FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2025/2026

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

Contents

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ANNUAL REVIEW

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Karen Gidwani
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Welcome to our 2025/26 *Annual Review*, now in its 29th edition. And what an edition this year: with articles spanning subjects from AI to PFI and data centres to space law.

2025 has been a busy year across all sectors of construction law and for the firm. As I write, we have just received the last of the 2026 directory listings and I am delighted to say that we maintain our top tier rankings in *Chambers and Partners* and the *Legal 500* as well as our listing as a *Times* Best Law Firm. We could not achieve this without the support and references from our clients – thank you.

As expected, we have seen a continued focus on building safety cases, with a rise in disputes through all sections of the supply chain. There have been some very important court decisions that affect our work in this area, ranging from *URS v BDW Trading* in the Supreme Court to the decision that claims under the Defective Premises Act could be adjudicated in *BDW Trading v Ardmore*.

In adjudication, the courts continue to enforce robustly. The third annual adjudication report was published by King's College London in collaboration with the Adjudication Society and the issue of diversity in Adjudicator Nominating Bodies remains a hot topic. It is clear that the ANBs are moving to open their panels and attract a broader range of adjudicators, whilst maintaining high quality, but this process has still some way to run.

Our international practice continues to flourish, out of both our Dubai and London offices, with complex international arbitration cases spanning multiple jurisdictions, and different arbitral institutions including ICC, LCIA, SIAC and ICSID.

We were pleased to welcome in London new Senior Associates, Philip Hancock and Richard Burton, and new Associates, Layla Blair and Jonathan Clarke, and in Dubai new Associate, Nicole Leahy. Additionally, it was great to see Caitlin Binns qualify and join our non-contentious team, and Gilbert Hakim in Dubai and Ben Smith in London both well-deservedly promoted to Partner in April.

This past year has brought a better understanding and harnessing of AI, for the benefit of both the firm and our clients. We now utilise a number of AI tools that assist with the efficient management of cases, and we continue to work on our client-facing tools and internal platforms in order to intelligently use AI and mould the training of our lawyers and development of our services accordingly. I would urge you to read the article by Stacy Sinclair in this edition and to check out her work with the UN on use of AI in major infrastructure projects.

Partners and Associates from Fenwick Elliott continue to be involved in leadership roles in numerous industry and legal bodies including Jeremy Glover with the DRBF and FIDIC Net Zero Task Force TG23; Claire King with the Adjudication Society; Katherine Butler with SCL; Simon Tolson with the Society of Construction Arbitrators; Stacy Sinclair with the FIDIC Digital Transformation Committee; Mark Pantry with the JCT Young Professional Group; and myself, Simon Tolson and Stacy Sinclair with TECSA.

2025 also saw the foundation of the Jon Miller Scholarship. The Scholarship was established in memory of partner Jon Miller, who passed away in September 2024. Each year the Scholarship will be awarded to a new student beginning their legal studies at Queen Mary University London's (QMUL) School of Law, where Jon studied. Scholarship students will receive a bursary for each year of their studies, alongside mentoring and work experience with the firm. The Scholarship aims to support wider access for those wishing to study law, in tribute to Jon, who left school at 16 to start an apprenticeship in the construction industry before switching to a law degree at QMUL. I am delighted that we have made our award of the inaugural Scholarship to Gizem Demir and all of us a Fenwick Elliott wish Gizem the very best with her studies at QMUL.

The *Annual Review* would not be what it is without the hard work and dedication of Jeremy Glover and all the contributors. My heartfelt thanks to them for another fascinating edition which I hope you enjoy reading.

Next year will mark the 30th edition of the *Annual Review* and Fenwick Elliott's 40th year. These are significant milestones to look forward to in 2026 and we are planning to mark the occasion well: so watch this space! ■

Karen Gidwani

Jeremy Glover
Partner, Editor

Welcome to the 29th edition of our *Annual Review*.

As always, our *Review* contains a round-up of some of the most important developments from our clients' points of view over the past 12 months including, from pages 44-56, 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*.

I am really pleased that this year our *Review* is introduced by Karen Gidwani, who became Senior Partner in April 2025. I am sure there will be many more *Annual Review* introductions to come from Karen!

This has, of course, left Simon Tolson with a little, just a little, more time on his hands, which he has put to great use by researching and drafting a fascinating article about Space Law. As you'll see from pages 24-29, although it is a little longer than our usual articles, it is a very rewarding read.

Our *Review* also features, for the very first time I believe, the word: "*gobblefunk*". If you want to know why, then turn to pages 7-9 where Lucinda Robinson provides some clear, practical advice about the best ways to avoid disputes about what contracts mean.

Stacy Sinclair at pages 10-13 looks at the ongoing impact of the use of AI in dispute resolution, particularly in relation to the debate around the use of AI for decision-making. Using AI in a different context, Philip Hancock asked it for some thoughts about how to mitigate the risks inherent in data centre construction. As you will see at pages 16-17, AI was good for providing introductory ideas, but for a more detailed analysis, you should clearly consult with Philip.

It is difficult, too, to underestimate the importance and continuing impact of the Building Safety Act, which is why Ben Smith and Caitlin Binns at pages 18-19 provide a useful update and summary of all you need to know. Then at the end of this year's *Review* at pages 57-58, Ben, Huw Wilkins and Paul Smylie provide a run-down on the key takeaways from one of the leading court cases in 2025, the Supreme Court decision in *URS Corporation Ltd v BDW Trading Ltd*. The article was first published in our Fenwick Elliott Blog. Edited by Andrew Davies, the Fenwick Elliott Blog remains a popular feature of our website, offering a wide range of short thought leadership and more traditional in-depth reviews of key issues.

As always, adjudication remains a key focus of our *Review*. At pages 33-34 Adele Parsons provides an update on withholding notices, whilst at pages 31-32 George Boddy, based on his own frustrating experiences, discusses what can be done when parties fail to comply with adjudication timetables.

We have a trio of articles from our team in Dubai. At pages 38-39 Nicole Leahy reviews recent legislation regulating construction activities, whilst on page 37 Roma Patel discusses the recent recognition of "*without prejudice*" in the UAE. Roma, too, at page 40 discusses a recent case from the Dubai court of Cassation which reaffirms the independence of arbitration tribunals.

