Fenwick Elliott

The construction & energy law specialists

Annual Review

A round-up of key developments in the construction, engineering and energy arena

2013/2014

BIM: how might the latest developments affect your contract?

Costs management in the courts: all you need to know

Adjudication update: liability of adjudicators

Delay damages in the UAE and UK: a comparison

ANNUAL REVIEW 2013/2014

Fenwick Elliott is the UK's largest specialist construction law firm with clients across the world. We advise on every aspect of the construction process in the building, engineering and energy sectors, including oil, gas, nuclear and power.

Our expertise includes procurement strategy, contract documentation and negotiation, risk management and dispute avoidance, project support, and decisive dispute resolution, including international arbitration, mediation and adjudication.

Our approach is commercial. We aim to add value to transactions and find practical solutions to disputes.

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Fenwick Elliott
The construction & energy law specialists

Simon Tolson
Senior partner

First word

It is my great pleasure to introduce the 2013/14 edition of the Fenwick Elliott Annual Review. This is our 17th such annual publication, and it is always a challenge to try to squeeze into one journal the climaxes of the wider legal year. Our purpose is to be edifying and to alert you to areas of the law and practice which may be relevant to your business endeavours. We recognise that while you need to make sure you avoid getting on the wrong side of the contract or the law, keeping up with the latest developments and staying ahead of the pack is just one of a long list of tasks you need to fit in to your busy day. The Review allows you to sit down and 'catch-up' – my intro is more to skip through Fenwick Elliott's highlights, and gives you a précis of our news.

Worldwide, Fenwick Elliott is a truly international construction law business. We are now opening our associate office AIFE,[1] in Dubai focused on projects in the MENA region, partnering with local firm Ahmed Ibrahim Advocates. We have been acting in the region since 2005 on a wide range of projects and our new association will strengthen our ability to offer our clients access to prompt cost-effective multi-jurisdictional advice.

This last year has been intensely busy for all of us, and whilst the summer brought some respite we still had some teams in trial – a very demanding August – once we would have been buffered from such things by that great legal convention, "the long vacation." Alas, that no longer exists!

Our dominance in the legal construction and energy law market here at home remains our priority and is rightly nurtured. London is our engine room. I am delighted to say it has been a year pulsating with activity; in fact, it has been the busiest year I can recall in 26 years at the firm. The practice has expanded significantly, there are many new faces. At Aldwych House, the builders have also been in remodelling and updating, and we were in the happy position of knowing both our fit out contractor and landlord as business clients!

Our range of construction and energy work is now more diverse than ever. The types of work include every aspect of the procurement and construction process within the transport and infrastructure sectors on projects around the world; wind turbine disputes, submarine jetties, highways, skyscrapers, process plants, airports, theme parks, tunnelling for Crossrail to the deepest immersed tunnels tube under the Bosphorus Strait, major gas fields and pipelines in Turkmenistan, waste to energy plants, subsea pipelines, water projects involving the Disi aquifer in Jordan and deep basements in the West End. You name it, we are on something exciting and/or muddy. We are also working with pretty well every English language-based construction contract currently in use, and of course many are bespoke or adulterated FIDIC, IChemE, NEC3 etc.

Our work continues to cover dispute avoidance strategy, litigation, international arbitration, adjudication and all forms of ADR/mediation. Our projects team have also been busy, demonstrating London is really ratcheting up again. The food chain in development work in London and the South East is truly energised. Our remodelled website keeps track of our latest legal updates; you can now follow us on Twitter or LinkedIn.

We aim to hold our central London position whether for our commercial legal work, or for dispute resolution through litigation, arbitration or mediation. London is a global leader in commercial dispute resolution and as a business hub. English judgments are easily enforceable, not simply within the EU but also in most parts of the world, even when there are no reciprocal enforcement arrangements. Also with me as Chairman of TeCSA and Richard Bailey as Chairman of the Society of Construction Law concurrently Fenwick Elliott is figuratively at the heart of construction law practice in London.

We thank you for the opportunity your problems have given us to resolve. Long may this continue and be to our mutual advantage!

Simon Tolson

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Fenwick Elliott
The construction & energy law specialists

Jeremy Glover
Partner
Editor

In this issue

Welcome to the 17th edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from the past 12 months including from page 42, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter Dispatch as well as the Construction Industry Law Letter.

One of the features of this year's *Review*, is the impact of the latest reforms to the CPR or court procedural rules. Nicholas Gould, Claire King and Christina Lockwood lead the research team at the Centre of Construction Law at King's College, London who reported on the implementation of a new costs monitoring regime. Some have suggested that the new provisions may lead to forum shopping or even a rise in arbitration as people look to avoid the effects of the new scheme. Others take the opposite view that focusing on costs at an early stage helps the parties concentrate on the key issues in dispute which can promote settlement. We discuss all these developments at pages 4-8.

There are other changes to the CPR, including those which may have an impact when the court considers whether or not to allow expert evidence. As we discuss at pages 13-15, it is already clear that the courts will take a restrictive view to allowing expert evidence in cases where a challenge is made to a public procurement tendering exercise. We follow that discussion with an update on pages 16-17 on the likely changes to the public procurement tender process in 2014.

Simon Tolson and Sana Mahmud take a look, at pages 9-12, at the latest developments on e-disclosure and its potential impact on trials. I well remember many many years ago being a small part of one of the teams during the Carlton Gate litigation before Judge Bowsher, where (for the first time ever in the TCC) we had an electronic hearing bundle. Naturally all the parties also had at least one, if not more, hard copy of that hearing bundle in the court room. However, as Simon suggests, it may not be long now before there are true paperless hearings.

Developments in Building Information Modelling (BIM) continue to carry on apace. On pages 32-36 you can find an update on what we need to know, focusing on the legal and contractual implications.

At the end of 2012, the Court of Appeal decision in the *Systech v Harrington* case caused much discussion in the world of adjudication. Here the Court of Appeal broadly said that an adjudicator who produces an unenforceable decision should not be entitled to payment. In April 2013 at the 13th International DRBF Conference in Paris, I spoke on a panel looking at the slightly wider question of the liability of adjudicators, both at home and abroad. The panel session provoked a lively debate, and you can find further information at pages 22-25.

One of the issues that I touched upon in that paper was confidentiality. In a companion piece, which can be found at pages 40-41, Richard Smellie looks at the extent to which the arbitration process at home and abroad is truly confidential.

As Simon mentioned, we now have an associate office in Dubai and Ahmed Ibrahim from AIFE, and our own James Mullen, compare the Dubai and UK approach to delay (or liquidated) damages on pages 18-21.

FIDIC celebrates its centenary in 2013. We had wondered whether FIDIC would mark the occasion by producing the much-anticipated revision to its 1999 suite of contracts. As we go to press, there is no news. However, during 2013, FIDIC did issue a Guidance Note dealing with the powers of, effect of and potential ability to enforce Dispute Adjudication Board decisions. You can read about that at pages 26-27. As you will see, FIDIC have largely borrowed from the *Gold Book*, and it is likely that a number of other provisions from the *Gold Book* will find their way into the revised *Yellow Book* when it is finally released.

As always, I'd welcome any comments you may have on this year's *Review*. Just email me at jglover@fenwickelliott.com.

Jeremy Glover

Costs management

Costs management: what you need to know

The Costs Management Pilot Scheme (the "Pilot") was launched in all Technology and Construction Courts and Mercantile Courts on 1 October 2011 and ended on 31 March 2013. At the invitation of Lord Justice Jackson, the Centre of Construction Law at King's College London was asked to monitor the Pilot by means of questionnaires and a follow-up telephone survey in order to evaluate how effective the Pilot was in terms of controlling costs, keeping clients informed about the overall costs position (not just their own budgeted costs) and the additional workload imposed on judges and court staff. The monitoring team consisted of Nicholas Gould, a Visiting Senior Lecturer at King's College London and a partner in Fenwick Elliott LLP, Christina Lockwood, a lawyer and CEDR accredited mediator, and Claire King, an Associate of Fenwick Elliott LLP.

"It will normally be extremely difficult to persuade a court that mistakes in an approved budget can be rectified."

In this our first article on costs management within this *Annual Review*, we outline the key findings of the Costs Management Final Research Report and the case law governing the implementation of the Pilot to date. In our second article, we consider in more detail the recent hot topic as to the exemptions to case management implemented in the run-up to 1 April 2013.

Costs management is here to stay

From 1 April 2013 costs management has applied to most types of litigation, in accordance with CPR 3.12-3.18 and Practice Direction 3E, under the 60th update to the CPR (the "New Rules"). The amended CPR rule 3.12(1) allows for exemptions from automatic costs management. This includes the whole of the Admiralty and Commercial Court; such cases in the Chancery Division as the Chancellor of the High Court may direct; and such cases in the TCC and Mercantile Courts as the President of the Queen's Bench Division may direct. A direction made under CPR 3.12(1) exempts cases in the Chancery, TCC and Mercantile Courts from costs management where the sums in dispute exceed £2,000,000, excluding interest and costs, except where the court so orders.

Practice Direction 51G governed the Pilot and required each party to prepare a costs budget in the form of Precedent HB for consideration and approval by the court at the first Case Management Conference ("CMC"), and a revised costs budget at various stages of the proceedings thereafter. Within the costs budget (under the Pilot and also under the New Rules), reasonable allowances must be made for: (a) intended activities such as disclosure, preparation of witness statements and obtaining experts' reports; (b) identifiable contingencies, for example specific disclosure applications; and (c) disbursements, in particular court fees, counsel's fees and any mediator or expert fees.

When can an approved costs budget be revised or rectified?

The judgment in *Henry v News Group Newspapers Ltd*[1] was the first indication of the approach the courts might take with regard to departing from approved costs budgets. The Court of Appeal had to consider whether there was a good reason in this case to depart from the appellant's approved budget. The Court of Appeal's decision to allow the appeal was published on 28 January 2013, but stated that failing to comply with costs management practice directions could have draconian consequences.

In essence, the Court of Appeal found that:

(i) both parties and the court failed to comply with PD 51D "*to a greater or lesser degree*";

(ii) there was no inequality of arms;

(iii) the objects of PD 51D were not undermined;

(iv) a budget is not a cap; and

[1] [2013] EWCA Civ 19

Costs management

(v) the costs incurred by the appellant were reasonable and proportionate to what was at stake in the proceedings.

The Court of Appeal judgment concluded by highlighting important differences between the New Rules and the Pilot as well as the Defamation Proceedings Costs Management Scheme. Going forwards, a budget is much more likely to act as a limit on recoverable costs unless there is a very good reason for it not to do so. Getting a budget right (and revising it regularly) will therefore be more important under the New Rules than under the two pilot schemes.

This approach was confirmed by Mr Justice Coulson in *Murray and another v Neil Dowlman Architecture Ltd*[2]. The case was running under the Pilot but also considered the position under the New Rules. The court gave guidance about the circumstances in which an approved costs budget can be revised or rectified. Coulson J held that it will normally be extremely difficult to persuade a court that mistakes in the preparation of a budget, which is then approved by the court, may subsequently be rectified. The courts will expect parties to submit accurate budgets in the first place. Trying to amend an inadequate (and approved) budget is, however, different from revising a budget upwards or downwards because of significant developments in the litigation (see PD 3E, paragraph 2.6).

Costs management introduces a degree of certainty, helps focus on the costs and can encourage settlement.

In *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd*,[3] Mr Justice Coulson handed down another judgment relating to a case running under the Pilot and subject to a Costs Management Order. In that case a successful defendant was refused permission to revise its budget which it had submitted after judgment. Mr Justice Coulson made it clear that an approved budget can only be revised by making a formal application to the court not by simply filing a revised budget.

As stated in *Murray v Neil Dowlman Architecture*[4], a departure from the approved budget would only be allowed if there was good reason to do so. An application to revise an approved budget (even under the New Rules) should therefore be made as soon as it becomes apparent that the original budget has been exceeded by more than a minimal amount. There is no ability to make an application after trial due to the wording of paragraph 6 of PD 51G.

He further held (on an obiter basis) that even where costs are awarded on an indemnity basis (which they were not in this case) the:

"*costs management order should also be the starting point of an assessment of costs on an indemnity basis, even if the 'good reasons' to depart from it are likely to be more numerous and extensive if the indemnity basis applies.*"[5]

The overall message from the courts could not be clearer. If you want to be able to claim your costs make sure that your approved budget is updated as soon as you have any concerns it may be exceeded even if you are in the middle of preparing for trial.

Feedback from the Pilot

One of the concerns expressed by solicitors under the Pilot is that the costs management procedure increases costs due to the time taken to comply with it. Another concern is the difficulty of predicting costs accurately at the early stages of litigation because the work required to bring a case to trial can change as the case progresses, and costs also depend on the tactics and general approach taken by an opponent.

It has been argued that the analogy of costs management as "project management for litigation" does not take on board the fact that in litigation two parties are each trying to build their own case while destroying their opponents. A claimant tries to push its case forward while a defendant seeks to delay and develop every potential defence. This makes it much harder to budget for litigation than for a construction project, where at the commencement at least everyone is pulling in the same direction.

[2] [2013] EWHC 872 (TCC)
[3] [2013] EWHC 1643 (TCC)
[4] Ibid.
[5] [2013] EWHC 1643 (TCC) at 28 to 31

Costs management

Solicitors interviewed seem to acknowledge that completing the budget form becomes easier once familiarity with it increases. The improvements made to Precedent H (the budget form to be used under the New Rules) and, in particular, the fact that it is in Excel may also assist the process. Most solicitors agreed that the Pilot did assist with early attention to costs and that it gave their clients a better understanding of their potential liabilities (including their potential liability to the other party if they did not win). As a result it could also facilitate settlement.

Feedback gathered under the Pilot indicates that transparency about costs is a most relevant factor. Even solicitors who disapproved of the Pilot, and particularly of Precedent HB, appreciated how important it is that clients know the potential liability they face if they lose.

If you want to be able to claim all your costs make sure your budget is updated and approved as soon as you have concerns it may be exceeded.

In summary, the majority of solicitors who provided feedback under the Pilot acknowledged several benefits of costs management, namely that:

- it makes the parties focus on the key issues in dispute early on, and more thoroughly analyse what is necessary to prosecute the action;
- it helps to focus on the costs of the future conduct of the case;
- it informs the parties about each other's budgets for the litigation and provides an insight into the opponent's tactics;
- it introduces a degree of certainty to the planned amount of work and costs for the client, and provides a strong incentive to keep within the budget;
- it may avoid lengthy detailed assessments of costs at the end of the litigation; and
- it informs the parties about the cost of not settling at an early stage and thus can encourage settlement.

In relation to the judges' views, they generally seem to believe that costs management encourages proportionality of costs to the value of the claim and that it aids case management as well as controlling future costs. Feedback received from judges towards the end of the Pilot was, however, more critical in that the extra burden on case managing judges had become clearer. Costs management adds significantly to the time required by judges for case management.

Moving forwards from 1 April 2013

Costs management is a new discipline that requires skill and practice but can be, and will have to be, learnt. The costs management procedure effectively shifts the focus of costs control from retrospective, as it used to be, to prospective, with the court focusing upfront on how much should be spent (or at least recovered) in the litigation. More certainty as to the other side's costs and as to the likely overall costs at the beginning of the litigation seems to be widely regarded as a positive factor.

Costs management under the New Rules will introduce a new discipline in respect of incurring litigation costs where those rules apply. The findings of the Pilot suggest that it is likely that the overall effect of costs management will be to bring down the total costs of the litigation.

There could also be an important impact on costs assessment in the future. Detailed assessments might become a thing of the past if all litigation is subject to costs management. The final costs will be measured by the last agreed or approved budget rather than a detailed review of the costs incurred throughout the litigation.

The Costs Management Pilot Final Report has been published on the websites of the Judiciary, TeCSA and Fenwick Elliott LLP – www.fenwickelliott.com/costs-management-pilot-final-report.

Costs management

Costs management: to exempt, or not to exempt, that is the question

One of the issues that has caused the most discussion, is whether the new costs regime is suitable for the largest cases – a discussion provoked by the different approaches adopted by the courts. Claire King outlines some of the arguments for and against opting out of costs management.

On 18 February 2013 an Amendment Notice issued by the President of the Queen's Bench Division and the Chancellor of the High Court amended CPR rule 3.12(1) to allow for further exemptions from automatic costs management (the "Amendment Notice"). Previously only the Admiralty and Commercial Courts had been subject to an exemption. The reason for this according to LJ Jackson when he first proposed the reforms, was that the large commercial businesses that litigate in the Commercial Court had informed him that they were 'unconcerned' about the level of legal costs. The new amendments also allowed exemptions to such cases in the Chancery Division as the Chancellor of the High Court may direct; and such cases in the TCC and Mercantile Court as the President of the Queen's Bench Division may direct. A direction made at the same time within the Amendment Notice exempted cases in the Chancery, TCC and Mercantile Courts from costs management where the sums in dispute exceed £2,000,000, excluding interest and costs, except where the court so orders.

"If costs are to be recoverable, our commercial clients can live with a new 50% instead of the 70% broad rule on recoverables… But greatly depreciate being in effect told they cannot or should not run cases with their specialist lawyers the way they wish…"

The Amendment Notice justified this decision on the grounds that it is:

"*undesirable for an exception from automatic costs management to apply only to the Admiralty and Commercial Courts, when in many commercial cases there is an element of concurrent jurisdiction between that court, the Chancery Division, the Technology and Construction Court and the London Mercantile Court…*"

They therefore wanted "*to avoid any inappropriate forum shopping.*"

The exemptions have been the subject of much debate since they were announced. In the Costs Management Final Research Report we noted that there was disappointment from judges at these last minute exemptions. Feedback received in telephone interviews with TCC, Mercantile and High Court judges during the Pilot indicated that:

"*many judges share the feeling that there is no principle for the exemption of the Commercial Court from the costs management regime, and that they find this very unsatisfactory.*"[1]

However, the report also noted "*a sense of victory of the opponents of costs management*."

The overriding objective has of course been amended so that Judges must deal with cases "justly" and "at proportionate cost". This means that even if costs are incurred reasonably and are necessary they may be disallowed if the court considers them to be disproportionate.

The Amendment Notice made it clear that the exemptions were in any event an interim measure. On 14 June 2013 a Consultation Paper was published by a Sub-Committee of the Civil Procedure Rule Committee (the "CPRC") tasked with advising on:

(a) the desirability of retaining the Admiralty and Commercial Courts' blanket exception to the costs management rules; and

(b) the current value-based exceptions for the TCC, Chancery Division and Mercantile Courts (the "Consultation Paper"). The Chairman of the Sub-Committee is Coulson J.

The Consultation Paper described the last minute introduction of the £2 million exception as "*something of an emergency solution*".[2] It expressed the view that the blanket view for the Admiralty and Commercial Courts "*may be unnecessary and inappropriate*", noting the successful pilot scheme run in the Mercantile and TCC.[3] It went on to state that "*depending on its conclusion on the future of the Admiralty and Commercial Courts'*

[1] See Page 52 of the Costs Management Final Research report
[2] See paragraph 2.3 of the Consultation Paper
[3] See paragraph 4.1 of the Consultation Paper

Costs management

exception", the value-based exception elsewhere would need to be considered. If these were to remain, should they be framed by reference to financial value? If so, at what level? Alternatively, should the parameters be different?[4]

Consultation meetings were held on 10 and 16 July 2013. Written responses were accepted until 20 July 2013. The results of this consultation have not yet been published and it remains to be seen what the final recommendation of the Sub-Committee is. However, the written responses of the two key institutions representing construction lawyers (TeCSA and the SLC) are interesting.

Will extending costs management encourage forum shopping and lead to an increase in arbitration?

The SCL does not comment on the blanket exemption of the Commercial Court save to state that the various specialist courts should have the same system to avoid forum shopping. However, it is unhesitating in its support for the exceptions already in place. The reasons given include the fact that international users may be put off using the TCC as the costs regimes in other jurisdictions are more favourable. It also notes anecdotal evidence that parties are choosing arbitration instead of the courts due to the costs regime. Indeed the tone of the response is generally anti-costs management. It notes the additional costs imposed by the system (which it believes will be in the region of £3,000 to £4,000), the front-loading of costs and the fact that accurate estimates in complex cases are difficult.

TeCSA's position is primarily that there should be a blanket exemption for mandatory costs management for the specialist courts sitting within the Rolls Building. This would avoid forum shopping. Indeed the TeCSA submission appears to be generally opposed to costs management in high value cases within the London TCC in any event, given the difficulties with accurately predicting costs in such cases.

The TeCSA submission notes:

"*If costs are to be recoverable, our commercial clients can live with a new 50% instead of the 70% broad rule on recoverables… But greatly depreciate being in effect told they cannot or should not run cases with their specialist lawyers the way they wish… To win. There is a feeling at the moment (and Members have had some experience of this) that if you have to increase the budget because things have changed that could not have been predicted, you get 'told off' and one is told off by someone who knows very little about predicting and estimating costs.*"

It is perhaps unsurprising that in light of this, TeCSA have suggested that the limit for the costs management scheme applying should be lowered to £250,000, being the limit below which the London TCC will decline to deal with cases in any event.[5]

Conclusion

What happens in the future remains to be seen. Before any final decision is made on the exemptions, there must be a proper investigation into whether the clients in these high-value and complex cases actually want their legal costs to be subject to the rigours of costs budgeting, or not.

What is interesting is that practitioners focussing on cases within the London TCC based in the Rolls Building only now seem to be fully waking up to the implications of costs management and they do not seem to be convinced by the benefits judges in the TCC elsewhere espoused during the Pilot.

What the sub-committee is no doubt aware of, is the risk that if users do not like the system they will start opting out of the court system and using arbitration instead. This argument has already been used rather successfully by the London Litigation Solicitors' Association who argued that high value disputes such as *Berezosky v Abromovich* would simply not use the Commercial Court if costs management was applied there.

[4] See Paragraph 5.2 of the Consultation Paper
[5] *West Country Renovations Ltd v McDowell & Anor* (Rev 1) [2012] EWHC 307 (TCC)

E-disclosure

The paperless trial

One of the major changes affecting large construction disputes, is the approach to disclosure (or discovery). Increasingly (and somewhat inevitably) the approach of the courts, arbitral tribunals and parties is moving towards e-disclosure. Almost 20 years ago, Official Referee Judge Bowsher QC presided over the first full trial (part of the Carlton Gate litigation) where there was an electronic trial bundle available for use. It did not, however, open the floodgates. Now, finally, times are changing, as first Simon Tolson, in an article which first appeared in Building Magazine*, and then Sana Mahmud explain.*

It is said that lawyers are historically slow to adapt to change. Yet lawyers are using the latest technologies in their law practices on a scale unheard of only a few years ago. In my practice we have used computers extensively for word processing and accounts since at least 1986, for data crunching and research since 1989, and we started using email and the internet in 1997. I insisted all qualified staff had Blackberrys from their launch in 2003.

The impact of certain technologies is apparent, particularly in litigation where e-disclosure is proving to be one of the biggest areas of technological innovation in the legal sector; but also in the wider management of law firms. Internet-based cloud computing, mobile technologies and social media have profoundly affected lawyers' professional and personal lives. But I am not going to talk about technology developed specifically for lawyers back at their desks. Instead, I refer to something even more exciting and it is the shape of things to come. The paperless trial, no less.

The e-bundle is "truly better value. It reduces time... and it reduces uncertainty."

Smith Bernal International, founded by Graham Smith, was the company that brought us LiveNote in 1990. For non-lawyers I should explain that LiveNote is a tool for judges and lawyers that enables access to live computer transcripts. The feed came directly from the court's stenograph machine, within a second or two of the words being uttered and then written by the reporter. The primary benefit was that it allowed the user to interact with the evidence as it was given, jettisoning manual note-taking by my fraternity. It chiefly removed the need to read through reams of irrelevant transcript in a search for key evidence and made prep for cross-examination much easier.

Graham Smith later sold LiveNote to Thomson Reuters and "retired" to Italy. However, he soon re-emerged to set up his new baby, his company Opus 2 International. Opus' new product is called Magnum. No, not an ice cream or the Clint Eastwood movie, but a true Magnum Opus. Whereas LiveNote only addressed transcripts, Magnum has a wider agenda. Unlike LiveNote, it provides a secure, cloud-based interface for accessing, annotating, tagging and managing transcripts and other electronic documents and files. This helps litigators develop their cases after they have sorted and reviewed material gathered during e-disclosure. It allows the team to review evidence and collaborate for applications, trial preparation and courtroom presentation. Magnum integrates with document review platforms so that a document set, including all metadata, can be uploaded onto the system. Trial teams can access the system from anywhere and are not restricted to being on the same network to collaborate. It is easy to share files with team members and uploading additions to trial bundles is near child's play.

Magnum debuted just over a year ago in a trial before Dame Elizabeth Gloster in the £4bn litigation between Russian oligarchs Roman Abramovich and the now-late Boris Berezovsky, and is now being used in one of my construction cases in the Technology and Construction Court. Magnum has several obliging features, including how witness statements, expert reports, openings or skeleton arguments and the daily transcripts are hyperlinked to the underlying disclosed documents. Clicking on a reference within a document avoids hours of flicking through files to find the correct page. This is particularly useful in court where both time and the space required to house voluminous files can be at a premium.

But that is not all. Now synchronised audio and video comes with it, allowing you to listen remotely to proceedings where the judge permits. Transcripts stored on the system also allow you to visit later and replay bits of the evidence you missed. For arbitration there is

also the choice of video. Whether your client is in the retiring room, or in his car in Delhi or Riyadh, he can tune in and follow what is going on. No more having to go to the Court Mechanical Recording Department weeks later to get an "official recording."

Our experience using it thus far has been great because as an e-bundle it works, and the environment truly matches the way a lawyer works with paper. In a case with a chronological bundle of 228,258 documents, traditional photocopying would have set us back at least £65,000 for three sets, plus related administration costs, so it makes going paperless truly better value. It reduces time, as documents are identified quicker on common screens concurrently, and it reduces uncertainty.

Systems like this will undoubtedly replace hard copy. The use of email, text messaging, etc., has today rendered paper nearly obsolete anyway. I cannot see any large or medium-sized commercial dispute not using something like this in future trials and tribunal hearings. What is more, the judges seem to love it.

"Parties to litigation will only begin to reduce the scope and cost of disclosure if they discuss and agree the extent of a reasonable search for documents before they undertake the search and if they cannot agree, involve a knowledgeable court in the process."

Minimising the costs of e-disclosure in commercial litigation

In a lecture delivered in November 2011[1] as background to his reforms, Lord Justice Jackson criticised the often disproportionate costs associated with electronic disclosure exercises in large-scale actions. The accentuating factor he went on to cite was, in his view, that "relatively few solicitors and even fewer barristers really understand how to undertake e-disclosure in an effective way". It is an accepted truth that large construction and engineering cases tend to be document heavy. Furthermore, this burden is exponentially growing as the prevalence of electronic communication on even small projects continually increases. As Sana Mahmud explains, when faced with disputes on larger projects, where vast quantities of documentation and correspondence are often produced over the course of years, controlling the costs of an e-disclosure exercise from the outset is paramount.

At the time of the initial Costs Review there was no practice direction in force governing the disclosure of electronic documents. Practice Direction 31B, entitled *Disclosure of Electronic Documents* ("PD31B"), was eventually introduced in October 2010. In cases where documents are stored electronically, PD31B placed the onus firmly on the parties to consider and discuss at an early stage how disclosure should be carried out.

In his Final Report[2] in respect of large commercial claims (including actions brought in the TCC) Jackson LJ recommended that the default position of the court should not be to simply order standard disclosure as had been the case under the Civil Procedure Rules. As part of the Final Report, and as discussed in his November 2011 lecture, he went on to recommend that in such cases, where the cost of standard disclosure is likely to be disproportionate, the court should consider making alternative orders ("the Menu Option"). This Menu Option now forms part of new CPR 31.5 which has, from 1 April 2013, operated in conjunction with PD31B.

Under new CPR 31.5, at the first (or any subsequent) Case Management Conference the court can, "*having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly*", make the following orders[3]:

(i) an order dispensing with disclosure;

(ii) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;

(iii) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;

[1] Lord Justice Jackson, Controlling the Costs of Disclosure, Seventh Lecture in the Implementation Programme, LexisNexis Conference on Avoiding and Resolving Construction Disputes, 24 November 2011 (http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/controlling-costs-disclosure.pdf).

[2] Review of Civil Litigation Costs: Final Report, December 2009, Chapter 27, paragraphs 2.1 to 2.8 (http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf)

[3] CPR 31.5(7)

E-disclosure

(iv) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;

(v) an order that a party give standard disclosure; and

(vi) any other order in relation to disclosure that the court considers appropriate.

Under CPR 31.5(8), the Court may also at any stage direct how disclosure is to be given including:

(i) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;

(ii) whether lists of documents are required;

(iii) how and when the disclosure statement is to be given;

(iv) in what format documents are to be disclosed;

(v) what is required in relation to documents that once existed but no longer exist; and

(vi) whether disclosure shall take place in stages.

Opposing parties should at the earliest opportunity aim to set and agree their parameters in respect of how their disclosure exercise is to be conducted in order to minimise costs at the outset.

The above provisions allow judges to limit the scope of the exercise to an extent that is reasonable in the circumstances. Senior Master Whitaker, who chaired the working party responsible for drafting PD31, makes clear in an article in the 2012 New Law Journal[4] that the courts must "*espouse the principle that turning over every stone is no longer possible*" and that parties must be reminded that limitations on disclosure for the sake of proportionality "*may leave the so-called 'smoking gun' and more undiscovered.*"[5] The new approach encapsulated by CPR 31.5A is designed to focus the attention of the court and parties as early as possible in the proceedings on the appropriate extent of disclosure required, something which is key to controlling costs in commercial disputes.

Additionally, under the new rules forming part of a package of case management reforms which are now in effect, parties are obliged to provide a budget for disclosure costs two weeks prior to the first Case Management Conference as well as a report which sets out details of any relevant documents identified and their location(s). In cases where standard disclosure is ordered, under CPR 31.6 a party is obliged to disclose the following:

(i) the documents on which he relies; and

(ii) the documents which:

- adversely affect his own case;
- adversely affect another party's case; or
- support another party's case.

The test under CPR 31.6 is not one for relevance. It is narrower, and if applied strictly may go some way to reduce the amount of documents finally disclosed. In *Shah v HSBC Private Bank (UK) Ltd*[6] Lewison LJ pointed out that:

"*it is noticeable that the word relevant does not appear in the rules. Moreover the obligation to make standard disclosure is confined 'only' to the listed categories of document. While it may be convenient to use 'relevant' as a shorthand for documents that must be disclosed, in cases of dispute it is important to stick with the carefully chosen wording of the rules.*"

[4] Steven Whitaker, *A Brighter Future, New Law Journal*, Vol. 162, Issue 7507 (2012)
[5] *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 and *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch)
[6] [2011] EWCA Civ 1154

E-disclosure

As soon as litigation is contemplated the client must be made aware of the requirement under PD31B to preserve disclosable documents. Clients will need to scrutinise their document retention policies to ensure that any such material is not deleted. This is particularly important in cases where the client is an international business and may be subject to differing laws in relation to the preservation or retention of personal data.[7]

Historically, costs are prone to spiral because it often transpires that parties and their advisors are not fully aware at the outset of the process how much data needs to be reviewed and/or where it is stored. Even where a party might know the location of documents that need to be extracted, it is inherently difficult to determine with any degree of accuracy the total volume of data that will need to be eventually processed.

The new approach encapsulated by CPR 31.5A is designed to focus the attention of the court and parties as early as possible in the proceedings on the appropriate extent of disclosure required, something which Jackson LJ argues is key to controlling costs in commercial disputes.

A reasonable search is defined by PD31B[8] as one that is proportionate depending on the circumstances of the case. The nature and complexity of the proceedings, cost of retrieval of documents, and volume and accessibility of data are all relevant factors in gauging proportionality.[9] Annexed to PD31B is an Electronic Disclosure Questionnaire which can be used effectively to investigate, categorise and agree the nature of documents that the parties must potentially disclose. The earlier this is done, the easier it becomes to retain a proper handle on the costs of the process. Master Whitaker chaired the working party that formulated PD31, and in his 2012 article echoed this view.[10] He stated that:

"parties to litigation will only begin to reduce the scope and cost of disclosure if they discuss and agree the extent of a reasonable search for documents before they undertake the search and if they cannot agree, involve a knowledgeable court in the process."

Following the search and processing of responsive documents, the lack of proper de-duplication is a further common pitfall and was recently the subject of a TCC case in which a party was granted a wasted costs order as a result of inadequate de-duplication in its opponent's dataset.[11] Generally, e-disclosure service providers will offer a de-duplication process with their package that is designed to weed out exact duplicates of documents. This is usually a standard de-duplication process and does not pick up documents that are identical in terms of content but have slightly different metadata (for example, in instances where the same document has been saved in multiple locations). At the time of writing there is no provider offering technology that can pick up such documents which are on their face identical, save for differences in metadata, and automatically remove them before they are presented for review. However, providers do offer alternative solutions (at additional cost), that group near-duplicate documents which can then be reviewed in one place and manually removed from the dataset.

Conclusion

Given that data volumes on large projects are perpetually increasing, there is a fear that we will sooner or later get to a point where the exercise becomes potentially unmanageable from both a time and cost perspective. Providers are seeking to pre-empt this problem with the development of predictive coding which uses sophisticated technology to identify relevant documents and code them by issue. A new CPR 31.5 is also likely to address the issue of manageability by allowing the court to restrict the overall scope of a potentially huge disclosure exercise. Parties should at all times bear in mind that PD31B advocates an important practical principle: that opposing parties should at the earliest opportunity aim to set and agree their parameters in respect of how their disclosure exercise is to be conducted in order to minimise costs at the outset.

[7] Steven Whitaker, *A Brighter Future, New Law Journal*, Vol. 162, Issue 7507 (2012)
[8] Paragraphs 20-25
[9] Paragraph 21
[10] See footnote 4
[11] *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC)

Expert evidence

The need for expert evidence

Part 35 of the CPR, like many other parts of the CPR, was amended on 1 April 2013 and those changes made it clear that the court has the power to limit the issues that the expert evidence should cover. Although it was heard before April 2013, the case of BY Development Ltd & Others v Covent Garden Market Authority, *[2012] EWHC 2546 (TCC), which came before Mr Justice Coulson, raised important issues about the extent to which, if at all, expert evidence can be admissible or relevant in a procurement dispute under the Public Contracts Regulations 2006 (as amended). Following the new rules, it is likely that the courts will adopt a similarly tough approach in other cases.*

The starting point under CPR 35.1 is always that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. CPR 35.4 now states that:

(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When a party applies for permission under this rule they must provide an estimate of the costs of the proposed expert evidence and identify –

(a) the field in which he wishes to rely on expert evidence and the issues which the expert evidence will address; and

(b) where practicable the name of the proposed expert.

(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address.

(4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

"where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases."

In the *BY* case, the defendant ("CGMA") wished to develop the site next to Vauxhall Cross where, for almost 40 years, the New Covent Garden Market has operated. It began a tender process in March 2010 using the competitive dialogue procedure which, following pre-qualification, involved three stages: stage 1, being initial dialogue and submission of outline solutions; stage 2, being the detailed dialogue; and stage 3, being the submission of final tenders. The claimants reached stage 3 of the process.

However, on 27 March 2012, CGMA issued a notice under Regulation 32, notifying the claimants that their tender had not been successful and that it intended to award the development contract to a rival bidder. The claimants sought to challenge that decision arguing that CGMA's evaluation of the respective bids contained a number of manifest errors, particularly in relation to planning matters. Alternatively, they said that the decision was unfair and/or arose as a result of the unequal treatment of their bid. The claimants sought leave to rely on expert evidence in relation to both planning and finance matters.

The question for Mr Justice Coulson was whether the expert evidence was either admissible or relevant. The Judge noted that the test of "manifest error" applied in the European procurement cases was very similar to, if indeed not the same as, the *Wednesbury*[1] test of unreasonableness or irrationality in domestic judicial review proceedings where it is very rare for expert evidence to be either relevant or admissible. He referred by way of example to the case of *R (on the application of Lynch) v General Dental Council* [2003] EWHC 2987 (Admin) where Collins J concluded that:

"*it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert.*"

[1] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. Adopting the Wednesbury approach a court will consider whether the decision was so perverse that no reasonable tribunal, properly directing itself as to the law to be applied could have come to the same conclusion.

Expert evidence

The one exception might be a report from an expert which, again in the words of Collins J, "*seeks to explain what is involved in a particular process and how complicated that process is.*" In rare circumstances such a report might be admissible to explain the technical terms and concepts.

The Court's role is to "ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded."[2]

Mr Justice Coulson considered that the correct approach to the test of "manifest error" in public procurement cases is that the court must carry out its review with an appropriate degree of scrutiny to ensure that the basic principles for public procurement have been complied with, that the facts relied upon by the contracting authority are correct and that there is no manifest error of assessment or misuse of power. The relevant point to Mr Justice Coulson was that the exercise undertaken by the judge was a straightforward factual investigation. There was no expert evidence. Indeed, one thing to emerge from the *BY* case was the fact that procurement disputes of this type do not generally involve expert evidence. Only three were referred to in the judgment:

(i) *Harmon CFEM Facades (UK) Limited v Corporate Officer of the House of Commons* [1999] 67 Con LR 1, where HHJ LLoyd QC found that the tender procedure for the fenestration package at Portcullis House was operated in breach of the relevant Regulations. Here the Judge had to consider expert evidence from an engineer and a quantity surveyor. The evidence here was not about the tender process but went to particular issues of causation (namely whether or not, but for the errors, the claimant's tender would have been successful) and quantum.

