KEATING LEGAL UPDATE

Autumn 2024

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KEATING
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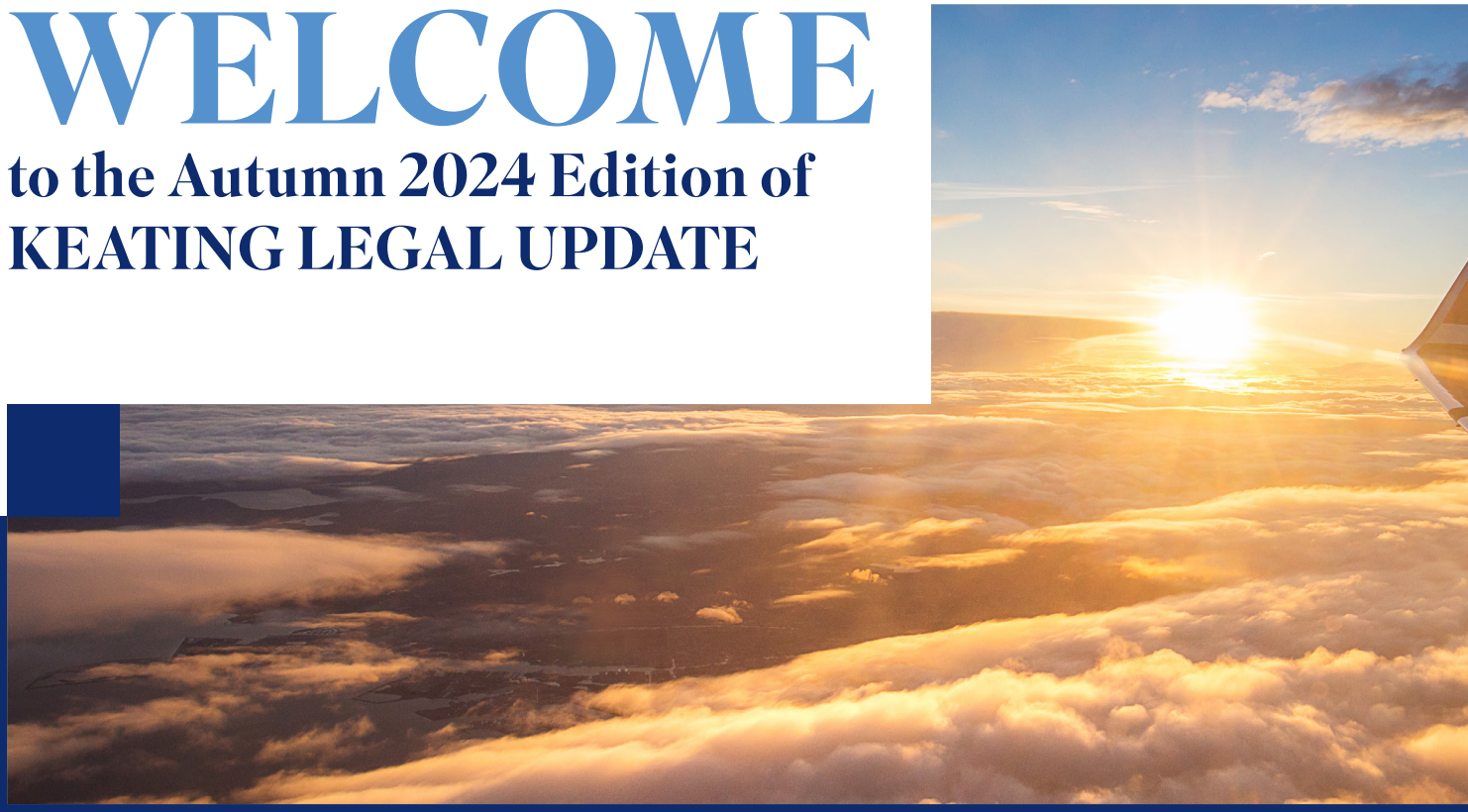
WELCOME

to the Autumn 2024 Edition of KEATING LEGAL UPDATE



Welcome to the Autumn 2024 edition of Keating Legal Update. We begin with a heartfelt tribute to Paul Darling OBE KC. Paul's tenure at Keating Chambers, including his five years as Head of Chambers, left an enduring impression. Our deepest sympathies go out to Paul's family and his many friends.

In this issue, we present insightful articles from Sean Wilken KC on infrastructure under the new Labour Government, Lucy Garrett KC on conclusive evidence clauses, and Abdul Jinadu on the new Nigerian Arbitration Act. Additionally, we feature engaging interviews with Tom Owen KC, who took silk earlier this year, and Jennie Wild, who was named "Construction Junior of the Year" for 2024 at the Legal 500 MENA Awards.

Chambers has enjoyed a highly successful year in terms of awards thus far. We are proud to have been named "Chambers of the Year" at the 2024 Legal Cheek Awards, reflecting the high-quality of training, support and work opportunities for junior barristers. Additionally, we have been nominated for 19 Legal 500 awards at this year's Legal 500 Bar Awards, including Leader of the Year and Marketing Team of the Year. Our esteemed planning silk, Charles Banner KC, has also been recognized as one of the top two planning silks in Planning Magazine's Annual Planning Law Survey. Long may it continue!

This month we are thrilled to introduce our new pupils, Connie Trendle and Courtney Burrell-Eade, and extend our congratulations to Edmund Crawley and Youcef Boussabaine, who have joined us as tenants after completing their pupillage. September is always an exciting time at Chambers as we gear up for the pupillage recruitment season. We are launching a new pupillage-focused video and will be participating in several pupillage fairs, both virtual and in-person. Our annual Women at the Commercial Bar event is also on the horizon. We look forward to meeting prospective barristers and supporting them on their journey to pupillage. For updates, please follow our website, Instagram page, and 'Keating Pupils' X feed.

In other exciting news, we are launching a new website next month. This new platform aims to reflect Keating Chambers' modern ethos and enhance the accessibility of information for our clients. Additionally, we are preparing for the release of new editions of two major publications: 'Keating on Construction' and 'Keating on Offshore Construction and Marine Engineering Contracts'. These books will offer comprehensive, up-to-date guidance on these key practice areas.

Finally, we would like to take this opportunity to congratulate Rosina Thomas on her promotion to Junior Practice Manager and to celebrate Sarah Sutherland's promotion to Head of Marketing. We also bid a fond farewell to Marie Sparkes, our Director of Business Development and Marketing, who is leaving Keating after nearly a decade of invaluable service. We thank Marie for her significant contributions to Chambers and wish her all the best.

Thank you for reading, and we hope you enjoy this edition of the Keating Legal Update.

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CONCLUSIVE EVIDENCE CLAUSES: COURT COMES TO CONCLUSIVE CONCLUSIONS

By Lucy Garrett KC

The issue of conclusive evidence clauses came before the TCC again in February this year, in *Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd* [2024] EWHC 591 (TCC). This is almost exactly a decade after the decision in *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC). I represented the losing side in both cases, so consider myself well qualified to discuss the points arising.

There were three points in issue in *QFS*:

1. The nature and terms of an agreement reached as to the timing of service of the Referral.

2. The proper construction of the relevant clause.

3. Whether QFS Scaffolding Ltd ("QFS") had abandoned the proceedings so that it could no longer rely on the clause.

I start by describing the facts.

The facts in *QFS*

By late 2022 there had been 10 adjudications between QFS and *Battersea Power Phase 2 Development* Company ("BPS") arising out of the scaffolding subcontract on Battersea Power Station. Adjudications 8, 9 and 10 were ongoing. Notice of Adjudication No. 11 was issued by QFS on 19 December 2022. The dispute referred was the calculation of the Final Sub-Contract Sum, a statement of which had been provided on 21 October 2022. BPS objected to the appointment of Mr Molloy in Adjudication No. 11 on the same day (on the basis that he was already dealing with three adjudications and could not within the rules of natural justice be expected to deal with a fourth). In response that afternoon, QFS proposed a timetable (copied to the adjudicator), the key parts of which were:

"QFS offers the following to seek to alleviate his concerns:

1. QFS will not serve its Referral in Adjudication 11 before Friday 13 January 2023.

...

5. If for some unforeseen or unforeseeable reason QFS is delayed in serving its Referral in Adjudication 11 until after Friday 13 January 2023 then the parties both consent to extend the period within which the Adjudicator shall reach his decision by the same number of days that the service of the Referral is delayed. This consent shall not need further ratification by either party."

This was accepted by BPS on the same day and Mr Molloy proceeded to accept the appointment in Adjudication 11.
BPS issued its Final Payment Notice on 22 December 2022.

QFS subsequently sent emails to the Adjudicator, copied to BPS, on 11 January 2023 and 31 January 2023, in each case postponing service of the Referral. BPS did not respond to the email on 11 January 2023. QFS's email on 31 January stated, *"I shall be writing to you at some point soon in relation to Adjudication 11 timetable but advise that QFS expect it to be another two weeks or so before submission."* BPS objected to this on the same day. It said that it had waived its right to receive the Referral within seven days of the Notice and to raise a jurisdictional challenge provided that the Referral was served no earlier than 13 January 2023. It said the waiver was suspensory and, given that a further two weeks or so was being asked for, this was unacceptable. It gave notice that its waiver would end on 3 February 2023.

QFS objected to BPS's approach, stating that there had been a binding contractual agreement to extend time for the Referral on an open-ended basis, with no long stop, from which BPS could not be resile. As the Judge said at [30], "*That same day, Mr Molloy expressed the view that the agreement to delay service of the Referral was probably effective but said he would not be entirely comfortable with proceeding with the adjudication absent either express confirmation that no point would be taken about the delayed service of the Referral or re-service of the Notice of Adjudication. As Ms Garrett noted, at this point Mr Molloy was unaware that the Final Payment Notice had been issued, because QFS had not told him. Accordingly, his suggestions as to the appropriate course must be understood in that light.*"

QFS did not serve its Referral on 3 February 2023. In fact, it re-referred the dispute by its Notice dated 10 May 2023 and Referral served on 17 May 2023, over 3 months later. Mr Molloy reached his decision in that referral in September 2023.

The first issue between the parties was the nature and terms of the agreement made on 19 December 2022.