Back in the UK, Sam Thyne and Rhea Yactine at pages 35-36 look at the changes introduced by the new Arbitration Act 2025. This article is taken from *International Quarterly* (IQ), our regular round-up of legal and commercial developments around the world.

From the English courts, Katherine Butler at pages 20-21 provides a cautionary tale about drafting suitable contract provisions to deal with ground conditions and existing structures. Then Ted Lowery and Richard Burton, at pages 22-23, provide insight into PFI handback, as the frequency of PFI contract expiries is set to increase each year over the next decade.

For the past four years, Fenwick Elliott has been pleased to support the 10,000 Interns scheme. This years' intern, Munotida Munipoda, who is currently employed as a member of our paralegal team, at page 30 provides an insight into the ways in which the infrastructure in southern Africa is developing.

Over the past two years, the JCT has been releasing the latest update of its contract suite. The final part, released in 2025, was the JCT Target Cost Contract 2024. As Mark Pantry discusses on pages 14-15, this is not an update, but a brand-new contract form for the JCT.

And finally, I have been a member of the FIDIC Net Zero Task Force for a couple of years now and I am very pleased to say that in December 2025, the FIDIC Carbon Emissions Guide for use with the FIDIC Red Book was released. You can find a summary of the key parts at pages 41-43.

Our website (*www.fenwickelliott.com*) keeps track of our latest legal updates or you can follow us on LinkedIn. As always, I'd welcome any comments you may have on this year's *Review*. Just send an email to jglover@fenwickelliott.com. ■

Jeremy Glover

What did you mean by that?

Roald Dahl's BFG warned, *"Don't gobblefunk around with words"*. It's good advice for contract drafting. Why? Because gobblefunking around with your words could cause confusion when contracts are supposed to create certainty.

Choosing words carefully is crucial when it comes to contracts to ensure intentions are clear, as **Lucinda Robinson** explains. If a problem ever arises on a project, a lawyer will go straight to the contract to see what it records as the parties' agreement on the subject. Contracts for complex construction projects inevitably include multiple documents setting out legal, technical and commercial requirements and running to hundreds of pages, so they are not an easy read, and there is huge scope for inconsistencies. How can these be unravelled or reconciled? Well, over time, some rules of interpretation have been developed through the judgments of the courts and these are explained below, along with some practical tips to avoid inconsistencies arising in the first place.

Describing the dilemma

First, here are two stories that demonstrate how the problem can arise and how it is approached.

Workman Properties Ltd v Adi Building and Refurbishment Ltd

[2024] EWHC 2627 (TCC)

Set on a dairy farm in Gloucestershire, this is a tale of refurbishment and expansion works carried out under an amended JCT Design and Build Contract.

Workman, the employer, said its contractor, Adi, was responsible for all design work including that done by a consultant before Adi came on board. Adi disagreed, pointing to clause 1.4 of the Employer's Requirements, which Adi said was a contractual warranty meaning it did not have to check the pre-contract design: *"significant design has been developed to date which has been taken to end of RIBA Stage 4"*. The adjudicator agreed, finding Workman was in breach for not ensuring the design was at Stage 4, so Adi was entitled to a change and related costs. Adi then adjudicated for those costs, won and got paid.

Unhappy with that ending, Workman asked the court to rewrite it using CPR Part 8. Workman argued that the contract was Design and Build, so Adi was responsible for all the design, and Workman listed multiple clauses in support. This time, Workman won. Reading the contract as a whole, the judge could see that clause after clause made Adi responsible for all design. The one clause that did not was an outlier in the Employer's Requirements and it was not enough, on its own, to override the clear intention.

What does this tell us? The court will look at the words of the contract and the overall picture they paint. If you want to override the nature of the contract, you need to do more than add one contradictory statement or qualification at the back or rely on subjective understandings.

John Sisk and Son Ltd v Capital & Centric (Rose) Ltd

[2025] EWHC 594 (TCC)

Once upon a time, Sisk designed and built two residential buildings and refurbished two mills. The amended JCT Design and Build Contract placed extensive site risk conditions on Sisk, which came to life.

In chapter 1 – an adjudication – Sisk was found liable for ground conditions and existing structures on the site, depriving it of an extension of time and loss & expense for delay.

In chapter 2, Sisk challenged the existing structures finding at court. The judge had to grapple with some uncertainty around the documents. Clause 2.42 said Sisk was responsible for site conditions subject to item 2 of the *"Clarifications"*. But there were two clarifications documents, so which one was it? The *"Contract Clarifications"* document said the employer (C&C) took the existing structures risk. The Tender Submission Clarifications document said otherwise, but this was an earlier document and was only in the electronic version of the contract and not the hard copy.

The ending favoured Sisk. The judge found that the Contract Clarifications document was the relevant one, meaning the risk of existing structures belonged to the employer. The Tender Submission Clarifications were not referred to in the Contract Document schedule and there was no other reference to them, or signature upon them, to suggest they had been incorporated.

What is the moral of this story? Check all the documents you plan to include in your contract and ensure they record the agreed intentions and are consistent with each other. Avoid including all previous correspondence and documents created before negotiations finish because they may not reflect the final position and risk causing confusion.

Working out what the words mean

There is a lot of academic law around contract interpretation, but the five key principles were summarised succinctly in *Bank of Credit and Commerce International SA (in Compulsory Liquidation) v (1) Munawar Ali, (2) Sultana Runi Khan and Others* [2001] UKHL 8:

> *"To ascertain the intention of the parties, the court reads the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the*

relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions, the court does not of course inquire into the parties' subjective states of mind but makes objective judgment based on the materials identified."

These principles are explored further below.

1. ***Construe contracts objectively***

   The parties' subjective views do not matter. The court will try to identify *"what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean"*, as captured in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101.

2. ***Start with the words used***

   Words in a contract will be given their *"natural and ordinary meaning"*, and they will be the starting point for interpretation *(Arnold v Britton and others* [2015] UKSC 36). The senior courts have repeatedly emphasised that the language should be prioritised over other issues, such as commercial or common sense. For example: *"The primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage" (Bank of Credit and Commerce v (1) Ali, (2) Khan and Others* [2001] UKHL 8).

   Whilst the text is a starting point and important, the court will not be beholden to a dictionary meaning if it would make no sense in the context of the overall agreement, so the following principles also apply.

3. ***Consider the purpose of the clause and contract***

   When applying the objective test, it is assumed that the reasonable person reading the text has all the background information known by both parties at the point the contract was made *(Investors Compensation v West Bromwich Building Society* [1997] UKHL 28). Consequently, the court can look at the overall purpose of the contract and surrounding facts. A good way to ensure this information is considered is to include it into the recitals or clauses of the contract.

4. ***Read the contract as a whole***

   Clauses need to be read in the context of the contract as a whole, *(Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA 962). A court will look at all relevant clauses and parts of the contract to ascertain the overall intention, rather than focus in on just one item, as *Workman v Adi* above demonstrates.

   An exercise lawyers can do when faced within an inconsistency is to identify all relevant clauses and consider which support which arguments. This can reveal a pattern indicating the real intention.

5. ***Apply commercial common sense***

   Usually, commercial common sense will not override the language used, even if that results in a bad bargain for one party. The classic example was in *Arnold v Britton* [2015] UKSC 36, where a formula for calculating ground rent for caravans on a holiday park would result in rents of >£1 million after a few years. The formula was upheld based on the words used, even though it was a tough result.

   However, there are some limits to this. For example, if the drafting is ambiguous, there are conflicting meanings, and one result would be unreasonable or absurd, the court may adopt the most common-sensical interpretation on the assumption it was mostly likely to reflect the intention *(Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50 and *Wood v Capita Insurance Services Ltd* [2017] UKHL 24).

Extra Tip: Apply the "Canons of Construction"

If the court is still struggling to decipher the parties' meaning after applying the rules above, it can resort to some *"canons of construction"* to help with interpretation. These three are worth remembering:

- **Contra proferentum:** Uncertainty is usually resolved against the party putting forward a clause, but this may not be appropriate if both parties have been advised and are on an equal footing.
- **Clear words are needed to remove rights.** Courts are reluctant to accept interpretations that remove key legal entitlements – for example, by limiting liability, or removing common law rights and defences. The words will need to be crystal clear before such meanings will be found.
- **Bespoke over standard:** Individually negotiated or bespoke wording will usually take precedence over standard terms, on the assumption that if time was spent wordsmithing, the more likely it is that the words will reflect the deal reached.

> ***To reduce the amount of time you spend talking to lawyers, say what you mean and mean what you say. If you choose your words carefully, you can write a story with a happy ending.***

Managing the risk

It is easy to say that questions of interpretation could be avoided by being clear in the contract from the outset. However, ensuring consistency across and within all documents forming a construction contract is a tall order when there are numerous sets of complicated documents, written by different teams under time pressure. Strategies that may help with this are suggested here.

1. Read through the entire contract to see if any terms conflict or are unclear before it is signed. Even if there is not enough time for a thorough review, any time spent checking the terms could identify and resolve some issues.
2. Involve the right people in drafting the contract to ensure the intention is clear to design, programming, and commercial teams, as well as the lawyers.
3. Avoid including documents that are out of date, or email trails, as they are rarely complete and often outdated.

4. If you are using formulas or calculations, include worked examples to show how they are supposed to function. The example may be a more accurate illustration of intention than the words used to explain the mechanism.
5. Consider how conflicts between documents should be managed if they arise and make provision for this in the terms of the contract. For example, will the contractor need additional time and money if there is a conflict between drawings within the Employer's Requirements that it needs to resolve?
6. Similarly, if the contractor has included a list of clarifications and derogations, then the terms of the contract will need to be amended to ensure they are incorporated and that the information in the list takes precedence over any conflicting information in the Employer's Requirements. Any assumption that the Contractor's Proposals will trump the Employer's Requirements because it is the later document is (usually) a myth.
7. A priority clause can be used to manage conflicts between contract documents by establishing their order of precedence. Typically, the order will be amendments, standard terms, Employer's Requirements, Contractor's Proposals, other contract documents. Whilst this approach can help when time is tight, there are some limitations to the effectiveness of these clauses.

For example, priority clauses are only needed if there is an irreconcilable discrepancy between contract documents. Even then, they may be ignored if apparently inconsistent terms can be reconciled. *Blackpool Borough Council v VolkerFitzpatrick Ltd & Ors* [2020] EWHC 1523 (TCC) concerned an NEC contract for the design and construction of a tram depot. A question arose over whether the design life of the roof components was 25 years or 50 years. The Works Information stated the design life was 20 years unless otherwise specified in Appendix 1. In Appendix 1, the design life was said to be 50 years for the structural frame and 25 years for the external shell. The standard form does not include a priority clause, but one had been added as a Z clause by amendment. However, the court did not use the priority clause, finding that the provisions could be read together as a whole, so there was no inconsistency.

Further, priority clauses do not address ambiguities in the wording of a clause, or between documents at the same level. Overall, it is worth including a priority clause, but alongside, and not in substitution for working to ensure clarity and consistency across the contract.

Final word

The idea for this article grew out of a conversation with my colleague David Bebb about what keeps disputes lawyers busy. The answer: unscrambling words and phrases in contracts to figure out what was intended. It is at the heart of what we do, and it costs businesses far too much money. So, David and I considered the ways to minimise this risk set out above. In short, to reduce the amount of time you spend talking to lawyers, say what you mean and mean what you say. If you choose your words carefully, you can write a story with a happy ending. ■

AI & dispute resolution: is the construction industry ready for AI-Judges, AI-Arbitrators and AI-Adjudicators?

In November 2025 the AAA-ICDR announced that its AI-Arbitrator is now available for use in construction disputes. In light of this, **Stacy Sinclair** considers the use of AI in dispute resolution and asks, are we ready for this?

Introduction

Artificial Intelligence ("AI") continues to fuel worldwide debate, dividing global opinion and polarising society on issues of regulation and governance, data protection, accountability, ethical responsibility and technological progress. Some view AI as a potential saviour for humanity and the planet, while others at the opposite end of the spectrum fear it could ultimately lead to our destruction.

Regardless of differing perspectives, it is undeniable that AI is here to stay. Following OpenAI's release, or rather, explosion of ChatGPT into the market in November 2022, AI is now a household name. AI has been democratised.[1] AI is no longer confined to technology specialists in research labs, but it is embedded into our everyday life, making advanced technologies accessible to both individuals and organisations of every size, across every sector – including law and construction.

As AI systems become more capable, their reach is extending into domains traditionally reserved for human judgment – including the resolution of disputes. AI already is assisting construction professionals, lawyers, tribunals and judges in dispute resolution by analysing vast datasets, legal research, predicting outcomes, helping to frame issues and assisting in daily drafting and summarisation tasks with unprecedented speed and consistency. What was once experimental has quietly become routine.

While these tools do not yet replace human decision-makers, they certainly are increasingly shaping the information and arguments relied on by human decision-makers. In doing so, the boundary between decision-support and decision-making itself is blurring, raising inevitable questions about what comes next.

How far away are we from the AI-Judge, the AI-Arbitrator, or the AI-Adjudicator? Are we ready for this?

Democratisation of AI

The prospect of AI-Judges, AI-Arbitrators and AI-Adjudicators is already sparking debate, but this is far from unprecedented. Major technological shifts often are met with scepticism, uncertainty and heated discussion. Yet, once accessible to the general public, we have seen how they become embedded in society, ultimately reshaping how we work, communicate, decide and deliver outcomes. For example, in recent history:

The Personal Computer (PC): In the 1980s, it was the PC that was placed into the hands of the wider public. In 1982, *Times Magazine*[2] declared the PC as the "*machine of the year*" and Marvin Minsky, an eminent MIT computer scientist commented: "*The desktop revolution has brought the tools that only professionals have had, into the hands of the public: God only knows what will happen now*".[3] Another leading AI expert at the time, Nils Nilsson, said the PC, like television, can "*greatly increase the forces of both good and evil*".[4] Today, AI similarly is regarded as a technology that can magnify our capacity for both progress and harm.

The Internet: In the 1990s, it was the internet. In 1994, Netscape, one of the first leading web browsers made its debut, known as the "*Netscape Moment*".[5] Again, before its release, the internet was only in the hands of the privileged few. Once released, and the general public had access, it changed the way we communicate, shop, date and find partners, and even vote. It changed the way we live, work and understand our environment. In business, those who did not get onboard with the internet struggled to keep pace with those who did, and many ceased trading. Again, when released, the reaction was much the same with views of mistrust and anarchy and headlines such as "*the Internet, used by millions of Americans every day, has become a virtual textbook for terrorists*".[6]

Artificial Intelligence: And in the 2020s, ChatGPT brought AI to the general public, democratising AI. We are now facing that next "*Netscape Moment*". Will it play out like the PC and the internet? My bet certainly is that those who have access to AI and take advantage of it will reshape the future, and those who do not will lose out.

The use of AI in dispute resolution is simply the latest chapter in this long-running story of technological evolution.

Use of AI in dispute resolution

AI is reshaping dispute resolution by enhancing the speed, accuracy and consistency across the lifecycle of disputes. From early case assessment and case preparation through to conducting hearings and trials and decision-making, the tools available have the capability to analyse vast amounts of information, surface critical insights in real-time, and support lawyers and decision-makers in producing clearer, more robust and more efficient outcomes.

Each stage of the dispute lifecycle itself has various activities that can be supported through AI, for example:

- advanced legal research engines rapidly locating relevant authorities;
- automated chronology builders extracting events from large datasets;
- drafting assistants for pleadings, submissions and correspondence;
- summarisation tools for distilling lengthy reports, witness accounts and expert materials;
- document review platforms which categorise and cluster datasets and identify relevance, privilege and anomalies;
- outcome-prediction models and strategic assessment tools to test positions, quantify risk and refine case tactics;
- tribunal-selection tools which draw

on historical data to identify decision-makers whose expertise and past reasoning align with the dispute; and

- real-time technology which generates summaries and extracts key points from evidence as it emerges during the course of a trial or hearing, providing rapid cross-referencing across the document set.

Together, these technologies have the potential to create a more informed, efficient and strategically sophisticated dispute resolution process. Of course, the successful use of any AI system depends on navigating a range of challenges and risks, particularly:

- defining appropriate AI governance, strategies and policies;
- harnessing data and addressing issues of quality, availability, privacy and security;
- ensuring human-centred, responsible AI;
- driving adoption and change;
- building capacity and engaging talent; and
- enabling digital access, inclusion and equality.

Each of these must be considered carefully to enable the safe and effective integration of AI into dispute resolution, in a way that is responsible and ethical, supporting people and enhancing trust. Failure to do so results in systems that lack proper human oversight and therefore increased risk of error and exposure to serious consequences when outputs are relied on without review – including the well-known dangers of hallucination and misinterpretation.

In 2025, we continued to see a number of cases in England & Wales exposing such failures, a few of which include:[7]

- *Zzaman v Revenue and Customs Commissioners* (April 2025):[8] The litigant-in-person confirmed his use of AI to prepare the statement of case, which cited cases that did not provide authority for the propositions advanced.
- *Bandla v Solicitors Regulation Authority* (May 2025):[9] Again, a solicitor cited several authorities that were fake or did not exist.
- *R (Ayinde) v London Borough of Haringey, Al-Haroun v Qatar National Bank QPSC* (June 2025):[10] In the *Ayinde* case, counsel relied on non-existent cases. In the *Al-Haroun* case, the claimant's solicitor relied on fictitious cases, as he did not verify his client's research which had been AI-generated.
- *Ms (Bangladesh) v Secretary of State for the Home Department* (August 2025):[11] A barrister included a false case citation produced by ChatGPT, without checking its authenticity.
- *Victoria Place Flats et al v Assethold Limited* (October 2025):[12] Following his own investigations with M365 Copilot, the judge concluded that a litigant-in-person provided an invalid, AI-hallucinated case citation, as well as submissions that were based on hallucinated legal points.

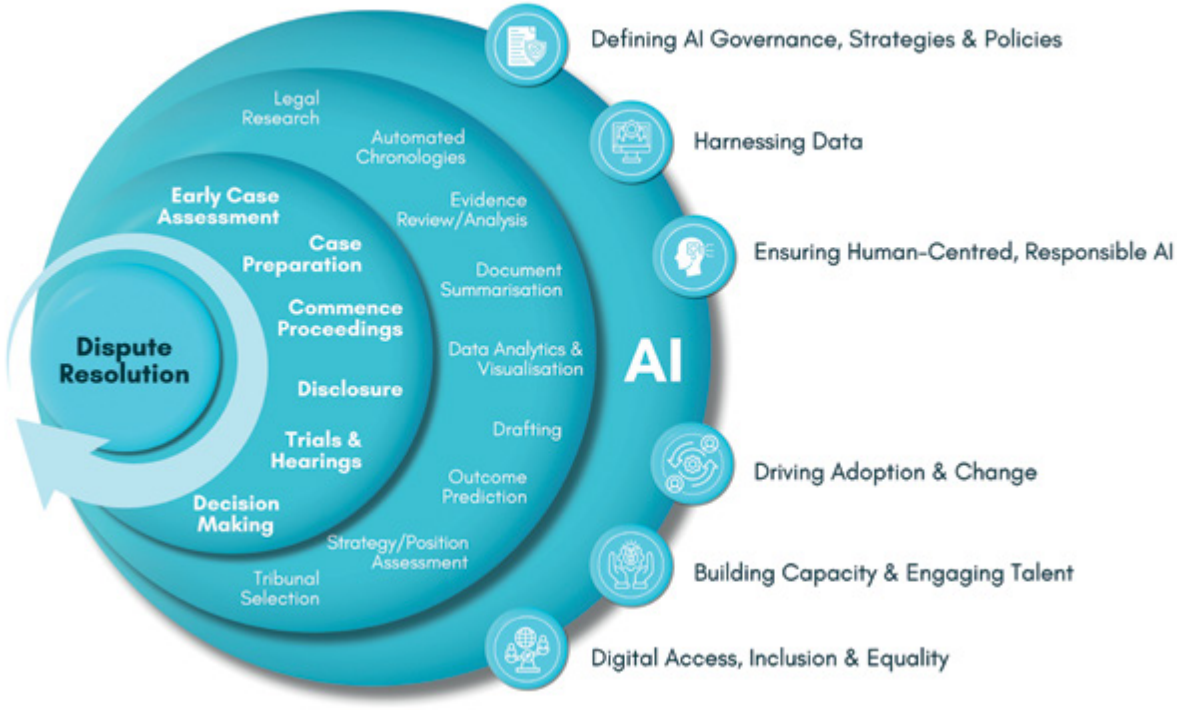
AI & judicial decision-making

In 2025, we also saw the rise in the use of AI to ***assist*** judicial decision-making, as well as a call for a debate on the use of AI to ***automate*** certain aspects of judicial decision-making.

*AI **assisting** in decision-making*

In February 2025, at the LawtechUK Generative AI event, Sir Geoffry Vos, Master of the Rolls, encouraged the use of AI:[13]

> *"...there are three excellent reasons why all lawyers and judges should embrace AI: those we serve are using it. It will make what we do available to more people, more cheaply, and allow us to do necessary things more quickly, and it will be at the centre of the future work of lawyers, when claims are all about*



The AI & Dispute Resolution Landscape

when AI has been used for the wrong things, and AI ought to have been used but was not used."

In April 2025, the UK courts rolled out Microsoft 'Copilot Chat',[14] a secure and private tool in the eJudiciary platform, encouraging judicial office holders to make use of generative AI. The Courts and Tribunals Judiciary also updated their publication *"AI Guidance for Judicial Office Holders"*,[15] highlighting potential use cases.

By July 2025, there was a general sense, among at least a handful of the judiciary, of *"opportunity regarding the use of AI for various tasks within the judiciary, particularly to improve efficiency and access to justice."* This included 12 UK judges, five of which are members of the UK Supreme Court.[16]

In August 2025, in the case of *Evans v HMRC*,[17] Judge McNall expressly stated that he had used AI in the production of his decision, why he did so, and how. The judge primarily used AI to summarise documents:

> *"This application is well-suited to this approach. It is a discrete case-management matter, dealt with on the papers, and without a hearing. The parties' respective positions on the issue which I must decide are contained entirely in their written submissions and the other materials placed before me. I have not heard any evidence; nor am I called upon to make any decision as to the honesty or credibility of any party."*

In October 2025, in the case of *Victoria Place Flats et al v Assethold Limited*,[18] Judge Gethin also used Microsoft Copilot to investigate the Respondent's submissions.

And at the end of October 2025, the Courts and Tribunals Judiciary published a further revision *"AI Guidance for Judicial Office Holders"*, again promoting the use of AI and setting out key risks. Notably, this latest version is more risk-focused and security-aware, highlighting such issues as *"white text"*.[19]

AI automating decision-making

It is one thing to use AI to assist in the decision-making process, and it is an entirely different proposition for AI to automatically make the decision itself. Given the rapid rate at which technology is developing, and the acceptance already of AI to assist in decision-making, provided adequate safeguards are in place with human oversight and responsibility, how far away are we from certain decisions being entirely automated by AI? Which categories of disputes, or administrative processes, if any, can safely be handed over to AI, and which must remain firmly under human control and judgment?

Over the past year, we have seen a growing debate around these questions. Ethical, legal, and practical considerations are surfacing, reflecting a broad recognition that the path toward automation must be navigated deliberately and cautiously, shaped by transparency, accountability, and public trust.

At the end of 2024, Lord Justice Birss noted that AI has potentially transformative implications for justice:[20]

> *"Looking further into the future, one could imagine that AI may very well be able to assimilate much larger quantities of data than a normal human judge. One could then be faced with the situation in which an AI system might be a better decision maker than a human being in those circumstances...*
>
> *The question will then become an important ethical and human rights based one – in which we need to decide whether there are decisions we are prepared to have made by AI, and which decisions should remain the preserve of human beings. One could imagine for example that a decision relating to children and whether someone had committed a crime might be one where we wish to maintain human decision making. On the other hand, one might imagine that a large number of small money claims or some other similar kinds of case, might be more efficiently done by AI, in the first instance. There could then be a right of appeal to human judges after the event."*

The Master of the Rolls, Sir Geoffrey Vos, is also at the forefront of this discussion, consistently challenging the profession to confront the practical, ethical, and constitutional implications of automated justice.

On 15 October 2025, Sir Vos asked, the *"big question is what should it be used for?"*.[21]

Sir Vos said the answer is *"difficult and potentially troubling"* ... *"Nobody can tell me why it should not be used to assess, for example, the damages to be awarded in a personal injury case."* That would cut the time taken for a ruling from years to minutes. *"So acknowledging that some decisions may be taken by AI, why should we balk at its use more widely?"*

Acknowledging various issues, including AI's lack of ability to mimic human emotion, empathy and insight, Sir Vos called for *"a serious debate now to consider what human rights people should have in the light of more capable AI"*.

At the International Bar Association conference in Toronto in November 2025, Sarah Sackman MP also called for a debate on AI-judges.[22]

This call for deeper debate is timely, given AI decision-making is now starting to emerge in practice.

AAA-ICDR AI-Arbitrator

On 3 November 2025, the American Arbitration Association – International Centre for Dispute Resolution ("AAA-ICDR") announced that its AI-Arbitrator is now available for use in two-party, documents-only construction disputes.[23]

The AAA-ICDR developed the AI-Arbitrator in collaboration with QuantumBlack, AI by McKinsey, and trained it on over 1,500 construction awards and refined it with expert-labelled examples.

This marks a genuinely ground-breaking moment for the dispute resolution community. For the first time, an arbitral institution has deployed an AI decision-maker to determine real-world construction disputes, moving beyond pilot projects and theoretical demonstrations. It represents a fundamental shift in how disputes can be resolved and signals the beginning of a new era in which AI may become an integral component of mainstream arbitral practice.

How does it work? Once the parties have agreed to use the AI-Arbitrator,[24] the parties submit their claims and evidence to the AI-Arbitrator for processing. The parties then validate that the AI-Arbitrator has accurately summarised their submissions. Once the AI-Arbitrator drafts the proposed award, a human AAA-trained arbitrator reviews, finalises and issues the award. The human arbitrator is ultimately

responsible for the award, not the AI-Arbitrator.

What is the benefit? The AI-Arbitrator has the potential to drastically reduce the time it takes to reach a decision, and therefore lower the parties' costs. The AAA-ICDR are reporting that early testing shows 20-25% faster resolution times and 35% or greater cost savings. In addition, by providing AI technology to the human arbitrator, increased data-driven reasoning is now possible. Given the vast amount of data in construction, equipping human arbitrators with advanced analytical tools enables them to process evidence more comprehensively and consistently in a controlled environment.

What are the risks? As with any new innovation, the AI-Arbitrator introduces risks and challenges that the industry likely will need to confront. In addition to the usual risks which must be considered with any use of an AI system (hallucinations, transparency, bias or errors in the training data, explainability, etc), questions around due process and enforceability may arise. Perhaps less so as the parties have agreed to the process in AAA-ICDR arbitrations; however, one can image challenges in any event, or in other contexts. See for example the current case of *LaPaglia v Valve Corp*, in a US District Court, where LaPaglia is arguing that the arbitrator *"outsourced his adjudicative role to Artificial Intelligence"*, therefore undermining the validity of the award.[25]

Whilst the AAA-ICDR AI-Arbitrator is not fully autonomous, and is more akin to AI-assisted arbitration, this clearly is setting the direction of travel for how technology will shape future decision-making processes. It signals that the integration of AI into core procedural functions is no longer speculative, but an emerging reality the industry must actively prepare for.

AI-Adjudicator

What are the prospects for an AI-Adjudicator? The release of the AI-Arbitrator suggests that the AI-Adjudicator might soon become a reality too.

Whether AI-assisted adjudication or an autonomous AI-Adjudicator, this must be on the horizon, particularly as many construction adjudications, on the whole, already tend to be documents-only. Furthermore, the adjudication process generally is not the *"last stop shop"*. Adjudication decisions are binding unless or until revised in arbitration or litigation. Perhaps this could lend itself to an AI-Adjudicator determining the dispute in the first instance, followed by a human judge or arbitrator if a party is not satisfied?

Alternatively, in an AI-assisted adjudication this would allow human adjudicators access to AI tools to interrogate evidence, process and analyse any large data sets in submissions, and generally assist with administrative or drafting tasks, in a safe and confidential platform, in the short timeframe of a 28-day adjudication.

Is the technology advanced enough for this? Is the industry ready for this?

Either way, doing nothing is not an option. We need to advance the debate around the use of AI in decision-making and address issues of trust, transparency, ethics and human rights. In my capacity as Vice-Chair of the Technology and Construction Solicitors' Association ("TECSA"), a leading Adjudicator Nominating Body ("ANB"), I certainly can say, watch this space!

Conclusion

As AI systems become more integrated into dispute resolution, they offer significant benefits such as increased efficiency, accuracy, and cost savings. The call for debate around the AI-Judge, along with the introduction of the AAA-ICDR AI-Arbitrator, marks a pivotal shift, suggesting that AI could soon play a central role in decision-making processes.

However, the industry must address concerns related to transparency, bias, and the ethical implications of automating judicial decisions. The successful integration of AI requires careful consideration of governance, human oversight, and the establishment of robust safeguards to ensure responsible and ethical use.

Regardless of whether you think AI is here to save us or destroy us, it is imperative that we demystify and deepen our understanding of AI and learn how to leverage its capabilities to increase access to justice and create meaningful, real impact in a manner that is safe, responsible and ethical. ■

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JCT Target Cost Contract 2024

The publication of the JCT Target Cost Contract 2024 ("TCC 2024") in June 2025 is the JCT's first venture into Target Cost contracts, a market which is dominated by NEC ECC Option C. The TCC 2024 provides experienced users of the JCT suite of contracts with a Target Cost variant that will be familiar to them, without the need to adapt to NEC contracts. As a founding member of the JCT's Young Professional Group, **Mark Pantry** is perfectly placed to discuss this new contract.

Introduction

The TCC 2024 adapts the JCT Design and Build Contract 2024 ("DB 2024"), keeping many of the key principles around design, workmanship and liability while introducing a significant change to the basis of payment.

As with the DB 2024, the TCC 2024 is a Design and Build contract suitable for more complex projects of medium to high value. Under this form, the Employer identifies its requirements, and in response the Contractor proposes its solution, completing the design and constructing the Works. What differentiates the TCC 2024 from the DB 2024 is the Target Cost mechanism. The mechanism draws on the cost-reimbursement approach used in the JCT Prime Cost Contract 2024 to introduce a Target Cost incentive. If the Contractor beats the Target Cost, it gets a gain share. If the Contractor exceeds the Target Cost, it gets a pain share. The drafters of this contract noted at its launch webinar[1] that they hoped this would enable a balanced risk profile to be adopted by those using the TCC 2024 in the context of an industry where the level of risk placed on contractors under the DB 2024 is frequently high.

How the Target Cost mechanism works in the TCC 2024

The key principles of the Target Cost mechanism in the TCC 2024 are:

- **Target Cost:** the benchmark for the cost of the Works, agreed between the Employer and the Contractor prior to contract signature, against which actual costs are measured.
- **Allowable Cost:** the actual, properly incurred project costs as defined in the contract which are paid to the Contractor for the carrying out of the Works.
- **Difference Share:** the shares agreed between the Employer and the Contractor of the difference between the Allowable Cost plus the Contract Fee when compared against the adjusted Target Cost.
- **Contract Fee:** the fixed sum or percentage fee agreed between the parties and payable to the Contractor.

Payment under the TCC 2024 is built around a shared risk and reward ratio which is agreed up-front between the parties. By paying the Contractor the Allowable Cost plus the Contract Fee, the Employer avoids paying the Contractor for risk-based contingencies that are likely to have been baked into fixed price contracts. The Contractor gains protection against bearing all the risk for unforeseen cost overruns.

The success of the TCC 2024, like all Target Cost contracts, is dependent on the work done by the parties before the contract is entered into. Setting a realistic Target Cost at the outset is the most important factor in avoiding future disputes under a Target Cost contract. The parties should also give due consideration to the Difference Share and how this incentivises both parties and, when advising on Target Cost contracts, we always recommend that the parties run multiple worked examples to allow an understanding of the commercial implications of certain scenarios.

Contractors used to the fixed price element of the DB 2024 will also need to change their approach to allow transparency of the Allowable Cost and its open book nature. This will likely result in both parties having to spend more on internal resources: for the Contractor, making sure that its records and cost controls are in good order; and for the Employer, giving such records the oversight and interrogation needed to be certain that the Allowable Cost presented is the value of the Works.

Target Cost and adjustments

The Target Cost is the amount agreed between the parties when entering into the TCC 2024 and it can only be adjusted in certain limited circumstances. The most frequently encountered adjustments will likely be Change and encountering Relevant Matters.

As with other JCT contracts, additional work instructed by the Employer or identified as a Change under the TCC 2024 is valued according to defined rules, with the Target Cost adjusted accordingly. Where values are not agreed, work is assessed as measurable work or daywork, with valuations aligned to comparable items in the Target Cost Analysis or, failing that, on a fair basis or by reference to the RICS Definition of Prime Cost. Importantly, an instruction that substantially alters the conditions for executing other work also triggers an adjustment to the Target Cost.

The TCC 2024 addresses loss and expense through the mechanism of Relevant Matters, which largely mirrors the JCT 2024 suite. Entitlement arises where the Contractor notifies as soon as the likely effect of a Relevant Matter becomes reasonably apparent. As with the DB 2024, the Employer is obligated to respond to claims for Relevant Matters within 28 days of receiving the initial information, with further assessments at 14-day intervals thereafter.

Allowable Cost

Central to the TCC 2024 is the definition of Allowable Cost, equivalent to Defined Costs under NEC ECC Option C. These are the reasonably and properly incurred costs of performing contractual obligations. Whether they are reimbursed in full depends on the balance between the Target Cost and the incurred Allowable Cost.

The TCC 2024 sets out how such Allowable Costs are recovered: costs must not be duplicated, must be evidenced by records, and must exclude those arising from post-completion remedial work. Pre-completion costs relating to defects remain allowable, reflecting the incentive-based philosophy of Target Cost contracts. Rates are frozen during periods of

Contractor delay, and discounts or credits must be passed back to the Employer. Where lump sum rates are agreed, these are deemed final and binding.

Employers are given protections through audit and inspection rights, with Contractors required to maintain records in prescribed formats. Unlike NEC4 Option C, however, there is no mechanism to finalise Defined Costs at interim stages, which could otherwise provide greater certainty.

In terms of categories of Allowable Cost, subcontract work is allowable where payments are due under the subcontract, but exclusions apply to losses arising from Contractor default or insured risks, which may lead to disputes over responsibility.

Direct workforce costs are allowable where labour is directly employed and engaged on the Works, whether on site or in workshops. Contractors should anticipate evidential requirements, particularly for off-site activity, and should agree record formats with the Employer at the outset.

Materials and goods costs are recoverable, subject to compliance with rules on proof of payment and timing of reimbursement. Costs of plant, services and consumables provided by the Contractor are allowable, but the scope of eligible items must be checked carefully to ensure coverage. Finally, sundry costs such as statutory charges, utilities and office expenses are recoverable where expressly included.

The Contract Fee

Separate from Allowable Cost is the Contract Fee, specified as either a fixed sum or a percentage in the Contract Particulars. This fee is deemed to cover all other costs and expenses payable to the Contractor which are not identified as Allowable Cost. Where a fixed Contract Fee is agreed, the TCC 2024 permits upward adjustment of the Contract Fee where the Target Cost increases beyond a defined percentage threshold, ensuring the Contractor is not penalised by disproportionate cost growth.

Difference Sharing

The Difference Share mechanism set out in the TCC 2024, whereby the Employer and Contractor share any variance between the adjusted Target Cost and the actual cost of the Works (being Allowable Costs plus the Contract Fee), acts as a pain/gain mechanism. If actual costs exceed the Target Cost, the Contractor's recovery is reduced; if savings are achieved, the Contractor shares in the gain.

The incentive structure depends on setting the Target Cost at an appropriate level. It must be realistic to avoid inevitable overspend, yet not so generous as to remove incentive. Striking this balance of risk and reward is at the heart of the TCC 2024's commercial effectiveness.

Practical tips

The TCC 2024, like all Target Cost contracts, will inevitably demand a higher level of administration than traditional lump sum design and build forms, particularly in relation to the keeping and verification of cost records. To avoid disputes, parties must ensure that appropriate systems, resources and training are in place from the outset so that the contract is administered as intended. Failure to do so risks gaps in records, inconsistent practices and ultimately disagreements about what constitutes the Allowable Cost.

A recurring problem in other Target Cost contracts has been the practice of certifying interim payments "*on account*" and revisiting them later when the Target Cost approaches. While this may appear expedient, it merely defers conflict. Disputes commonly arise because records are incomplete, requirements are unclear, or formats change mid-project. The better course is to establish clarity at the outset, encourage audits and inspections from the beginning, and agree in advance the form and standard of records to be provided.

The growth of remote working adds further complexity, raising questions about whether time spent off-site qualifies as Allowable Cost. Such flexible working should be considered and agreed between the parties prior to entering into the contract to avoid legitimate resources being excluded from recovery.

Comparison with NEC ECC Option C

Until the publication of the TCC 2024, the principal standard form Target Cost contract in the UK has been the NEC ECC Option C. The NEC's underlying mechanisms are in many respects closely aligned with those now introduced under the TCC 2024. While the terminology differs, with the NEC referring to Defined Cost and Disallowed Costs and the TCC 2024 referring to Allowable Cost, the substantive effect is broadly similar. The TCC's detailed criteria for Allowable Cost effectively incorporates the exclusionary principles captured under NEC Disallowed Costs.

For most users, the decision between NEC ECC Option C and the TCC 2024 is therefore unlikely to hinge on the mechanics of the Target Cost model itself. Instead, it will likely reflect broader preferences. NEC places greater emphasis on proactive risk management, forecasting, and administration of compensation events, often demanding higher resource input. By contrast, the TCC 2024 offers a Target Cost framework within JCT's more familiar drafting and procedures, potentially making it more accessible for lower value or less complex projects.

The NEC form is inherently flexible in allocating design risk but the TCC 2024 is fundamentally a design and build contract into which a Target Cost mechanism has been integrated. NEC has also evolved through recent amendments, addressing issues such as remote working costs and periodic audits of Defined Costs, neither of which are fully present in the TCC 2024.

Conclusion

The JCT Target Cost Contract 2024 is a welcome addition to the JCT suite and fills a longstanding gap. By offering a structured Target Cost model within the familiar JCT framework, it provides clients and their contractors with an alternative to NEC without requiring them to depart from the ever-popular JCT's principles.

The success of any project using the TCC 2024 will depend not only on the drafting but also on the behaviours of those who use it. Parties should be encouraged to set realistic targets, share costs transparently and foster collaboration. ■

1. https://corporate.jctltd.co.uk/target-cost-contract-hub/

Common issues in data centre construction – and how to avoid them

In last year's *Annual Review,* Lyndon Smith wrote that the demand for data centres was on a meteoric rise. This year, **Philip Hancock** takes up the baton. As he notes, that demand looks set to continue; see for example the recent news of Google's staggering £5 billion investment in UK artificial intelligence, including the expansion of a US$1 billion data centre in Hertfordshire.[1]

Unsurprisingly, we are also seeing an increased number of disputes relating to data centre projects. Far from being *'big sheds with lots of M&E'*, they are technically complex, challenging projects which can give rise to all manner of issues and disputes. In this article, Philip explains more.

I enlisted the help of AI, powered by a data centre somewhere, to identify some mitigation tips. It came up with some good suggestions of how to mitigate the risks inherent in data centre construction:

"Mitigation Tips:

- *Involve specialist consultants early (especially for MEP and commissioning).*
- *Conduct thorough site surveys for refurbishments to uncover legacy issues.*
- *Use BIM and clash detection to pre-empt integration issues.*
- *Have a robust change control process with client sign-off protocols.*
- *Allow generous time for system commissioning and testing."*

That's a pretty good start, but what about the detail? Data centre projects are a construction project like most others and so the three typical issues and sources of dispute will apply, namely:

1. Time (i.e. delays to completion);
2. Cost (i.e. cost overruns); and
3. Quality (i.e. defects and technical issues).

Time – delays to completion

- ***Design changes.*** These may arise from different approaches to procurement, for example initial design carried out by different specialist designers with resulting interface issues. There is often mismanagement of sequential trades – many data centres are built following a construction management model, which can have the downside that the construction manager has less exposure to risk and so less incentive. There are also often design changes during the works, for example due to tenant requirements that are not known until late-on, or due to technological changes. Different end users may have different requirements or specifications.
- ***Access delays.*** The largest single scope of work in a data centre is the M&E, which is often the final trade to begin work, usually with a long commissioning period at the end. Delays to preceding trades can have a big effect on data centre construction, and there are often issues with earlier works (e.g. openings for services) which can lead to re-work.
- ***Supply chain delays.*** Lots of data centre equipment are long-lead items and so late design decisions and design changes can have a big impact where it delays procurement.
- ***Site conditions.*** Due to the demand for data centres, there is more incentive to convert existing buildings or retrofit old data centres. The unknown site conditions in existing buildings carry a greater risk than a new build.
- ***And, commissioning!*** Data centres invariably require a large amount of commissioning of complex interrelated systems, more than many other types of project. Commissioning is often carried out by a variety of subcontractors, sub-subcontractors and suppliers, making it a complex and time-consuming process. The numerous stakeholders will often not feed into the construction programme at the outset, meaning that commissioning can be a much larger and more involved process than anticipated.

Cost overruns

- The most obvious cause of cost overrun is delays, as discussed previously. On data centres, delays can be particularly costly. Tenants often impose very high delay liquidated damages which can be difficult to pass down to the supply chain, because they are much higher than on a typical construction project. That can mean contracts are not back-to-back, increasing exposure for delay losses.
- ***Inflationary pressures.*** We are in a period of high inflation. Most construction costs have risen significantly over the past few years. That can be pronounced in data centres where several of the components may come from a variety of different countries. Trade wars and tariffs, together with supply chain disruption, may drive costs up exponentially. A survey by Turner & Townsend in 2025[2] found that two-thirds of respondents

1. https://www.bbc.co.uk/news/articles/crmek723dz9o
2. https://reports.turnerandtownsend.com/data-centre-construction-cost-index-2025/data-centre-cost-trends

reported 6% or more average increase in tender/bid prices for data centres, citing AI and inflation.

- ***Variations.*** The risk of variations is high on data centre projects. