or not, usually focus on arbitration or litigation and most usually arbitration (whether private or investment treaty). It is trite that arbitration is consensual. As arbitrators and practitioners, we have tended always to mean that arbitration is consensual as *between the parties* and not, absent unusual cases, to look at the wider underpinning of arbitral law and practice, namely the relevant framework of international law, treaties and conventions.[3] True it is that there have always been difficulties over enforcement but those have tended to be seen as sui generis. It is only recently, we would suggest, that more fundamental doubts have begun to arise about the international consensus supposedly underlying international arbitration.

A pertinent and recent example of state practice that gives rise to such doubts is to be found in Russia. In 2020 Federal Law 171-FZ came into force in Russia amending the Arbitrazh Procedure Code of the Russian Federation. 171-FZ, in crude terms, removes the ability to arbitrate against sanctioned Russian persons located outside Russia: to do so attracts the possibility of an injunction; damages equal to the sum claimed plus costs and an inability to enforce any Award. In *Uraltransmesh v PESA*,[4] the Russian Supreme Court declared 171-FZ to be valid and that any sanctioned person could invoke it as against an arbitral proceeding brought against them outside Russia.

With the invasion of Ukraine on 24 February 2022, 171-FZ and *Uraltransmesh* may have to be viewed in a different context.

On 21 February 2022, the Security Council of the Russian Federation ("SCRF") recognised the independence of the Donetsk and Luhansk People's Republics. From reporting and speeches made, the decision of the SCRF was at the instigation of the President of the Russian Federation, Vladimir Putin. In any event, the SCRF has a defined legal status as a constitutional consultative body concerned with formulation and implementation of decisions by the President in the fields of *inter alia* "defence and national security".

On 24 February 2022, the SCRF authorised the invasion of Ukraine and on the same day as a result, Russia invaded Ukraine under purported cover of a "special operation" allegedly under the right of self-defence under Article 51 of the UN Charter. Again, from reporting and speeches made, in crude terms, the rationale for the invasion was a denial of Ukrainian statehood, an appeal to *Velikorossiya* (or irridentism) and allegations that Ukraine was a fascist state. All of these purported justifications fail to meet the criteria under Article 51 which underscores the consensus among public international law specialists that the "special military operation" amounts to a war of aggression in international law.

This is obviously not the first occasion on which Russia has acted against Ukraine – there is the annexation of Crimea in 2014. This earlier incursion did trigger investment treaty arbitrations which were successful in law – finding assets had been expropriated in violation of the Russia – Ukraine Bilateral Investment Treaty.[5] Russia, however, did not cooperate with the arbitral proceedings and it must be presumed that no recovery was made – highlighting the very rogue state problem at issue here. Thus, the question arises as to whether there can be alternate means of recovery and restitution to finance the post-war reconstruction of Ukraine.

There has been extensive reporting of Russia's actions since the invasion including allegations of war crimes including the targeting, torture and execution of civilians and the use of thermobaric weapons. There has also been reporting of widespread damage to infrastructure and Ukrainian property which from past Russian actions (Aleppo and Grozny for example) appears to be part of the Russian military strategy (indeed those in overall command – Putin, Gerasimov, Shoigu and Surovikin – are the same as were in command in Syria). Finally, there has been reporting of widespread pillaging – particularly of grain stocks.

Thus, there is extensive reporting not only of the waging of aggressive war but also of other breaches of the laws of war and of the *ius* cogens. So far there has been little denial of the allegations by the Russian Federation.

Tritely, the waging of aggressive war can and has attracted sanctions – but absent further domestic action, sanctions merely prevent the current use of sanctioned property – they cannot be used for reparations or restitution of economic loss. Further, reparations claims whilst theoretically possible,[6] involve lengthy proceedings which even if successful, are unlikely to result in the recovery of damages against a rogue state. Actions before the International Court of Justice will face the difficulties that were encountered in *Monetary Gold* where recovery was not possible because the relevant state did not agree.[7] Finally, the ultimate irony of 171-FZ is that it puts, so far as arbitral proceedings are concerned, sanctioned persons beyond the reach of arbitral recovery and, of course, persons are only sanctioned if there is thought to be a reason – breach of international or domestic law – for so doing.

Similarly, much of what has happened in Ukraine violates the European Convention on Human Rights and claims have already been brought against Russia. If those claims are successful, which it is more than reasonable to expect they will be, no doubt Russia will adopt the same attitude as it has to other claims against the state – to ignore them.

1 This article is an expansion of a short talk to COMBAR in Edinburgh in September 2022.

2 See, for example, https://www.reuters.com/video/watch/idRCV00BQF7 which raises arguments against some of the points made in this article.

3 At least since 1945

4 A60-36897/2020

5 See eg *PJSC Ukmafta v The Russian Federation* PCA 2015-34. The Award has not been published but the precis can be found at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/658/ukrnafta-v-russia

6 See eg the Congo litigation – see https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf at [257 ff].

7 *Case of the Monetary Gold Removed From Rome in 1943 (Italy v France et al) (Preliminary Question)* [1954] ICJ Rep 19

Thus, there is something of an impasse with neither private nor public international law offering a remedy. This impasse is even more stark given the International Court of Justice's comments in *Ukraine v Russia*.[8] Put another way, there is now a broadening question of impunity – how can rogue states or rogue state actors be held financially accountable for their actions? Particularly so when we are concerned with the waging of aggressive war, the inflicting of economic damage and pillaging?

A possible answer may lie in recovery in private law. The starting point, paradoxically, however, is the well-established principles of international public law as set out in the Charter of the International Military Tribunal of 1945. That provides:

> *"the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participating in a common plan or conspiracy for the accomplishment of any of the foregoing are 'crimes against peace' entailing individual responsibility".*[9]

Thus, a rogue state's actions in waging a war of aggression becomes a question of individual responsibility. It was this individual responsibility that was debated and resolved at the first of the Nuremberg trials ("Nuremberg 1"). Crucially, at Nuremberg 1, some defendants were found guilty of both conspiracy to wage aggressive war and for ***economic*** acts which formed part of the waging of aggressive war.[10] At the follow-on *IG Farben* trial ("IG Farben"),[11] nine of the Defendants, who were in essence economic actors, were found guilty of plundering, spoilation and the seizure of industrial plants throughout Europe. It is this liability flowing from economic acts[12] on which I wish to focus – in particular elements of a civil as opposed to criminal law conspiracy.[13]

As before, there have been multiple, verifiable reports of the destruction of infrastructure as well as, for example, pillaging of food and goods (particularly grain) from Ukraine.[14] Thus, there is a clear overlap between the actions of Russian combatants and their commanders in Ukraine and the conduct imputed to the individual Defendants in IG Farben. Further, given that some of the meetings and decision making in relation to the war in Ukraine were televised, it is not difficult to prove that individuals knew of and were involved in decisions relating to the start and waging of war in Ukraine. Thus, for the purposes of this debate, I assume that both the elements of breaches of the *ius* cogens and conspiracy will be made out as against at least some putative defendants.

The question then becomes – what, if any, recovery there can be. As set out above, it is reasonable to assume (at least whilst the present administration is in control) that any attempt to recover in international investment treaty arbitration or at the state level will be blocked and ignored.[15] Therefore, it falls to consider possible claims against non-state actors – that is individuals and corporations involved in the war in Ukraine – either by ordering the destruction of infrastructure and aircraft or profiting from pillaging.

The financial route into such claims is via the extensive and well documented capital outflows from Russia before 2014 and then before February 2022. Due to the nature of the Presidential Administration, those responsible for the capital outflows are usually part of the Presidential inner circle[16] and are therefore likely to be close to key decisions – like the invasion of Ukraine.[17] These outflows have already produced US$300bn of sanctioned assets[18] which manifestly only represents part of the capital invested outside Russia. The question is whether there is a means to access those sums without having resort to sanctioned assets.

Under the law of England and Wales,[19] the most obvious route to some form of recovery would be the law of tort. Thus, the deliberate destruction or removal of a chattel is conversion.[20] Although there is evidence of pillaging (grain for example), all that is needed is the destruction or removal of the chattel. Thus, conversion was the initial cause of action asserted in respect of aircraft taken by Iraq in the *Kuwait Airways Corporation* litigation after the first Gulf War.

Similarly:

> *where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage*[21]

there is a conspiracy to injure by unlawful means. In such cases, it is worth bearing in mind that:

> *"it is no defence for [the Defendants] to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful"; in such cases "an intention to injure the claimant", rather than a predominant purpose to injure, is enough*[22]

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8 On 16 March 2022, the ICJ issued an Order on Preliminary Measures in *Ukraine v Russia*. Russia was ordered to cease the invasion and comments were made as to the legitimacy of Russia's conduct at [74 – 77].

9 Under Art 6(a) of the Charter of the International Military Tribunal, Annexed to the London Agreement for the Establishment of an International Military Tribunal 1945.

10 See eg Frick and Funk

11 *United States of America v Carl Krauch et al* 30/7/48 at http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf

12 That is in no way to dismiss the liability for other war crimes such as attacks on civilians, torture and murder. Those war crimes and any prosecution for lie outwith the scope of this article.

13 For a discussion of the criminal law of conspiracy in this context see eg Yanev *A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise* Criminal Law Forum (2015) 26:419–456. Under the modern approach to conspiracy, the crime is now confined to genocide only. Reliance is instead placed on Joint Criminal Enterprise – see eg *Prosecutor v Tadic* IT-94-1 at [185 – 225].

14 See eg https://apnews.com/article/russia-ukraine-putin-business-lebanon-syria-87c3b6fea3f4c326003123b21aa78099

15 This is quite apart from the fact that the Russian State would rely on state immunity at the public international law level – see *Germany v Italy* ICJ Reports 2012 p 99 at [92 – 97]. Whether a *Germany v Italy* type argument would succeed under current public international law is an open question but one which will no doubt be considered in the next round of Germany v Italy commenced before the ICJ in May 2022.

16 See discussions in Aslund *Russia's Crony Capitalism* Yale UP 2019; see also Burgis *Kletopia* William Collins 2020.

17 See, by way of example, the Putin – oligarch meeting on 24 February 2022.

18 See eg the Reuters article above.

19 Other jurisdictions may more easily permit recovery but this article unsurprisingly focuses on England and Wales.

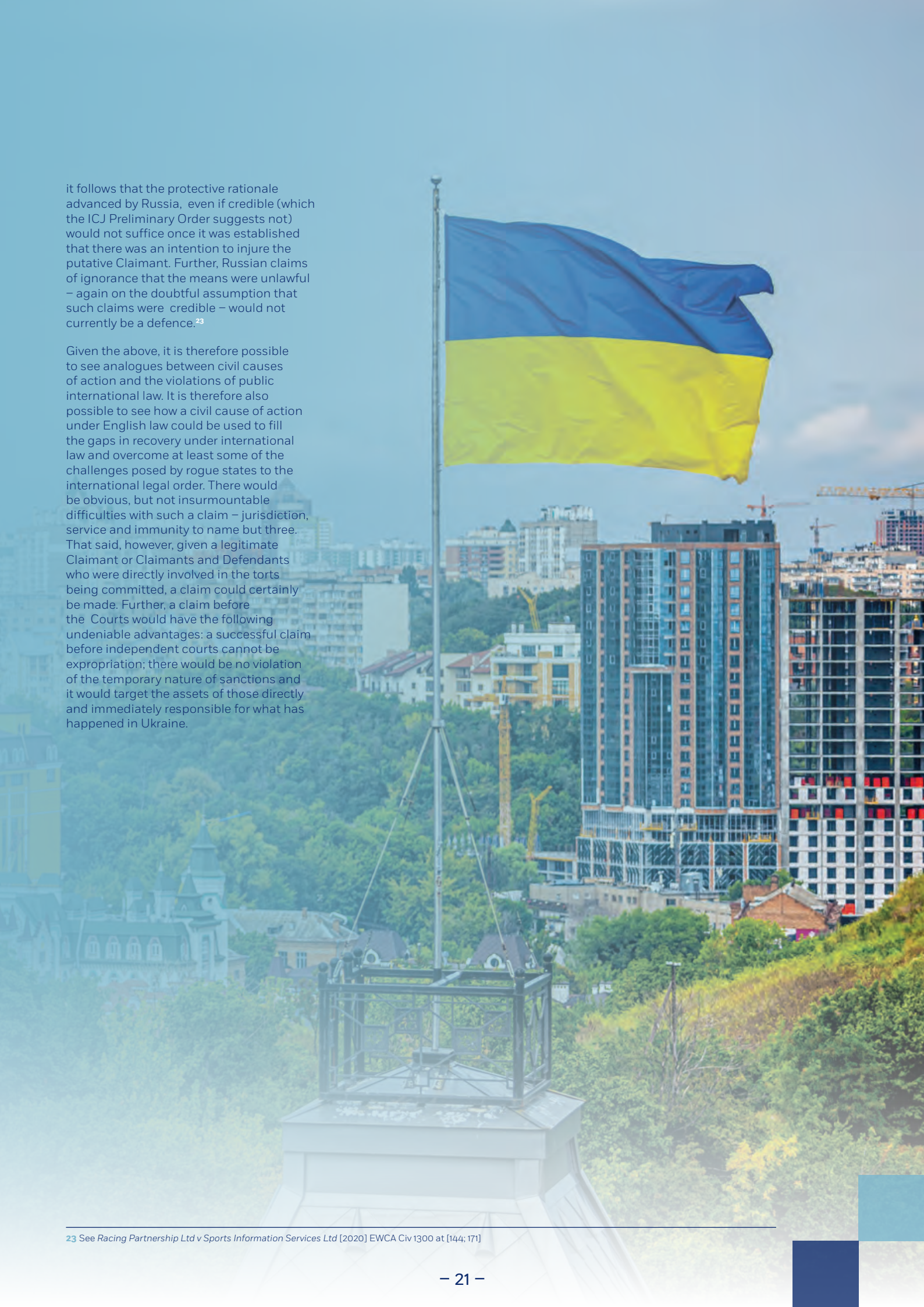
20 Clerk & Lindsell on Torts at 16-30; *Insurance Corp. of British Columbia v Alexander 2016 BCSC 1108* [destruction of a car during a riot is conversion].

21 Clerk & Lindsell at 23-105 citing *Baxendale-Walker v Middleton [2011] EWHC 998* at [60]; cf. *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45; [2011] 1 W.L.R. 2370* at [55].

22 Clerk & Lindsell at 23-106 citing *Lonhro Plc v Fayed* [1992] 1 AC 448 at 466; 468

it follows that the protective rationale advanced by Russia, even if credible (which the ICJ Preliminary Order suggests not) would not suffice once it was established that there was an intention to injure the putative Claimant. Further, Russian claims of ignorance that the means were unlawful – again on the doubtful assumption that such claims were credible – would not currently be a defence.[23]

Given the above, it is therefore possible to see analogues between civil causes of action and the violations of public international law. It is therefore also possible to see how a civil cause of action under English law could be used to fill the gaps in recovery under international law and overcome at least some of the challenges posed by rogue states to the international legal order. There would be obvious, but not insurmountable difficulties with such a claim – jurisdiction, service and immunity to name but three. That said, however, given a legitimate Claimant or Claimants and Defendants who were directly involved in the torts being committed, a claim could certainly be made. Further, a claim before the Courts would have the following undeniable advantages: a successful claim before independent courts cannot be expropriation; there would be no violation of the temporary nature of sanctions and it would target the assets of those directly and immediately responsible for what has happened in Ukraine.



23 See *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [144; 171]

BEN GRAFF

Q&A

Ben has a busy practice across Chambers' specialisms and is regularly involved in disputes arising out of large-scale construction and infrastructure projects and high-value procurement challenges. Ben's cases include domestic and international work. He works with large legal teams and also appears in his own right in the High Court, County Court and as part of his busy adjudication practice.

What have been the highlights of your practice so far at Keating Chambers?

I have been fortunate enough to have acted in two significant (3-4 week) TCC trials (on both occasions representing HS2) and they are the clear highlights. The first one took place in 2020, right at the beginning of my career (in fact, it started whilst I was still a pupil) and I don't think there was any better way to learn the ropes than being thrown into big-ticket litigation right from the off. I learnt a lot from those leading me, in particular in relation to handling witnesses (and judges!). It was then a massive bonus when judgment came in and we had won on every point. That really validated all the hard work that we had put in.

The second trial recently came to an end in January this year. This time around, I had been heavily involved in the litigation for over a year and had a couple of years of experience under my belt so I think (or at least hope) that I was able to make a more significant contribution. Judgment has not yet been handed down so we will have to wait and see whether we get the same outcome.

How have you found being involved in such a significant and long running TCC trial?

It was a very intense experience taking up a large proportion of the last 6 months of my life, but I certainly don't have any regrets. Firstly, I have already learnt in my short time at the Bar that nothing beats the excitement of fighting a trial, particularly when you have been consumed by the case for months and years and feel like you know it back to front. Secondly, it was a fascinating case, raising a number of novel points of procurement law and it will be very interesting to see how they are determined in the judgment. The case also required me to spend an inordinate amount of time thinking about trains, which I enjoyed to a possibly worrying extent. Perhaps, a new hobby awaits me. Thirdly, we had a great team – counsel, solicitors and client – who I really enjoyed working with, which is incredibly important when you're working with each other at such close quarters for months on end.

You have developed a busy and varied practice since being called to the Bar in 2019, do you have a particular area of practice that you enjoy most?

I would say that my practice is about 50/50 construction and procurement which is exactly how I'd like it to be. Procurement law has already afforded me some great opportunities, in particular, the two TCC trials that I've mentioned as well as a couple of interlocutory applications that have led to interesting judgments – concerning expert evidence and limitation issues. In addition, the subject matter of procurement cases can vary incredibly widely. It's all been train related for me so far – train stations, railway tracks and

rolling stock (i.e. trains) – but I'm looking forward to taking on a wide variety of different cases in the future. I also really enjoy construction cases so that balance is perfect.

What do you enjoy most about your work as a construction barrister?

I think it is the variety. One case you do might turn entirely on a point of law or construction – e.g. whether a clause entitling a contractor to terminate at will falls foul of the Unfair Contract Terms Act or whether a builder had design responsibility in the face of apparent contradictory requirements in the contract (both recent examples) – and the next may require you to undertake a vast factual inquiry and get to the bottom of what happened on an enormously complicated project (e.g. what caused the delay?). Further, the projects that give rise to these disputes can range from the construction of a block of flats to things like waste treatment plants, train stations or off-shore drilling rigs (again, all recent examples).

I also really enjoy having the opportunity to immerse myself in the technical detail of a dispute so that for a brief period, I might genuinely understand (or at least think that I understand) why, for example, a building is leaking or sinking. I think that it something that we all find satisfying as construction barristers.

Finally, construction law has provided me with opportunities to take on cases in my own right, for example in adjudications for reasonably large sums of money – I recently helped a contractor resist a claim for a £1.8m claim in liquidated damages for the allegedly poor performance of an anaerobic digestion plant – and adjudication enforcement proceedings.

Do you have any advice for aspiring pupil barristers considering their path to the Bar?

Don't be put off from applying somewhere because they practice an area of law that you don't have intimate (or any) knowledge of, as long as you have reason to believe (and can articulate) that you would enjoy doing what they do. The vast majority of us at Keating were not engineers in previous lives and did not have a masters in construction law before starting and we've done alright. You learn on the job.

Also use the materials that are available to you. Lots of chambers (particularly Keating) provide information about what they do and what their practices involve on a day-to-day basis (at different levels of seniority) and what they are looking for in pupils/barristers. Use this to inform your decision as to which places to apply to and to help you explain, in your application forms, why you fit what they are looking for.

Outside of chambers, what do you enjoy doing in your free time?

On my Chambers profile, it says that I'm a long suffering Arsenal fan. I think this was justified when I wrote it, as my whole adult life had borne witness to a period of steady (and sometimes rapid) decline, having grown up in the golden era of the late 90s and early 2000s. Thankfully though, times appear to be changing and the self-pity might finally have to stop.

Occasionally, I like doing things that are not football related including spending time in the/near mountains and I'm a big fan of the cinema. I would go weekly if I had the time.

By Philip Boulding KC

CONSTRUCTION ADJUDICATION IN THE UK 25 YEARS ON – WHAT DO WE KNOW?[1]

Statutory adjudication in construction disputes in the UK has now been operational for 25 years. As a younger barrister lecturing on the process before it came into effect, I confidently predicted that, given the timescale in which the Adjudicator had to determine the dispute, it would be used to resolve discreet issues but it was difficult to contemplate that it would be used to resolve 'full-blown' final account type disputes; this is notwithstanding the fact that it applied by its terms to all kinds of disputes arising out of a construction contract. How wrong could I be!

1 By Phil Boulding KC, M.A., LI.M. (Cantab), Bencher of Gray's Inn

As Sir Peter Coulson, an alumnus of Keating Chambers and author of arguably the leading text on adjudication, Coulson on Construction Adjudication, stated in 2015:

> *"Adjudication has been described as a parallel universe in which decisions which everyone knows to be wrong are solemnly upheld by the courts, and where potentially important disputes are decided at a gallop, with no time for the adjudicator to think very hard about any one problem before the next one arises for his/her decision."*

Experience over time has shown that this description of construction adjudication applies as much to complicated, high value, final account type disputes as it does to the sort of comparatively simple disputes that I, like many others all those years ago, contemplated would form an Adjudicator's staple diet.

In terms of what we have learnt about construction adjudication over the last 25 years or so, very recently the results of a very comprehensive survey concerning the statutory adjudication process from the perspective of the users of such process for the resolution of construction disputes in the UK have been published – *'2022 Construction Adjudication in The United Kingdom: Tracing trends and guiding reform – report by The Adjudication Society and the Centre of Construction Law & Dispute Resolution, King's College, London'*[2] ("the Report"). The primary purpose of the survey which forms the subject-matter of the Report was to discover what users liked and disliked about the statutory adjudication process.

As many of our readers will know already, the Adjudication Society ("the Society") is a not-for-profit association which promotes the resolution of construction disputes by means of adjudication. The Society was formed so that the construction industry might benefit from the body of experience and case law associated with the introduction of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), the growth in adjudication by means of Expert Determination and Dispute Boards, and the popularity of the New Engineering Contract. The Society's purpose is to encourage and develop adjudication as a method of resolving construction disputes (without denouncing other procedures, such as arbitration, litigation and conciliation) and to provide a regular and informal forum at which adjudication problems and practices may be discussed. The Society encourages learning and training at many levels for all its members and other stakeholders in statutory adjudication.

For the sake of completeness, this article also where appropriate takes account of the data collected by the Adjudication Reporting Centre at Glasgow Caledonian University ("the Adjudication Reporting Centre Report"), which obtains its information from the responses to questionnaires received from Adjudicator Nominating Bodies ("ANB") and from samples of practising Adjudicators.

Statutory Adjudication was introduced to the UK through the 1996 Act and enabled through The Schemes for Construction Contracts and their respective Exclusion Orders. Since its adoption in the UK in 1998, statutory adjudication has also appeared in other Common Law jurisdictions, but with certain key differences. By way of example, in Singapore the referring party can only adjudicate payment disputes and, broadly speaking, this looks as though this will be the situation in Hong Kong. Staying with the differences which exist between various jurisdictions, in Queensland, Australia, Adjudicators' Decisions have been publicly available since 2022, whereas in Singapore they are published, but only in a redacted version - on the other hand, in the UK Adjudicators' Decisions are confidential, although there is no statutory provision to such effect.

Returning to the Report, the illuminating contents thereof stem from the responses to two questionnaires that were open between April and July 2022. The first questionnaire was sent to ANB and was mainly quantitative in nature, enabling the research team to collect statistical data on construction adjudication and as it was not anonymised it allowed the research team to compare statistics from different ANB. In total, ten ANB took part in the study.

The second questionnaire had the objective of reaching the broadest range of adjudication users possible. Accordingly, it covered all the UK regions and was addressed to a number of individuals from differing backgrounds, including adjudication practitioners who publicly advertised their practices, and was entirely anonymised and aggregated upon submission. In total, the questionnaire was completed by 257 individual respondents.

The Report was the outcome of one year's work by the Centre, in cooperation with the Society, and represented the first report of a three-year project by King's College London, working in close collaboration with the Society. The objective of this intense period of work was to publish robust and comprehensive empirical analyses of construction adjudication in the UK in order to take stock of how adjudication was currently functioning as well as to inform adjudication practice going forward and guide possible reform. The Report also aimed to contribute to the understanding of adjudication and guide possible future reform against the background of legal developments and previous empirical studies. Importantly, by reforms the Report was referring not only to statutory reforms, but also to changes or developments in the case law and changes to the practice of ANB, as well as Adjudicators and all practitioners involved in the process.

Coulson L.J. was (justifiably so in my view) impressed enough by the contents of the Report to write the principal Foreword thereto. So far as he was aware, and I consider him to be correct, the Report is the first comprehensive survey of construction adjudication from the perspective of the users, designed to find out what users like and dislike about the process and was both comprehensive and clear. Specifically, Coulson L.J. saw fit in his Foreword to quote the commendation he had given in John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516):

> *"I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town."*

The Report self-evidently reveals many attitudes and statistics that support Coulson L.J.'s overall positive view that construction adjudication is generally successful, a view which is shared by the Adjudication Reporting Centre Report. In addition, Coulson L.J. also pointed out

2 The co-author and producer of the Report, the Centre of Construction Law & Dispute Resolution ("the Centre"), was founded in 1987 by Professor John Uff KC CBE, a member of Keating Chambers, who was its first Director (1987-1999) and the Nash Professor of Engineering Law (1993-2002). The current Director is Professor Renato Nazzini and the Centre is part of the Dickson Poon School of Law at King's College, London, which is consistently ranked internationally among the top law schools.

that two other things would be readily apparent to any informed reader of this Report. The first was that users ascribed a high proportion of the causes of the underlying dispute to 'inadequate contract administration' and to 'lack of competence of project participants', thereby suggesting that construction professionals still had much to learn about the ways to ensure the smooth running of any project. The second was a suggestion that a potential problem with construction adjudication had existed for some time – perceived bias.

The concern as to perceived bias stemmed from the fact that 40% of users of adjudication in the UK have suspected that on at least one occasion, an Adjudicator was biased towards one party and that the vast majority of those based their suspicion on the Adjudicator's relationship with the parties or the parties' representatives. There is no reason to doubt this concern which, as such, constitutes a truly startling, unacceptable message.

There are other aspects of the Report which make very interesting and informative reading:

- Claims for extension of time are the most common head of claim;
- Claims for professional negligence/ liability sit at 5%;
- The median hourly fee of Adjudicators is between £251 and £300;
- The median total fee charged by Adjudicators falls between £12,001 and £14,000;
- 58% of respondents consider that Adjudicators' Decisions should not be published, whereas 30% replied that they should, with redactions - following the Singaporean model;
- 42% of questionnaire respondents replied that less than 5% of adjudicated cases proceed to litigation or arbitration; and
- 25% said that they have never experienced adjudication disputes proceeding further.

I consider that the figures referred to above serve to emphasise both the effectiveness of the process, as well as the perception that most decisions are, at least, reasonable outcomes that allow the parties to move forward without resort to arbitration or the courts.

The Report proposes further developments, as the Society intends to explore the publication of Adjudicators' Decisions further, as it is considered that it could have the following advantages:

- It may create an informal system of 'precedent', affording consistency or certainty;
- It could reduce the risk of serial adjudications with potentially inconsistent outcomes; and
- It may encourage Adjudicators to maintain high standards.

However, on the other hand, there is a concern that the disadvantage of publication is the loss of confidentiality which might cause severe reputational damage to parties.

It is anticipated that our readers will want to read the body of the Report themselves, once tempted by the terms of this article, however the Report makes a number of important points, which are summarised in the addended document.

ADDENDUM TO CONSTRUCTION ADJUDICATION IN THE UK 25 YEARS ON – WHAT DO WE KNOW?

ARTICLE BY PHILIP BOULDING KC

(1) Number of referrals and impact of Brexit and Covid-19

- The number of adjudication referrals received by ANB has been on an upward trend since the introduction of statutory adjudication in 1998;
- The number of referrals reached an all-time high in May 2020 – April 2021 at 2,171;
- Referrals then decreased in the period May 2021 – April 2022 to 1,903, which is the same level as in the period May 2018 – April 2019 (1,905), and were at almost the same level as in the period May 2019 – April 2020 (1,945);
- The Report suggests that these figures evidence a situation where Brexit and the Covid-19 pandemic have not significantly changed the trend of adjudication referrals and, in fact: 38% of questionnaire respondents believed that the Covid-19 pandemic had made no difference to the number of adjudication referrals; 30% believed that it had actually increased the number of disputes, at least slightly; and, only 10% believed the opposite i.e. that the pandemic had decreased the number of referrals.

(2) Complaints about Adjudicators before ANB

- Adjudication referrals in the UK are mostly handled by ANB which then appoint the Adjudicators, albeit that the 1996 Act does not restrict appointments to just ANB;
- Whilst naming the Adjudicator in the contract is possible albeit unusual, it is an increasingly common practice in the UK for parties to agree on the Adjudicator when the dispute has arisen;
- ANB also administer the training and qualifications of Adjudicators who are registered with them, which is obviously a very important function;
- Despite various professional rules through which ANB regulate the conduct of their members, including their Adjudicators, disciplinary proceedings concerning Adjudicators in the UK by ANB are rare and, in fact, in the period May 2020 – April 2021 there were just 39 complaints submitted to the ten ANB that took part in this questionnaire, only three of which were upheld;
- In the following year, May 2021 – April 2022, there were only 47 complaints of which only 12 were upheld, but in neither year has a successful complaint resulted in the removal of an Adjudicator from an ANB's list, which is obviously the most severe sanction that an ANB can impose;
- The most common reasons for complaints to the Adjudicator are lack of jurisdiction (which is the most common ground) which, of course, also forms a possible defence to summary enforcement of the Adjudicator's Decision, with other grounds for complaint (at 18% each) being: the Adjudicator's conflict of interest; an alleged ethical breach (such as a breach of the ANB's rules of conduct); and, the Adjudicator's treatment of fees;
- It should be noted that in the UK ANB cannot remove an Adjudicator from the adjudication itself or impose any financial penalties, so a complaint concerning an Adjudicator should typically be raised before the Adjudicator, with the view to obtaining a resignation, which in the UK an Adjudicator can do at any time.

(3) Number and background of Adjudicators

- The total number of Adjudicators registered on the panels of ANB has remained largely constant over the past seven years;
- In April 2016 it reached 543, but dropped slightly to 541 in April 2022, with little oscillation in between;
- Adjudicators also represent a variety of professional backgrounds, including: quantity surveyors; lawyers; engineers; architects; construction consultants; and, Chartered Institute of Builders' members/builders;
- As sole decisionmakers, Adjudicators are entrusted with significant power in consequence of which the parties can expect them to possess certain minimum qualifications and expertise that would allow them to decide the cases justly;
- In this latter context Coulson L.J. identified three characteristics which in his view it was essential for an Adjudicator to possess: firstly, the ability to manage time in order to facilitate the resolution of the adjudication within the prescribed timeframe with the use of a timetable; secondly, the ability to grasp essential issues quickly and focus on these issues while avoiding distractions; and thirdly, the ability to treat parties fairly and courteously and pay due attention to their submitted documents;

- Almost all of the respondents stated that knowledge of construction law or adjudication was essential which, not surprisingly, suggests that respondents expect Adjudicators to meet a certain level of experience. Further, technical knowledge was considered to be a requirement by 59% of respondents, whereas 69% of respondents took this a step further and said that Adjudicators should have a fixed number of years of relevant experience;
- 70% of respondents said that Adjudicators should complete relevant preparatory courses or qualifications, from which it follows that ANB should impose qualifications and training requirements for Adjudicators and implement such qualifications and requirements if they have not done so already.

(4) Value, causes and categories of claim

- The most common pair of parties in dispute remains the main contractor and sub-contractor, albeit that the client and main contractor account for a significant number of disputes which go to adjudication;
- The most common value of an adjudication claim in the UK is between £125,001 and £500,000, which was the response selected by 42% of those responding to the questionnaire for individuals;
- Only 5% of questionnaire respondents selected a value of less than £25,000;
- Only 16% of questionnaire respondents considered claims above £5m to be most frequent;
- The 1996 Act places no express limits on what types of claims are capable of being adjudicated if they arise from a construction contract, so the referring party is not limited to claims for money and by its terms the 1996 Act embraces any variations to the construction contract and disputes pursuant to it;
- Moreover, courts interpret disputes arising 'under' a contract liberally, as even covering instances of fraud and there can also be a claim for a mere declaration, or a claim seeking guidance on the interpretation of the contract so, consistent with experience to date, the variety, extent and scope of disputes capable of adjudication are infinite;
- The leading causes of disputes are: inadequate contract administration (49%); changes made by the client (46%); and, exaggerated claims (43%), although these causes of dispute are closely followed by the lack of competence of project participants (41%);
- The four causes referred to immediately above are the most common by a wide margin and exceed other causes by at least 13%;
- Claims for extension of time are the most common head of claim by a wide margin (73%), but are followed by: final account claims (51%); claims for interim payments (49%); claims for damages (as selected by 25% of the questionnaire respondents); and, claims for liquidated damages (as selected by 20% of the questionnaire respondents);
- The least common categories of claim were: non-monetary claims and quantum meruit at 2% each; and, professional liability at 5%;
- 12% of respondents added that there were other more common categories of claims and that these included: termination; and, prolongation costs;
- The data referred to in the Report and the data available from the Adjudication Reporting Centre Report shows that in the UK adjudication is no longer, if it ever was, a mere tool to ensure cash flow during the execution of a project, but a dispute resolution procedure in its own right which is capable of resolving all types of disputes that may arise under a construction contract - in fact, the kind of disputes which are dealt with by adjudication has changed from being simple payment problems where the payment regime laid down in the 1996 Act was not being followed to the present day when many disputes are concerned with large sums of money and complex legal questions.

(5) Duration of proceedings

- 56% of questionnaire respondents reported that adjudications are typically completed within 29 to 42 days from the date of the referral notice;
- 16% of questionnaire respondents stated that the default 28-day period is the typical length of the proceedings;
- 29% of questionnaire respondents believed that the typical duration was more than 42 days;
- Upon being appointed and receipt of the Referral Notice, the Adjudicator should immediately assess whether he or she can complete the adjudication within the 28-day period provided for by default in the 1996 Act, and if he or she cannot do so, they should seek either an extension of time from the parties, or resign;
- The 1996 Act provides that the Adjudicator may apply for an extension of time of up to 14 days with the consent of the referring party, but for any further extensions the Adjudicator must have the consent of both parties.

(6) Costs

- The most common hourly rates of Adjudicators are between £251 and £300 (according to 37% of respondents);
- This most common range was followed by values between £301 and £350 (at 34%) and then £351 and £400 (24%);
- In total 95% of respondents agreed that hourly rates between £251 and £400 are most common (which range is broadly comparable to the guideline hourly rates of solicitors and legal executives with at least eight years of experience in the UK and hence do not appear particularly unreasonable), albeit that the median hourly fees of Adjudicators fall between £251 and £300;
- The total fees of Adjudicators vary, with the most common values falling between £8,000 and £30,000;
- The median of total fees charged by Adjudicators falls between £12,001 and £14,000 (which in combination with the median hourly fees of Adjudicators set out above, means Adjudicators typically spend between 40 and 56 hours per adjudication);

- 22% of respondents have typically encountered Adjudicator fees higher than £30,000, although only 9% of respondents typically encountered fees above £50,000;
- Although an Adjudicator must conduct the proceedings fairly in accordance with the rules of natural justice, he or she can take procedural decisions to achieve cost efficiency and it bears emphasis that in *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*, HHJ Lloyd QC held that *"the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties";*
- The most common step taken by Adjudicators to ensure cost efficiency was the determination of the case on documents only at 65% (which is commonly regarded as giving the Adjudicators greater protection from natural justice or procedural challenges), which was followed by limiting the time periods for individual submissions (62%) and working only with electronic bundles (47%);
- The least common measures to ensure cost efficiency were (at only 2% each) declining to take expert evidence and striking out evidence, it being suggested that the low frequency of such measures may be due to concerns about natural justice;
- Respondents reported that holding meetings remotely was a tool to ensure cost efficiency (29%) and that holding an in-person hearing can be such a tool (4%), which suggest that virtual hearings are, on average, more cost efficient than in-person meetings;
- 15% of questionnaire respondents said that there were other steps taken to ensure cost efficiency in proceedings, the most common one being to agree or clarify the issues as soon as possible to establish jurisdiction, albeit that another was the Adjudicator putting questions to the parties in advance of submissions. Other suggestions included: the avoidance of site visits; providing for joint expert statements; and, reviewing only sample evidence rather than all the evidence;
- Overall: avoiding in-person, arbitration-style hearings; using technology for e-bundles and virtual meetings: and, the use of more sophisticated, 'tailor-made' case management techniques e.g. defining the scope of the dispute and the issues to be determined at the outset or after the pleadings or limiting the number and/or length of submissions, appear to be the most used and most effective ways an Adjudicator can ensure that proceedings are cost effective.

(7) Adjudicators' approach to fees and expenses

- Most questionnaire respondents (39%) stated that Adjudicators most often follow the 'loser pays all' approach, which approach was closely followed by the apportionment of costs based upon the degree to which each party was successful or failed with respect to the claim or discrete issues (38%);
- The least common approach was to apportion the fees based on prior offers to settle that had been rejected;
- This approach differs from some other jurisdictions, for example Hong Kong where it is understood that the intended position will be that each party will bear its own costs.

(8) Publication of Adjudicators' decisions

- 58% of questionnaire respondents replied that Adjudicators' Decisions should not be published, albeit that a minority of 30% replied that they should be published, but with redactions, following the Singaporean model;
- 8% of questionnaire respondents replied that they should be published fully, as in Queensland, Australia.

(9) Technology and cybersecurity

- It is plain that technology is changing the landscape of dispute resolution and has a key role to play in adjudication;
- The Covid-19 pandemic has accelerated the trend for remote hearings which have become the 'new norm' almost overnight, which development has led to the deployment of online platforms, electronic document management tools and virtual hearings;
- 91% of questionnaire respondents replied that technology can assist adjudication by fostering document management and 89% thought that it can simplify the adjudication procedure through, e.g. remote hearings;
- However, it should be noted that the use of technology in dispute resolution and ADR also brings about risks, including: possible reduced access to justice for those less fluent in the use of technology; additional costs or the risks to privacy; and, high susceptibility to cyberattacks, as the sensitive data submitted or produced in an adjudication might make them an attractive prey for cybercriminals;
- The most common cybersecurity measures taken by Adjudicators are: sharing documents only on password-protected links (41%); conducting routine backup of documents; and, using encryption (26%);
- Very surprisingly and, indeed, worryingly so far as this author is concerned, 33% of questionnaire respondents replied that Adjudicators take no specific cybersecurity measures at all;
- This section of the Report concludes by stating that it appears that there should be more awareness of cybersecurity on the part of Adjudicators and the parties themselves and that it may be appropriate that the ethics codes or guidelines which the Report recommends should include a duty on Adjudicators to ensure that cybersecurity measures adequate to the case are adopted.

(10) Adjudicators' perceived bias and failure to disclose

- 31% of questionnaire respondents stated that Adjudicators rarely voluntarily disclose information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties and 14% of respondents said that they never do so, which is obviously a matter for concern;
- Equally concerning is that 40% of respondents answered that they have suspected, at least once, that an Adjudicator was biased towards a party;

- Bias can be actual or apparent. Actual bias would occur if there was direct evidence that the Adjudicator has a vested interest in a specific outcome of the case or is otherwise biased against a party, whereas apparent bias would occur where a fair-minded and informed observer would conclude that there was a real possibility of the Adjudicator being biased. However, these may be matters of perception as court cases in which an Adjudicator has been found to lack the requisite impartiality have been rare;
- Furthermore, 78% of questionnaire respondents agreed that Adjudicators ensure that the parties are on an equal footing always or most of the time, whilst only 7% thought that Adjudicators rarely or never ensure that the parties are on an equal footing;
- The Report suggests that these perceptions, or misperceptions, may be due to the lack of clear and consistent rules or guidelines on disclosure and ethics even though it is acknowledged that certain ANB already have robust ethical codes or standards in place, it also being suggested in the Report that all ANB should have robust ethical codes or standards in place;
- The Report also suggests in this context that there may be merit in having what might be described as a 'horizontal, all-embracing, instrument' to complement but not supersede existing ethical codes and standards and which is applicable to all ANB charged with appointing Adjudicators and which applies even if the Adjudicator is not appointed by an ANB.

(11) 'Ambush'

- The ways in which the parties in the UK abuse the adjudication process are different, but one of the most common forms of abuse in the UK is 'ambush' which occurs when the referring party takes a significant amount of time to prepare for the adjudication before issuing the Notice of Adjudication just before the most common holiday periods commence in August and December. The impact of this tactic can be exacerbated if the Referral Notice is long and complex and is accompanied by voluminous and/or irrelevant documents;
- Timeframes in the adjudication process are inevitably tight and the parties, in particular the responding party, will be under considerable pressure to deal with potentially complex matters within a very short time. Moreover, the referring party's natural time advantage cannot be neutralised, as it is inherent in any dispute resolution procedure that the claimant can choose when to start proceedings, subject to any time bar or limitation period;
- However, in circumstances where the referring party, or any party, is abusing the procedure so as to cause unfairness to the other party, the Adjudicator has at his or her disposal effective powers to avoid or mitigate prejudice against the other party;
- First, the Adjudicator may decline the appointment, or resign, if he or she believes that there is insufficient time for the dispute to be resolved fairly due to a pre-holiday 'ambush';
- In this context, whilst the Courts have held that it is not a breach of natural justice where a referring party commences the adjudication just before a holiday period, it is a matter for the Adjudicator to decide whether he or she can conduct the adjudication fairly in the timeframe provided and the best way for the Adjudicator to act in such circumstances is to decline the appointment, or resign, on the grounds that justice cannot be done;
- Secondly, and assuming that the adjudicator does not resign, another way is for the Adjudicator to penalise the ambushing party in costs, although since the costs of the Adjudication that may be allocated by the Adjudicator between the parties are only the Adjudicator's fees this deterrent may not be significant in most cases.

(12) Enforcement of adjudication decisions and subsequent litigation/ arbitration

- The hallmark of construction adjudication is interim finality and whereby in order to promote cash flow, an Adjudicator's decision is binding on the parties unless or until the dispute is re-opened either in litigation, arbitration or resolved by agreement;
- In *Bouygues Ltd v Dahl-Jensen Ltd* [2000] EWCA Civ 507 Buxton L.J. said that the purpose of adjudication is to *"enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes";*
- The outcome of the approach in *Bouygues* is that the losing party must accept the Adjudicator's decision and pay any sums due, even if it is confident that the decision was incorrect whereas, conversely, the winner can enforce the Adjudicator's Decision before the court and in respect of which the losing party has only limited defences available;
- If the losing party does not immediately comply with the Adjudicator's decision, the winner may apply to enforce that decision by way of summary judgment under CPR Part 7 and Rule 24;
- It is rare for Adjudicators' Decisions to proceed to litigation or arbitration and as to which: 42% of questionnaire respondents replied that less than 5% of cases proceed to litigation or arbitration; 25% said that they had never experienced adjudication disputes proceeding further, and, 15% of respondents said that between 6% and 10% of cases are referred to litigation or arbitration;
- There are only limited grounds on which the courts would decline summarily to enforce an Adjudicator's decision. The first is where the Adjudicator acted outside his or her jurisdiction, good examples of this being: where the contract was not a construction contract as defined by the 1996 Act; where the dispute had not crystallised before the adjudication was commenced; or, where the Adjudicator has breached the terms of the appointment e.g. by answering a question which was not put to him;
- The second ground is where there has been a breach of natural justice, good examples of this being: if the Adjudicator was biased; or, if the Adjudicator failed to address key issues in the decision;
- Adjudicators' errors of fact or law do not constitute sufficient grounds for the court to decline enforcement;
- Empirical analysis of enforcement cases since 2011 shows that enforcement of an Adjudicator's decision is granted most of the time (in 79% of the cases in the period under review), but that in 21% of the cases enforcement was denied, in whole or in part - jurisdictional objections being successful in 9.5% of cases, followed by natural justice and other grounds at 4.8%, albeit that only in 2.1% of cases did both natural justice and jurisdictional objections succeed. Other grounds for resisting enforcement, such as fraud, a successful Part 8 application or the insolvency of the payee, were successful in 4.8% of cases.

(13) Adjudication and insolvency

- The seminal cases of *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27 and *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2020] EWHC 2451 (TCC) have had a significant impact on adjudication;

- 37% of questionnaire respondents identified the insolvent company's failure to provide adequate security as the main obstacle to the enforcement by the insolvent company of an adjudication decision made in its favour;

- That is because there would be concern that if the Adjudicator's decision was over-turned by the court or in an arbitration there would be little, if any, prospect of getting the money back.

(14) Diversity in adjudication

- Adjudication suffers from the poor diversity of Adjudicators, by way of example the Report stating that while diversity is not limited to gender, based on a limited number of publicly available ANB panels, only 7.88% of Adjudicators are women;

- The possible solutions to the problem that were successful, for instance, in arbitration are: the adoption of a *'voluntary pledge'* which would encourage organisations and adjudication practitioners to promote diversity among construction Adjudicators in the UK; and, the establishment of a *'Taskforce on diversity'* consisting of construction practitioners and representatives of relevant institutions which would lead efforts aimed at improving diversity in construction adjudication.

(15) Reforms in the UK

- Two conclusions are particularly audible from the received responses: first, that many respondents strongly oppose the exceptions under the 1996 Act in sections 105(2) (*'the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature'* – which are not *'construction operations'*) and 106 (*'a construction contract with a residential occupier'*); and, second, respondents believe that the payment regime under the 1996 Act, as amended in 2011, would benefit from clarification and simplification;

- This could also address current concerns relating to so-called 'smash and grab' adjudications that rely on the failure of the payer to comply with the strict deadlines and rigorous requirements of the 1996 Act to obtain a favourable adjudication decision only to force, at least in some cases, a second 'true value' adjudication, with the consequences of duplication of proceedings and costs with respect to the same claim.

This author considers that principal contents of the Report are succinctly summarised above for the benefit of our readers, whilst emphasising that there is no substitute for a full read and consideration of the contents of the Report as it provides invaluable guidance for those who have any desire to pursue a career involving the resolution of construction disputes by way of adjudication, whether as an adjudication practitioner or as an Adjudicator.

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