Issue 1: Nature and terms of agreement

QFS had argued before the Court that the only relevant term of the agreement was paragraph 1 – the open-ended agreement – and BPS's acceptance of this amounted to a contractually binding agreement. BPS contended that the email had to be read as a whole, so that paragraph 5 qualified paragraph 1 (imposing a fetter on QFS's ability to extend time for an "unforeseen or unforeseeable reason") and that the agreement was not capable of amounting to a binding contract, because there was no intention to create legal relations.

The Judge found at [31] that *"there was an agreed variation to the requirement in [the dispute resolution procedure] whereby, instead of the Referral being served within seven days of the Notice, it would be served on 13 January 2023 or such later date as may be appropriate in the event of an unforeseen or unforeseeable event"* and that this was a binding contractual agreement.

QFS did not suggest whether at the time or at the hearing any unforeseen or unforeseeable event had occurred. Therefore, the Judge held that QFS was in breach of that agreement when it did not serve a Referral on 13 January 2023. BPS's silence could not amount to a further agreement to extend time. He also held at [41] that the three additional days BPS gave for service of the Referral was reasonable. This was particularly so because (a) QFS did not contend at the time that it was not and (b) QFS had provided sworn witness statements in the subsequent Referral which stated that the Referral had in fact been ready to serve on 26 January 2023.

The Judge said at [42], *"QFS did not serve a Referral on 3 February 2023. On this basis, absent any further agreement or waiver (neither of which is suggested), the prosecution of an effective adjudication based on the Notice of Adjudication dated 19 December 2022 was bound to fail because QFS had not served its Referral by the agreed date."*

The next issue was what that factual situation meant in the context of the proper construction of the clause.

Issue 2: Construction of the clause

The Judge gave a useful summary of the applicable legal principles at [43] to [46]. In particular, it was common ground that as a conclusive evidence clause is a form of exclusion of what would otherwise be a party's right to adduce evidence, the *Gilbert Ash*[1] principle (as reiterated in *Triple Point*[2]) applied: namely that in construing a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.

The contract in *QFS*

In *QFS*, the contract was in the form of the JCT Design and Building Sub-Contract (2011 Edition). It was extensively amended but the relevant clause was not and so is in the wording of the standard form as follows:

"Effect of Final Payment Notice

1.8.1 Except as provided in clause 1.8.2 and 1.8.3 (and save in respect of fraud), the Final Payment Notice under clause 4.12.2 shall have effect in any proceedings under or arising out of or in connection with this Sub-Contract (whether by adjudication, arbitration or legal proceedings) as:

1 Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd [1974] AC 690.

2 Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29 at [108] and [109].

[conclusive evidence that various adjustments have been made]

*1.8.2 If **adjudication**, arbitration or other proceedings **are commenced**:-*

.1 by either Party prior to or within 10 days after the date of receipt of the Final Payment Notice;...

...

the Final Payment Notice shall not have the effects specified in clause 1.8.1 in relation to the subject matter of those proceedings pending their conclusion. Upon such conclusion, the effect of the Final Payment Notice shall be subject to the terms of any decision, award or judgment in or settlement of such proceedings." [emphasis added]

The parties' submissions

It was common ground that an adjudication had been validly "commenced" within the meaning of the clause. The dispute was as to whether the proceedings had concluded and if so, what the effect of that was. The parties' positions were summarised by the Judge:

"48. BPS contends that, in the circumstances, the proceedings validly commenced by the Notice of Adjudication dated 19 December 2022 reached a conclusion. No effective adjudication could be pursued once 13 January 2023, alternatively 3 February 2023, had passed given that no unforeseen or unforeseeable reasons for that date being missed have been relied on. Therefore, those proceedings were a nullity. On a proper construction of clause 1.8.2, a "conclusion" was a wide concept that did not require either a decision, award or judgment or a settlement. An adjudication could foreseeably come to a conclusion without either of those things having occurred. So, in circumstances where the proceedings had become a nullity, there had been a conclusion of them. They had come to an end. If there was a conclusion resulting from either a decision, award or judgment or a settlement then the Final Payment Notice would take effect subject thereto but, if there was a conclusion which did not result from either of those things, no change to the Final Payment Notice was required. In that respect, BPS emphasised the word "any" in the penultimate line, because, it said, it recognised that there may not be a decision, award etc. despite the fact that the proceedings have concluded. Taking these two points together, the proceedings had concluded, but the Final Payment Notice remained unchanged as there was no decision or settlement which impacted upon it.

49. QFS submits that clause 1.8.2 does not require a decision, award or judgment in or settlement in order for the first part of the saving provision to be effective. However, QFS contends that proceedings only reach a conclusion once and if there has been either a decision, award or judgment or a settlement. When that occurs, the Final Payment Notice takes effect subject to those matters. In this context the word "any" in clause 1.8.2 simply means any of a decision, award (of any type) or judgment or a settlement. QFS submits that, in the circumstances of this case, the adjudication proceedings were concluded by the decision of Mr Molloy in September 2023"

The Judge held at [52] that the *QFS* clause had two phases. *"Pending the conclusion of the proceedings, which is the first phase, the Final Payment Notice does not have any of the effects specified in clause 1.8.1 "in relation to the subject matter of those proceedings". Then, upon the conclusion of the proceedings, which starts the second phase, the Final Payment Notice is subject to the terms of any decision, award, judgment or settlement."* As the Judge said, this is not a distinction which had been made in the clauses discussed in previous cases.

Decision in *Dovehouse*

QFS submitted that the *QFS* clause was on all fours with the clause in *Dovehouse* and that decision should therefore be applied. In *Dovehouse*, the Court considered a similar, but (as was accepted in *QFS*) not in fact identical, clause as follows:

"Effect of Final Certificate

1.9.1 Except as provided in clauses 1.9.2 and 1.9.3 (and save in respect of fraud) the Final Certificate shall be conclusive evidence

[that various adjustments have been made]

*1.9.2 If any **adjudication**, arbitration or other proceedings **are commenced by either Party before or not later than 28 days after the Final Certificate has been issued,** the Final Certificate shall be conclusive evidence as provided in clause 1.9.1 **save only in respect of the matters to which those proceedings relate."*** [emphasis added]

On the facts in *Dovehouse*, a notice of adjudication had been issued but the wrong nominating body identified, so that the first nominated adjudicator resigned and the claiming party had to re-issue a new notice and thus start new adjudication proceedings.

Carr J (as she then was) held that the giving of a notice of adjudication was sufficient to commence proceedings within the meaning of the clause and that the invalidity of the referral and the resignation

of the adjudicator did not negate the sufficiency of the Notice for the purpose of commencing proceedings. She considered the effect of the Court of Appeal's decision in *Lanes Group*[3] at [93] to [96] and commented:

"96. As set out above, the Court of Appeal eschewed the notion that where adjudication is not pursued (for whatever reason) the right to adjudication is lost forever. It drew no distinction between circumstances where adjudication was thwarted by error on the part of the referring party or for some other reason. It expressly rejected the invitation to alter the result by reference to the cause of the adjudication proceedings not continuing to their end.

97. Objectively construed, the parties would have intended the saving proviso in clause 1.9.2 to be and remain engaged in circumstances where a notice of adjudication that was valid under paragraph 1 of the Scheme inadvertently identified the wrong nominating body for referral purposes. The error would not lead to the loss of the entitlement to the saving proviso in clause 1.9.2 of the Contract. This is what the reasonable person as envisaged in Rainy Sky... would have understood the parties to have intended."

Decision on construction in *QFS*

The Judge in *QFS* referred to this discussion and adopted it at [60]. He went on to reject BPS's submissions. He said at [63] to [72]:

1. An adjudication which became a nullity had not reached a "conclusion" within the meaning of the clause. The clause envisaged a decision or settlement as the relevant conclusion.

2. BPS's case meant there was potential for a harsh outcome (for example where an adjudication became a nullity because the adjudicator acted in breach of natural justice). He rejected that this is what the parties would have intended as sensible businessmen.

3. As in *Dovehouse*, he agreed that there should be no distinction drawn between, "circumstances where the failure in the adjudication process was the result of error by the referring party and it having resulted for some other reason."

4. It therefore did not matter that a second Notice had had to be issued.

5. On the facts, "the proceedings" had concluded with the decision of Mr Molloy in September 2023. *"The reference to adjudication proceedings is generic. In my view, the expression "such proceedings" is broad enough to encompass adjudication proceedings relating to the same dispute as was the subject of the initial notice raised within time in respect of the Final Payment Notice. There is no necessity for the adjudication decision in question to be responsive to the specific Notice of Adjudication by which the adjudication proceedings were commenced. Consistent with the approach in the cases to which I have referred, including Bennett at [17] and Dovehouse at [97], what matters (in line with the expectation of sensible businessmen) is that the decision is responsive to the subject matter of the dispute raised within time in respect of the Final Payment Notice. Overall, I consider that to be a sensible, business-like construction of "such proceedings".*

6. It also did not matter whether the same adjudicator was appointed.

It will be seen that, exactly as in *Dovehouse*, the Court was not interested in technical points and (consistently with the *Gilbert Ash* principle) took pains to construe the clause widely where necessary in order to achieve a practical, commercial, solution which meant that where a party had substantively started an adjudication, it would not be caught by the conclusive evidence clause. The Judge concluded at [75]: *"Standing back, I consider this outcome strikes the right balance between, on the one hand, recognising the benefits of a conclusive evidence provision (see Marc Gilbard at [9]) and, on the other hand, allowing a true value of the works to be undertaken and paid for on the other. BPS had known that the Final Sub-Contract Sum was in dispute even before the Final Payment Notice was issued. In accordance with clause 1.8.2, QFS had challenged the Final Payment Notice within time. From that moment, BPS will have understood that it could not, by that short cut, obviate the need for the parties to investigate the true value of the account. That exercise was duly undertaken by the adjudicator."*

Issue 3: Abandonment

There was however a further issue, that of abandonment. Again consistently with the previous cases, the Judge held that if on the facts QFS had abandoned the proceedings, then the saving proviso would fall away (as it cannot have been the intention of the parties that a party could abuse its ability

3 Lanes Group plc v Galliford Try Infrastructure Ltd [2012] BLR 121, CA.

to commence proceedings by lacking any intention to resolve the dispute pursuant to those proceedings).

As summarised above, QFS had chosen not to issue the Referral on 3 February 2023, despite the fact it had the document ready to go on 26 January and despite being formally on notice that BPS was taking the point that this would mean the Referral was out of time.

