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Construction

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Robert S Peckar
Peckar & Abramson, PC

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Rachel Nurse
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Production editor
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Chief subeditor
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Senior subeditor
Caroline Rawson

Subeditor
Tim Beaver

Director
Callum Campbell

Managing director
Richard Davey

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Fax: +44 20 7229 6910

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Law Business Research

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United Kingdom

Stacy Sinclair
Fenwick Elliott LLP

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

When establishing a business in the UK key concerns include:

- considering which legal entity is most suitable (a partnership, limited company, limited liability partnership (LLP) or a joint venture (see question 11)) and complying with the relevant regulations to establish this entity;
- determining which value added tax (VAT) provisions are applicable;
- obtaining the necessary insurance required by statute (see question 14);
- complying with UK employment law regarding employee contracts;
- determining if any currency fluctuations will prove problematic; and
- ensuring compliance with the health and safety legislation.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

Foreign contractors and designers will need to follow the same licensing procedures required by domestic contractors and designers. As an example, some licences or consents that may be required include:

- registration with HM Revenue & Customs (HMRC) and compliance with the Construction Industry Scheme (CIS). For further information see www.hmrc.gov.uk/cis;
- a licence from the Health and Safety Executive for work involving asbestos;
- consent from the local authority regarding planning permission and compliance with the Building Regulations (see question 6);
- registration with the Environment Agency or local council, or both, for certain controlled activities (eg, disposal of Japanese knotweed);
- consent from the local authority should a skip or scaffolding be required on a public highway; and
- for designers, registration with the relevant professional body.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

No, there is no local legislation that provides an advantage to domestic contractors. However, as a member of the EU, the UK must comply with the EU public procurement directives that require public bodies to follow the principles of transparency, non-discrimination and equal treatment when awarding public contracts. They aim to open up public procurement to enable competition and ensure that any EU member state is given an equal and fair opportunity when bidding on public projects. The EU directives have been implemented into UK law by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006. These regulations apply to those contracts that equal or exceed established monetary thresholds.

In addition, as the UK is party to the World Trade Organization's Agreement on Government Procurement (GPA), it is obliged to award government contracts in accordance with rules that are similar to the EU public procurement directives. Accordingly, these two initiatives may prove problematic for contractors who reside in those countries that are not party to these agreements.

4 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Prior to the Bribery Act 2010 (the Act), which came in to force on 1 July 2011, bribery of a public official was a common law and statutory offence and a number of statutes dealt with the offence of bribery. These have now been repealed by the Act in an attempt to modernise and simplify the law on bribery. However, the Act is not retrospective and therefore any offences committed prior to 1 July 2011 will be dealt with under the old law.

The Act creates the four new criminal offences of paying a bribe, receiving a bribe, bribery of a foreign official and the corporate offence of failing to prevent bribery. Facilitation payments (such as those encouraging a public official to perform their duty in a more time-efficient manner) are illegal under the Act.

With regard to the construction industry, the corporate offence of failing to prevent bribery is likely to be of most interest. However, provided a construction company or organisation is proactive and prepared, it can advance a defence to most prosecutions on the basis that it had 'adequate measures' in place. If a company can demonstrate that it not only has proper procedures in place, but also that compliance with these procedures is properly monitored, it would be difficult to fall foul of the Act. The Ministry of Justice has published guidance (revised on 9 October 2012) on these procedures, which can be found on its website: www.justice.gov.uk. In summary, a company or organisation needs to consider the six key principles of risk assessment, proportionate procedures, communication, due diligence, monitoring and review and top level commitment.

Where a contractor has illegally obtained an award of a contract through bribery, the contract can be set aside by the court. By accepting or offering a bribe, a director of a company is likely to be in breach of its fiduciary duty while acting as an agent of the company and the contract may therefore be capable of rescission.

Further, where a party knowingly enters into an illegal contract, it may not be able to enforce it on the basis of the principle of ex turpi causa non oritur action, meaning that no cause of action may be founded on an illegal act.

Some standard form contracts, such as the JCT Design and Build Contract and the FIDIC Red Book, also incorporate express terms that enable the employer to terminate the contract for bribery.

5 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

There are no laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties; however, one must be mindful of the Bribery Act 2010 (the Act).

For example, section 1 of the Act makes it an offence to provide hospitality or gifts to another person that provide an advantage to that person and that are given with the intention of inducing the person to perform a relevant function improperly, or given with the knowledge that acceptance of the advantage would itself constitute the improper performance. For additional information on the Act, see question 4.

6 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

In addition to those issues mentioned above, contractors must also be aware of the planning and building control legislation that governs the UK. Prior to the commencement of the works, planning permission must be obtained from the appropriate local planning authority if the proposals amount to 'development' as defined under section 55(1) of the Town & Country Planning Act 1990 (as amended).

In addition, the local building control must approve the plans prior to commencement to ensure that the proposed works are in line with the Building Regulations 2010. 'Approved Documents A-P' have been issued by the secretary of state to provide practical guidance on how to comply with the Building Regulations.

Contractors and employers must also be aware of any international or national taxes or schemes that affect their specific sector or project. By way of example, the European Union introduced the European Union Emission Trading System (EU ETS) in order to help member states reach their greenhouse gas emissions reduction targets. The scheme operates by allowing each member state to set an overall limit on the total emissions permitted from all installations covered by the scheme. Accordingly, if the installations on a particular construction project are caught by the scheme, requisite permits must be obtained, reports issued and a fee paid if additional allowances are required.

Further, though this article has principally focused on the jurisdiction of England and Wales, contractors should note that Scotland and Northern Ireland are separate legal jurisdictions and therefore additional or different laws (or both) may be applicable.

7 Construction contracts

What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

It is common practice in the UK to use one of the various standard form contracts available for construction and engineering projects. Parties also amend these standard forms, or alternatively use a standard form as a starting point for developing their own bespoke contract.

In general, the standard forms have been developed by professional institutions and trade bodies. For example, one of the most widely used standard forms is the JCT suite of building contracts, published by the Joint Contracts Tribunal. Their range of contracts caters for traditional, design and build and management procurement routes.

Other common standard form contracts include:

- the New Engineering Contracts (commonly known as the NEC3, as it is in its third edition);
- ICE engineering contracts (published by the Institution of Civil Engineers. On 1 August 2011 the ICE Conditions of Contract were withdrawn from sale and re-launched as the Infrastructure Conditions of Contract, now owned by ACE and CECA. The ICE now endorses the NEC3 suite of contracts);
- GC/Works (sometimes used for engineering or public sector projects);
- FIDIC forms of contract (commonly used on international construction projects);
- IChemE forms of engineering contract (published by the Institution of Chemical Engineers for use on chemical and process engineering projects);
- IMechE/IET model forms of contract (published by the Institution of Mechanical Engineers and the Institution of Engineering and Technology for use on electrical and mechanical works); and
- PPC2000 contracts (published by the Association of Consulting Architects and described as the first standard form partnering contract).

The method of procurement chosen, the nature of the works and the previous experience of parties involved will largely determine which contract form is most appropriate.

Standard forms for the appointment of professional consultants are also commonly used. Some examples include: the Royal Institute of British Architects Agreements 2010 (RIBA), the Royal Institution of Chartered Surveyors Forms of Appointments (RICS), the NEC Professional Services Contract (PSC) and the Association for Consultancy and Engineering Agreements 2009 (ACE).

Legislation does not dictate that English must be the language of the contract; however, English is predominately used.

There are no restrictions on choice of law or the venue for dispute resolution. These can be agreed by the parties and incorporated into the contract. Where the governing law is not clearly identified in the contract, Rome I ((EC) 593/2008) will apply (to contracts made on or after 17 December 2009) to determine the law applicable to contractual disputes between the parties. In short, the contract will be governed by the law of the country where the party required to effect the characteristic performance of the contract has his or her habitual residence (article 4(2)) and if this cannot be determined, the contract is governed by the law of the country with which it is most closely connected (article 4(4)).

8 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Contractors, subcontractors, vendors, workers and consultants are typically paid by electronic payment. In certain circumstances payment may also be by cheque. The frequency for payments will be determined by the building contract, consultant appointment or employee contract.

With regard to contractors and consultants, section 109(1) of the HGCRA (as amended) gives a party the right to payment by 'instalments, stage payments or other periodic payments' provided the duration of the work is specified or estimated to be more than 45 days and the contract is a 'construction contract' (see question 18). The parties are free to agree the amounts of the payments and the intervals or circumstances in which payment becomes due. However parties must also comply with section 110 of the HGCRA (as amended), which requires an 'adequate payment mechanism'.

In practice, building contracts typically provide for periodic payments based on the value of the work performed in the relevant period. In the absence of agreement, valuations are to be made every 28 days in accordance with the Scheme for Construction Contracts 1998 (as amended) and final payment becomes due on the expiry of 30 days following completion of the work or the making of a claim by the payee (whichever is later).

With regard to government projects, contractors are required to pay their subcontractors within 30 days from the receipt of a valid invoice. In addition, some government projects may also require the use of a project bank account (PBA). On such projects the parties set up a PBA in joint names or in the name of the contractor. The building contract includes a mechanism for calculating the sum that the employer must pay into the PBA in time for payments to be made under contract, sub-contracts and supply contracts. The aim is to speed up payment and reduce the risk of cash-flow problems to the supply chain. For further information see the Cabinet Office's Guide to the implementation of Project Bank Accounts (PBAs) in construction for government clients.

With regard to consultants, fees are typically paid monthly. Often a lump sum fee is agreed with a monthly drawn-down schedule, against which the consultants invoice. Alternatively, in some situations, consultants may agree to be paid when certain project milestones are reached.

The most recent legislation that gives businesses a statutory right to claim interest in the event of late payment is the Late Payment of Commercial Debts Regulations 2013. These regulations amend the Late Payment of Commercial Debts (Interest) Act 1998 Act with effect from 16 March 2013. In short, these regulations increase the complexity as to interest in respect of late payment. In some cases interest may start to run after 60 days and in other cases it is extended to 90 or 120 days. These payment periods relate to the start date for statutory interest and they do not affect the due date of the principal debt.

9 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Various forms of procurement are used for major projects in England and Wales depending on nature of the works and the risk profile each party is willing to accept. The four most common procurement routes include:

- traditional – the client directly appoints both the contractor under a building or engineering contract and the design team under separate appointment documents;
- design and build – the contractor is engaged directly by the client to both design and build the project. It is often the case that the client will initially appoint the design team, prior to the appointment of the contractor, to produce the employer's requirements and design intent for the project. The consultants are then ultimately novated to the contractor;
- management – this term includes both management contracting and construction management. Under management contracting, a management contractor is appointed by the client, who in turn engages the individual subcontractors. Under construction management, the contracts with the subcontractors are placed directly by the client. In both instances, the client typically appoints and retains the services of the design team; and
- PPP or PFI – for large projects in specific sectors (see question 10), a private sector company will form a special purpose vehicle (SPV) with a public sector body to finance, design, build and (often) maintain the project.

10 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

PPPs and PFIs are generally only used for large construction and engineering projects in the education, health, leisure, justice, social housing, transport and waste sectors. There is no specific legislation that governs these projects; however, HM Treasury does oversee the PPP/PFI framework by providing key policy, guidance and advice. In addition, it produces standardised contract documentation that must be used on all PFI projects in England. The current version of the PFI project agreement is known as SoPC4 (Standardisation of PFI Contracts, version 4) and sets out what each PFI contract must include, as well as some compulsory drafting. Should a PFI project wish to depart from this standardised contract form, a derogation request must be sent to HM Treasury for approval. Sector-specific standardised PFI contracts, which are SoPC-compliant, may also apply.

Local authorities are given the power to enter into PFI contracts via the Local Government (Contracts) Act 1997 and the Local Government Acts 1972 and 2000.

11 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

A joint venture (JV) is not considered a legal entity under English law. Accordingly, a JV may take one of the following legal forms:

- a limited liability company;
- a limited liability partnership (LLP);
- a partnership; or
- a contractual agreement.

The members' liability and responsibility will depend on the commercial arrangements between them and the legal form chosen. Where a JV limited liability company is established, either for the sole purpose of one project or with a long-term relationship in mind, it is this legal entity that maintains the liabilities and responsibilities. It is the company that enters into the project or building contract and ultimately can sue or be sued. This enables members to limit their liability in respect of the company and indeed any project losses. Only in certain situations would company directors be held personally liable. The same is largely the case with JV LLPs. Where either a company or an LLP is created, it may be case that the members are required to support the legal entity by way of guarantees or other assurances, in turn placing liability back on individual members.

Where neither a company nor an LLP is established for the JV, a legal partnership may be created, either expressly or as deemed by the Partnership Act 1890. In this case the individuals and corporate bodies are agents of the others and each is jointly and severally liable for the acts and omissions of the other partners. Finally, a consortium can be formed on a simple contractual basis. Liability of each consortium member will depend on the provisions of the joint venture agreement, agreements made with third parties and the general rules of common law. Accordingly, members will be liable for their own actions, as well as for any other members, if they have assumed responsibility for them or are deemed to be vicariously liable under the joint venture agreement.

12 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

In general, a contractor will be liable to the employer for his or her own negligence when carrying out the main building contract, as well as all acts, errors and omissions arising from the work of his or her subcontractors. The exception to this in previous years was in the

situation where an employer nominated a particular specialist subcontractor, thereby retaining certain liabilities for the defaults of the subcontractor. However, this is rarely used now and standard forms have been amended and no longer include nomination provisions.

A contractor may rely on an express indemnity provided in the subcontract for those acts, errors and omissions caused by the subcontractor; however, the contractor should note that if the loss was partly caused by him or herself, he or she may not be able recover these losses from the subcontractor. Additionally, should the contractor wish to recover any liquidated damages he or she has had to pay as a result of the subcontractor's performance, he or she must have notified the subcontractor of the liabilities in the main contract. If he or she has not done so, the contractor may be unable to recover these monies.

A contracting party will not be able to indemnify him or herself against death or personal injury claims that have been caused by his or her negligence.

13 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

The Contracts (Rights of Third Parties) Act 1999 (the Act) creates an exception to the doctrine of privity and may enable certain third parties, such as a future tenant or mortgage lender, to pursue a claim against a contractor in situations where no contract exists between the two parties. The third party must be expressly identified in the contract either by name, as a member of a class or as answering to a particular description. Alternatively, the third party may seek to enforce a term of the contract if the contract purports to confer some benefit upon that third party. Where the third party is entitled to enforce a term in the contract, he or she will only be entitled to any remedy that would have been available to him or her had he or she been a party to the contract.

Despite the above, the Act is often expressly excluded in most construction contracts and professional appointments, or conversely, provisions are included that explicitly state that the agreement does not purport to confer a benefit on any third party other than the assignees or parties to the contract. As a result, the contractor and design consultants are commonly required to enter into collateral warranties with various third parties. Standard forms, such as those drafted by the Construction Industry Council and the Joint Contracts Tribunal, are widely used.

The tort of negligence will also enable a third party to claim against a contractor in some situations where no contract exists and the third party is not covered by the Act. The third party will have to establish that the contractor owed it a duty of care, that duty was breached and that the third party suffered a loss as a result. A claim in tort is often problematic for third parties as pure economic loss is often irrecoverable, except where the claim is for negligent advice. For example, if a latent defect merely damages the building itself and does not cause personal injury or damage to another's property, that loss is purely economic loss and unlikely to be recovered in tort. Recent case law suggests that pure economic loss could be recoverable if the defect falls within the 'complex structure theory'; however, this is still somewhat unclear.

Contractors should also be aware that the Defective Premises Act 1972 provides statutory rights of fitness for habitation to home owners, and others with an interest in residential buildings, even where no contract exists between the parties.

14 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Various types of insurance are available to a contractor, including (but not limited to):

- employer's liability insurance (compulsory under UK law);
- motor insurance (compulsory under UK law);
- all-risks insurance;
- professional indemnity insurance;
- product liability insurance; and
- public liability insurance;

Though less commonly used, single project insurance, latent defects insurance and liquidated damages insurance may also be available. Public liability insurance covers damage to the property of third parties and liability arising from death or personal injury to third parties (this being parties other than the contractor's own employees). With regard to injury to workers, employer's liability insurance would protect the contractor against liability for injury to its employees arising out of their employment. The Employers' Liability (Compulsory Insurance) Act 1969 requires most employers to maintain liability insurance cover of not less than £5 million for each occurrence.

With regard to environmental insurance, various policies are available, which may afford coverage for: loss from historical contamination, loss from contamination caused by ongoing operations, loss arising from cost overruns during remediation, loss arising from contractors operating on third party sites and pollution and environmental liabilities arising from the business activities. Each policy needs to be carefully considered as insurers tend to seek to exclude or restrict cover arising from existing pollution conditions that have been identified in a report or are 'reasonably foreseeable'.

The local law does not limit a contractor's liability for damages; however, the parties may agree a cap in respect of their liability to each other.

15 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

No, there are no laws that require a minimum amount of local labour to be employed. However, employers should note that it is illegal to employ an individual who does not have the right to work in the UK. Accordingly, employers need to carry out various checks and keep copies of original documents that establish an individual's right to work in the UK.

Workers from the EU have the right to move freely between EU states without permission; however, they must be employed, self-employed, studying or economically self-sufficient should they wish to reside for more than three months in the UK.

Regarding workers from outside the EU, a points-based system is, at present, in place and any migrant worker wishing to work in the UK will need to pass a points-based assessment system. The system is comprised of five tiers. Tier 1 is for 'highly skilled' workers. Anyone who qualifies for this category will not need sponsorship from a particular employer. All other workers must be sponsored by an employer who is licensed to employ migrant workers. Tier 2 is aimed at 'skilled workers' and tier 3 aimed at low-skilled construction workers. However, both employers and migrant workers should note that tier 3 is suspended at present and that the government has placed an annual limit on tier 1 and tier 2 applications.

For further detailed information on the current status of the migration laws, see the UK Border Agency's website.

16 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

If a contractor engages an employee on a fixed-term contract for less than one year and the contract of employment comes to an end at the completion of the project, the contractor has no further legal obligations to that employee.

However, for all other contracts of employment that are indefinite, or continue for more than one year, the contractor must be aware of the possible rights and remedies of an employee whom he or she wishes to dismiss. There are three potential claims an employee has the right to make: the common law claim for wrongful dismissal, and the statutory claims of unfair dismissal and redundancy payment.

An employee is likely to have a right to a claim for wrongful dismissal or unfair dismissal (or both) if his or her indefinite employment contract is terminated without the appropriate notice or, alternatively, if his or her fixed-term contract is terminated before its expiry date. Section 86 of the Employment Rights Act 1996 sets out the statutory minimum notice periods. At present, one week's notice must be given if the employee has been employed for more than one month. Where the employee has been employed for two years or more, one week for each complete year (up to a maximum of 12 weeks) must be given. A longer period will be required for senior employees.

In addition, employees with over two years of continuous employment have the right to claim for statutory redundancy in the event that the employer ceases or intends to cease to carry on his or her business, no longer requires employees to carry out a particular type of work or no longer requires them to carry out that work in a particular place. The way statutory redundancy pay is calculated is based on how long the employee has been in continuous employment, his or her age and his or her weekly pay (up to a certain limit).

For further information on employment terms and conditions, see www.direct.gov.uk/en/employment.

17 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

When a foreign contractor decides to close its operations, it must (though this is not an exclusive list):

- dissolve the limited company (if one has been established) in accordance with the Insolvency Act 1986 by putting it into liquidation and following the necessary procedures to have its name removed from the register at Companies House;
- alternatively, where the company is no longer trading but may seek to do so in the future, it may qualify as a dormant company. Certain administration procedures still must be complied with;
- give the required notice of termination to its employees and make any necessary redundancy payments (see question 16);
- pay any outstanding invoices and taxes and finalising the accounts; and
- advise HMRC (for corporation tax, payroll and VAT purposes) that the company will cease to trade.

If the employees of the organisation will be automatically transferred to another organisation, the same terms of their employment must continue with the new organisation. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) was established to protect the rights of employees in a transfer situation and legal advice should be sought as early as possible in situations where this is likely to occur.

18 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

The principal means by which a contractor secures the right to payment is either through the express terms of his or her contract, or through the statutory provisions set out in the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). Section 109 to section 113 of the HGCRA, including the amendments for contracts concluded after 1 October 2011, state that:

- a party has the right to be paid by instalments or stage payments (for those contracts lasting more than 45 days);
- the construction contract must include an adequate mechanism for determining what payments are due, by when and a final date for payment of any sum due;
- the construction contract must require the payer to give a payment notice to the payee not later than five days after the payment due date. If this notice is not issued, the payee must serve a default payment notice;
- if a party wishes to withhold payment, it must serve a 'pay less notice' seven days before the final date for payment;
- a contractor has the right to suspend performance for non-payment for 'any or all' of the contractor's obligations if it has first issued a default notice; and
- any provision that amounts to a 'pay-when-paid' or 'pay-when-certified' clause will be void.

Provided the contract falls within the wide-ranging definition of a 'construction contract' under the HGCRA, the contractor can rest assured that in the event the contract payment mechanisms do not comply with the HGCRA, or fail to address one of the issues listed above, the Scheme for Construction Contracts 1998 (as amended) will automatically apply to that part of the contract that is non-compliant.

A contractor is unable to place liens on the property unless he or she has received a court order that entitles him or her to do so.

19 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

An English government agency cannot assert sovereign immunity as a defence to a contractor's claim for payment. Equally, if the contract falls within section 3 of the State Immunity Act 1978, a foreign state cannot claim immunity in relation to the commercial transaction unless the parties have agreed otherwise agreed in writing.

20 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Interruption or cancellation of a project is typically dealt with by express terms in the contract. For example, in the JCT Major Project Construction Contract, where a contractor's employment is terminated as a consequence of force majeure, terrorism or a specified peril, the contractor is entitled to his or her valuation to date under the contract and his or her costs of removal from the site.

Where a contract is silent on this issue, or does not provide a means by which to assess the amount due on termination, a contractor would likely be able to recover a reasonable sum for the services he or she has provided by claiming under the common law principle of quantum meruit, meaning 'as much as he deserves'.

In the event that the employer becomes insolvent, a contractor would rank among the list of other creditors who are due payment. Liquidators allocate the assets in accordance to priority under the Insolvency Act 1986, and unless the contractor has secured a fixed or floating charge over one of the employer's assets (which is rare), he or she is unlikely to recover the full amount owed. Where appropriate, a contractor could seek protection by obtaining a bond or parent company guarantee, if possible.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The term 'force majeure' is not recognised under English law as a term of art. As a result, parties often incorporate such clauses into engineering and construction contracts and indeed most of the standard form building contracts include a provision for what happens when an unforeseen event has occurred. For example, in a JCT contract, force majeure is listed as a 'relevant event' and therefore the contractor would be entitled to an extension of time where the contract administrator has deemed such an event to have occurred. These clauses are often drafted such that the contractor is allowed an extension to the completion date, rather than being excused from performing its contractual obligations.

In situations where a force majeure clause has not been incorporated into the contract, a party who cannot perform its contractual obligations owing to events beyond its control must rely on the doctrine of frustration. In order for a contract to be frustrated, a radical change in the contractual obligation must have occurred and the unforeseen event must not be as a result of the actions of either party. A contract will not be frustrated in situations where the contract merely became more expensive to perform than one party had initially anticipated.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

The TCC is a specialist court that principally deals with construction, engineering and technology disputes in England and Wales. The TCC is located in London and 10 other regional centres around England and Wales and hears both High Court and county court TCC cases at each of these centres. Previously, the general rule was that TCC claims for more than £50,000 are brought in the High Court, while those below £50,000 are brought in the county court. Having said that, the TCC issued guidance by way of the recent case of *West Country Renovations v McDowell* [2012] EWHC 307 (TCC): claims valued at less than £250,000 should be issued in the County Courts or High Courts outside London that have designated TCC judges unless the case concerns one of the identified exceptions (cases involving adjudications or public procurement, injunctions, Part 8 claims, cases with an international element, etc). Appeals are heard by the Court of Appeal and ultimately the Supreme Court (previously known as the House of Lords), which is the final court of appeal in the UK for all civil cases.

Part 60 of the Civil Procedure Rules and its associated practice direction sets out the practice and procedures of the TCC along with the types of disputes the TCC specifically deals with. In addition, the Technology and Construction Court Guide (now in its second revision of the second edition) provides practical guidance for those litigating in the TCC.

Scotland and Northern Ireland are separate jurisdictions and do not have a specialist court such as the TCC for construction disputes.

Occasionally, specialist, project-specific tribunals will be established for large infrastructure and construction projects such as the Channel Tunnel and the London Olympics 2012 (see question 23).

23 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Some large construction and engineering projects in the UK have utilised dispute review boards. For example, the Channel Tunnel, the Docklands Light Railway and the Saltend Private Gas Turbine Power Plant all employed some form of tribunal or dispute board. Whether or not the board's decisions are final and binding, or are non-binding recommendations, depends on the particular contract and dispute board rules used.

A recent example of a UK dispute board concerns the London Olympics 2012. The Olympic Delivery Authority established two panels: an Independent Dispute Avoidance Panel (IDAP) comprised of 10 construction professionals, and an Adjudication Panel, comprised of 11 adjudicators who hear those disputes that have not been resolved by the IDAP.

24 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation has gained wide acceptance in England and Wales as an appropriate and efficient means by which construction disputes can be resolved.

Under the Civil Procedure Rules, all parties to litigation have an obligation to consider whether some form of alternative dispute resolution (ADR) might enable them to settle the matter without court proceedings. As the court may now consider cost penalties against a party who unreasonably refuses to mediate, the practice of mediation has increased and those advising the parties often consider mediation as a means of resolving the dispute. A recent survey carried out by the TCC and King's College London (in association with Fenwick Elliott LLP) (the TCC research) showed that 91 per cent of mediations occurred as a result of the parties' own initiative and not as a result of an indication by the court.

The vast majority of mediators tend to be legally qualified in construction disputes. The TCC research showed that only 16 per cent of the mediators were construction professionals. There is no state requirement that mediators undertake some form of training prior to appointment; however, it is common practice for mediators to obtain accreditation by one of the commercial mediation training schemes.

Appointing bodies such as the Centre for Effective Dispute Resolution are sometimes utilised; however, the TCC research suggests that the construction mediation market is quite sophisticated and parties more often appoint a mediator by agreement, choosing ones they have worked with previously.

The government is also committed to utilising mediation and on 23 June 2011 signed a Dispute Resolution Commitment requiring all government departments and agencies to use ADR forms such as mediation, arbitration and conciliation, where possible, prior to commencing litigation.

25 Confidentiality in mediation

Are statements made in mediation confidential?

Under the EU Mediation Directive 2008/52/EC, mediators should not be compelled to give evidence about information arising out of, or in connection with, a mediation unless overriding public policy considerations or enforcement of the settlement agreement make it necessary to do so. The UK is party to this Directive; however, no legislation has yet been implemented. Nonetheless, parties typically sign an agreement to mediate which incorporates confidentiality clauses.

The case of *Farm Assist Ltd v The Secretary of State for the Environment* (2009) confirmed that mediation proceedings are confidential both between the parties and between the parties and the mediator. The court also held that it will generally uphold the confidentiality of the mediation unless in the interests of justice it is necessary for evidence to be given of the confidential matters.

As a result, the Civil Mediation Council issued a Guidance Note in July 2009 that advises parties to continue to specify in their mediation agreements that the mediation proceedings are conducted on a 'without prejudice' basis, to make it clear that what is said during the mediation will be confidential, and not to restrict the circumstances in which a mediator cannot be compelled to give evidence in court.

26 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration in England and Wales is preferred over litigation in the local courts only in so far as it is a private and confidential means of obtaining a binding decision to a construction dispute. Many see arbitration as a formal process that often takes longer than litigation in the Technology & Construction Court (TCC), and is often more expensive. With the rise of adjudication and mediation (see question 24) domestic arbitration is no longer as widely used as it once was in the construction industry. However, international arbitration is still extensively used and the English courts are renowned for their supportive and supervisory approach in enforcing international arbitration agreements and awards. In England, Wales and Northern Ireland, arbitrations are regulated by the Arbitration Act 1996. In Scotland, arbitrations are governed by the Arbitration (Scotland) Act 2010, which came into force on 7 June 2010.

27 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

There is no preference as to international arbitration providers. Parties may either agree on a particular named arbitral institution and rules, or alternatively may prefer to conduct an ad hoc arbitration, pursuant to rules established by the parties. Where institutional arbitration is chosen, the ICC International Court of Arbitration and the London Court of International Arbitration (LCIA) are regularly used.

There is no requirement stating what law must apply to the dispute; however, in situations where the choice of law of the arbitration is not explicit, English law, in line with article V(1)(d) of the New York Convention 1958, supports the view that the law of the seat follows the procedural law governing the arbitration.

28 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Government agencies may participate in private arbitration and be bound by the arbitrators' award.

29 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

As the UK has acceded to the New York Convention of 1958, the courts will recognise and enforce an award rendered by a tribunal in one of the other signatory countries, provided it has not been set aside by the court of the seat of the arbitration (article V(1)(e) of the New York Convention and article 36(1)(v) of the UNCITRAL Model Law).

Sections 101 and 103 of the Arbitration Act 1996 make it clear that recognition and enforcement of a New York Convention award is mandatory unless one of the specified grounds has been proven. Section 103 sets out these grounds, which closely follow articles V and VI of the New York Convention 1958. For example, enforcement of the award may be refused if there is no valid arbitration agreement or if it would be contrary to public policy to enforce the award. Similar provisions are seen in sections 19 and 20 of the Arbitration (Scotland) Act 2010.

30 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

Yes, those commencing proceedings must do so within the statutory limitation periods. A claim in relation to a contract (eg, a breach of contract) must be brought within six years from the date on which the cause of action accrues. If the contract is executed as a deed, it must be brought within 12 years. In general, where a contractor is liable under a contract to complete all of the works, the limitation period for defects runs from the date of completion of the entire works, not from any earlier date when the subject matter of the defects was carried out.

As for negligence claims in tort in respect of physical damage to property, the limitation period is ordinarily six years from the date the damage occurred. However, if the damage is discovered after this six-year period, section 14A of the Limitation Act 1980, as amended by the Latent Damage Act 1986, extends the time period to three years from the date when the claimant had both the knowledge required for bringing the action and the right to bring such an action. There is a 15-year long-stop date from the date of the defendant's negligent act.

Claims for personal injury or death must be made within three years of the cause of action or the date of knowledge of the injured person, whichever is later.

In relation to claims of fraud or concealment, section 32 of the Limitation Act provides that the limitation period does not start to run until the claimant could have reasonably discovered the fraud or concealment.

Further, limitation periods may apply in respect of specific legislation. By way of example, when bringing a claim under the Defective Premises Act 1972, the claim must be brought within six years from completion of the dwelling. Alternatively, if specific works are carried out to rectify a defect, the limitation period in respect of this further work will run from the time it was completed.

31 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The UK is a signatory to the Stockholm Declaration of 1972 and is, at present, a member of the European Environmental Agency. The following list, though not exclusive, identifies key UK environmental legislation affecting the construction industry:

- the Climate Change Act 2008, which aims to improve carbon management and help with the transition towards a low-carbon economy;
- the Clean Air Act 1993, which aims to protect the environment from harmful gases and other airborne pollutants;
- the Environment Protection Act 1990, Environment Acts 1995/1999, which aims to prevent pollution to air, land and water and regulate, among other things, the disposal of waste and contaminated land;

Update and trends

Jackson Cost Reforms

Significant changes to civil procedure came into force on 1 April 2013. They follow on from Lord Justice Jackson's Review of Civil Litigation Costs in 2010. This was the biggest review of civil procedure in England and Wales since Lord Woolf's Access to Justice in 1996. Jackson's report made a number of important recommendations, which now have the backing of legislation – the Legal Aid, Sentencing and Punishment of Offender Act 2012.

The key objective of the Jackson Report was 'to promote access to justice as a whole by making costs of litigation more proportionate'. It is hoped that the changes will make the dispute resolution process quicker and easier, and will discourage unnecessary or unmeritorious claims. For example, for the first time, those using 'no win, no fee' conditional fee agreements (CFAs) will have an interest in controlling the costs that are incurred on their behalf. The previous regime allowed claims to be pursued with no real financial risk to the claimants and with the threat of excessive costs to the defendant. The government believes that 'access to justice' depends on costs being proportionate and unnecessary cases being deterred.

Other changes include new rules in respect of disclosure (the process by which parties make relevant documents available to the other parties in the dispute), cost management, witness statements and part 36 offers. By way of example in respect of cost management, if the sum in dispute is under £2 million, under the new rules parties must file and exchange detailed cost budgets before the first case management conference. The court may then make a cost management order that will record the extent to which budgets are agreed or approved. Importantly, when assessing costs the court will not depart from the agreed budget without there being a good reason why further costs should be allowed.

Further, in respect of disclosure, the new rules seek to control costs by imposing an obligation on the parties to file a report on disclosure describing what documents exist and the likely costs of giving standard disclosure. It is expected that the courts will take greater control of the disclosure process generally and will be required to limit the level of disclosure to what is necessary to deal with the case justly and at proportionate cost.

The recent case of *Venulum Property Investments Ltd v Space Architecture Ltd & others* is an example of the effect of the new reforms. Here, the claimant applied for an extension of time in which to serve the particulars of claim as they had failed to do so within the time required by the Civil Procedure Rules (CPR). The judge dismissed the application. Looking at the circumstances as a whole and in the light of the stricter approach now being taken by the courts, there were insufficient grounds to justify the court exercising its discretion to grant an extension of time. The amended CPR requires the court to enforce compliance with rules, practice directions and orders. This decision, therefore, embodies the new strict approach that the courts will now take. There will be significantly less indulgence towards, and tolerance of, parties who unnecessarily or without good reason delay proceedings or fail to comply with directions or Court Rules.

The RIBA Plan of Work 2013

The new RIBA Plan of Work (new Plan) was launched on 21 May 2013. It is the first major update since its inception in 1963. It has been updated to reflect the current working practices and methods of the construction industry, including BIM (see below). The new Plan continues to provide a framework for the organisation and management of building projects and is a definitive model for building design and construction processes in the UK. The traditional 11 stages, defined by the letters A–L, have been replaced with eight stages, defined by the numbers 0–7, and eight task bars.

Users of the new Plan should note that it is merely guidance, just as it has been in its previous forms. It is not mandatory and simply sets out current best practice in terms of briefing, design, construction, maintenance and operation. Indeed the new Plan states: 'The RIBA Plan of Work 2013 should be used solely as guidance for the preparation of detailed professional services contracts and building contracts.'

The RIBA Plan of Work 2013 is a non-contractual document that aims to influence contract documents and construction processes in terms of best practice thereby minimising ambiguities at the outset, which ultimately may lead to costly disputes. As such, the new Plan does encourage the preparation of legally binding documents, though obligations would only arise if they are expressly incorporated into contracts. By way of example, the new Plan recommends such documents and tools as the Strategic Brief, Initial Project Brief, Information Exchanges, Project Programme, Project Budget, Technology Strategy and the Schedule of Service. These tools aim to bring clarity to appointment documents by ensuring that design responsibility has been allocated (Design Responsibility Matrix), that the right information is issued at the right time (Information Exchanges) and that the brief is clearly established at the outset of the project (Strategic Brief and Initial Project Brief).

BIM

Building Information Modelling (BIM) continues to be a hot topic in the construction industry. One real driver for this is the government's construction strategy, which mandates the use of Level 2 BIM on all government projects by 2016. Level 2 BIM involves the shared use of information and models in a 'common data environment', or in other words, an identified location for storing project information that can be accessed by the project team.

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, up from 13 per cent in 2010.

Most recently, in March 2013 the Construction Industry Council (CIC) published its much anticipated Building Information Modelling (BIM) Protocol. The 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 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. If it is accepted in the construction industry as a standard document then it is thought that this will encourage the use of BIM.

Further, PAS 1192-2:2013 came into effect on 28 February 2013. This PAS (Publically Available Standard) is designed to help support the government's construction strategy to achieve Level 2 compliance and provides specific guidance for the information management requirements associated with projects delivered using BIM. Indeed, compliance with this standard will be mandatory on all public sector jobs from 2016. PAS 1192-2:2013 sets out how to share information on BIM projects and is intended to provide a framework that parties can apply to specific projects. It includes a glossary of terms and references to other relevant British Standards Institution (BSI) standards, Construction Product Information (CPI) guidance and other documents. It also sets out definitions for process and data needs, details about roles and responsibilities as well as sources for key templates for the documents referenced within the PAS.

- the Environmental Permitting (England and Wales) Regulations 2010, which regulates commercial and industrial activities (ie, disposal of waste, discharges to watercourses, etc) by requiring facilities covered by the Regulations to obtain a permit; and
- the Control of Asbestos Regulations 2012, which imposes obligations to determine whether asbestos is present on a construction project and to manage any asbestos that is or is likely to be present.

In addition, claims made under common law can also affect the construction industry: nuisance, the rule in *Rylands v Fletcher* (a party keeps something on his or her land, the activity of which amounts to 'non-natural use' of the land, that is likely to cause damage if it escapes) or negligence, or both.

Contractors and developers should also note that depending on the nature, size or location of the project, an 'environmental impact assessment' (EIA) may be required prior to the grant of planning permission in accordance with the Town & Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999 (EIA Regulations).

In addition, the Building Regulations 2010 set out energy efficiency requirements in buildings and the Approved Document Part L provides technical guidance on complying with these regulations. Where construction is in relation to new homes, the Code for Sustainable Homes, which aims to reduce carbon emissions and create more sustainable homes, will also apply.

As for sustainable design, the standard and assessment most commonly referred to in construction documentation is that established by the Building Research Establishment Environmental Assessment Methodology (BREEAM). BREEAM standards are not statutory obligations that a development must comply with, but the scheme is considered to be best practice in relation to sustainable design. If a party wants these environmental standards to be met, the obligations must be contractually created.

32 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

With regard to local laws and liability in respect of the environment, please see question 31. Depending on the violation, criminal or civil sanctions can be imposed and developers and contractors could be required to carry out remediation or comply with an enforcement notice. Possible risks therefore include fines or imprisonment, or both, payment of damages, cost of carrying out remediation and clean-up works, cost of participating in an emissions trading scheme (see question 6), cost of compliance with an injunction, closure of a site or operation, etc.

33 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

The UK is a signatory to over 100 bilateral investment treaties for the protection of the investments of foreign entities. The definition of 'investment' varies, depending on the particular agreement; however, many include moveable and immoveable property, shares in stock, intellectual property rights, goodwill, claims to money or performance under a contract and business concessions.

34 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

The UK has one of the largest networks of double taxation treaties, which covers over 100 countries. Specific information regarding each of the individual treaties can be found on the HM Revenue & Customs website. In addition, as a result of the Organisation for Economic Co-operation and Development, the UK has signed a number of tax information exchange agreements.

35 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No.

36 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

There are no laws that restrict removal of profits and investments from England and Wales. However, those in control of the business should be aware that there are certain situations in which they could be personally liable for wrongly removing profits from the country, particularly when insolvency is looming. For example, a person who has knowingly intended to defraud creditors (fraudulent trading) can be ordered by the court to make a personal contribution. Equally, directors of a company who have failed to minimise a potential loss to the company's creditors when they knew, or ought to have known, that the company could not avoid liquidation (wrongful trading) can also be held personally liable. The Insolvency Act 1986 provides mechanisms by which a liquidator or administrator can overturn past transactions and claw back money or other assets in the interest of creditors.

Stacy Sinclair **ssinclair@fenwickelliott.com**

Aldwych House
71–91 Aldwych
London WC2B 4HN
United Kingdom

Tel: +44 20 7421 1986
Fax: +44 20 7421 1987
www.fenwickelliott.com

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