(ii) *Henry Brothers (Magherafelt) Limited and Others v Department of Education for Northern Ireland* [2011] NICA 59, where at first instance there was expert evidence about applicability of one of the relevant criteria, against which the bids were considered, rather than any wider issues concerning the tender process as a whole.

(iii) *Newcastle Upon Tyne Hospital NHS Foundation v Newcastle Primary Care Trust and Others* [2012] EWHC 2093 (QB), where the expert evidence put forward was criticised by the Judge.

This led Mr Justice Coulson to conclude that:

"*where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the decision; and in part because such evidence may usurp the court's function.*"

This does not mean that expert evidence can never be admissible in public procurement cases concerned with manifest error. Sometimes technical explanatory evidence is required. Is the claim one where the technical background is so complex that explanatory expert evidence is required, and/or the claim an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness? In the *Henry Bros* case, the issue in question related to the amount of Defined Costs as required under the NEC3 form of contract. The underlying assumption made by the Contracting Authority was that Defined Costs would be the same for each contractor. It was demonstrated at the hearing at first instance, through expert evidence called by the claimant and cross-examination of the witnesses, that that assumption was incorrect and amounted to a manifest error.

In the *BY* case here, all the matters at issue went to elements of the tender evaluation itself. In these circumstances, unlike in the *Henry* case, the need for such evidence to explain background technical matters was not made out. Indeed, the Judge went further to suggest that there did not seem to be any substantive disputes between the parties as to the technical background to the evaluation. The Judge gave an example. One of the questions for the proposed planning expert was whether or not the London Borough of Wandsworth would have accepted an outline application for planning permission for a

[2] *Mr Justice Silber, Letting International Ltd v London Borough of Newham*

Expert evidence

175m tower. The Judge was of the view that the opinion evidence of a planning expert, reached some time after the event, as to what a third party local authority might have done had it received a hypothetical planning application, was not going to be of any meaningful assistance to a judge who had to decide whether or not there was a manifest error in the assessment of planning risk.

Saying this, the Judge recognised that in these cases, claimants, who are almost invariably the party whose bid has been unsuccessful, can often be at something of a disadvantage in mounting a challenge to the decision. That claimant has had no involvement in the detailed evaluation, so does not know precisely why its bid was unsuccessful. In the first instance, it is entirely dependent on the information which it is given by the defendant. Even once the proceedings have commenced, and further information has been provided (usually with a greater or lesser degree of reluctance), the claimant often remains unclear as to precisely what happened during the evaluation exercise. However, whilst, against that background, the Judge could see that the possibility of being able to rely on a detailed expert's report dealing with all aspects of the evaluation, and out of which a case as to manifest error or unfairness might emerge would be at least superficially attractive to a claimant, he reconfirmed that:

"*I consider that such an approach is wrong. Given the limited nature of the court's review function, such expert evidence will not generally be admissible unless there are particular reasons why, on the facts of the case in question, the costs, time and effort required to present such opinion evidence could be justified*."

The starting point under CPR 35.1 is always that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Here the Judge was concerned that the instruction of the expert would lead to a complete rerun of the evaluation process, with the experts commenting on each element of the tenders and their evaluation, and seeking to substitute their views for those held, and the decisions taken, at the time. That is not the role of the Judge. To do this would be to ignore the limited review task for the court at trial. You should not assume that a complete replay of the whole evaluation process will be allowed. Further, there was a danger that the experts were being asked to usurp the function of the court. The experts were being asked not only whether it was their view that the claimant's bid did not represent an unreasonable planning risk but also whether, in reaching the contrary conclusion, they were of the opinion that the authority's evaluation was manifestly wrong.

Conclusion

The *BY* judgment makes it clear that the need for explanatory expert evidence will be very carefully assessed by the courts in cases where a challenge is being made to the tender process. It is only where there is a complex technical field where explanation is required in order for the court to reach a conclusion that such evidence will be permitted. Given the very clear comments made by Mr Justice Coulson in the *BY* case, it must be anticipated that it will only be on very rare occasions that such expert evidence will be allowed. The task of the court when considering challenges to the procurement process is a limited one and the court will not allow a complete replay of the whole evaluation process. Here the Judge felt that the desire to appoint an expert was designed to permit such a complete rerun of the evaluation process.

When deciding whether or not to allow expert evidence, the question the court will ask itself is this:

"*Is this a claim where the technical background is so complex that explanatory expert evidence is required, and/or is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness?*"

The likely answer in most public procurement cases at least will be: no.

Public procurement 2014

Changes ahead: public procurement 2014

At the end of 2011, after extensive public consultation, the European Commission published its proposals for simplifying and modernising the public procurement regime. It is not expected that the proposals will become law in the UK before June or July 2014. However, the Commission is now in the process of making the final revisions to the relevant Directives.

Why?

UK current law is based on the public sector and utilities Directives of 2004, supplemented in 2007 by another Directive setting out the remedies available to aggrieved suppliers when there are problems with the process. Despite the innovations and improvements brought about by these Directives, the regime has been criticised for taking too long to implement them, and for being resource heavy and inflexible. A number of changes have been introduced to address these issues.

How?

The new rules are intended to promote the participation of small businesses, and will mean that the public procurement regime will apply to more contracts.

The new Directives for public contracts and utilities will be accompanied by a third Directive which will apply to concession contracts. The new Directives will apply alongside the existing remedies Directive and other sector-specific legislation. Implementation in the UK is likely to be through statutory instruments. The new rules will not apply retrospectively, so will apply to procurements beginning after the date of implementation.

What?

We consider some of the most significant anticipated changes here.

- No differentiation between Part A and Part B services

  Part A services are currently fully regulated by the procurement rules; Part B services (education, health, cultural and some transport services, for example) are regulated to a more limited extent. However, all contracts above the financial thresholds will generally now need to be procured formally, and so will be subject to OJEU contract notices. The proposed new thresholds are 5 million euros for public works contracts, 130,000 euros for goods or services contracts awarded by central Government bodies and 200,000 euros for goods or services contracts awarded by other Government bodies. Different thresholds apply to "social services" and utilities contracts.

- More flexible procedural rules with increased opportunity to negotiate

  A lighter-touch regime for certain low-value health and social services contracts (due to their diversity across member states) will be implemented. Contracting authorities will be able to dictate their own procedures, provided that they advertise their contracts properly and adhere to the established principles of equal treatment and transparency.

  Open and restricted procedures remain; however, member states will also be able to use two new procedures: (i) the competitive procedure with negotiation (similar to the previous negotiated procedure) and (ii) the innovative partnership procedure (where the market does not already offer viable procurement solutions). Option (i) is distinct from the competitive dialogue procedure. Competitive dialogue will no longer be limited to complex procurements, again allowing a contracting authority greater choice.

Public procurement 2014

- Simplified tendering through e-procurement

  The ability to submit contract notices online and to download tender documentation following publication of a notice will increase accessibility and streamline the tender process.

- Benefits for SMEs

  The new rules are intended to promote the participation of small businesses through various initiatives. When procuring large contracts, a contracting authority must now justify why the large contract could not be broken down into smaller lots. Other than in exceptional circumstances, contracting authorities will now no longer be able to specify a turnover of more than three times the contract value in a pre-qualification questionnaire.

  The new rules will also allow bidders to self-certify that they meet the selection criteria at pre-qualification stage and so reduce the administrative burden (accounts and/or other financial information will therefore only be checked if the particular bid progresses).

Changes increasing the value of a contract by less than 5% of the contract price will not be considered material.

- In-house suppliers exemption

  The Teckal test for in-house provision has been codified and so clarifies the exemption criteria for direct awards of contracts. For the exemption to apply: (i) there must be no private ownership; (ii) a prescribed percentage of the contractor's turnover must be generated by work for the contracting authority; and (iii) the contractor must be controlled as if it were a department of the authority.

- Clarification of the effect of change in a project

  Whilst changes to the terms of a contract have always been allowed provided they were not material, it has been difficult to determine in some cases where a significant change should properly trigger a new procurement. The new rules follow the Pressetext case law, so that changes increasing the value of a contract by less than 5% of the initial contract price are not considered material (provided that the change in question does not alter the nature of the contract). Structural changes to a party to a contract, such as internal restructuring or merger, will now no longer in themselves trigger a fresh procurement.

- Additional rules on framework agreements

  Clarification has been needed for some time as to when authorities not originally party to a framework agreement can subsequently use it. The new regime provides this clarification and establishes other rules to simplify and support framework procurements.

Good news?

In many ways, the changes are good news, particularly for SMEs and in-house suppliers. The emphasis on efficiency and the clarification (through extra rules) of perceived gaps or grey areas in the current law which previously the ECJ has been left to address, can only be seen as a positive development.

However, the public procurement regime will now apply to more contracts. Contracting authorities will therefore need to update their internal procedures, published policies and other know-how in order to respond properly to the new rules and provide additional training for staff involved in commissioning and project delivery.

Liquidated or delay damages

Liquidated damages under UAE and UK law: a comparison

As we set out in our Introduction*, we have recently formed an association with Dubai-based law firm Ahmed Ibrahim. This means that we can offer our clients access to quick, cost-effective multi-jurisdictional advice. And there can be many differences of approach between the Arabic civil code of Dubai and the common law of England and Wales. Here Ahmed Ibrahim and James Mullen discuss the differences in approach relating to delay or liquidated damages.*

Liquidated damages in the UAE

Construction contracts commonly provide for a predetermined amount of damages which are to be paid by the contractor in the event of late completion of the works, or possibly specific milestones. This is what is known in the construction industry as liquidated damages ("LDs") for delay. The existence of LDs in a construction contract is a means of incentivising a contractor to perform in time. It is also an advantage for the parties to avoid the difficulty, time, efforts and expenses involved in assessing the loss which the employer will suffer from late completion. As Ahmed Ibrahim notes, the position of LDs under the UAE law, however, presents a significant degree of uncertainty as to the enforceability of LDs clauses. This may undermine the aforesaid advantages. Dealing with LDs clauses under the UAE law is one of the few areas where the judge may exceptionally intervene to revise the parties' agreement. This will be illustrated below.

According to Article 390 of the Civil Code, it is not sufficient – for the agreed compensation to become due – to establish the element of fault alone. The element of loss which is suffered by the other party must also be established as well.

It is worth noting that the Arabic term used, mostly by state courts, for LDs can be translated as "delay fines" or "penalty clause", and rarely the term "consensual compensation" is also used. This terminology sheds light on an essential difference between the position in the UAE and that in common law countries where the penal nature of LDs is a ground to attack their enforceability. Notwithstanding the terminology, the term "LDs" is commonly used within the industry, given the widespread use of standard forms in the English language in the UAE.

An LDs clause is supposed to set a pre-agreed assessment of the loss which will be suffered by the employer in the event of late completion. Thus, it concerns the quantification of damages as opposed to the liability for damages. The liability for damages is to be generated from the breach of the primary obligation to complete the work in time. Hence, the contractor's obligation to pay LDs is a secondary obligation.

Consequently, if a construction contract is terminated, the LDs clause automatically becomes valueless. The employer may then claim general unliquidated damages. In this respect the Dubai Court of Cassation stated that:

"*delay fines contained in contracts are deemed to be a penalty clause which is a secondary obligation correlated to the primary obligation, and it is a forfeit to the breach of the latter. The ineffectiveness of the primary obligation – as a result of the contract termination – leads to the ineffectiveness of the penalty clause. It follows that the court should not take account of the agreed damages stated in the delay fines clause; the judge may award general damages subject to proof of fault and loss according to the general rules.*"[1]

The legal ground for the parties' ability to agree the amount of damage in advance is found in Article 390 of the UAE Civil Transactions law (Civil Code) which states:

"*1- The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.*

2- The court may, on the application of either party, vary such agreement so as to make the compensation equal to the loss and any agreement to the contrary shall be void."

[1] Dubai Court of Cassation, 17 June 2001, case 302/21

Liquidated or delay damages

As such, to avoid the payment of LDs, a contractor may challenge the element of "loss." Article 390(2) entitles the judge to vary the parties' agreement to reflect the actual loss. This position is repeatedly affirmed and further explained by the UAE courts in considering LDs clauses. For example, the UAE High Federal Court in Abu Dhabi stated that

"*delay fines clauses contained in construction contracts are, in substance, no more than an agreed estimate of compensation that would become due in case of the contractor's failure or delay to perform its contractual obligations. According to Article 390 of the Civil Code, it is not sufficient – for the agreed compensation to become due – to establish the element of fault alone. It should be established, in addition, the element of loss which is suffered by the other party. If the contractor succeeds in establishing the absence of loss, the agreed compensation should be repudiated.*"[2]

Dealing with LDs clauses under the UAE law is one of the few areas where the judge may exceptionally intervene to revise the parties' agreement.

Accordingly, the court may set aside entirely the LDs in the unlikely case of the employer suffering no loss from the delay. The court may also award lesser damages reflecting the actual loss. In these two cases, the burden of proof is placed heavily on the contractor's part. In practice, courts tend not to easily accept the disregarding of LDs; the court would attempt to respect the parties' agreement and it would not be reluctant to uphold the LDs clause unless it is evident that the LDs considerably exceed the actual loss.

The opposite scenario is to award damages greater than the LDs upon the application of the employer. In this case the burden of proof is shifted onto the employer who should establish the fact that the actual loss exceeds the LDs. This position undermines one of the most important advantages of LDs which is the protection of the contractor against unliquidated damages.

The conclusion is that the uncertainty of LDs causes concerns for both sides; contractor and employer. Attempts to overcome this uncertainty would not work. Article 390(2) expressly states "*…and any agreement to the contrary shall be void*."

In the writer's view, LDs in the UAE should not be looked at from the same perspective as if they were subject to another applicable law, e.g. English law. Courts enforce LDs but there is always room for either party to challenge them; the judge may disregard the parties' agreement and award compensatory damages according to the general rules of civil law.

Liquidated damages in the UK

Most construction contracts contain a provision for the payment of liquidated damages ("LDs") in the event of certain specified breaches by a contractor. As James Mullen notes, those within the construction industry in the UK will no doubt be familiar with LDs although it is useful to remind ourselves of a few basic principles, especially in comparison with the civil law approach.

LDs are a predetermined level of damages agreed between the parties which the employer will be entitled to deduct from the contractor in the event of certain specified breaches occurring. LDs benefit both parties to the contract. They offer certainty, limit the contractor's liability, can save costs in circumstances where proving actual damage can be complex, expensive and time consuming, and they act as a deterrent to breaching the contract.

The parties agree the level of LDs when negotiating their contract. Although not always straightforward, the predetermined level of LDs should represent a genuine pre-estimate of the employer's likely loss that it will suffer should the specified breach occur. When claiming LDs, the employer does not have to prove that it has actually suffered the loss in the amount stipulated or at all. Further, the employer will be entitled to the amount of LDs stipulated, even if its actual loss is lower. If the level of LDs does not represent a genuine pre-estimate, it may be open to challenge by the contractor later down the line on the grounds that it constitutes a penalty (see below).

[2] High Federal Court, case 25/24 – 1 June 2004 (Civil).

Liquidated or delay damages

Care needs to be taken by the employer when completing the LDs provisions in the contract. Most standard form contracts such as the JCT have an Appendix which includes a section allowing the parties to simply fill in the level of LDs. However, in the past the courts have held that where the parties have completed such a provision by entering "£nil", they have agreed that there should be no damages for delayed completion, that it constitutes an exhaustive remedy entitling the employer to nil damages and that it is not open to the employer to claim general damages as an alternative.[3]

The most common specified breach in construction contracts for which LDs will be payable is the contractor's failure to complete its works on time. The fact that an employer may not suffer any actual loss from the delay does not relieve the contractor from its obligation to complete on time or pay LDs in the event of a delay. However, LDs do not relate exclusively to delay issues and the parties may decide at the contract negotiation stage to apply them to other events of default.

Whilst LDs will usually be an exhaustive remedy for a specified breach such as the failure to complete on time, an interesting question arises as to whether LDs also constitute a remedy where the breach is not the failure to complete on time but some other breach which gives rise to the delay. For example, if the contractor's work is defective and needs to be remedied, which in turn causes delay, does the LDs provision constitute a remedy for that breach? If, as a matter of construction, the provision appears to be a complete remedy for delayed completion then it does not matter why the contractor failed to complete on time (providing of course that the cause of delay does not give rise to an entitlement to an extension of time or was due to the employer's default).

Another interesting question is whether a contractor's liability for LDs continues after the termination of the parties' contract. The orthodox view by most legal commentators is that LDs will remain recoverable up to the date of termination and general damages for delay will apply thereafter.[4]

If a contractor does successfully defend a claim for LDs, the employer is not left without a remedy and it can still pursue a claim for general damages in the usual way.

Where there are delays on a project, a contractor may find itself faced with a significant amount of LDs levied against it. In such circumstances it is likely that the contractor will want to challenge the LDs provision in the contract. In reality, given that the parties negotiated and agreed the terms of their contract, the courts are usually reluctant to go against the parties' agreement. However, there are grounds for the contractor to challenge the LDs being levied by the employer and one of the most common of these is an argument that the amount of LDs constitutes a penalty rather than a genuine pre-estimate of loss and therefore is unenforceable.

Nearly a hundred years ago, the House of Lords in *Dunlop v Matthew Tyre Co Limited v New Garage Motor Co Limited*[5] established a number of principles to help distinguish LDs and penalties. Although these principles have inevitably been refined over the years by the courts, the law on LDs has not been the subject of drastic change and evolution and the basics principles are well established.

If the employer had made a genuine attempt to pre-estimate its loss, the courts are unlikely to judge it to be a penalty. That said, it should be noted that a genuine pre-estimate does not mean an honest pre-estimate. However, where the amount of LDs bears no relation to a loss that could conceivably result from that breach, the courts will not enforce it against the contractor on the basis that it constitutes a penalty. In *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd*[6] the court held that the sum must not be extravagant and unconscionable; although this does not mean that it has to be very similar in amount to the actual losses. The point in time for the assessment of whether a stipulated figure is a genuine pre-estimate or a penalty is when the contract is entered into, not when the delay occurs.

It is always a sensible precaution for an Employer to consider keeping records to show the reasonableness of the final figure agreed for LDs. In *Tullett Prebon Group Ltd v Ghaleb El-Hajjali,*[7] Nelson J. noted that an express contractual statement that there is a pre-

[3] *Tremloc Ltd v. L Errill Properties Ltd* (1987) 39 BLR 30

[4] However, the position has become slightly less clear following Coulson J's judgment in *Selby Hall and Philip Shivers v Jan Van Der Heiden* 9 (No.2) [2010] EWHC 586 (TCC)

[5] (1915) AC 79

[6] For example, in *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC)

[7] [2008] EWHC 1924 (QB)

Liquidated or delay damages

estimate or that the sum stipulated is not a penalty is persuasive but not conclusive. In *Azimut-Benetti SpA v Healey*,[8] the trial judge concluded that both parties had the benefit of expert representation in the conclusion of the contract. The terms, including the liquidated damages clause, were freely entered into:

"*As the authorities referred to... show, in a commercial contract of this kind, what the parties have agreed should normally be upheld.*"

Difficulties can also arise where the contract provides for a single sum of LDs but the works are in fact completed in sections or the employer takes partial possession of the works before completion. Unless the contract provides for the division of the single sum between sections or a proportionate reduction for partial possession, it is likely that an employer's claim for LDs will fail.

In reality, the argument that LDs in fact constitute a penalty is a difficult one to run and where the contractor is challenging the LDs provision, the burden is on it to demonstrate that it constitutes a penalty.

In addition to the penalty argument, other defences available to a contractor to challenge LDs include (but are not limited to): the employer is responsible for the delays, there has been a breach of condition precedents by the employer (for example, a failure to comply with the contract's certification or notification provisions) and the contractor is entitled to an extension of time.

"As the authorities referred to show, in a commercial contract... what the parties have agreed should normally be upheld."

Challenging LDs can be difficult. However, if a contractor does successfully defend a claim for LDs, the employer is not left without a remedy and it can still pursue a claim for general damages in the usual way. Alternatively, if it is determined that the agreed sum is in fact a penalty, the employer can rely on its claim for the penalty but recover no more than the actual loss which it proves up to the amount of the penalty.

Should a contractor fall into delay, in order to try and protect itself from LDs it should assess whether it has any notification obligations under the contract, whether it may be entitled to an extension of time and the procedure that needs to be followed in relation to this. However, whilst perhaps stating the obvious, the best way for a contractor to protect itself against LDs is to ensure that it manages its works diligently and effectively and that progress is closely monitored.

Conclusion

LDs are a universal feature of construction contracts. The FIDIC Guide notes that the purpose of LDs is to compensate the employer for losses it will suffer as a consequence of delayed completion. Where the amount of LDs is pre-agreed, the intention is that the employer does not have to prove actual loss and damage. Whether that is entirely correct may, as we discuss above, depend on the applicable law of the contract.

Unsurprisingly as we have seen, different jurisdictions deal with delay damages in different ways. And there is not a straight split between the civil codes and common law. For example, South Africa adopts a similar approach to the UAE. Under the Conventional Penalties Act 15 of 1962, the court can reduce the amount of LDs that might be applicable if the contractor can show that the employer will be unjustly enriched if he receives the LDs as specified in the contract, in other words if the employer is not suffering any loss due to the contractor's delay.

The onus, of course, is on the contractor to show that the rate of LDs agreed is out of proportion to the loss suffered by the employer. In that there may be some similarity with the UK, where the onus is on the contractor to show that the rate of LDs is a penalty. However as Ahmed Ibrahim has said, whilst there may appear to be similarities, there are dangers in simply looking at LDs from the perspective of the law and legal approach you are familiar with.

[8] [2010] EWHC 2234 (Comm)

Liability of adjudicators

In May 2013, Jeremy Glover spoke at the 13th International DRBF Conference on the thorny question of the liability of adjudicators (in the UK and abroad) and in particular the measures an adjudicator can take to protect themselves against liability. This is an extract from his paper.

So what do we mean when we talk about liability of adjudicators or protection from liability? Essentially, it is immunity from a claim for damages for professional negligence. When considering who has immunity, as a starting point, you need to look at which legal system governs the duties and liabilities of the adjudicator. This will be a mix of the parties' agreement, the law governing the adjudication agreement, the law of the place of the adjudication and perhaps the law of the country where any enforcement takes place.

Payment of adjudicators

In the UK, of course, at the end of 2012 questions relating to the enforceability of adjudicators' decisions (and potentially maybe the liability of adjudicators themselves) became a particularly hot topic following the decision of the Court of Appeal in the case of *PC Harrington v Systech International Ltd* [2012] EWCA 1371 (Civ). The Court of Appeal found that one of the key points was what is an adjudicator contracted to do? The Scheme for Construction Contracts gives the adjudicator a number of powers which he exercises during the course of an adjudication. This lead the Court of Appeal to ask:

"If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall... reimburse each of the Employer and the Contractor for any fees and expenses... for proceedings or decisions (if any) of the DAB which are rendered void or ineffective."

(i) Was the adjudicator's contract with a party a divisible contract whereby the adjudicator was entitled to be paid for the actions taken throughout the adjudication process?

(ii) Alternatively, was the agreement an "*entire*" contract which required complete performance and the delivery of an enforceable decision as a condition precedent to payment?

Lord Dyson stated that: "*a Decision which was unenforceable was of no value to the Parties*" and concluded that:

"*I can see no basis for holding that Parliament must have intended that an adjudicator who produces an unenforceable decision should be entitled to payment.*"

There are many ways in which a decision can be unenforceable. In *Harrington*, the adjudicator had not considered an aspect of the responding party's defence. In *Lee v Chartered Properties (Building) Ltd*, the decision was "*unenforceable by reason of its late delivery.*"

Statutory or contractual immunity

During the discussions, that introduced the adjudication legislation in the UK, Nick Raynsford, the MP for Greenwich, said:

"*If adjudication is to work, it is essential for the adjudicator to enjoy immunity from litigation. Otherwise, he will not be able to act quickly and expeditiously, but will be constantly looking over his shoulder, worrying about the prospect of a writ being issued by one of the parties who is aggrieved by the way in which he is proceeding. If we want swift adjudication, the adjudicator must have immunity.*"

There was concern that if the adjudicator was exposed to claims from the parties, any award or decision might result in further litigation, and so the whole judicial process would be undermined. Further it was said that the cost of professional indemnity insurance could be prohibitive. If adjudicators are sued all the time, no one will want to do the job. However, the Government was not having any of it. The Government's view was that adjudication is a contractual process. The adjudicator's immunity should be restricted to the Contract in question, and that protection from actions taken by third

Liability of adjudicators

parties should be a matter for contracting parties, not legislation. This is why s.108(4) of the HGCRA states that:

"*The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.*"

"I can see no basis for holding that Parliament must have intended that an adjudicator who produces an unenforceable decision should be entitled to payment"

This is also why Rule 32 of the TeCSA Rules states that:

"32. *Neither TeCSA, nor its Chairman, nor deputy, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of his functions as Chairman, deputy or Adjudicator (as the case may be) whether in negligence or otherwise, unless the act or omission is in bad faith.*"

In contrast, s.30 of the Building and Construction Industry Security of Payment Act 1999, in New South Wales says that:

"*(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:*

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act."

You cannot remove the protection enjoyed by the arbitrator/adjudicator by agreement. The protection is mandatory. However if there is no statutory process (for example Dubai) the adjudicator is solely reliant on the protection provided for by the contract.

Examples of bad faith might include the deliberate obstruction of proceedings, refusing to participate in tribunal's deliberations (without good cause) or perhaps the "leaking" of details of award/decision before publication. Potential outcomes following a breach of good faith (or any other breach by the adjudicator), might include unenforceability of any decision on grounds of public policy (*Systech), or the* removal of that adjudicator (something more possible during the Dispute Board process). Though there may be other potential losses to the parties: abortive costs, the costs of re-hearing the reference, the adjudicator's fees.

How wide is that protection?

Many adjudications arise under the contract. This means that they are often subject to the rules set out in the contract. So you need to consider what the rules actually say. The point about mentioning the TeCSA Rules earlier is to note the exclusion about negligence. Not every form of rules goes this far. Here TeCSA says clearly that the adjudicator is not liable for anything in the discharge of his functions as adjudicator "whether in negligence or otherwise". If of course the words "whether in negligence or otherwise" carry any weight then this casts real doubt on the protection that other rules, which do not have similar wording, may give.

At common law, a contractual exclusion of liability (as opposed to statutory immunity) is only effective in excluding liability for negligence if the intention to exclude negligence is made clear. This goes back to the 1972 case of *Gillespie Bros & Co. Ltd v Roy Bowles Transport Ltd* where the words "all claims or demands whatsoever" were held to constitute an agreement in express terms that the trader indemnified the carrier against all claims without exception, including a claim arising from the negligence of the carrier.

The common law is in contrast to many civil jurisdictions, where again you need to look to the wording of the rules. In Germany, Section 29 of the DIS Rules on Adjudication says that:

"*The adjudicator, the DIS, its officers and employees are only liable for intentional misconduct.*"

Liability of adjudicators

So what about FIDIC?

FIDIC is very similar to the rules discussed above. Under item 5 of the General Conditions of Dispute Adjudication Agreement, the Contractor and Employer undertake that the Dispute Adjudication Board will not:

"*be liable for any claims or anything done or omitted in discharge… of the Member's functions, unless the act or omission is shown to have been in bad faith.*"

The best way to guard against any such claims is to understand what you are required to do. What are the time limits? What are you not allowed to do? What law are you operating under?

And agree to

"jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph."

Procedural Rule 5 reinforces this by requiring that the members of the DAB shall:

"*act, fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case.*"

But note the sanction. If the DAB does not do its job, it does not get paid:

"If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB which are rendered void or ineffective."

Confidentiality

This is an important consideration. What do the rules of the contract say? Does the adjudicator or DAB have to keep the process confidential? At the end of 2012, there were stories in the press about an action being taken in the Dubai courts against a three-member arbitration panel due to the way they were said to have handled private settlement negotiations during a stay in the arbitration procedure. Now whilst it strikes me as difficult to believe that the claims had any substance, certainly, in theory there could have been a breach of the DAB or Arbitration Agreement.

Rule 32 of the TeCSA rules states that:

"*33. Unless the Parties otherwise agree the Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings.*"

Item 4(j) of the FIDIC general obligation of the DAB also notes that the DAB shall:

(j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any);

However, without that specific obligation, in some jurisdictions there may be a question mark as to the extent and nature of an adjudicator's confidentiality obligations. That said, the wise adjudicator will, as a matter of course, expect to keep any proceedings confidential.

Liability of adjudicators

Third parties

It is thought possible that liability may attach to third parties in certain extreme circumstances. The adjudicator makes a ruling and the parties are bound to comply with it on a temporary basis. An adjudicator who makes a decision that a building is structurally safe where the building subsequently collapses injuring a third party might be liable in negligence to that person. In the UK, the statutory Scheme does not make provision for such a situation. The ICE Adjudication rules require the parties to indemnify the adjudicator against claims from third parties:

"*7.2 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator is similarly protected from liability. The Parties shall save harmless and indemnify the Adjudicator and any employee or agent of the Adjudicator against all claims by third parties and in respect of this shall be jointly and severally liable.*"

Others such as the CIC rules state that no duty of care is owed to third parties, but there has yet to be a court case to decide whether such a duty of care exists. An adjudicator could include in his own terms and conditions a provision that the immunity includes claims for negligence. However for this to work, those terms and conditions would have to form part of the arrangement. Equally, if you have to sign up to a Dispute Adjudication Agreement as provided for in the contract, it is unlikely that an adjudicator would be able to impose something. Most employer organisations will not be able to deviate from the terms of contract demanded by the funders.

The wise adjudicator will as a matter of course expect to keep any proceedings confidential.

Often parties have exclusion of liability clauses. In the UK this is subject to the Unfair Contract Terms Act. In the case of *Ampleforth Abbey Trust v Turner and Townsend Project Management Ltd*, one such clause was excluded on the grounds that it was unreasonable in trying to limit liability to the amount of its fee (£111,321) when there was a requirement to maintain PI insurance of £10 million.

Insurance

Given the uncertainties surrounding the potential liability of adjudicators, it is important that sufficient professional insurance cover is maintained. Were there to be a successful negligence claim against an adjudicator this would inevitably increase the premiums for adjudicators and be another blow to the adjudication process. Remember that if you are an adjudicator you may well be required to maintain insurance in any event. Often maintaining insurance is a criteria for entry into the appropriate adjudicator list. For example Item 8 of the FIDIC – National Adjudicator Lists - notes that:

"FIDIC national Member Associations will decide upon admission criteria. The FIDIC guidelines (based on draft admission criteria for the ACE-UK Adjudicators Panel) can be summarised as follows:

– maintains adequate professional indemnity insurance."

Conclusion

There are very few cases where it has even been suggested that action could be taken against an adjudicator. Indeed, one of the dangers of discussing topics such as these is that, however unwittingly, they all help start the ball rolling. That said, it was clear from the discussion at the DRBF conference that this is a topic which is of some concern to many who act as adjudicators or as members of dispute boards. However, in truth, the best way to guard against any such claims is always to understand above all else what your obligations under the contract or agreement actually are. What are you required to do? What are the time limits within which you must act? As importantly, what are you not allowed to do? What is the law you are operating under?

FIDIC – enforcing DAB decisions

FIDIC, as is well known, is currently finalising a new revised and updated version of the Yellow Book. As Jeremy Glover explains, in a taste of what is to come, on 1 April 2013 the FIDIC Contracts Committee issued a Guidance Note dealing with the powers of, effect of and the enforcement of Dispute Adjudication Board ("DAB") decisions.

The purpose of the Guidance Note is to clarify clause 20 of the General Conditions of the Rainbow Suite or 1999 Conditions of Contract. The guidance is intended to address the question of how one enforces DAB decisions that are binding but not yet final. FIDIC say that their intention is to make it explicit and clear that the failure to comply with a DAB decision should be capable of being referred to arbitration under sub-clause 20.6 without the need first to obtain a further DAB decision under sub-clause 20.4 and to comply with the amicable settlement provisions of sub-clause 20.5.

The changes to clause 20 mirror the scheme currently to be found in the Gold Book, *a likely pointer to FIDIC's approach when the revised* Yellow Book *is finally released.*

Such an approach will be familiar to those who operate in jurisdictions where short-form adjudication has been introduced (for example the Housing Grants, Construction and Regeneration Act in the UK) and where decisions that are binding and not yet final can be immediately enforced. Indeed the Building and Construction Industry Security of Payment Act 2006 in Singapore goes as far as to state that an application for review of an adjudicator's decision can only be heard if that decision has actually been paid.

The idea behind clause 20.4 is that whether or not a party has given notice of its dissatisfaction, the DAB's decision should be immediately binding on the parties and they must comply with it promptly. If a party fails to comply with a DAB decision and that decision has become final, sub-clause 20.7 already provides for a party to refer the other party's failure to comply with such a decision direct to arbitration. However, if the DAB decision is binding but not final (i.e. the "losing" party has served a notice of dissatisfaction), there is now doubt about whether or not there is a straightforward route to enforcing that decision.

The reason why FIDIC has issued this guidance now owes much to the discussion and disagreement that followed the Singapore case of *CRW Joint Operation v PT Perusahaan Gas Legara (Persero) TBK* [2011] SGCA 33. Here, the Singapore Court of Appeal held that an Arbitral Tribunal had, by summarily enforcing a binding but non-final DAB decision by way of a final award without a hearing on the merits, acted in a way which was: "*unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract*". The problem for the court was that the Arbitral Tribunal had assumed that they should not open up, review and revise a DAB decision which was the subject of a notice of dissatisfaction.

The Singapore case examined the grounds for setting aside arbitration awards in construction-related disputes. If, within 28 days after receiving a dispute adjudication board (DAB) decision, either party gives notice to the other party that it is dissatisfied with the decision, the decision will be binding but not final. This case looked at whether a party may refer to arbitration the failure of the other party to comply with a DAB decision that is binding but not final.

However, where a party does not comply with the DAB decision and where the Singapore case is followed, the decision of the dispute board itself cannot simply be enforced as an arbitral award, without some form of arbitration, or local court litigation (where the contract permits it), which opens up and reviews again the issues decided by the DAB. This is particularly unhelpful to a contractor who has been awarded money. It is to avoid similar problems in the future, that FIDIC has now issued the Guidance Note which suggests amendments to clause 20.

The Guidance Note follows the approach to be found particularly in sub-clause 20.9 of the FIDIC Gold Book. It provides a new sub-clause 20.4, and amends the wording to

FIDIC – enforcing DAB decisions

sub-clause 20.7 as well as further provisions at clauses 14.6 and 14.7. The amendments are for use in the Red Book, Silver Book and Yellow Book. The Gold Book already adopts a different approach, and so the amendments proposed in the Guidance Note should not be used in their current state. FIDIC recommends the introduction of a new penultimate paragraph of sub-clause 20.4:

"*If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment.*"

This gives the DAB a contractual right or power to order one party to provide security. The DAB cannot force a party to comply, and so once again a party may have to go to arbitration in order to obtain an appropriate sanction and then seek to enforce that award in an appropriate court.

In relation to the payment provisions in clause 14, a payment under sub-clause 14.6 "shall" now include any amounts due to or from the contractor in accordance with the DAB's decision. Sub-clause 14.7 further requires that amounts due under a DAB decision be included within any Interim Payment Certificate that is to be issued. The intention here is that any amount ordered by the DAB to be paid should be included within an assessment of payment made by the engineer or the Employer's Representative, and then included within the Interim Payment. Failure to do so is simply a further breach.

Does the new guidance in fact make it more difficult for a party to persuade a court or tribunal that the current (1999) drafting does actually achieve FIDIC's intentions that the DAB decision, if it is not followed, can be summarily enforced?

Sub-clause 20.7 is then deleted and replaced with the following:

"*In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [obtain Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.*"

Sub-clause 20.7 relates to decisions that are either binding or final and binding. Therefore regardless of any notice of dissatisfaction, or more importantly any arguments or issues as to the adequacy or timing of any notice of dissatisfaction, a valid referral can be made to arbitration. The amendment also clarifies that the parties expect a summary or expedited relief to be used if and as appropriate. That said, the ICC's emergency arbitrator provisions are unlikely to be appropriate. This is because they are for use when the contract itself does not provide for an expedited procedure. A DAB dispute resolution procedure is such an expedited procedure. Therefore it is probably more appropriate to commence arbitration and seek an immediate award for payment if there is any failure to honour the DAB decision.

Conclusion

Of course, this guidance will only apply to future contracts, where the amendment is negotiated and agreed. However for current contracts, the likelihood must be that it will be more difficult for a party to persuade a court or tribunal that the current (1999) drafting does actually achieve FIDIC's intentions that the DAB decision, if it is not followed, can be summarily enforced. The issuing of contract amendments will be used as proof that the existing contract form does not achieve this aim. By simply issuing guidance that the Singapore Court of Appeal's decision was contrary to FIDIC's intentions regarding the operation of clause 20, FIDIC may have had a different effect. But by issuing amendments to the existing contract, FIDIC have gone further and might be said to have admitted that their existing contract was not sufficiently clear.

That said, it is useful to know now some of the changes that are likely to appear in the new FIDIC Form, and the Guidance Note itself is a useful reminder of the need for clarity and certainty within tiered dispute resolution provisions, not only in FIDIC and other standard forms but also bespoke construction contracts.

Good faith

Can you imply good faith under English law?

In last year's Review, *Richard Smellie wrote about the importance of the decision of the Supreme Court in* Rainy Sky S.A. and others v Kookmin Bank[1] *when it came to considering ambiguities in contract documents. Richard explained that where the language is clear, the rights and obligations will be clear, but language is often susceptible to more than one possible meaning, particularly when arguments arise or the unexpected occurs. Commercial contracts are often complex, and ascertaining the true nature of the parties' agreement on a particular point can be challenging. The starting point is, of course, the words on the page, but where there is conflict or ambiguity, this must be interpreted. It is at this point that the law of the contract steps in, with rules on how the contact is to be interpreted. In the Kookmin case, the Supreme Court confirmed the particular importance of giving weight to "business common sense" in ascertaining what the parties meant by the language they used, when ambiguity arises.*

"In the light of these points, I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced."

The *Kookmin* decision, arguably, reflects an emphasis on the perceived commercial realities that many Dispute Adjudication Boards and arbitrators have been quietly giving precedence to for many years. It does, however, place business common sense at the heart of contract interpretation when ambiguity arises, and so has important ramifications for all commercial contracts, not least construction contracts. It is also a decision which is now routinely to be found in disputes over what a contract actually means. It may also be the reason why the past 12 months or so have seen a resurgence in attempts by parties to rely on the principles of good faith in determining what a contract might mean.

Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corporation Ltd[2]

Traditionally under English contract law there is no legal principle of good faith. There are two reasons for this, the general principle of freedom of contract whereby parties are free to pursue their own goals in both negotiating but also in performing contracts provided they do not act in breach of a term of the contract. Second, there is concern that the concept of good faith is too vague and subjective and therefore uncertain.

Mr Justice Leggatt noted that this approach, in refusing to recognise any general obligation of good faith, would appear to be an example of "swimming against the tide" of both civil and common law jurisdictions. Good faith appears in most civil codes and in Australia, for example, the existence of a contractual duty of good faith is reasonably well established.[3] The Judge concluded that he doubted that English law had reached the stage where it was ready to recognise a requirement of good faith as a duty implied by law, in all commercial contracts. That said, there seemed to be no difficulty in adopting the established principles of the implication of such terms.

Under English law, the two basic and principal criteria used to identify terms to be implied are that the term is so obvious that it goes without saying and that the term is necessary to give business efficacy to the contract. What would the contract, read as a whole against the relevant background, reasonably be understood to mean? In the case here, the Judge noted that the relevant background was important, not only in terms of matters of fact known to the parties but also in terms of shared values and norms of behaviour. These may include norms that command general social acceptance or that may be specific to a particular trade, commercial activity or even the particular contractual relationship in question.

The Judge stressed that commerce takes place against a background expectation of honesty. Such an expectation is essential to commerce, which depends critically on trust. However, such an expectation is seldom, if ever, made the subject of an express contractual obligation. To seek to do so might actually damage the parties' relationship by the lack of trust that this would signify. The Judge concluded that as a matter of

[1] [2011] UKSC 50
[2] [2013] EWHC 111 (QB)
[3] The Judge's judgment provides a useful summary of the position worldwide.

construction, it would be hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance.

Mr Justice Leggatt stressed that what good faith requires is sensitive to context. That includes the core value of honesty. Some contracts, including joint venture agreements, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence, which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. He also referred to the body of cases in which duties of cooperation in the performance of the contract have been implied and the authorities which show that a power conferred by a contract on one party to make decisions that affect them both must be exercised honestly and in good faith for the purpose for which it was conferred, and not arbitrarily or unreasonably. Mr Justice Leggatt concluded:

"*In the light of these points, I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.*"

In the Kookmin case, the Supreme Court confirmed the particular importance of giving weight to "business common sense" in ascertaining what the parties meant by the language they used, when ambiguity arises.

Now, of course, Mr Justice Leggatt clearly is not saying that you would be able to imply good faith into each and every agreement. It all depends on the context of the contractual arrangements made between the parties. However, the Judge has potentially opened a pathway which others (perhaps coincidentally) have tried to follow. And indeed there have been two further cases in the English courts. Both confirm that everything does indeed depend on the context, and both confirm that the ability to imply good faith into agreements made under English Law remains a difficult matter.

TSG Building Services Plc v South Anglia Housing Ltd.[4]

Here, TSG and SAH entered into a contract for the provision by TSG of a gas servicing and associated works programme relating to SAH's housing stock. This contract was based on the ACA Standard Form of Contract for Term Partnering (TPC 2005, amended 2008). Mr Justice Akenhead identified two key contract terms:

"*1.1 The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme,[5] within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and in all matters governed by the Partnering Contract they shall act reasonably and without delay.*"

"*13.3 If stated in the Term Partnering Agreement that this clause 13.3 applies, the Client may terminate the appointment of all other Partnering Team members, and any other Partnering Team member stated in the Term Partnering Agreement may terminate its own appointment, at any time during the Term or as otherwise stated by the period(s) of notice to all other Partnering Team members stated in the Term Partnering Agreement.*"

A question arose as to whether or not termination under sub-clause 13.3 of the Contract needed to have been effected in good faith or at least reasonably. Did sub-clause 1.1 as a matter of construction provide for any constraint, condition or qualification on the apparently unfettered right of either party to terminate in effect for convenience (or without any already given reason) under sub-clause 13.3? In broad terms, the Judge said that this meant that one needed to determine objectively what a reasonable person with all the background knowledge reasonably available to the parties at the time of the contract would have understood the parties to have meant. In doing this, he was saying that he was looking to adopt a more rather than less commercial construction.

The first part of sub-clause 1.1 was clearly primarily calling upon the parties to "work together" and in that context to do so, jointly and separately, "in the spirit of trust, fairness and mutual co-operation", the object being towards "the benefit of the Term Programme." The Term Programme had as its object the efficient and good quality performance of the gas-related works in some 5,500 dwellings. This was all to be "within the scope" of the

[4] [2013] EWHC 1151 (TCC)

[5] This is not so far away from the NEC clause 10.1 which requires all those operating the contract to act "in the spirit of mutual trust and co-operation."

Good faith

"roles, expertise and responsibilities" called for in the Partnering Documents. This both on its face and as a matter of commercial common sense did not obviously or at all impinge upon either party's right to terminate at will under sub-clause 13.3. Termination at will was not a "responsibility." It did not give rise to a "role" and/or was not dependent upon any "expertise."

Mr Justice Leggatt emphasised that "what good faith requires is sensitive to context."

It was therefore necessary to consider the scope of sub-clause 1.1 in the context of the preamble confirming that the parties had agreed to work "*in mutual co-operation to fulfil their agreed roles and responsibilities and apply their agreed expertise in relation to the Term Programme, in accordance with and subject to the Partnering Documents*" and the bespoke part of sub-clause 1.1 which spelt out that the "roles, expertise and responsibilities" of the parties were further described in the Term Brief and Term Proposals. The clause was primarily directed to the way in which the parties shall work together (and individually).

The Judge concluded that sub-clause 1.1 did not require SAH to act reasonably as such in terminating under clause 13.3. Sub-clause 13.3 entitled either party to terminate for any reason or even no reason. It was clear that the four-year term is subject to clause 13. Clause 13 provided for automatic termination for insolvency, termination for breach, and an unqualified and unconditional right to terminate. There could be no doubt that if either party had applied their mind to this prior to the contract being signed it was clear that there was such an unqualified right available to either party; it was obvious to each that the other could terminate at any time. Sub-clause 1.1 was primarily concerned with the assumption, deployment and performance of roles, expertise and responsibilities set out in the Partnering Documents and the parties in so doing must "*work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme*" and act reasonably and without delay in so doing.

However, was there an implied term of good faith? The Judge referred to the review carried out by Mr Justice Leggatt in the *Yam Seng* case. He noted the need to be "*sensitive to context*" and also the Judge's comments on what he described as the "*core value of honesty*." Mr Justice Akenhead did not consider that the case here was one involving implied obligations of fidelity. There was no suggestion or hint that there had or might have been any dishonesty in the decision to terminate. The Judge concluded that:

"*I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of 'trust fairness and mutual co-operation' and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term…*"

Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd[6]

The Court of Appeal also referred to the *Yam Seng* case in considering whether or not Compass had been entitled to terminate their long-term facilities contract, the court had to consider the meaning of clause 3.5 which imposed a duty to co-operate in good faith:

"*3.5 The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or... any Beneficiary to derive the full benefit of the Contract.*"

At first instance Mr Justice Cranston had noted that the Trust and Compass had entered into a long-term contract for the delivery of food and other services within a hospital. The performance of this contract would require continuous and detailed co-operation.

[6] [2013] EWCA 200 Civ

Good faith

He considered that it accorded with commercial common sense for there to be a general obligation on both parties to co-operate in good faith.

The Trust said that if the parties had intended to impose a general duty to co-operate with one another in good faith, they would have stated this in a stand-alone sentence with a full stop at the end. They did the opposite of that in clause 3.5. This was a very detailed contract, where the obligations of the parties and the consequences of any failings were spelt out in great detail. Commercial common sense therefore did not favour the addition of a general overarching duty to co-operate in good faith.

"Clause 13.3... was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term…"

On appeal, LJ Jackson began his judgment by noting that there is no general doctrine of "good faith" in English contract law. If the parties wish to impose such a duty they must do so expressly. He then held that he agreed with the Trust. The content of a duty of good faith is heavily conditioned by its context. The obligation to co-operate in good faith was not a general one that qualified or reinforced all of the obligations on the parties in all situations where they interacted. The obligation to co-operate in good faith was specifically focused upon the two purposes stated in clause 3.5. In the context of clause 3.5, the obligation to co-operate in good faith simply meant that the parties would work together, honestly endeavouring to achieve the stated purposes. The obligation to co-operate in good faith was limited to those stated purposes stated, i.e. the efficient transmission of information and instructions and the enabling of the Trust to derive the full benefit of the Contract.

Compass could not rely upon breaches of the implied term to support their arguments that there had been a breach of good faith. In any event, absent any dishonesty, the Trust's miscalculation of the amount of service failure points would not have amounted to a breach of a general obligation of good faith.

Conclusion

It should be noted that Lord Justice Beatson specifically commented upon the *Yam Seng* case, noting that Mr Justice Leggatt had emphasised that "*what good faith requires is sensitive to context*",

"*that the test of good faith is objective in the sense that it depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people, and that its content 'is established through a process of construction of the contract'… Those considerations are also relevant to the interpretation of an express obligation to act in good faith.*"

He therefore agreed that the scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract and its overall context. In other words, the content of the obligations to co-operate in good faith was to be determined by reference to the two purposes specified in the clause. Put another way, one should take a narrow interpretation of any clause that suggests that parties must exercise the duty of good faith. He said:

"*In a situation where a contract makes such specific provision, in my judgment care must be taken not to construe a general and potentially open-ended obligation such as an obligation to 'co-operate' or 'to act in good faith' as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them.*"

That both Mr Justice Akenhead in the TCC and the appellate judges in the Court of Appeal laid stress on Mr Justice Leggatt's view that "what good faith requires is sensitive to context" rather suggests that we are still a long way off from the English and Welsh courts accepting that there is a wide-ranging duty of good faith, such as to be found in the majority of other jurisdictions around the world.

BIM (Building Information Modelling)

BIM: what you need to know

In the UK, there continues to be considerable comment about Building Information Modelling (or BIM). BIM is a way of approaching the design and documentation of a project by utilising 3-D computer technology which is shared amongst the design and construction teams, incorporating cost, programme, design, physical performance and other information regarding the entire life cycle of the building in the construction information/building model. It is clear that the use of BIM is increasing. An NBS survey of the construction industry conducted between December 2012 and February 2013 found that 39 per cent of respondents were using BIM, which does not sound a lot but it was up from 13 per cent in 2010.

In the UK[1] this discussion has largely been generated by the publication of the Government's construction strategy which requires that all Government projects utilise BIM in the form of a fully collaborative 3-D computer model (Level 2) by 2016, with all project and asset information, documentation and data being electronic. Cabinet Minister Chloe Smith, speaking at the BIM4SME Building Information Launch on 15 April 2013, said that BIM lies "*squarely at the heart of*" the Government's push to reform the construction industry, that it was *"a great leveller*" and "*was becoming a catalyst*" for growth. That said, currently there are many different types of BIM models being used in the market and certainly not everyone will have the means to use BIM in the short/medium term which will lead to duplication as hard copy drawings are still required – for example planning authorities still require hard copy drawings.

BIM is not just about the technology: it is just as important to be able to manage the use of that technology as well.

This rise of BIM will only continue if the trial projects are a success. And it has been widely reported that the Cookham Wood prison is proceeding very well, with over £800,000 of savings apparently having been achieved in part by taking the staff on a virtual walk through at an early stage in the design, enabling a discussion over what was and was not needed, and also again through discussions at an early stage with the contractor over what needed to be done to achieve the necessary BREEAM ratings.

It is important to remember that BIM is not simply the use of 3-D technology – it is a way of design and construction. And as the use of BIM spreads throughout the construction industry, thoughts inevitably turn to the question of the type of legal and contractual implications that may arise. The Singapore BIM Guide notes that:

"*A basic premise of Building Information Modelling (BIM) is collaboration by different project members at different stages of the life cycle of a facility to insert, extract, update or modify information in the BIM process to support and reflect the roles of each project member.*"

Will BIM alter responsibilities for design?

This can lead to concerns about whether or not the use of BIM might alter the traditional allocation of responsibilities as between the client, contractors, designers and suppliers. In the UK, where the Government is talking about the implementation of BIM Level 2, the answer to this question is that BIM should not alter those traditional responsibilities to any great degree. The reason we say this is because BIM Level 2 is:

"*a series of federated models prepared by different design teams (the number of models and purpose to be determined by the Employer), put together in the context of a common framework for the purpose of being used for a single project with licences granted to other project teams members to use the information contained in the federated models.*"[2]

If you think of each model as a drawing or design in the more traditional sense, then provided your contract clearly defines your role and responsibility in the usual way, you can see why there should not be any significant change. Indeed, you should remember that your usual responsibilities will remain. Remember the importance of understanding the design brief and the ongoing obligation to review the design. The new technology and new way of producing design do not change the fundamental legal principles.[3]

[1] Of course internationally, the use of BIM can already be found on projects worldwide. For example, in Norway, the Statsbygg (the Norwegian government's key advisor in construction and property affairs) already uses BIM in all public projects.
[2] NBS Roundtable, 12 July 2012.
[3] In time, as the technology bounds on and the collaborative nature of BIM increases, this may (most would say "will") change, but not at Level 2.

BIM (Building Information Modelling)

What will happen to my contract?

There is also the question of how (if at all) the standard form appointments and building contracts should be altered to account for the use of BIM. The general view is that there is no need to do anything more than insert a BIM protocol into the Works Information or Scope. This is the approach taken by the standard UK contract body, the JCT, whose "Public Sector Supplement 2011" (the only standard form contract that actually refers to BIM at the moment) suggests incorporating a "BIM protocol" as a "Contract Document."

"*In the definition of 'Contract Documents' insert after 'Contractor's Proposals' any agreed Building Information Modelling Protocol.*"

BIM is "squarely at the heart of" the Government's push to reform the construction industry.

On 22 April 2013 the NEC published the first set of major amendments to the NEC3 suite since it was first published in 2005. As well as the introduction of a new Professional Services Short Contract and provision being made for the use of project bank accounts, the NEC published seven "how to" guides including one entitled *How to use BIM with NEC3 Contracts*. This includes guidance on using the CIC BIM Protocol. It also provides suggested additional clauses for use with each of the main NEC3 Contract forms, the intention being that they are included as additional contract clauses under Option Z. Unsurprisingly, the Guide also says that it is important to include as part of the Works Information or Scope any particular information requirements and also tables which may be required, for example, in relation to the timing of model production or manner (i.e. use of software) in which it is to be produced.

The Guide also suggests the need to include additional compensation events: first, where a party is unable to provide its model as required because of events outside of its control; and second, in acknowledgement of the difficulties that may arise if an employer is obliged to revoke any sublicence that may have been provided to use information provided by others. In these circumstances, it may be necessary to remove that information for your own model.

So far, this seems quite simple. But what is not necessarily so straightforward is knowing quite what the BIM Protocol actually is.

What is the BIM protocol all about?

In the UK there are at least two protocols. According to the AEC (UK) BIM Protocol, the purpose of the protocol is:

- To maximise production efficiency through adopting a coordinated and consistent approach to working in BIM;
- To define the standards, settings and best practices that ensure delivery of high quality data and uniform drawing output across an entire project; and
- To ensure that digital BIM files are structured correctly to enable efficient data sharing whilst working in a collaborative environment across multidisciplinary teams both internally and in external BIM environments.

To achieve this, the key features of a typical BIM protocol should include consideration of:

- Definitions;
- The place of the BIM protocol in the priority of the contract documents;
- The obligations of the Employer and project team member;
- Who should appoint the BIM Information Manager and when?
- Who is to produce the models? And in what format and by when?
- The use of models. Who can amend data once it is incorporated? Can you look but not touch? What are the limitations (if any) on liability associated with models?
- Copyright. The need to grant licences related to permitted purposes.

BIM (Building Information Modelling)

The CIC BIM Protocol[4]

In March 2013, the Construction Industry Council (CIC) published its much anticipated *Building Information Modelling (BIM) Protocol*. The CIC Protocol is intended to set a standard for the future and was published alongside two other BIM documents: *Best Practice Guide for Professional Indemnity Insurance when using BIM* and *Outline Scope of Services for the Role of Information Management*. The CIC BIM Protocol is UK-wide and is specifically for the use of Level 2 BIM.

The intention was to produce a simple document which can be added to standard forms of contracts and appointment documents. The CIC Protocol, in eight clauses, establishes the contractual and legal framework for the use of BIM on a project and clarifies the obligations of the team members. There are also two appendices which will need to be carefully considered and completed. If it is accepted in the construction industry as a standard document then it is thought that this will encourage the use of BIM.

The CIC *Best Practice Guide for Professional Indemnity Insurance* suggests that professional indemnity insurers do not currently consider that there are any significant issues with Level 2 BIM. Indeed, the use of BIM itself should reduce the number of claims against insurers. This should mean that the effect on premiums will be minimal.

The RIBA recognise that BIM is part of a move away from the traditional design team.

This is one of the intentions behind the production of standard form documents like the CIC Protocol. That said, as the CIC recommend, if undertaking BIM for the first time, it would be sensible to check with insurers and brokers before commencing a project to make sure everyone is happy with the contractual arrangements and the role you are going to play. The idea behind the CIC Protocol is that it would be incorporated as a contract document using the standard enabling provisions that have been provided. It should take precedence over other documents in relation to BIM matters. It therefore fits neatly with the approach of the JCT and NEC, the latter, for example, having suggested that the CIC Protocol needs to be inserted into the Works Information.

Clause 3.1 of the Protocol says that the Employer should arrange for the Protocol to be incorporated into all the Project Agreements – an important requirement. The same clause also requires that the Employer ensure that there is a BIM Information Manager appointed at all times during the project.

The CIC has also prepared details of the scope of services of the Information Manager. There are two versions: a detailed version compatible with the CIC scope of services, and a simpler version said to be suitable for incorporation with any appointment. It is important to remember that the Information Manager should have no design-related duties. The Information Manager's role is to manage the processes and procedures for information exchange on projects. They will therefore be responsible for initiating and implementing the Project Information Plan – who does what and when.

Clause 4 sets out the obligations of project team members. They must produce models to the specified level of detail. This is subject to the same level of skill and care required under the main appointment. Other obligations, such as the incorporation of the Protocol into subcontracts, are subject to a reasonable endeavours' obligation.

Clause 5 deals with what happens if data becomes corrupt. Here clause 5.1 expressly states that the Project Team Member does not warrant, expressly or impliedly, the integrity of any electronic data delivered in accordance with this Protocol. Further by clause 5.2, it appears clear that it is the Employer who bears the risk for "*any corruption or any unintended amendment modification or alteration of the electronic data in a Specified Model which occurs after it has been transmitted by the Project Team Member, save where such corruption, modification or alteration is a result of the Project Team Member's failure with the protocol.*" An Employer may well consider that this will need to be altered in a design and build project. And indeed, clause 11.3.4 of the CIOB Contract for use with Complex Projects provides that a Contractor required to design the whole of the works using BIM shall: "*select and remain solely responsible for the suitability and integrity of the selected software and any information, drawings, specifications or other information extracted from the model.*"

[4] All the CIC documents referred to here can be downloaded at: http://staging.cic.org.uk/publications/

BIM (Building Information Modelling)

In this regard, the CIC Protocol has taken a different approach to international protocols. The American ConcensusDocs 301 simply states that: "Each Party shall be responsible for any contribution it makes to a model or that arises from that party's access to that model."

Use a BIM Protocol to help ensure that everyone understands who needs to do what and by when.

Clause 6 deals with intellectual property (IP) rights. The traditional approach is for the lead designer to retain copyright in his designs whilst giving a licence to the client, tenants, etc. to use the designs, normally for purposes associated with the construction, maintenance of the building, etc. The licence is often (but not always) irrevocable and will remain in place even if the designer is not paid. The CIC Protocol clearly states that the use of the BIM model is limited to the particular project in question and that the information loaded onto that model remains the property of the party that produced it. Licences to use the model will be granted by the employer to the participants but only for the purposes of the project and only to the extent that each participant feeds into the model. One potential problem may come if one of the parties suspends the licence it has offered for use of its model. This could cause serious disruption to a project. The best, if not only, way to deal with this would be to make the licences irrevocable.

However, in general, the CIC Protocol does achieve its aim. Using the CIC Protocol should not lead to substantial amendments to existing contracts. However, as with all contracts and all standard forms and amendments, it is important to make sure that the contractual documents and project specifications fit the demands of the particular project.

Who is the BIM Manger?

It is critical that you understand the terms being used. BIM is (relatively) new. People use different words and terms to define the same role. Here, more than ever, you should not assume what a word means. To take one example: the list of key features of the BIM protocol set out above refers to the BIM Information Manager. Other people might refer to the BIM Model Manager or maybe the Design Coordination Manager or even the VDC (Virtual Design to Construction) Manager. Whatever name the BIM Information Manager goes by, it is an important position. The basic role of the BIM Manager is to coordinate the use of BIM on a project. The BIM Information Manager is responsible for the administration and management of processes associated with Building Information Modelling on a particular project. More specifically, the PAS 1192-2:2012 requires the BIM Information Manager to:

"*provide a focal point for all information modelling issues in the project; ensure that the constituent parts of the Project Information Model are compliant with the MIDP [Master Information Delivery Plan]; [and] ensuring that the constituent parts of the Project Information Model have been approved and authorized as 'suitable for purpose' before sharing and before issuing for approval.*"

This will include having responsibilities for user access to the project BIM Model and for coordinating the submission of the individual designs and integrating them into the project model. The BIM Information Manager should also be in charge of data security and for maintaining records (who submitted what and when, and whether it was according to the agreed programme) and a data archive.

At Level 2 BIM, it is during the coordination process that the models are linked (or referenced) together into one federated model. A well-drafted protocol will ensure that the liabilities of each designer remain the same, before and after the incorporation of their design (or model) into the federated model.

This does lead to one further question. If each party is responsible for its own model, to what extent is the BIM Information Manager liable when clashes are not detected or the design is not coordinated? The typical approach, at least at common law, is that set out by the PAS 1192-2:2012[5] which suggests that the Lead Designer shall be responsible for the coordinated delivery of all design information.

[5] A free copy can be downloaded at: http://shopbsigroup.com/en/forms/PASs/PAS-1192-2/

BIM (Building Information Modelling)

In other words, nothing has changed. The role of the BIM Information Manager is therefore not meant to be equivalent to that of Lead Designer. The Information Manager is responsible for the management of information, information processes and compliance with agreed procedures, not the coordination of design. However, this does need to be spelt out, perhaps in a BIM protocol; otherwise a potential conflict arises with regard to design and design coordination roles.

The RIBA Plan of Work[6]

The RIBA Plan of Work was published in May 2013. Replacing the traditional eleven stages defined by the letters A–L, are eight stages defined by the numbers 0-7, and eight task bars. BIM is an integral part of the Plan of Work and the RIBA recognises the importance of properly establishing the project team at an early stage, especially given the increasing use of technology that enables remote communication and project development using BIM. In this, the RIBA is recognising a move away from the traditional design team. At the same time, it focuses on who amongst the project team does what, when and how.

The role of the BIM Manager is key: to "provide a focal point for all information modelling issues in a project."

One of the main points of BIM is to allow the design to start more promptly and in more detail. However, this can only be done once everyone's roles have been identified. This is why the RIBA Plan of Work 2013 has a Project Roles Table to try and assist in the development of the project team. The Plan of Work also provides for a Schedule of Services as well as encouraging the preparation of a project programme agreed by all members of the project team. This will of course need to align with any construction programme produced by the contractor.

The Plan of Work advocates the development of a technology strategy which is established at the outset of a project. As you would expect, this should set out the technologies, specific software packages, including Building Information Modelling (BIM), and any supporting processes that each member of the project team will use. The strategy can also include details about how information is to be communicated, including the file formats in which information will be provided and any file-naming protocol. This information can then be set out in a Project Execution Plan and should help in ensuring that information can be used and shared. As the RIBA states, any interoperability issues can then be addressed before the design phases commence.

Conclusions

The fact that the NEC has prepared a "how to" guide rather than sought to introduce widespread revisions to their contracts, demonstrates that at Level 2 at least, from a legal point of view, there is no need to make substantial changes to your contracts. At least at Level 2, BIM should not alter the traditional design roles and responsibilities. As always, it is important that these are clearly defined and spelt out. It is also true that at Level 2, there should not be any great need to amend or rewrite the standard forms of contract and professional appointments. However, this is provided that those working with BIM all sign up to a BIM protocol and agree to produce a BIM Implementation Plan promptly.

It is far more important to understand what you (and others) are being asked to provide in terms of BIM, and when you need to provide it. It is equally important that someone in your organisation is tasked with keeping up to speed with the developments, both contractual and technical.

In the introduction to the RIBA BIM Overlay, author Dale Sinclair uses the term "BIM(M)" meaning "Building Information Modelling and Management" – an important reminder that BIM is not only about the technology. It is just as important to be able to manage the use of that technology as well.

[6] Information about the Plan of Works can be downloaded at: http://www.ribabookshops.com/plan-of-work

Management contracting

Management contracting – the JCT Management Contract: a review

One of the least used forms of contract, produced by the JCT, is the JCT Management Building Contract, related Works Contract and other related documents. Management contracting is perceived in the industry as a complex form of contract sitting partway between the more traditional forms such as the JCT Private with Quantities and the most popular JCT form, the Design and Build form. Richard Bailey provides an overview of management contracting and some of the potential problems presented by the slightly unusual contractual matrix of management contracting.

Management contracting is described by the RICS as:

"*…appropriate where the Management Contractor undertakes to manage the carrying out of the work through work contractors, and those work contractors are contractually accountable to the Management Contractor. The client normally engages the Management Contractor to take an active role in the project at an early stage, and because of this the Management Contractor is normally an experienced contractor.*

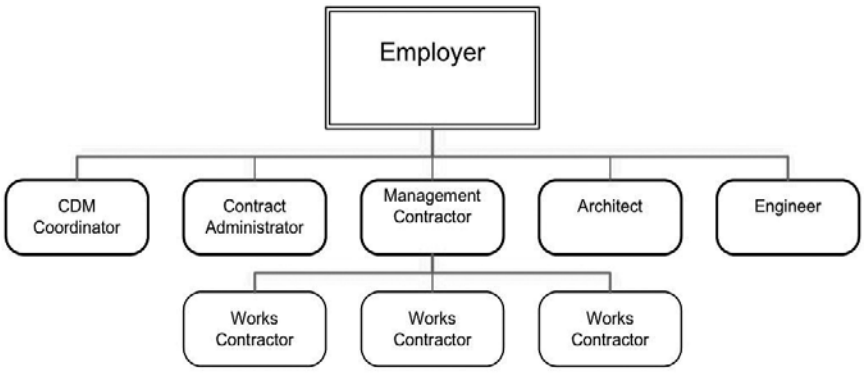
…the Management Contractor is responsible for the administration operation of the Works Contractors. However, the Management Contractor is not liable for the consequences of any default by a Works Contractor so long as the Management Contractor has complied with the particular requirements of the management contract."

There are two key issues where management contracting is different and can create problems both for the Management Contractor and the Works Contractor, extensions of time and loss and expense.

An alternative view of management contracting is that it is an effective method for the client to retain control of the design whilst drawing on the experience of a construction specialist as part of the professional team. Management contracting is popular in some areas and is becoming increasingly popular when constructing major projects.

Overview

Rather than trying to explain the contractual relationships in a management contracting scenario we produce below a diagram that shows the layers of professional contractor involvement and how the team that will build the project will be constructed. As can be seen from my review this diagram is a somewhat flatter process than the normal contractor matrices either under a design and build form or a traditional form of contracting.



In this article we are solely interested in the Employer/Management Contractor relationship and the Works Contractor relationship.

As in a traditional construction project, the Employer retains responsibility for the professional team and for the design of the works. This does create risks for the Employer which do not appear in a design and build contract but does allow the Employer to keep

far greater control of the works and of the design in the same way as the Employer did under the traditional form of contract.

Management contracting

The main difference with management contracting is that the Management Contractor, normally a fairly experienced contractor, becomes involved far earlier in the process and will take responsibility, in conjunction with the professional team, for the splitting of the works into appropriate works packages and for letting those packages. The JCT has drafted both the Management Building Contract and the Management Works Contract specifically to make them back to back.

There are two key issues where management contracting is different and can create problems both for the Management Contractor and the Works Contractor, extensions of time and loss and expense.

Management contracting can be an effective method for the client to retain control of the design whilst drawing on the experience of a construction specialist as part of the professional team.

Extensions of time

Clause 2.18 provides that the Management Contractor is to consult with the Architect/ Contract Administrator before granting an extension of time, showing a direct relationship with the Architect/Contract Administrator, who has no role under the works contract, in the granting of an extension of time.

Clause 2.18.2 provides that the Management Contractor only has to grant an extension of time within 16 weeks of receipt of the required particulars. The same clause in the Management Building Contract provides that the Architect/Contract Administrator has 12 weeks to grant an extension of time following receipt of the same particulars. This gives the Management Contractor 4 weeks to submit/pass on a claim up the line, receive a response and communicate that response back to the Works Contractor. Of course on a strict reading of the terms there is no relationship between the granting of an extension of time under the two contracts; however, clearly the intention was to link the two.

The greatest potential danger for the Managing Contractor, and in many ways a risk for the Works Contractor as well, is clause 2.19.9 which provides for "*any impediment, prevention or default, whether by act or omission by either Management Contractor or any of the Management Contractor's Persons…*" Within the definition of Management Contractor's persons there is no provision excluding other works contractors employed on other parts of the project. Therefore the Management Contractor may be required to grant an extension of time to a Works Contractor due to delays caused by another Works Contractor.

Under the Management Building Contract, the Relevant Project Matters include Relevant Works Contract Events therefore in theory the Management Contractor will simply be able to obtain an extension of time up the line for any delays by a Works Contractor. However, clause 2.19 of the Management Building Contract contains the following caveat:

"*Provided that no such cause of Relevant Works Contract Event shall be considered to be a relevant project event to the extent cause or contributed to by any default, whether by act or omission, of the Management Contractor or any other Management Contractors person.*"

If a delay is caused to a Works Contractor by a default of the Management Contractor, the Management Contractor who is only receiving a fee for their services must grant the Works Contractor an extension while not receiving one itself.

Payment terms

Since the introduction of the 2011 Amendments to the Housing Grants, Construction and Regeneration Act, a party to a contract cannot tie a payment under one contract to the issuing of a certificate under another contract. How then does this work when the Management Contractor is only taking a fee for administering the works and passing all claims through?

Management contracting

The method is as follows:

Management Works Contract

Clause 4.9.2 Application not less that 7 days before the due date for an interim application.

Clause 4.10.1 Final date for payment 21 days after the due date.

Therefore the period between application and payment is at least 28 days.

Management Building Contract

Clause 4.9.1 Sum due to be calculated at a date not more than 7 days before the due date for payment.

Clause 4.11.1 The final date for payment is 14 days after the due date

Therefore the period between application and payment is no more than 21 days, thus creating a minimum of a 7-day gap.

The main difference with management contracting is that the Management Contractor becomes involved far earlier in the process and will take responsibility, in conjunction with the professional team, for the splitting of the works into appropriate works packages and for letting those packages.

Loss and expense

Clearly a link has been established between payments under the Management Building Contract and the Management Works Contract. How do the contracts deal with loss and expense? One can assume that there is a risk that an agent of the employer when valuing the works and seeing in an application for payments sums that relate to what one might call domestic issues, will be reluctant to value those and have the employer pay for them. The Management Building Contract has a way round these issues. The Management Building Contract has a new section, section 5, entitled Works Contracts. This section is expressly intended to deal with breaches of the works contract by the Works Contractor and has a section on alleged breach by the Management Contractor. The provisions are set out in clauses 4.3 and 5.4 of the Management Building Contract and in summary provide as follows.

When a claim is made by a Works Contractor for an alleged breach by the Management Contractor, the Management Contractor is required to immediately inform the Architect/ Contract Administrator and if authorised or directed by the Employer take action to either settle the claim or to defend it in proceedings and pay the amount of any settlement, including any costs agreed to be paid by the Management Contractor or awarded against him. This clause gives the Employer power to force a Management Contractor to fight a claim and incur potentially many tens of thousands of pounds in legal expenses, consultant fees and the costs of the tribunals.

Under clause 5.4, the Employer is not required to reimburse the Management Contractor for their costs if those costs arise as a result of a breach of contract or negligence on the part of the Management Contractor. This is almost certainly going to be the case when the Works Contractor makes a claim against the Management Contractor.

The provisions within the contract are clearly unsatisfactory, especially for a Management Contractor, and do create a very serious risk both for the Works Contractor and the Management Contractor, whereby the latter may try to avoid a claim and avoid notifying the Employer of the claim in order to avoid being given an instruction to defend a claim the Management Contractor knows it will lose.

Conclusion

Management contracting is, as the JCT says, for large-scale projects requiring an early start on site and where full design information cannot be prepared before works commence. In the right circumstances, it is a contract which has benefits for both employer and contractor. However, for the reasons described above, it is a contract form that should be used with great care.

Is arbitration confidential?

It is generally assumed that arbitration proceedings will be both private and confidential. As Richard Smellie explains, the first assumption is essentially correct. Arbitrations are private in that third parties who are not a party to the arbitration agreement cannot attend any hearings or play any part in the arbitration proceedings. However, the second assumption, since the 1990's, is not. Confidentiality – which is concerned with the parties' obligation to each other not to disclose information concerning the arbitration to third parties (and the arbitrator's like obligations to the parties) – does not apply to arbitration as an all-encompassing rule, and indeed in some circumstances will not apply at all. Generally speaking, however, parties to arbitration agreements assume that it does. Indeed, surveys suggest that confidentiality is one of the main reasons commercial parties choose arbitration over court proceedings.[1]

When embarking upon arbitration you can assume that it is private, but that is not necessarily the same as confidential.

The traditional assumption that arbitrations are confidential is, on the face of it, a fair one, given that arbitration arises through private agreement: it is the contractual agreement to arbitrate (and usually to do so using a pre-agreed set of arbitration rules and with the assistance of an administrating body that provides the necessary legal framework for arbitration. This is inherently different to taking a dispute to a local court, which is a formal dispute resolution process provided and mandated by the state, and therefore, to varying degrees, open to the public and the press.

This traditional assumption was, however, dealt a severe blow in the 1990's, when, with the growth in the use of international arbitration, a closer consideration of various aspects of arbitration began to take place. Those considerations included the extent to which arbitrations were confidential, and when the issue came before the courts in Australia and Sweden in the mid-to late 1990's, the courts in those jurisdictions rejected the concept of an overall duty of confidentiality in arbitration. This led to a debate about confidentiality in many jurisdictions, and new legislation in some places. It also led to many arbitral institutions amending their rules to clarify the position on confidentiality.

Unfortunately, however, there has been no common approach amongst legislators and arbitral institutions. In some instances legislators and arbitral administrative bodies moved to make the default position that there was no confidentiality in arbitration (leaving it entirely a matter of the parties' agreement), whilst others included such a duty, but covering differing scopes. Further, serious questions arose as to the extent to which confidentiality obligations, particularly those imposed through the rules of an arbitral institution as opposed to state legislation, can be enforced.

Whether an arbitration is confidential or not, therefore, depends upon the law at the seat of the arbitration, and the rules (if any) that have been agreed by the parties as part of their agreement to arbitrate. The issue of confidentiality is made complex by the various persons involved in the arbitration process, and the ability of the parties to the arbitration to impose rules upon persons such as witnesses, translators and transcribers who will know of and have access to private and confidential information through their involvement in the arbitration, but who, unlike the parties themselves, are not contractually bound or obliged by the arbitration agreement.

Different aspects of confidentiality

To give a flavour of the problem, consider the question of documentation generated as part of the arbitral process by the parties and the arbitrators, including the award, as against pre-existing documentation made available as evidence. The former is perhaps in a similar category to the private and closed nature of arbitration hearings, and therefore readily considered confidential, save that in some instances there may be a third party, like a witness of fact, who knows the content of the document and regards it as theirs. Pre-existing documentation that was not created for the purposes of the arbitration might also be thought to be confidential because it might concern or involve parties other than the parties to the arbitration agreement, but equally some or all of it might already be in

[1] Along with the flexibility of the process and the ability to nominate an arbitrator of choice.

Is arbitration confidential?

either the public domain, or certainly a wider domain, having, for example, been issued to various parties on a complex construction project.

Then there is also the question of the many different people involved in the arbitration, and whether a duty should be – or, in the case of arbitration rules rather then state legislation, can be – imposed on them. Who should a duty of confidentiality extend to? Whilst it is probably fair to expect it to extend to the Tribunal, and to the staff of the arbitral administrative body, to do so requires legislation, or agreement, as the people concerned are not parties to the arbitration agreement and therefore have not agreed to the rules that have been agreed to by the parties to the arbitration itself. Further, what about witnesses of fact, who are also not parties to the arbitration agreement, and who might not be entirely willing participants, and may well regard what they hold by way of documents, and the knowledge they have, as being theirs to do with as they wish.

Whether the arbitration process is truly confidential depends on the seat of your arbitration and which rules, if any, you have agreed will apply.

Legislation and arbitration rules: no common approach

Each country and set of arbitral rules has taken its own approach. In France, which has been the traditional home of the ICC for many years, with Paris a common arbitral seat, it is only the deliberations of the arbitrators that are said by the relevant provisions of the Civil Code to be confidential, although there is case law which suggests that there may be a limited general duty of confidentiality.

In contrast, in England, where London is another common seat and the home of the LCIA, there is no relevant legislation: the Arbitration Act 1996 is completely silent on confidentiality. But as a consequence of case law, three quite far-reaching rules apply. The first is that unless agreed otherwise, arbitration proceedings are held in private. The second is that there is an implied obligation of confidentiality which arises from the very nature of arbitration, and the third is that any duty of confidentiality is subject to the exceptions of consent, court order, reasonable necessity and public interest.

In Singapore, again a common seat for international arbitration and the home of the Singapore International Arbitration Centre ("SIAC"), it is only court proceedings under the relevant arbitration Acts that might be confidential, if requested by the parties. Like England, however, case law (following English common law) recognises a general obligation of confidentiality, implied into the arbitration agreement.

In several jurisdictions, arbitrators are liable if they disclose arbitration information without consent, including the Dubai International Finance Centre ("DIFIC"), which has rules that require that all information relating to arbitral proceedings be kept confidential, except where disclosure is required by order of the DIFIC Court.

With regard to the arbitration rules, the position is equally diverse. Whilst many rules make the hearings private, awards confidential, and the duties of the administrating institution private, otherwise they vary significantly. As with countries, there are too many different sets of arbitration rules to cover them all here, but the following is a selection of the better known ones.

The UNCITRAL Rules do not extend beyond making the hearings private, and the award confidential:[2] The ICC Rules make the hearings private, and the workings of the ICC Court confidential, but otherwise they simply provide for arbitrators to make orders in relation to confidentiality on the application of one of the parties.[3] This followed considerable debate and deliberation in advance of the new rules which came into force in 2011. In contrast, the LCIA Rules[4] include a specific agreement that the award, disclosed materials and the deliberations of the Tribunal are confidential.

Conclusion

When embarking upon arbitration, therefore, you can assume that it is private – that is to say, that third parties will not be allowed to participate without your agreement; but whether, and if so to what extent, the process might be confidential, depends upon the seat of your arbitration, and which rules, if any, you have agreed will apply.

[2] Articles 34(5) and 38(3)
[3] Article 22(3)
[4] Article 30

Case law update

Our usual case round-up comes from two different sources. First, there is the Construction Industry Law Letter (CILL), *edited by Karen Gidwani and Ted Lowery. CILL is published by Informa Professional. For further information on subscribing to the* Construction Industry Law Letter, *please contact Kate Clifton by telephone on +44 (0)20 7017 7974 or by email: kate.clifton@informa.com. Second, there is our long-running monthly bulletin entitled* Dispatch. *This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.com. If you would like to receive a copy every month, please contact Jeremy Glover. We begin by setting out the most important adjudication cases as taken from* Dispatch.

Adjudication – Cases from *Dispatch*

Adjudication: breach of natural justice

ABB Ltd v Bam Nuttall Ltd

"Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process."

Here, the Claimant successfully argued that an adjudicator's decision should not be enforced because there had been a material breach of the rules of natural justice. It was common ground that the adjudicator had referred in his decision to a particular clause of the contract which neither party had raised and which the adjudicator did not refer to the parties before issuing his decision. Mr Justice Akenhead said it was perfectly legitimate for an adjudicator to raise new points with the parties and invite comment, argument or even evidence. Having done that, it will generally be perfectly fair and proper for an adjudicator to rely upon that point in reaching his decision. That did not happen here and the issue was an important one. The Judge noted:

"Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process".

Adjudication: alleged breach of natural justice

Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi)

Arcadis was employed by Sanofi to carry out "remediation" works at Sanofi's site in Dagenham. The remediations included soil washing, chemical treatment and off-site disposal methods in order to allow future redevelopment and use of the land for industrial purposes. The Contract incorporated the NEC3 Engineering and Construction Contract June 2005, as amended. Disputes arose and there were two adjudications. Sanofi sought to challenge a decision made by the adjudicator in the second. It was particularly concerned that the second adjudicator had been given and considered the decision of the first adjudicator. Sanofi said that the adjudicator "*took an erroneously restrictive view of his own jurisdiction, with the result that he decided that he was bound by Adjudication Decision 1 and by the first adjudicator's reasoning in Adjudication Decision 1"* and that Arcadis *"brought about the adjudicator's error by a misguided attempt to seek a tactical advantage or otherwise influence him."*

Mr Justice Akenhead had no hesitation in saying that it was neither improper nor contrary to the rules of natural justice for the decision in the first adjudication to be put before the second adjudicator. Arcadis had succeeded in the first adjudication in relation to very similar issues both in fact and in law. The first adjudicator's findings on what the contract meant were at the very least germane and could well be thought to be persuasive. The Judge felt that adjudicators must be trusted, generally at least, to be able to reach honest and intelligible views as to the extent to which such earlier decisions are relevant or helpful or not.

Indeed, on the facts, it was clear that the second adjudicator had decided the issues on their own merits and not (only or at all) because he felt that he was bound by the first decision. Further the Judge did not think that it was improper or wrong for Arcadis to put

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the first decision forward. The Judge thought that it would be a "rare case" in which the adjudicator's conduct could be challenged in later enforcement proceedings because they looked at or considered any material put forward by either party.

"What was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by the adjudicator which were preparatory to the making of an unenforceable decision."

It was also suggested that the adjudicator "went off on a frolic of his own" by "splitting the difference" on the quantum between an adjusted Arcadis forecast figure and the Project Manager's adjusted forecast figure. Arcadis argued that the proper approach to quantification (subject to liability) was, contractually, to be based on what it did (or what should or could reasonably have been) forecast, whilst Sanofi argued that the value needed to be determined by reference to the work actually done and the actual cost. Both arguments were respectable and it was clear that the adjudicator formed the view that the forecast basis, that is the basis advanced by Arcadis, was the right one. Remember that it was not the role of the court to consider whether the adjudicator was right to do this. Having therefore decided that the forecast approach was right, the adjudicator looked at the possible forecast figures and, ultimately, he was drawn to Arcadis' figure and to the Project Manager's figure. Whilst the Judge described the act of "splitting the difference" as Solomon-like in its simplicity, the adjudicator was effectively choosing between two figures, both of which had an evidential basis. Crucially, he did not come up with some basis of assessment upon which the parties had not had an opportunity to comment.

Payment of an adjudicator's fees

PC Harrington Contractors Ltd v Systech International Ltd

At first instance, Mr Justice Akenhead had decided that an adjudicator appointed pursuant to the Scheme was entitled to be paid when his decision had been ruled to be unenforceable because of a failure to comply with the rules of natural justice. The Judge noted that, as required by the Scheme, the adjudicator had carried out a number of activities, including producing a decision. Further there were policy reasons in favour of the adjudicator. The Judge said:

"*One should therefore be somewhat slower to infer that what parties and adjudicators intended in their unexceptionably worded contracts was something which excluded payment in circumstances in which the adjudicator has done his or her honest best in performing his or her role as an adjudicator, even if ultimately the decision is unenforceable. The position might well be different if there was to be any suggestion of dishonesty, fraud or bad faith…*"

Harrington appealed, arguing that the adjudicator had failed to perform the service which he had contracted to perform. The CA did agree that the Scheme imposes an obligation on the adjudicator to produce a decision within a short period. It also agreed that the adjudicator was obliged to perform some ancillary functions and entitled to perform others. He could not simply produce a decision out of the hat. However the question was not whether the adjudicator was obliged or entitled to take these steps. Rather it was whether he was entitled to be paid for those steps, if they led to an unenforceable decision. Here, the adjudicator's terms of engagement had to be read together with the Scheme. The Scheme carefully defines the circumstances in which the adjudicator is entitled to be paid. For example, the purpose of paragraph 25 of the Scheme is to make it clear that an adjudicator cannot charge an unreasonably high fee. Lord Dyson noted:

"*I return to the question: what was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by the adjudicator which were preparatory to the making of an unenforceable decision. The purpose of the appointment was to produce an enforceable decision which, for the time being, would resolve the dispute.*"

A decision that was unenforceable was of no value. The parties would have to start again in order to achieve the enforceable decision which the adjudicator had contracted to produce. If the adjudicator's appointment was revoked due to his default or misconduct, he is not entitled to any fees:

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"*the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a 'default' or 'misconduct' on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner.*"

The CA considered the difference between arbitrators and adjudicators. First, an arbitral award is binding, subject to the supervisory jurisdiction of the court under sections 66-68 of the Arbitration Act 1996. Second, when ancillary functions are carried out by an arbitrator, they are binding and therefore the arbitrator gives value in performing them. Third, an arbitrator has inherent jurisdiction to make a binding decision on the scope of his own jurisdiction. Finally, the CA considered the policy question:

"*I accept that the statutory provisions for adjudication reflect a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes. That is why the courts will enforce decisions, even where they can be shown to be wrong on the facts or in law. An erroneous decision is nevertheless an enforceable decision within the meaning of the 1996 Act and the Scheme. But a decision which is unenforceable because the adjudicator had no jurisdiction to make it or because it was made in breach of the rules of natural justice is quite another matter.*"

Such a decision does not further the statutory policy of encouraging the parties to a construction contract to refer their disputes for temporary resolution. It has the opposite effect. It causes the parties to incur cost and suffer delay. The CA stressed that what mattered was what the contractual arrangements between the parties actually said. Here, the adjudicator had not produced an (enforceable) decision which determined the matters in dispute. This was what his contract had required of him before his entitlement to fees arose. Finally, the CA noted that if their decision did give rise to concerns on the part of adjudicators then the solution was:

"*in the market-place: to incorporate into their Terms of Engagement (if the parties to the adjudication are prepared to agree) a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable.*"

"when as here, a party is seeking to avoid a stay where it has been shown to be insolvent and where it is proffering a bank guarantee to avoid the stay, the position is quite different. Where it is proffering a guarantee it is only appropriate that it provides the necessary current financial information of the company proffering the guarantee so that the Court and the other party can properly assess the worth of that guarantee."

Adjudication: stay of enforcement proceedings

FG Skerritt Ltd v Caledonian Building Systems Ltd

Caledonian engaged FGS as a subcontractor. The contract was based on the DOM2 standard form with a contract price of over £1.8 million. FGS submitted an invoice for the outstanding balance of the subcontract sum, less half the retention. This was on the basis that practical completion had been achieved. Caledonian did not accept that practical completion had been achieved and did not pay that invoice. FGS went into administrative receivership.

The administrative receivers sold FGS's book debts to Nathu Ram Puri Environmental Design Consultants ("EDC"). The sale to EDC was ineffective in assigning FGS's book debt because the DOM2 conditions included a prohibition on assignment. EDC was not therefore the owner of the relevant debt. The legal position was that the assignment took effect by way of a trust, so that FGS held the debt on trust for EDC.

FGS had ceased work on the project in 2010 following the administrative receivership, but then submitted an invoice for the remaining half of the retention, 12 months after it contended practical completion had been achieved. The administrative receivers ceased to act as such on 14 March 2011. FGS was not wound up but did not trade. It had not yet been struck off the register of companies. FGS issued a notice of adjudication and was awarded £184k (plus VAT).

As a result Caledonian's counterclaim relating to costs incurred in completing the subcontract works and rectifying defects as a consequence of FGS's administrative receivership could not be set off against the invoiced sums. FGS issued proceedings seeking to enforce the adjudicator's award, FGS's parent company, Melham Group Ltd ("MGL") having offered a guarantee.

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Mr Justice Ramsey also referred to the *Wimbledon v Vago* case and noted that if a claimant is insolvent then a stay of execution will usually be granted. However, if the party who has to pay has no real grounds for challenging the adjudicator's decision, then even if the party is insolvent a stay would not be appropriate because it would deprive creditors of the opportunity of making some recovery from the insolvent company. Here, whilst there was no challenge to the correctness of the adjudicator's decision in relation to the sums due on the two invoices, there was a challenge by way of defence of equitable set-off both for the sums already expended in remedying defects in FGS' s work at HM Prison Eastwood Park and also arguable claims for future remedial work to those works. These raised real grounds of equitable set-off amounting to a sum exceeding the sum awarded by the adjudicator.

"the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a 'default' or 'misconduct' on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner."

In considering the terms of the guarantee that was offered, the Judge had to consider the obligation of a party to disclose confidential financial information to another party so that that other party can consider whether to apply for a stay. He said that there was no general obligation for a party to provide confidential financial information to another party in order to allow that other party to investigate the solvency, so as to seek to establish that the judgment should be stayed. However:

"*when as here, a party is seeking to avoid a stay where it has been shown to be insolvent and where it is proffering a bank guarantee to avoid the stay, the position is quite different. Where it is proffering a guarantee it is only appropriate that it provides the necessary current financial information of the company proffering the guarantee so that the Court and the other party can properly assess the worth of that guarantee.*"

The fact that the money is held in trust by FGS for EDC and therefore has to be paid to EDC did not affect the general principle that an adjudicator's decision is temporarily binding and should be enforced. In general there was no requirement for a party to show or establish that the money was to be used in one way or another, in order to obtain enforcement of an adjudicator's decision. Therefore the Judge ordered that there should be summary judgment based on the sums in the adjudicator's decision but that that judgment should be stayed pending the production of a satisfactory guarantee.

Adjudication: set-off against an adjudicator's decision

Thameside Construction Co Ltd v Mr & Mrs Stevens

Mr and Mrs Stevens employed Thameside to carry out extensive construction works at their home. Thameside served a Notice of Adjudication claiming that a dispute had arisen "following the Employer's failure to pay amounts due" and seeking "a peremptory Decision from the Adjudicator". The Notice sought £190k and that Mr and Mrs Stevens should pay such sum "without set-off". Mr and Mrs Stevens' Response noted that the adjudicator had not been asked to determine the question of practical completion and so this fell outside of his jurisdiction. They also asserted that a final certificate could not be issued due to quality and other issues and raised a counterclaim, £88k for defects and £60k for liquidated damages, which they said they were entitled to set-off against any sum decided to be due to Thameside. Thameside said that no counterclaim could be raised as there was no withholding notice.

The Adjudicator awarded Thameside £88k and specifically on one of the supporting schedules put the figure of £0.00 against the LDs. Six days later the Contract Administrator issued an Interim Payment certificate, certifying a net sum due for payment of £88k. On the same day, Mr and Mrs Stevens wrote to Thameside purporting to give a withholding notice stating that it was their intention to withhold payment of £40k in relation to liquidated damages. They paid the balance. In the enforcement proceedings, Mr and Mrs Stevens said that the decision could be and was to be treated in effect as equivalent to an interim certificate and they were therefore entitled to set-off or withhold against the sum payable pursuant to the decision provided that the withholding was done in accordance with the contract between the parties. Having reviewed the previous cases, Mr Justice Akenhead set out the following "broad conclusions" on the issues arising where a party seeks to set-off against or withhold from sums which an adjudicator has said are to be paid:

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"(a) The first exercise should be to interpret or construe what the adjudicator has decided. In that context, one can look at the dispute as it was referred to him or her. That can involve looking at the Notice of Adjudication, the Referral Notice, the Response and other 'pleading' type documents. One can have regard to the underlying construction contract. Primarily, one needs to look at the decision itself.

(b) In looking at what the adjudicator decided, one can distinguish between the decisive and directive parts of the decision on the one hand and the reasoning on the other, although the decisive and directive parts need to be construed to include other findings which form an essential component of or basis for the decision (see Hyder).

(c) The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.

(d) There are limited exceptions. If there is a specified contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision, that is an exception albeit that it will be a relatively rare one. Where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, it may well be that a legitimate set-off or withholding may be justified when that amount falls due for payment or certification in the future. (See Squibb).

(e) Where otherwise it can be determined from the adjudicator's decision that the adjudicator is permitting a further set-off to be made against the sum otherwise decided as payable, that may well be sufficient to allow the set-off to be made (see Balfour Beatty)."

"(c) The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted."

Here, if you just looked at the wording used by the adjudicator, there could be no doubt that there would be no right of set-off or withholding. The adjudicator directed that payment should be made within 14 days and made it clear that he had allowed nothing for liquidated damages and that there should be no set-off albeit that Mr and Mrs Stevens were entitled to set-off the specific sums already allowed to them in the adjudicator's calculations. However, some confusion arose because the adjudicator formed the view that issues as to the date of practical completion, extension of time and liquidated damages should be left over "to another day". This provisional view was set out in a footnote, which was described by the Judge as being in the nature of an obiter type of finding, albeit it was clearly not part of the decision.

The Judge was of the view that, in deferring this issue "to another day", the adjudicator had fallen into error. The issue of liquidated damages was part of the dispute which he was required to resolve because it was raised at least as a defence by way of set-off to the disputed claim put before him. Although Mr and Mrs Stevens had stated that "*the question of whether practical completion was achieved*" fell outside his jurisdiction, what did not fall outside his jurisdiction was the question of whether there was any entitlement to liquidated damages, something which involved considering issues related to the question of when practical completion was achieved. Of course, Mr and Mrs Stevens actually paid out over half of what the adjudicator ordered and in that sense had accepted that he had jurisdiction. This was why they argued that the adjudicator was treating his decision as if it were an interim certificate and hence he must be taken to have envisaged that there could be a later set-off against his decision.

Adjudication – residential occupiers

Westfields Construction Ltd v Lewis

Lewis resisted the enforcement of an adjudicator's decision on the grounds that the construction contract was in respect of a house which, at the time of the contract, Lewis contended he occupied as his residence and intended to occupy in the future. In other words, Lewis relied on the exception at section 106 of the HGCRA. Westfields said that Lewis did not occupy the property at the time the contract was made and/or that his intention was always that the property would be refurbished so that it could be let for commercial purposes. Therefore the residential occupier exception did not apply.

One issue for Mr Justice Coulson was at what point should the court assess whether or not the employer occupies the property as his residence? Is it the date of the formation of

the contract? Or is it, as was suggested, important to regard occupation as a continuing operation, and not to over-emphasise the snapshot position at the date of the contract? The Judge was of the view that "occupation" was an ongoing process which could not be tested by reference to a single snapshot in time. "Occupies" must carry with it some reflection of the future: it indicates that the employer occupies and will remain at (or intends to return to) the property. Therefore the evidence about the position at the date that the contract was made had to be considered in the context of all of the evidence of occupation and intention, both before and after the agreement of the contract.

Is it time for the exceptions to statutory adjudication to be done away with so that all parties to a construction contract "can enjoy the benefits of adjudication?"

Above all, section 106 needed to be approached with common sense: it ought to be plain, on a brief consideration of the facts, whether the employer is or is not a residential occupier within the terms of the exception. Here, on the facts, the Judge considered that Lewis intended to rent out the property, which meant that he could show that he intended to occupy the property as his residence.

The case was interesting for the comments made by the Judge about the residential occupier exclusion. The Judge noted that section 106 was intended to protect ordinary householders, who were not otherwise concerned with property or construction work, and were without the resources of even relatively small contractors, from what was, in 1996, a new and untried system of dispute resolution. It was felt that what might be the swift and occasionally arbitrary process should not apply to a domestic householder. Hence, the Judge concluded his judgment by asking whether it was time for section 106, and indeed the other exceptions to statutory adjudication, to be done away with, so that all parties to a construction contract "*can enjoy the benefits of adjudication.*"

Other cases

Construction Industry Law Letter

Serious irregularity – ss 68 and 69 Arbitration Act 1996

Atkins Ltd v The Secretary of State for Transport

Technology and Construction Court; before Mr Justice Akenhead; judgment delivered 1 February 2013.

The facts

Under an amended NEC3 contract dated 26 February 2008, Atkins was employed by the Secretary of State for Transport ("the Authority") to act as managing agent and contractor for Area 6 of the highways network for a period of 5 years. Area 6 covered Cambridgeshire, Essex, Hertfordshire, Norfolk and Suffolk. Under the Contract Atkins was required to maintain the roads in Area 6 and carry out both routine and cyclical maintenance. Atkins was required to rectify defects and Annex 2.1.1 to the Contract included potholes in a non-exhaustive list of Category 1 defects that would require prompt attention.

Clauses 60-65 provided for compensation events entitling Atkins to claim additional monies over and above what the Contract otherwise allowed for. Under cl. 60.1(11) Atkins could claim compensation for a defect that: (i) had not been revealed by the information previously available; (ii) that was not evident from a visual inspection or routine survey; (iii) that could not reasonably have been discovered prior to the Contract date; and, (iv) that "*…an experienced contractor or consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for him to have allowed for it.*"

Clause 90.1 provided for disputes to be referred to adjudication and that if a party was dissatisfied with the Adjudicator's decision it could refer the dispute to arbitration.

A dispute arose between the parties regarding payment for works to remedy potholes. Atkins claimed that the prevalence of potholes on the network was significantly greater than anticipated and that it was therefore entitled to payment as a compensation event under cl. 60.1(11). On 3 February 2012 Atkins referred the dispute to adjudication. The parties agreed that the Adjudicator was to determine in principle the issue as to whether,

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assuming the facts were established, there was a compensation event. In his decision issued on 9 March 2012 the Adjudicator rejected two of the arguments put forward by Atkins but accepted the third, finding that potholes occurring after the date of the Contract were defects within clause 60.1(11) if they exceeded in volume the number of potholes that it would have been reasonable for an experienced contractor to have allowed for.

On 4 April 2012 the Authority commenced arbitration in order to challenge the Adjudicator's findings in favour of Atkins. The Authority submitted that the Contract provided no threshold or limit on the number of potholes Atkins might be required to repair and that Atkins' construction of cl. 60.1(11) which treated "defect" as meaning "volume of defects" made no commercial sense.

The nub of Atkins' case was that "a defect" could mean a pothole and that subject to meeting the first three criteria in cl. 60.1(11), point (iv) would be satisfied if the potholes claimed for would not have been allowed for by an experienced contractor because there was such a small chance of such an excessive number of potholes occurring.

What approach should the Court take when determining whether or not there was a serious irregularity in an arbitration award?

The correct approach was to consider the reasoning and the overall conclusion reached to see whether in reality there was a serious irregularity. The Court was not required to engage upon a hypercritical or excessively syntactical analysis of an award.

On 22 November 2012 the Arbitrator issued an Interim Award finding that an excess volume of potholes was not capable of constituting a defect and therefore was not a compensation event. On 19 December 2012 Atkins wrote to the Arbitrator stating that there had or may have been a "serious irregularity" within the meaning of s.68 of the Arbitration Act 1996 ("the 1996 Act").

On the same day Atkins commenced proceedings to challenge the Arbitrator's Interim Award under s.68 of the 1996 Act. Atkins contended that where the Arbitrator had failed to understand the claim they had formulated and had consequently failed to deal with it, then under s.68(2)(d) of the 1996 Act this amounted to a serious irregularity that had or would cause substantial injustice. In the alternative Atkins sought permission to appeal on a point of law under s.69(3) of the 1996 Act.

Issues and findings

What approach should the Court take when determining whether or not there was a serious irregularity in an arbitration award?

The correct approach was to consider the reasoning and the overall conclusion reached to see whether in reality there was a serious irregularity. The Court was not required to engage upon a hypercritical or excessively syntactical analysis of an award.

Had there been a serious irregularity?

No. It was impossible to say that there had been any, let alone a serious irregularity in circumstances where the words used by the Arbitrator confirmed that he knew the issue, had analysed the relevant wording of cl. 60, reviewed the commercial context and produced the decision that he did.

Had there been substantial injustice?

No. The Arbitrator was not wrong in his overall reasoning and his conclusion as to the meaning of cl. 60.1(11). It followed that there could be no substantial injustice even if a serious irregularity was established.

Should permission to appeal be granted?

No. The point to be appealed, i.e. the proper meaning of cl. 60.1(11), had already been determined by the Court when considering Atkins' application. Permission would have been refused in any event where on balance the Arbitrator's decision was not obviously wrong or open to serious doubt within the meaning of s.69(3)(c) of the 1996 Act.

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Commentary

The principal issue raised in this case was whether or not Atkins could satisfy the requirements of sections 68 and 69 of the 1996 Act in order to challenge the Arbitrator's award. For the purposes of considering these applications the Judge found it necessary to look at the issue of contractual interpretation raised in the adjudication and the arbitration, i.e. the proper meaning of cl. 60.1(11). Strictly speaking then, the Judge's comments upon this aspect of the NEC3 Form are obiter. Even so, as the Judge noted in paragraph 9 of the judgment, very few cases involving disputes as to the interpretation of the NEC3 Conditions have featured in reported Court decisions so the analysis of cl. 60 will be of interest to practitioners.

The Judge agreed with the submissions of the Authority to the effect that if cl. 60.1(11) was to be interpreted in the manner contended for by Atkins then it would have converted what was a lump sum contract into a re-measurement arrangement. The Judge concluded that if this interpretation was correct then Atkins would have been in a "win/win" situation because they could have kept the whole of the lump sum if the number of potholes was less than they reasonably anticipated but would be compensated if there were more potholes than they had expected. Commercial common sense therefore supported a construction whereby each party took commercial risks.

It still remains the case that very few cases involving the NEC3 conditions have featured in reported court cases.

The Judge also took into account the practical side effect that if every pothole encountered across the road network within Area 6 amounted to a compensation event, then possibly thousands of notices would have to be given under the Contract, with each one including a quotation.

The Judge stated that when considering whether an Arbitrator's award contains serious irregularities the Court should not undertake a hypercritical or excessively syntactical analysis of the award. Rather the Court should focus on the reasoning and conclusions. The Judge was clear that parties should not try to dress up a simple error as a serious irregularity in order to try and convince a Court to interfere with an Arbitrator's award.

Finally, on the permission to appeal point it is worth noting that the Judge concluded that the proper interpretation of cl. 61.1(11) did raise a question of general public importance in accordance with s.69(3)(c)(ii) of the 1996 Act. The Judge observed that this criterion would have been satisfied where the NEC3 Standard Form is widely used and where potholes in roads are an increasingly widespread problem in times of economic downturn, Government spending cuts and changing weather patterns.

Audit clauses – reasonable requests for documents

Transport for Greater Manchester v Thales Transport & Security Ltd

Technology and Construction Court; before Mr Justice Akenhead; judgment delivered 21 December 2012.

The facts

During October 2008 Transport for Greater Manchester ("TGM") engaged Thales under a contract ("the Contract") to supply a new tram operating system. The original Contract sum was for £22 million. The Contract contained provisions entitling TGM and others to carry out a detailed and wide ranging audit of Thales' documents with the purpose of verifying Thales' compliance with its contractual obligations. Under cl. 27, Thales was required for a period of at least 12 years to maintain in a form suitable for inspection all records relating to the performance of its obligations under the Contract ("the Records").

Clause 28.1 additionally provided that upon a reasonable request, Thales was to provide other information, records or documents in its possession or control, or in the possession or control of its auditors, agents or subcontractors, that related to the Records ("the Related Information"). Clause 28.2 provided that on giving reasonable notice, TGM, amongst others, would be entitled to inspect and make copies of the Records, the Related

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Information or any other documents in Thales' possession or control which related to the carrying out of any of Thales' obligations under the Contract.

The Contract works were delayed and during September and October 2012 Thales submitted claims for significant increased costs and an extension of time. Starting in July 2012, TGM submitted various requests to Thales for information regarding the claims. TGM stated that they wanted to inspect these documents in order to assess the claims. Thales did not provide any of the information requested.

During November 2012 TGM commenced Part 8 proceedings seeking an order for specific performance requiring Thales to disclose all of the categories of documents requested. Before the hearing Thales conceded that it would disclose some of the documents requested but the Court was left to consider TGM's entitlement to inspect documents in a dozen or so categories. Thales raised a number of objections including that:

(i) the references to documents which "related" to performance or carrying out of obligations were limited so that cost records were generally excluded;

(ii) TGM's requests lacked clarity and so specific performance should not be ordered;

(iii) requests for certain cost-related documents were too broad or imprecise;

(iv) commercially sensitive documents should not be disclosable, nor should documents relating to employment records as their disclosure might offend the Data Protection Act; and,

(v) some of the documents requested were privileged.

TGM argued for a broad definition of the Contract and asserted that each of the categories of documents requested were disclosable under clauses 27 and 28.

Did the contract require the contractor to provide access to commercially sensitive documents?

Issues and findings

Was TGM entitled to an order for specific performance?

Yes, in relation to the majority of the categories of documents requested. TGM had established that the documents had been requested in order to verify Thales' compliance with its obligations under the Contract. Clauses 27 and 28 encompassed the provision not only of source or basic records relating to Thales' performance and supply but also of other documents which related in a broad sense to performance and supply.

Commentary

It was common ground that the test here for disclosability was a matter of contract and the Judge's conclusions turned upon the proper construction of clauses 27 and 28. Whilst the Judge found that the requests for documents or information had to be reasonable, so that if they were not, Thales did not have to comply, he concluded that most of the categories of documents sought by TGM's requests were reasonable and in compliance with the terms of the Contract which were to be broadly interpreted. In particular the Judge noted the frequent use of the words "related to" in clauses 27 and 28 and found that these general words did not suggest that the requests for documents were to be limited.

Therefore, Thales was ordered to provide access to a wide range of information including commercially sensitive documents, documents containing confidential information or personal data and company board minutes. Unusually for a construction contract, the relief ordered was specific performance rather than disclosure in accordance with CPR Part 31. The range of documents that are to be disclosed under an audit clause may be wider or narrower than that required under CPR Part 31, and unless expressly catered for in the clause, issues of proportionality should not arise. The scope of a contractual audit clause will always depend upon the precise wording. As with any contractual term, an audit clause that is not clearly worded may be more difficult to enforce.

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The judgment also briefly touches upon the issue of litigation privilege. Thales argued that some of the reports identified in TGM's requests had been prepared for their legal department with the dominant purpose of gathering information for use in contemplated adjudication and/or litigation. The Judge declined to make a decision on the evidence before him and allowed Thales an opportunity to submit further witness evidence to enable the Court to form a view as to the dominant purpose of the reports and other issues relating to privilege.

Primary and secondary obligations – whether instrument comprised on-demand bond
Wuhan Guoyu Logistics Group Co Ltd and another v Emporiki Bank of Greece SA

Court of Appeal (Civil Division); before Lord Justice Longmore, Lord Justice Rimer and Lord Justice Tomlinson; judgment delivered 7 December 2012.

"When I use a word... it means just what I choose it to mean – neither more nor less."[1]

The facts

Wuhan Guoyu Logistics Group Co Ltd and Yangzhou Guoyu Shipbuilding Co Ltd ("the Sellers") jointly operated a shipbuilding company in Yangzhou, China. On 29 November 2006 the Sellers entered into two contracts with Swissmarine Inc of Liberia for the construction of two 57,000 DWT bulk carriers known as Hull GY402 and Hull GY404. During November 2007 the contracts were novated to Kantara Navigation Limited and Tamassos Navigation Limited ("the Buyer"), respectively. The price for Hull GY404 was to be US$41,250,000 payable in five instalments. Under Article 3(b) of the contract for Hull GY404 ("the Shipbuilding Contract") the second instalment of US$10,312,500 was payable following the provision by the Sellers of a Refund Guarantee and the Buyer's receipt of notification from the Sellers that the first 300m of steel plate had been cut, as confirmed and approved by the Buyer's representative.

The Shipbuilding Contract also required the Buyer to arrange an irrevocable letter of guarantee in a prescribed form to cover payment of the second instalment. In compliance with this requirement, on 14 December 2007 Emporiki Bank of Greece ("the Bank") issued a guarantee ("the Letter of Guarantee") to the Sellers. The Letter of Guarantee included wording to the effect that the Bank irrevocably, absolutely and unconditionally guaranteed as the primary obligor and not merely as the surety, the due and punctual payment by the Buyer of the second instalment. The Letter of Guarantee also provided that the Bank would pay the second instalment plus interest upon receipt by the Bank of the Sellers' written demand stating that the Buyer had failed to pay for a period of 20 days after the second instalment fell due.

The Sellers claimed that the first cutting of the steel took place on 18 April 2009 but the Buyer disputed this as its representative had not been present. On 29 April 2009 the Bank received a Refund Guarantee but this was not in the form prescribed by the Shipbuilding Contract. Following further exchanges the Sellers agreed to issue a revised version but did not do so. On 11 May 2009 the Sellers issued an invoice for the second instalment together with a certificate to the effect that the steel cutting for Hull GY404 had been carried out on 18 April 2009 at the Sellers' shipyard. The certificate had been signed by the Sellers and by a Bureau Veritas surveyor but not by the Buyer as again, its representative had not been present.

The Buyer's position was that the second instalment had not fallen due because the criteria in the Shipbuilding Contract had not been satisfied where: (i) it was not clear that 300 m of steel plate had in fact been cut; (ii) that the steel cutting had not in any event been approved by its representative; and (iii) the Refund Guarantee provided by the Sellers was not in the form prescribed by the Shipbuilding Contract. The Buyer and the Sellers subsequently commenced arbitration proceedings in relation to these and other disputes under the Shipbuilding Contract.

[1] Humpty Dumpty, Lewis Carroll, *Through the Looking Glass*

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On 22 June 2011 the Sellers submitted a demand for payment to the Bank. The Bank did not pay and in 2012 the Sellers issued an application for summary judgment contending that the Letter of Guarantee was in the nature of an on-demand bond so that payment was due upon a receipt of their written demand, irrespective of the contractual position between the Buyer and the Sellers. The Bank contended that the Letter of Guarantee was in the nature of a true guarantee so that its liability was contingent on resolution of the dispute raised by the Buyer over whether the second instalment was actually payable in accordance with the terms of the Shipbuilding Contract.

At first instance, Mr Justice Christopher Clarke found that whilst some of the wording suggested primary obligations, the Letter of Guarantee also included the classic language of a guarantee, so that when looked at as a whole, it could not be regarded as an on-demand instrument. The Sellers appealed.

"a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud."[2]

Issues and findings

Was the Letter of Guarantee a true guarantee that gave rise to contingent obligations only?

No. Where, as in this case, the document related to an underlying transaction between parties in different jurisdictions, had been issued by a bank, contained an undertaking to pay "on demand" and did not include any provisions excluding or limiting the defences available to the guarantor, the presumption should be that it was an on-demand instrument.

Commentary

Longmore LJ delivered the leading judgment in the Court of Appeal and began by confessing to facing some difficulty where the Letter of Guarantee included wording that pointed towards an on-demand obligation but also wording that pointed towards a guarantee. He made it clear that the Court would not adopt an approach based upon comparing the number of "pointers" in a document which suggested an on-demand obligation with those that suggested a guarantee, with the higher number prevailing.

Longmore LJ reiterated the principle that where certain phrases appear, they may give rise to a presumption as to the proper meaning of the document. Applying this principle, Longmore LJ placed considerable reliance upon the guidance set out in *Paget's Law of Banking* to the effect that where an instrument: (i) relates to an underlying transaction between parties in different jurisdictions; (ii) is issued by a bank; (iii) contains an undertaking to pay "on demand" (with or without the words "first" and/or "written"); and, (iv) does not contain any provisions excluding or limiting the defences available to a guarantor, then there is a presumption that the instrument should be construed as creating on-demand obligations.

Longmore LJ considered that at first instance, the Judge had construed the Letter of Guarantee in isolation and fallen into error by not giving enough weight to the presumption described in Paget and the relevant authorities that supported it. It seems clear that Longmore LJ was aiming to achieve a degree of consistency in the approach to be adopted by the Court when faced with disputes over whether or not an instrument is on-demand or a guarantee. As it is, the Court of Appeal's judgment should be of some comfort to those claimants who can satisfy all or most of the criteria giving rise to the presumption described in Paget but it remains difficult to set out a definitive list of factors which determine whether an instrument is a true guarantee or is on-demand.

Longmore LJ noted that in most disputes over the meaning of guarantees the Court will be called upon to consider numerous previous authorities in order to determine how near or how far the document in question differs from documents construed in past cases. Absent clear wording and a willingness to dispense with some of the archaic phrases that still appear in guarantees, it seems likely that disputes based upon competing authorities will still end up in Court, with this judgment now added to the pick and mix selection of decisions from which parties may seek to fashion arguments on interpretation.

[2] *Esal (Commodities) Ltd v Oriental Credit Ltd*

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