There were also some without prejudice negotiations over the relevant period (the parties waived privilege in these during the adjudication). These are described at paragraphs [83] to [101] of the judgment. In summary:

1. There was an exchange on 23 and 24 January as to the desirability of negotiating. BPS said, "*Any discussion would need to be on a without prejudice basis and to avoid doubt, I wouldn't want you to suspend any of the current proceedings or hold off from what you need to do*" and QFS replied "*Understood.*" The Judge held that, "*... Mr Parrish's email cited above should be understood to mean that the proposed without prejudice discussions should not be taken as a reason for not serving the Referral if that was what QFS needed to do. As I have found, QFS did not serve the Referral. It needed to do that if it wanted to maintain the efficacy of the adjudication commenced on 19 December 2022.*"

2. Discussions did not resume until 24 February 2023. There was a meeting on 7 March. There were then some further negotiations starting on 17 March. On 28 March 2023, BPS sent an email warning that none of its rights were waived and stating that its position was that the Referral ought to have been served by 3 February 2023 and specifically stating that "*BPS does not waive the conclusive effects of the Final Payment Notice issued on 22 December 2022 including (without limitation) determination of the Final Sub-Contract Sum.*" QFS replied stating it disagreed. The negotiations ultimately failed and QFS re-issued its Notice on 10 May 2023.

The Judge found at [108] to [119] that:

1. The test for abandonment was an objective one, of whether QFS had abused its timely commencement of proceedings either by lacking or losing any genuine intention to resolve the underlying dispute raised by the Notice. It would not be enough for a party to have a private intention to pursue, if that was not made manifest. "*It could do that by its words or conduct (or both) although I accept there may come a point when words would, in themselves, be insufficient to demonstrate that proceedings had not been abandoned. Ms Garrett argued that it ought not to be possible to keep adjudication proceedings "in limbo" forever, simply by repeating that you intend to pursue them but without taking action. I agree. When it becomes necessary to take action depends on the circumstances.*"

2. It was not enough that QFS consciously, but mistakenly, decided not to serve the Referral on 3 February. It did that because it erroneously believed it did not need to, not because it had abandoned the proceedings.

3. It was not right to approach the question of abandonment by looking at the pursuit of the specific adjudication which was the subject of the timely Notice, for the same reasons as discussed in relation to the meaning of "such proceedings."

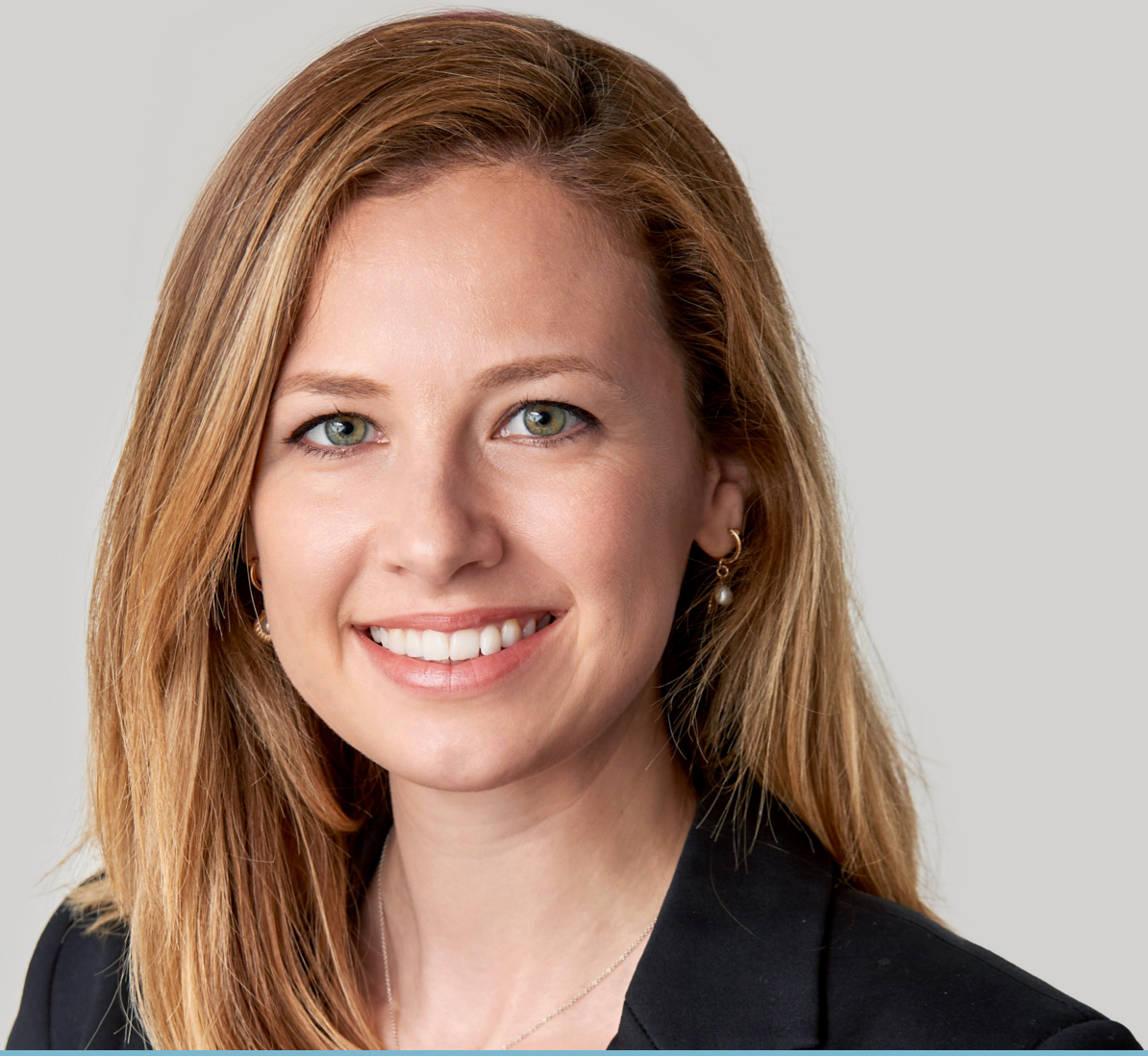
4. It was clear from the without prejudice exchanges both that QFS intended to pursue its dispute, and that the purpose of those discussions was to try to avoid the need for Adjudication 11 which would otherwise be pursued. BPS's warning on 28 March made no difference to the situation.

5. The commercial context was also relevant: at the time of Adjudication 11, the dispute on the final account stood at c. £40m.[4]

It follows that it will be a rare set of circumstances in which a party is found, on the facts, to have abandoned their proceedings – by definition, the fact that such an issue comes before the Court will mean that the proceedings must to some degree have been pursued. However, adjudication continues to generate unpredictable factual situations: it will be interesting to see how permutations of this play out over the next decade.

In the meantime, as long as proceedings are issued within the time limits set by a conclusive evidence clause, it is likely that the party issuing those proceedings has protected itself no matter what happens next.

4 In the event, the adjudicator determined that QFS was due c. £3m.



JENNIE WILD Q&A

Jennie's practice is a balance of international arbitration and domestic litigation. Jennie is ranked as a leading junior by Chambers & Partners and the Legal 500 in Construction, Energy, International Arbitration and the Middle East, and was recently awarded "Construction Junior of the Year" for 2024 at the Legal 500 MENA Awards.

You were recently awarded "Construction Junior of the Year" at the Legal 500 MENA awards, congratulations! You have been working on cases in the Middle East for a long time now, what do you enjoy about the work in that region?

Thank you! I was very fortunate to be brought into some big cases in the region early in my career, and my practice has grown from there. The disputes are often sizable and complicated. As a result, I have had to dive right in to work out what the issues are (often not those first presented) and how best to prove my client's case. I have spent a lot of time with solicitors, the technical experts, factual witnesses – often experts their own right – and digging through documents. After hours spent around a whiteboard and laptop you develop a fantastic technical and factual understanding of a given project (perhaps the airport you recently flew into or the solar plant that powers the lights above you). I have learnt so much and developed strong friendships. Much like the presentation of the disputes, my award is very much the product of a team effort! I really enjoy turning the learning into a concise and persuasive presentation of the client's case: winning a point because you have got the technical arguments right, found the key progress report, fitted the arguments into the legal framework and made it easy for the Tribunal to digest.

I also enjoy learning about the history and culture of the region. On one of my first trips to Dubai, after a long day of conferences, Richard Harding KC suggested that I made an evening trip to the Al Fahidi Fort. I confess, I had room service and an early night in mind, but I made the trip and was so glad I did. It became the start of many more – the Museum of Islamic Art in Doha is amongst my favourites. The fort visit sparked an interest in the region, which I believe has furthered my understanding of the local laws and principles too.

Before your career at the Bar, you spent time in Melbourne, including as an associate to the Honourable Justice Hargrave of the Supreme Court of Victoria. Can you tell us about that experience / what did you learn in that role that has helped you as a barrister?

I added a year to my undergraduate law degree to study at Melbourne University and gained a "with" (Law with Australian Law LLB Hons). After graduating, I returned to Melbourne for three years and gained legal experience alongside the tan: working for the Australian Wheat Board on the fallout from the Oil-for-Food scandal in Iraq, at the Victorian Government Solicitor's Office (mainly working on the Royal Bushfire Commission) and then for Hargrave J. As an associate, my tasks

included sitting in on hearings, being a sounding board for the judge before and after court and helping him to write judgments. Facing outwards in the court room is quite a different experience to being an advocate. I learnt how important it was to consider the person you are directing your submissions to and the need to objectively consider how your opponent's arguments might be received. Often parties would, effectively, throw material at the judge and expect him to unravel it all to work out the issues and find an answer, which was not effective advocacy. I believe I also developed a strong poker face!

What guidance would you offer law students aspiring for a career at the commercial Bar?

In recent years I have sat on our Pupillage Committee and Fair Recruitment Committee (established to consider and reform our recruitment practices in an attempt to be more inclusive, diverse and, hopefully, fair).

My first tip is: do your research and start it early. I suggest students look at the CVs of, say, the 10 most junior members of a chambers they might be interested in. Try to form a view as to the type of qualifications and skills they had when applying and consider whether you match up. If not, what you can do about it? Do you need to study harder to bring your grades up? Do you need to volunteer at your local law centre this summer to gain more experience? Should you consider working for a year after university to gain legal skills and knowledge? However, chambers are not looking for clones. The best barristers do not all come from the same mould. The task is to identify qualifications and skills rather than institutions and specific experiences.

Secondly, students should consider how they might be unique. Once you have acquired the basic qualifications and skills, try to think about what makes you stand out. Keating Chambers offers a first interview to about 50 candidates and a second interview to about 12. They all will have satisfied the basics. For example, have you gained impressive marks whilst holding down three jobs? Have you played sport to a high level? Did you run a charity event for a local school? Or have you taken a hobby to the next level? But most importantly: what skills do such experiences evidence (see below)?

Finally, at every stage of the process, I suggest students have regard to the skills and attributes chambers are looking for and explain how they meet a given criterion, rather than simply listing qualifications and experiences. Don't leave markers guessing how your cycling trip across Europe evidences eg an ability to work in teams, or resilience etc. Rather, explain why you believe you have demonstrated the particular skill or attribute. Keating Chambers publishes a lot of information about its selection criteria and mark schemes to assist.

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

I really enjoy yoga. I find it a good way to leave behind the stresses of the day. I also enjoy art – going to galleries and working on my own pieces. However, it is very hard to find time for it these days, perhaps primarily due to my third interest/passion, which is the most important by far: my two gorgeous children!

A New Dawn: Infrastructure Investment 2024

By Sean Wilken KC
Keating Chambers
&
Alison Fagan
DLA Piper

It is 5 July 2024. No doubt many are feeling somewhat tired and perhaps a little emotional. For those who are involved in or concerned about infrastructure, however, this morning may represent a significant change in infrastructure policy in the UK opening the door for investment and new projects.

In the Spring of 2017, the Conservative Government put future PFI projects on hold. By 2020, it was clear that there would be no future PFI or PPP type projects in the pipeline. By 2023, that was proven to be correct.

In the autumn of 2023, the Labour Party announced the formation of the Infrastructure Council and more recently they have proposed the introduction of the National Infrastructure and Service Transformation Authority (NISTA) combining the National Infrastructure Commission and the Infrastructure and Projects Authority. The Labour Party has also announced that the current model of infrastructure projects will change.[1]

The Labour Party, it seems, will be serious about infrastructure. But what will that look like?

It is known that the plan is to have a multi-billion plan for investment – this is per the Manifesto and press reporting.[2] The question is as to the format of the projects themselves and the scale and scope of any cash pipeline.

In terms of project structure, it is reasonable to expect that the Mutual Investment Model ("MIM"), which has been used in Wales, will form the basis of any discussion and is ripe for adoption and evolution.[3] MIM has a different corporate structure to PFI. Unlike PFI, where the structure is: Authority – Project Company (backed by the Funders) – Building Company/Operating Company; under MIM (on the Welsh model) the State is permitted to have a minority stake in the Holding Company and it is the Holding Company that is the sole shareholder in the Project Company. Thus, equity and return flows through the Holding Company whilst the Project Company runs the project and the contracts with Building and Operator Companies which are, as per later PFI structures, autonomous.[4]

There are two different streams here – commercial and legal.

Commercially, the obstacles are as follows:

- In terms of the scope and scale of the financial investment to interest the market it will need to be significant.
- In terms of the Public Sector, the Public Sector will want assurances that any infrastructure built will deliver value for money and will be structured so as to allow dynamic change and evolution to accommodate, amongst other things, technological change.
- Funders will need increased confidence in the consistent and clear application of Government policy.
- Building Contractors will need to know that they have a substantial programme into which they will sink their resources.
- FM Contractors will need to have clarity of risk/ reward and understand the delivery model so as to evolve their business structures.

Legally, the best intentions will not solve the debates that currently exist in the industry but all stakeholders will be keen to ensure that current issues with the PFI model - construction defects, a lack of active operational contract management on some projects, reporting complexities,[5] handback uncertainty[6] and early termination risk are not replicated in any future model.

The good news is that if the Labour Party, now in government, is serious about infrastructure, there is the acquired experience in the market and elsewhere on which it can rely.

1 See https://www.ft.com/content/4f8337e9-e0f4-4d5a-a320-eee1870ef2d6
2 See https://www.bloomberg.com/news/articles/2024-06-27/labour-expects-billions-of-private-investment-after-uk-election
3 See https://www.gov.wales/mutual-investment-model-infrastructure-investment
4 In early PFI, there could be an overlap between the Funders, Project Companies and Building/Operating Companies – this obviously centralised risk.
5 See Wilken Keating Chambers Legal Update: https://www.keatingchambers.com/wp-content/uploads/2023/03/PFI-Claims-Sean-Wilken-KC.pdf
6 See Wilken Keating Chambers Legal Update: https://www.keatingchambers.com/wp-content/uploads/2020/01/SDW-PFI.pdf
7 See Wilken Keating Chambers Legal Update: https://www.keatingchambers.com/wp-content/uploads/2024/01/Sean-Wilken-KC-PFI.pdf

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Outotec (USA) Inc & Anor v MW High Tech Projects UK Limited [2024] EWCA Civ 844

The Respondent was engaged as the main contractor in the construction of a power plant. It engaged the First Appellant as a sub-contractor, with the Second Appellant, the parent company, providing a guarantee to the Respondent.

Following a delay in the construction works, the Respondent's main contract was terminated by the employer. Proceedings were commenced by the employer against the Respondent in respect of the delays and the consequences of termination. The Respondent defended these proceedings and brought a Part 20 claim against the First Appellant. Adverse findings were made against the Respondent in this action. In particular, it was found that the employer had been entitled to terminate the main contract.

Following these findings, the Respondent commenced proceedings against the Appellants claiming the sum of £179m and alleging that it had been induced to enter into the main contract and the sub-contract with the First Appellant on the basis of fraudulent or negligent misrepresentations. The Appellants applied for strike out on the grounds that these proceedings were an abuse of process and ought to have been raised in the earlier proceedings, in breach of the guidelines set out by the Court of Appeal in the case of *Aldi Stores Limited v WSP Group plc*.

The High Court refused the application because the position between the Respondent and Appellants during the pre-contractual stages of the agreement (which was relevant to the question of misrepresentation) had not been in issue in the main action and did not therefore involve the re-litigation of these issues. While the Judge decided that the Respondent had breached the *Aldi* guidelines in failing to raise these issues in the earlier proceedings, this failure did not merit strike out. The Appellants appealed.

The Appeal was dismissed. It was held that a breach of the *Aldi* guidelines did not automatically justify the striking out of a new claim as an abuse of process. The *Aldi* guidelines are only one factor in a broad, merits-based evaluation. It would be rare for a court to find an abuse in the absence of factors such as vexation, harassment, or oppression.

Adrian Williamson KC, Paul Bury and John Steel represented the Appellants.

Augusta 2008 LLP (formerly Simply Construct (UK) LLP) v Abbey Healthcare (Mill Hill) Ltd [2024] UKSC 23

The Supreme Court considered: (1) statutory interpretation, i.e. the meaning of s.104 and Part II of the Housing Grants, Construction and Regeneration Act 1996 ('the Act); and (2) contractual interpretation, i.e. whether the collateral warranty in this case, executed long after the execution of works, was a construction contract within the meaning of s.104 and Part II of the Act.

Overturning the decision of the Court of Appeal (per Peter Jackson and Coulson LJJ, Stuart-Smith LJ dissenting), the Supreme Court held that the warranty was not within the scope of Part II of the Act. The Court overruled *Parkwood Leisure v Laing O'Rourke* [2013] BLR 589, and held:

- A collateral warranty will be an agreement "for … the carrying out of construction operations" if it is an agreement by which the contractor undertakes a contractual obligation to the beneficiary to carry out construction operations which is separate and distinct from the contractor's obligation to do so under the building contract.
- A collateral warranty where the contractor is merely warranting its performance of obligations owed to the employer under the building contract will not be an agreement "for" the carrying out of construction operations.

Alexander Nissen KC and Tom Owen KC represented the Respondent.

CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities [2024] EWCA Civ 730

The Claimant, a property developer, appealed against the refusal of its judicial review application, which sought to overturn a decision by the Secretary of State's planning inspector. The inspector declined to discharge certain conditions attached to a planning permission for a mixed-use development in Somerset.

The Court of Appeal dismissed the appeal.

On their true interpretation, the Conservation of Habitats and Species Regulations 2017 reg.63 and reg.70 allowed for an appropriate assessment to be undertaken when the discharge of conditions was being considered in a multi-stage process. Indeed, where the provisions for appropriate assessment were engaged, reg.63 and reg.70 had the effect of requiring such an assessment to be carried out before development was authorised to proceed by the implementing decision. Where an appropriate assessment was required before an implementing decision was made, the assessment had to be of the whole development whose implementation was authorised by that decision, not just of the matters affected by the conditions for discharge.

Lord Banner KC represented the Appellant.

Lancashire CC v Brookhouse Group Ltd [2024] EWCA Civ 717

A local authority appealed against the refusal of its application to strike out proceedings brought against it under the

Public Contracts Regulations 2015 by the Respondent.

The Court of Appeal dismissed the appeal.

The 30-day time limit under reg.93(5) of the Public Contracts Regulations 2015 ('PCR') for seeking a declaration of ineffectiveness under reg.99, running from an interested economic operator being given the 'relevant reasons' it had been unsuccessful, did not apply where the declaration was sought on the ground that no contract notice had been published despite one having been required. In such a case, the limitation period was six months from the contract being entered into, unless the contracting authority issued a contract award notice, where the period is 30 days from when the contract was published.

Rhodri Williams KC and Tom Walker represented the Appellant.

A&V Building Solutions Ltd v J&B Hopkins Ltd [2024] EWHC 1510 (TCC)

This case is the judgment following trial of the disputes between the parties, after four prior judgments concerning enforcement of an adjudicator's award and interlocutory matters. The issue arose from the taking of a final account under a construction sub-contract for plumbing works carried out by A&V at a new student accommodation development, known as the Moulsecoomb Campus, for the University of Brighton.

The Court considered in detail the factual circumstances, which included issues of delay, whose responsibility that was, lack of proper notice for work and also allegations of inferior quality work.

The TCC ruled that J&B committed repudiatory breach of contract by preventing A&V from completing plumbing works at the Moulsecoomb Campus project. As a result, A&V was entitled to accept the repudiation and cease work.

James Frampton represented the Defendant.

R (on the application of Birmingham City Council) v Secretary of State for Transport [2024] EWHC 1487 (Admin)

The Claimant local authority had entered into an agreement with a contractor for a 25-year project for the design, build, financing and maintenance of a highway network and related infrastructure. They applied for judicial review of the Defendant Secretary of State's decision not to support the revised highways maintenance private finance initiative (PFI) arrangement proposed by the local authority.

The Court granted their application. It was held that the terms of a letter from the Transport Secretary to a local authority confirming that PFI credits had been issued towards the capital costs of a highways project, along with the Local Government Support PFI Project Guide, had not created a legitimate expectation that, if the PFI contract was terminated or varied, the government would only withdraw credits in exceptional circumstances. However, it also held that withdrawing the credits without offering the local authority a further opportunity to make representations was procedurally unfair.

Sarah Hannaford KC represented the Defendant.

ISG Retail Limited v FK Construction Limited [2024] EWHC 878 (TCC)

The Claimant, ISG, sought declarations that FK had failed to comply with an alleged condition precedent to its entitlement to loss and expense in order to overturn part of an adjudicator's decision.

The Court decided that issues concerning the validity of notices of delaying events and issues of waiver and estoppel in connection with compliance with conditions precedent were likely to involve substantial disputes of fact and therefore entirely unsuitable for determination in Part 8 proceedings. It was also argued that when a dispute was taken to litigation for final determination, it ought to be the whole of the dispute originally adjudicated. The Court (obiter) rejected that argument. Permission to Appeal was not sought at handing down.

Simon Hargreaves KC and James Frampton represented the Defendants.

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC)

The Court rejected a contractor's argument that a final payment notice was not subject to any financial adjustment due to a conclusive evidence provision in a JCT sub-contract, granting summary judgment to the sub-contractor to enforce an adjudicator's decision determining the true value of the final sub-contract sum. [See article at page 4]

Lucy Garrett KC represented the Part 8 Claimant/Part 7 Defendant.

Bellway Homes Ltd v Surgo Construction Limited [2024] EWHC 269 (TCC)

In proceedings brought by Bellway to enforce an adjudicator's decision, the Court held that the contractual adjudication provisions did not fall foul of the requirements of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") despite the provisions allowing for: (i) the service of the Referral "as soon as reasonably possible after" the Notice of Adjudication rather than within 7 days, and (ii) the appointment of an adjudicator from Bellway's panel of adjudicators.

The Court went on to find that even though the adjudicator had been appointed under the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") instead of the contractual adjudication provisions which Bellway would have been entitled to refer the dispute under, it made no material difference in this case whether the referral was under the Scheme or contractual adjudication provisions and there was therefore no defence to enforcement of the decision.

Brenna Conroy represented the Defendant.

Triathlon Homes LLP v Stratford Village Development Partnership & Others [2024] UKFTT 26 (PC)

This was the first major case in which the First Tier Tribunal ("FTT") (made up of the President of the Lands Chamber, Edwin Johnson J, and its Deputy President, Martin Rodger KC) had to consider applications for a remediation contribution order ("RCO") under section 124 of the Building Safety Act 2022 ("the BSA"). The applications concerned the cost of rectifying fire safety defects in five tower blocks in the former Olympic Village in Stratford, London ("the Blocks"), one application per Block. They were made by Triathlon Homes LLP ("Triathlon"), who is the long leaseholder of all the social and affordable housing in the Blocks. The Blocks had been developed by the First Respondent ("SVDP"), which is a limited partnership whose three partners are ultimately owned (through subsidiaries) by the Second Respondent ("Get Living").

There was no dispute between the parties that the "jurisdictional" or "gateway" requirements which need to be met before an RCO can be made had been satisfied. The principal issue between the parties was whether it was "just and equitable" to make the order sought in respect of the remedial work that is currently being carried out to the Blocks. In reaching it's Decision, the Tribunal considered a number of common arguments about the extent of the jurisdiction and the just and equitable test.

Alexander Nissen KC represented the Applicant. Jonathan Selby KC represented the First and Second Respondents.

TOM OWEN KC

Q&A

Tom Owen KC was the youngest Silk ever to be appointed in modern times. Tom commands a formidable practice leading heavy and complex construction, energy, engineering, and professional negligence disputes in the High Court, Court of Appeal, Supreme Court, and in international arbitration.

Tom was called in 2011, appointed as a Recorder in 2022, and took Silk in 2024.

He is described as “an outstanding advocate, fierce and dedicated when fighting your corner” (Legal 500), and “a tenacious advocate and a trusted adviser” (Chambers & Partners). Prior to taking Silk, Tom was Construction and Energy Junior of the Year (Legal 500 and Chambers & Partners), and recognised in ‘Stars at the Bar’ (Legal Week) and ‘The Hot 100’ (The Lawyer).

Can you tell us about your road to becoming King's Counsel?

I had the fortune of an excellent education, the support and stability of my parents, my brothers, my loving wife and children, first-class clerking and loyal clients.

I attended Loughborough Grammar School from 2000-07 and then read law at the University of Cambridge, Downing College from 2007-10. I was called to the Bar by Middle Temple in 2011 and undertook my pupillage at Keating. My pupil supervisors were Gideon Scott Holland, Justin Mort KC, Jonathan Lee KC, and Jessica Stephens KC. I learned such a lot from each of them.

Starting out in 2012 I took every brief and opportunity that came my way. I was interested particularly in leading cases in my own right and appearing as the advocate. I prioritised this work. Sometimes it was not particularly glamorous or well-remunerated, but every trial, every hearing, every difficult brief was valuable experience. I developed a reputation for trial work, and soon was undertaking multi-day trials on a regular basis. These were typically specialist civil cases in construction, energy and professional negligence.

This often led to work outside of my comfort zone, and even more opportunities for advocacy. I recall fondly a criminal trial, defending a national housebuilder from a health and safety prosecution. After a hard-fought trial, my client was acquitted. The directors punched the air with an audible "yes!" and hugged me as the verdict was read out – a timely reminder of what our work means, and the importance of justice prevailing.

By 5 years' Call I was regularly conducting trials and substantial hearings in my own right in the High Court. My cases began to be reported.

By 10 years' Call I was routinely leading others in substantial cases against experienced Silks.

At 12 years' Call I applied for Silk and was successful in the competition. It was an honour to be appointed King's Counsel. I owe it all to my Clerks, clients and family. Their belief, support and trust is invaluable and sustaining. Along the way, like many others at the Bar, I have mentored, and continue to mentor aspiring barristers to join and succeed at the Bar. For me, this is the most rewarding of roles in our profession.

You are known particularly for your cross-examination and trial work, what are the key points for success?

Cross-examination is an art. I cannot improve upon the foreword of the Rt. Hon. Sir Travers Humphreys to "Notable Cross-Examinations" by E.W. Fordham (1953). As a student on the Bar Course, I read various cross-examinations by Rufus Isaacs KC, Edward Carson KC, Patrick Hastings KC,

Charles Russell KC, and Edward Clarke KC. Invariably they asked short, closed questions. They dealt with what the witness said, examining the evidence further where appropriate; sometimes robustly. I was fortunate in my early years to observe others cross-examine lay and expert witnesses with great skill and control: Paul Darling OBE KC, Richard Fernyhough KC, Marcus Taverner KC, Steven Walker KC, Jessica Stephens KC, and Justin Mort KC. They deployed the same techniques.

I seek to utilise the techniques which I have observed in those who are truly excellent cross-examiners. In my experience, the key points are: (1) prepare meticulously to ensure knowledge (by heart) of the documents, the chronology and the hearing bundle; (2) listen carefully and precisely to what the witness says; (3) lead and control the process of examining and testing the evidence; (4) put the client's case fearlessly and with clarity; (5) do not let go when you are onto something!

Different witnesses will require different styles of questioning. More reluctant or reserved witnesses sometimes benefit from being given space in non-leading questions to open up. This is a matter of experience and feel. Disputes in our fields tend, in my experience, to be won or lost on the evidence, and invariably the cross-examination and the documents.

"I see it as my professional duty to serve my solicitors and lay clients immediately with the highest quality advice, leadership and advocacy."

Does appellate advocacy differ to trial work?

Yes, but it requires the same underlying rigour and preparation as trial work. I have appeared in the Court of Appeal on five occasions, and once in the Supreme Court. Each time at 10.25am, I experience the same energising feeling of anticipation, excitement and reverence. In my formative years at the Bar I had the privilege of observing others excel in the appellate arena: Fiona Sinclair KC, John Marrin KC, Alexander Nissen KC, Adrian Williamson KC, and Simon Hughes KC. They always displayed tenacity and never shied away from the difficult aspects of the appeal. They answered the questions from the bench head-on and clearly. I seek to do the same. Whilst that has served me well, it does not always guarantee success – I came second in the Supreme Court recently!

You come recommended by your instructing solicitors for your outstanding advocacy. What other key skills do you think are most valuable to clients?

Total commitment to the case and the highest quality of service are key. I treat every case with the utmost diligence, respect and care. It is a tremendous responsibility and privilege to serve others as their advocate. It is invariably high stakes: substantial sums involved and/or the client's business, reputation, and livelihood on the line.

Nothing can be done in half measures. I see it as my professional duty to serve my solicitors and lay clients immediately with the highest quality advice, leadership and advocacy. It is all-consuming, and that is precisely what I would expect if it were my dispute.

As a busy Silk, and when not in trial, is there such a thing as a typical day and, if so, what does that look like for you?

I wake up early and exercise. Typically I cover 5 miles each morning and strength train. It is a physically demanding profession so I seek to maintain high levels of fitness, physical strength and endurance. I work. Then Livi and I get the children up and ready, and take them to school. I tend to have consultations most days throughout the day, often on different cases. After reading to my children and putting them to bed, I work late into the evenings. It then starts again! I love my work and my family – I am incredibly lucky.

You have been sitting as a Recorder since 2022, how has this impacted the way in which you approach cases as counsel?

It is a significant privilege to sit as a Recorder. It has reinforced for me the role that good advocates play in the operation of an efficient civil justice system; and the importance and significance that each and every case has for those involved.

As a member of the pupillage committee at Keating Chambers, what advice would you give to someone who would like to become a barrister?

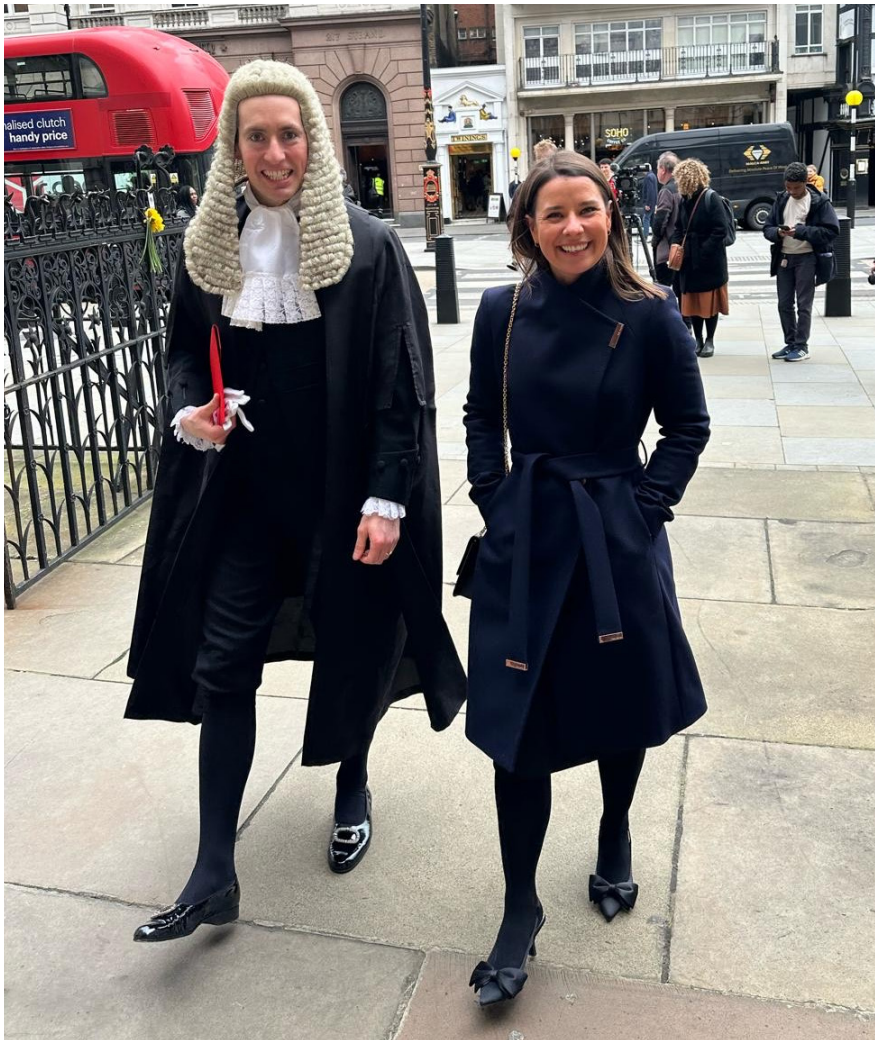
You can do this! Try to obtain the best academic grades you can. However, these do not define you. Intellectual ability and the skills required as an advocate go far beyond grades, important though they are.

In application forms: try to express yourself clearly and succinctly. Use short sentences. Use numbered paragraphs. Answer the question first, and then explain your reasoning.

In written assessments: do the same. Focus closely and accurately on the facts and the evidence when applying the law.

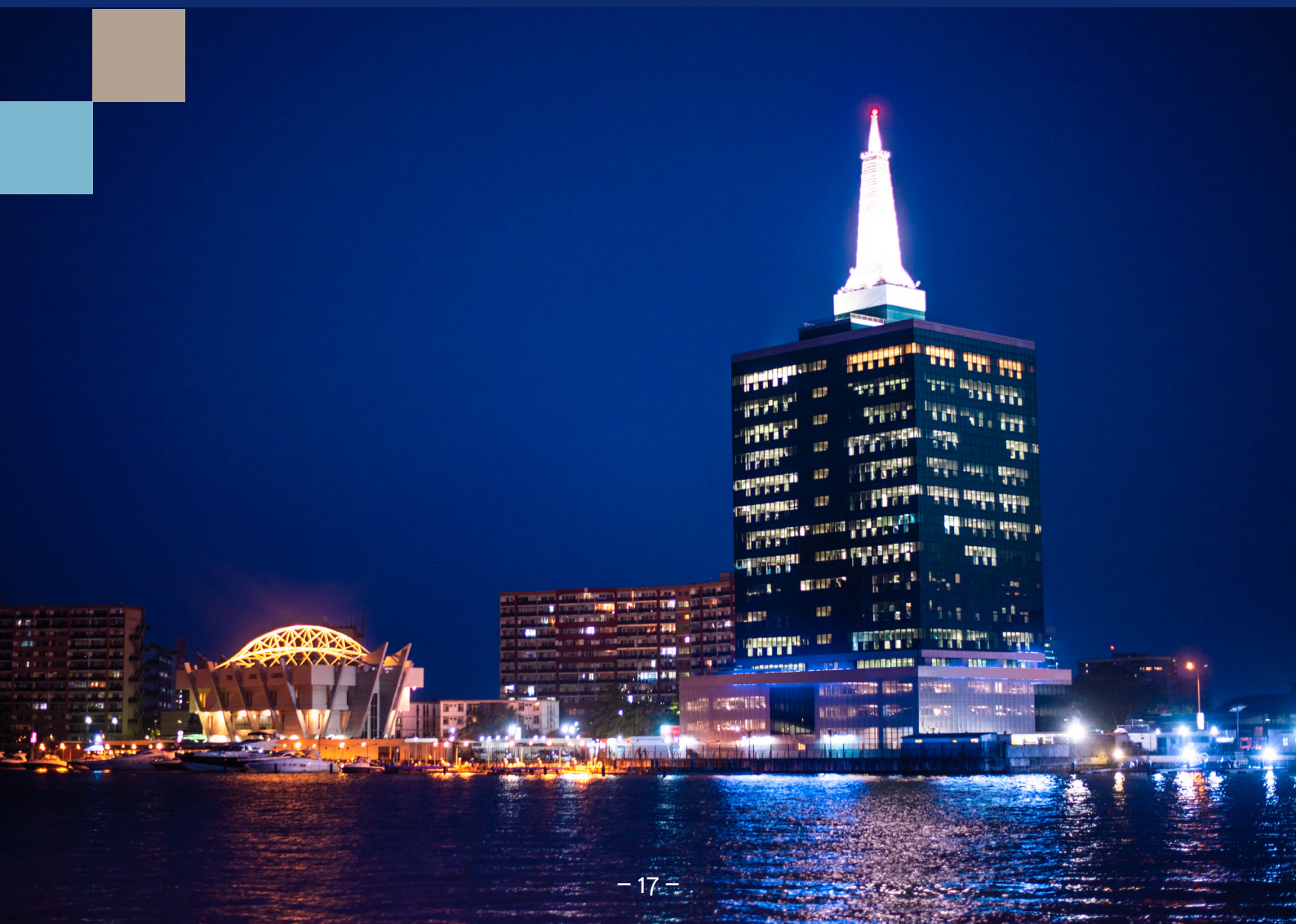
In interviews: be positive. Engage with the interviewers. Answer all questions directly. Be yourself.

To reiterate: you can do this!



ARBITRATION AND MEDIATION ACT 2023 – NIGERIA

By Abdul Jinadu



Nigeria has a large and very active arbitral community. In a development widely welcomed by that community, in the final days of the previous administration on 26 May 2023, the Arbitration and Mediation Bill 2022 received Presidential Assent and in so doing it morphed into the Arbitration and Mediation Act 2023 ('AMA'), which repealed the Arbitration and Conciliation Act 1988 ('ACA'). The Chartered Institute of Arbitrators of Nigeria ('CIArb') has described the AMA as a significant development and capable of shaping the future of arbitration in Nigeria.[1] The AMA was the result of several years of tireless efforts by many leading members of the Nigerian arbitral community who experienced and dealt with the deficiencies in the previous legislation in their everyday practice.

The Explanatory Memorandum to the AMA describes its purpose as being to "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation". It also makes applicable the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NY Convention') to any award in Nigeria or in any contracting state arising out of commercial arbitration.

Constitutional context

Both federal and state governments have legislative competence over matters allocated by the Nigerian Constitution. Under Part II of the Second Schedule of the Constitution, the federal government has exclusive legislative power over matters in the exclusive list. Both the federal and state governments have legislative power over matters in the concurrent list. If a matter is not contained in either list, it is said to be on the 'residual list', meaning the state government has exclusive legislative competence over it.[2]

In 2005, the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria concluded that: 'The Federal Government has the constitutional power and competence to legislate on arbitration and conciliation but only in respect of trade and commerce which are international or inter-state.'[3] As a result, Lagos and Delta State have passed their own Arbitration Laws (in 2009 and 2022, respectively).

Position under the old law

The ACA was promulgated under military rule and replaced the Arbitration Ordinance of 1914, which was based on the English Arbitration Act 1889. Unlike the Ordinance, the ACA applied to both domestic and international commercial arbitration. The ACA was largely based on the 1985 UNCITRAL Model Law on International Commercial Arbitration ('Model Law'): 22 provisions were identical; 16 were similar but modified; and 10 were unrelated.

The ACA contained no provisions supporting multi-party arbitration. Further, the ACA mandated that ACA Rules must apply for all arbitration conducted under it, preventing parties from selecting other institutional bodies and contravening party autonomy. In addition, the ACA lacked provision of court-ordered interim relief (such as injunctions) supporting arbitration. This was a marked absence especially as such relief is provided for under both the UNCITRAL Model Law and section 44(2) of the English Arbitration Act 1998 ('AA 1998').

The Nigerian Supreme Court in NV Scheep v MV S Araz[4] held that, to be able to grant interim orders such as injunctions, the substantive dispute must be before the court at the same time. The exception is statutory intervention providing for such interim relief, which the ACA did not do.

Reform: the AMA 2023

The AMA applies to both international and domestic arbitration proceedings in Nigeria. The main changes include: an obligation on the court to enforce arbitration agreements ('AA'); default rule of one arbitrator; default arbitrator immunity except in cases of bad faith; interim relief pending tribunal constitution; consolidation of arbitral proceedings where different parties are involved; joinder of parties bound by the AA; an Award Review Tribunal; third-party funding; changes to the limitation period; emergency arbitrations; a detailed procedure for dealing with arbitration related matters in court and on appeal; and a detailed schedule of rules applicable to domestic and international mediation.

A clear policy initiative underpins the Act: to support the development of Nigeria as a chosen venue and seat for arbitral disputes. The Act aims to address a number of issues which have developed over the years in the interpretation and application of the old law which were proving to be a significant hinderance to the use and development of arbitration in Nigeria and to address gaps in the old legalisation which were used by parties in the past to frustrate the intent and purpose of arbitral agreements.

Power to stay proceedings

Section 4(1) of the ACA provided that, upon the request of any of the parties, the court shall order a stay of proceedings and refer the parties to arbitration before the parties' submission of their first statements on the substance of the dispute. However, section 5(1) provided that if any party to an arbitration agreement commences an action in any court with respect to a matter that is the subject of the agreement, any party to the agreement may apply to the court to stay the proceedings at any time after appearing but before delivering any pleadings or taking other steps in the proceedings. The AMA resolves these contradictory provisions in section 5(1), which makes it mandatory for a court to grant an application for stay of proceedings pending arbitration, unless the arbitration agreement is found to be void, inoperative, or incapable of being performed. The referral should occur before the parties' first statement on the dispute's substance.

The AMA also overrides UBA Plc v Trident Consulting Ltd[5], where the Supreme Court held that there is a burden on the party applying for a stay to demonstrate unequivocally by documentary evidence that it is willing to arbitrate.

Emergency arbitrators

AMA introduces emergency arbitrators in section 16, which provides that a party that requires emergency relief may, concurrent with or following the filing of a request for a dispute to be referred to arbitration but before the constitution of the tribunal, submit an application for an emergency arbitrator to any arbitral institution designated by the parties, or failing such designation, to the court. If accepted, an emergency arbitrator is to be appointed within two business days of the application.

Appointments of emergency arbitrators can be challenged within three days of notice on the respondent of the appointment, or of the date when the party was informed of the circumstances on which the challenge is based, where that is after the date of notice.[6]

Article 27 of the First Schedule of the AMA prescribes the procedure for emergency relief proceedings. Further, applications for emergency relief shall not prevent a party seeking urgent interim measures from a court under section 19 of the AMA.[7]

Interim measures

The ACA did not provide expressly for the grant, recognition or enforcement of interim

1 CIArb, https://punchng.com/assent-to-arbitration-mediation-bill-will-boost-dispute-resolution-ciarb/, accessed on 31st August 2023

2 Constitution of the Federal Republic of Nigeria 1999, ss 6(6), (7).

3 The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, 'Amended Report' (2005) 13.

4 (2000) 15 NWLR (Pt 691) 622

5 (2023) 14 NWLR (Pt 1903) 95

6 Section 17 of the AMA.

7 Section 16(10) of the AMA.

measures by a court. Rather, the power to grant interim relief was vested solely in the arbitral tribunal. Section 19 of the AMA extends the scope of this power and allows a court to issue protective interim measures for, and in relation to, arbitration proceedings that are seated in Nigeria or another country in relation to court proceedings. The court must exercise its power under this provision within 15 days of any application.[8]

Interim measures are enforceable as an order of court irrespective of the country it was issued.[9] The court may order the requesting party to provide appropriate security.[10]

Preliminary orders

Section 22 of the AMA provides that, unless agreed otherwise, a party may, without notice, apply to the tribunal for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

Section 23 provides that the tribunal shall give notice of the preliminary order and request for interim measures, as well as all communications (if any), both written and oral, between the applicant and the tribunal relating to the applications, immediately after it has determined of preliminary order.

Preliminary orders expire after 20 days from the date of issue. The tribunal may modify or adopt the preliminary order by an interim measure after the respondent has been given notice and an opportunity to present its case.[11]

Setting aside awards

The ACA enabled parties to apply to set aside awards on grounds of misconduct on the arbitrator's part or where the proceedings/ award had been improperly procured.

Guidance in the case law as to what was considered improper encouraged a multitude of allegations against arbitrators. The AMA creates exhaustive limitations on grounds to set aside. Section 55(3) provides that an award can only be set aside if the applicant provides proof that:

(a) A party to the AA was under some legal incapacity;

(b) The dispute's subject matter cannot be settled by arbitration under Nigerian law or is against Nigerian public policy;

(c) The AA is not valid under the law that applies to it/laws of Nigeria;

(d) The applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not able to present its case;

(e) The award decides matters beyond the scope of the reference to arbitration; or

(f) The composition of the tribunal or its procedure was not according to the parties' agreement, unless the agreement was in conflict with a mandatory provision of the AMA or, in the absence of the parties' agreement, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the AMA.

Section 56 creates an Award Review Tribunal ('ART'), providing that, notwithstanding section 55, the parties may provide in their AA that an application to review an arbitral award on any of the grounds set out in section 55(3) above shall be made to an ART.

A party challenging an award on section 55(3) grounds shall within three months serve on the other party a written communication indicating its intent to do so. The number of arbitrators comprising the ART will be the same as that in the arbitral tribunal unless otherwise agreed: section 56(4)(a).

If the ART affirms an award, the court can only set it aside if it finds matters dealt with by the award are not arbitrable or contrary to public policy.

Consolidation of proceedings

Section 39 introduces consolidation of arbitral proceedings and concurrent hearings, subject of course to the agreement of all parties to such an order. This includes hearings with different parties.

Section 40 introduces a power of the tribunal to allow additional parties to be joined to the arbitration, provided that, prima facie, the additional party is bound by the AA. The tribunal's decision to order joinder is without prejudice to its power to later decide any question on its jurisdiction arising from such decision: section 40(2).

Third party funding

Section 61 abolished the torts of maintenance and champerty in relation to third party funding of arbitration. This applies to arbitrations seated in Nigeria and to arbitration-related proceedings in court.

Section 62 provides that, if a third party funding agreement is made, the party benefiting from the agreement shall provide written notice containing the name and address of the funder to the counterparties. The notice should be made on or before the start of the arbitration, or after the start of the arbitration as soon as the funding agreement is made.

The costs of securing third-party funding is a cost of the arbitration which the tribunal will allocate in its final award under section 50(1).

Limitation period for enforcement

The ACA did not provide for the limitation period for the enforcement of awards in Nigeria, but the limitation laws of various states made provisions for the application of those laws to arbitration in the same way they would to court actions.

The crucial issue is whether time begins to run (for the purposes of enforcing the award) from the date of the initial breach of the underlying contract or from the date of publication of the award. The Nigerian Supreme Court held in City Engineering v Federal Housing Authority (City Engineering)[12] that time begins to run from the date of breach of the underlying agreement between the parties, not from the making of the award.

This meant that, unless arbitration proceedings had been concluded and an award issued within the limitation period that applies to the cause of action, the resulting award may be caught by the limitation period and become unenforceable.

The changes introduced by the AMA were intended to ameliorate this effect. Section 34 provides as follows:

(a) Applicable limitation statutes shall apply to arbitral proceedings the same as they do to court proceedings;

(b) In computing the time prescribed by a limitation statute for the commencement of proceedings (court or arbitral) in respect of a dispute that was the subject matter of:

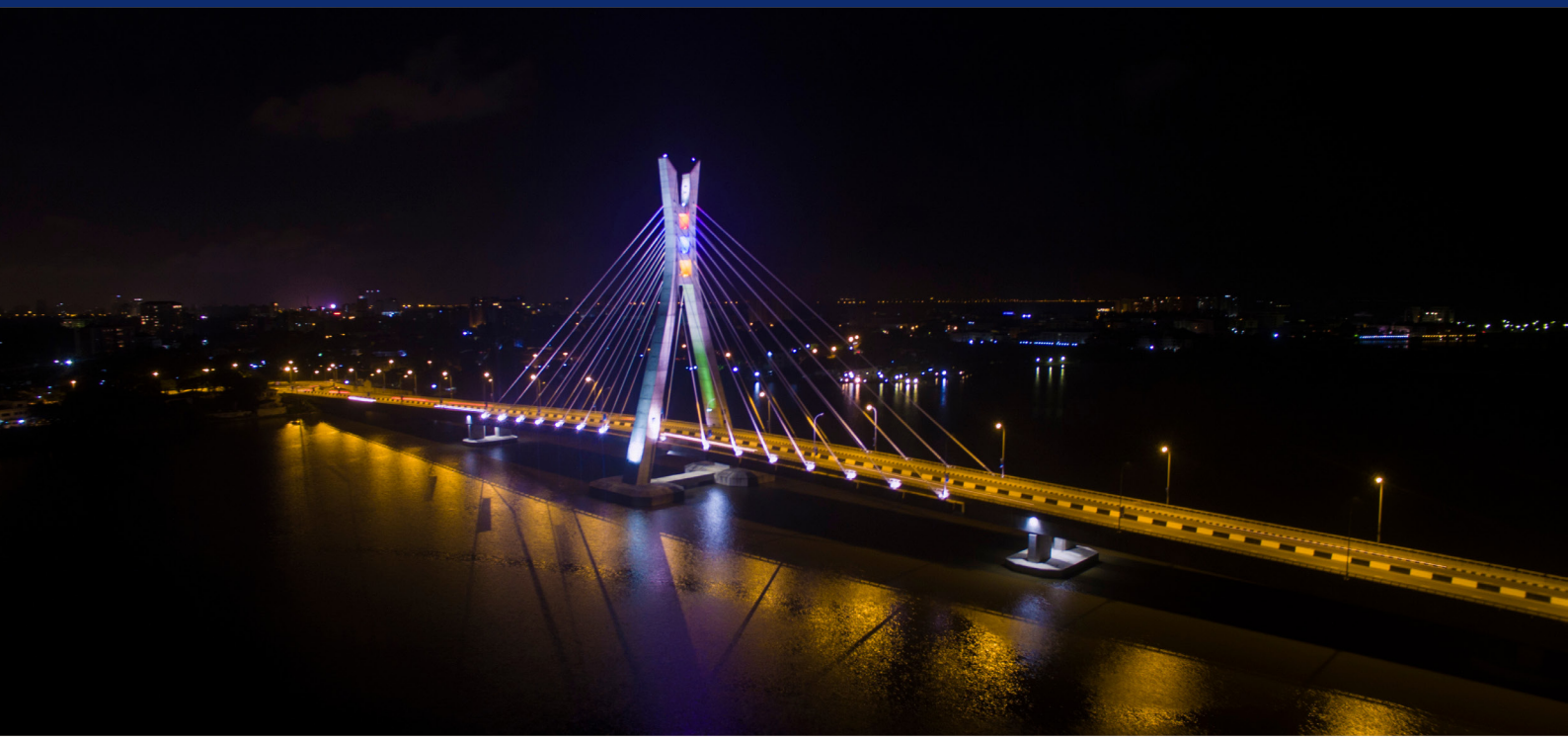
(1) an award that the court orders to be set aside or declares to be of no effect, or

(2) the affected part of an award that the court orders to be set aside or declares to be of no effect, the period between the commencement of the arbitration and the date of the order referred to in points (1) or (2) shall be excluded;

(c) In determining when a cause of action accrued, any provision that an award is a condition precedent to bring legal proceedings in respect of a matter to which an arbitration applies shall be disregarded; and

(d) In computing the time for the commencement of proceedings to enforce

8 Procedure set out in Third Schedule of the AMA.
9 Section 28(1) of the AMA.
10 Section 28(3) of the AMA.
11 Section 23(4) of the AMA.
12 (1997) 9 NWLR (Pt 520) at 224



an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

Electronic arbitration agreements

The ACA provided that all AAs must be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other recorded means of communication. The AMA includes electronic communication as fulfilling the writing requirement: section 2(4) AMA.

"Electronic communication" is defined in section 91(1) as *"any communication the parties make by means of data messages, i.e., any information generated, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data interchange, electronic mail, telegram, telex or telecopy"*.

Court Proceedings

Section 64(1) of the AMA provides that courts cannot intervene in any matter governed by the AMA except where provided by the AMA. Section 64(2) provides that applications in respect of matters governed by the AMA shall be conducted in accordance with the Rules set out in the Third Schedule to the AMA.

The Third Schedule contains the "Arbitration Proceeding Rules 202" which set out a detailed procedure for the case management of "arbitration claims" as defined in paragraph 1 of the Third Schedule. These rules are mandatory to claims which fall within the definition of arbitration claims. Such claims include applications for a stay of proceedings, determining challenges to arbitrators, interim measures and recognition and enforcement of an award.

The Third Schedule also deals with appeals in respect of arbitration matters and it expressly provides that such appeals shall have their first hearing no later than 6 months after the filling of the record of appeal.

Representation

The Arbitration Rules which are contained in the First Schedule deal with the issue of the representation of the parties which has often proved to be fertile grounds for challenges where one or more of the parties is a Nigerian entity. Article 5 of the First Schedule provides expressly that each party maybe represented or assisted by persons chosen by it. There is no restriction on the nationality or the qualification of such persons.

Mediation

The AMA has established substantive and procedural guidelines for international and domestic commercial mediation, along with the agreements arising from mediation processes, in Part II of the AMA. It aligns with the 2018 UNCITRAL Model Law on International Commercial Mediation, laying out a mediation procedure where by at either party's request, a jointly appointed mediator may review the conflict, hear from the parties, and then submit settlement ideas.

The new regime provides that settlement agreements arising from mediation are binding on the parties and can be enforced by a court as a contract, consent award, or consent judgment: section 82(2). Further, communications made during mediation proceedings are inadmissible in any court or arbitral proceedings: section 77(1).

Section 87 provides that the Singapore Convention on Mediation applies where a party seeks to enforce an international settlement agreement made in a jurisdiction other than Nigeria provided that (i) that State is a signatory to the Convention, and (ii) the dispute arises out of what would be considered a 'commercial' legal relationship in Nigeria.

Section 71 provides that when the mediation proceedings commence, the running of the limitation period regarding the claim is suspended. Time resumes upon unsuccessful mediations from the time that mediation ended.

Miscellaneous provisions

Repeal of the ACA does not affect ongoing proceedings under that Act. The AMA is not retrospective in effect.

Section 13 of the AMA introduces immunity for the arbitrator, appointing authority or arbitral institution. As mentioned in para 21 above, under the ACA, a multitude of claims were brought against arbitrators due to ambiguity in the definition of concepts such as 'improper'. Section 13 was introduced to encourage confident arbitrators and to discourage defensive practice due to fear of litigation, unless the act or omission was done in bad faith.

Commentary

The electronic agreement provisions and the new mediation regime have been largely welcomed by the arbitration community in Nigeria. It is noteworthy that while Nigeria adopted the Singapore Convention on Mediation in August 2019, it was not integrated into the AMA. Section 87, however, may be said to elucidate its scope to disputes in Nigeria. Mondaq describes the mediation regime as a positive step towards improving Nigeria's dispute resolution processes and ensuring that parties have access to a range of effective and

efficient means of resolving their disputes. In particular, parties can be assured of enforceability of the mediation outcomes without subsequent challenge.

In many ways, the AMA is evolutionary, rather than revolutionary, building as it does on the Model Law. However, the ART process is an innovation that aims to ameliorate the old position that parties may seek recourse in court against a final award, delaying the enforcement process and undermining arbitration as an efficient alternative. However, the ART does not expressly preclude the involvement of the court in the annulment or enforcement proceedings, and so a party may still seek review of the ART's decision if it is considered to be 'unsupportable', having regards to the grounds for annulment (i.e., arbitrability or public policy).

This has caused a stir in the Nigerian arbitration community, who are worried about the potentially counterintuitive impact of the ART process: where the ART sets aside the arbitral award partly or wholly, the court may reinstate the award, leading to arguably greater costs and delay than before.[13] However, the counterargument would be that the ART process provides parties the chance to include in their contract a private form of review before resorting to the court process, where there is significant backlog and delay, as well as public scrutiny. In the vast majority of cases, the ART will be the final step in the process. The aims of the ART to increase the efficiency of arbitration in Nigeria are irrelevant to determining the award's arbitrability or conformity to public policy.

One of the most impactful innovations introduced by the AMA is likely to be the new regime for dealing with arbitration matters set out in the Third Schedule. The hope and intent is that, by providing a comprehensive regime governing arbitration matters in the court, the extensive delays which have been a persistent feature of the way courts in Nigeria deal with arbitral matters will be significantly reduced and it will reduce the scope for parties to use court applications as a means of delaying or frustrating references to arbitration. Ultimately, the impact of these changes will depend on the attitude of the judges to the application of these new rules.

Comparative perspective: England and Wales

On 7 November 2023, the King's Speech confirmed that Parliament will consider the Law Commission's reform proposals to the Arbitration Act 1996 ('AA96'). This would modernise London's arbitration framework, which has a strong international reputation. There are at least 5,000 domestic and international arbitrations in England and Wales each year, worth at least £2.5bn to the economy.[14] The Chartered Institute of Arbitrators has over 17,000 members in 149 countries and is headquartered in London (the branch in Nigeria being one of the largest outside London). The Law Commission ('LC') noted in its Final Report that international arbitration has grown by about 26% between 2016 and 2020. An arbitration survey by Queen Mary University of London ('QMUL') in 2021 revealed that London and Singapore are the world's most preferred seats. For these reasons, it is worth looking at this jurisdiction's reform efforts in the field of arbitration when considering arbitration reform in any other jurisdiction.

Initial reaction from industry to the need for reform was that the AA96 works well and that major reform is neither needed nor wanted. The LC shared this view in the main but asked consultees how the AA96 might be reformed to remain cutting edge. In doing so, it focussed on the following: confidentiality; independence of arbitrators; immunity; summary disposal; interim measures; emergency arbitrators; jurisdictional challenges; appeals on legal issues; discrimination; and disclosure.

The Nigerian AMA covered arbitrator immunity, emergency arbitration, and interim measures. Therefore, it is worth considering the English reform proposals in these areas.

a. Immunity: The AMA is in line with the LC's reform proposal that arbitrators should not incur liability for costs in relation to an application for their removal under section 24 AA96 unless the arbitrator has acted in bad faith. There is a principle of arbitrator immunity already in operation in English law.

b. Interim measures: Section 44 provides that the court has power to make orders in support of arbitral proceedings in certain matters. S.44(2) lists those matters, which include granting of interim injunctions and preservation of evidence. It is proposed that section 44 should enable court orders to be made against third parties.

c. Emergency arbitration: The proposal for emergency arbitration to be provided for in the AA96 was rejected. However, the LC recommended provisions empowering the court to enforce a peremptory order issued by an emergency arbitrator, who will have the same power as a normal arbitrator to give parties permission to apply to court for an order under section 44(4) of the AA96.

The biggest innovation in the Nigerian AMA is arguably its most criticised: the ART. No such procedure was proposed by the LC in England. An equally novel innovation had been propounded instead: the power to order summary judgment.

The AA96 contains no provision for summary disposal but section 33(1)(b) provides that the tribunal shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, to provide a fair means for the resolution of matters falling to be determined. Section 34(1) provides that the tribunal is to decide all procedural and evidential matters subject to the parties' agreement on any matter. Thus, it had been argued that summary disposal was permissible.

The LC has proposed that the AA96 should expressly provide for summary disposal, subject to the parties' agreement. The procedure is to be a matter for the tribunal, having consulted the parties. The tribunal may make an award on a summary basis in respect of an issue only if it considers the party has no real prospect of succeeding on the issue.[15]

Arguably, this would have been a better solution than the ART, enabling arbitrators to deal with ex ante questions of arbitrability and public policy. Should these issues arise ex post, then they should be dealt with in court. This placates the concern of the ART as a potentially wasteful intermediary step.

Summary judgment does not appear in the UNCITRAL Model Law, but appears in certain model arbitral rules, such as:

a. ICSID Arbitration Rules 2022, r.41: 'objection for manifest lack of legal merit';

b. HKIAC Administered Arbitration Rules 2018, art.43: 'early determination'; and

c. ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration 2021, para 110: 'expeditious determination'.

Arguably, a summary procedure limits the opportunity for a party to put its case. The party must have a reasonable opportunity to do so: section 33(1)(a). This matters as a party may be able to resist under Article V.1(b) of the New York Convention. However, if explicit provision were to be included in the AA96, it would also remove the 'due process paranoia' of arbitrators who have shied away from adopting summary disposal in some cases for fear that their award will be challenged under section 68 of the AA 96 for serious irregularity, i.e., failing to comply with their section 33 duty.

13 https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 <accessed 21/06/2024>; https://www.stewartslaw.com/news/nigerias-new-arbitration-act-changing-arbitration-practice-in-the-country/ <accessed 21/06/2024>.

14 Law Commission, Review of the Arbitration Act 1996: Final Report and Bill (HC 1787, Law Com No 413), 1.

15 LC Final Report: paras 6.24, 6.34, 6.51.

Keating Chambers
15 Essex Street
London WC2R 3AA
DX: LDE 1045

Providing dispute resolution services to the construction, engineering, shipbuilding, energy, procurement and technology sectors worldwide.

Tel: +44 (0)20 7544 2600
Email: clerks@keatingchambers.com
Web: keatingchambers.com

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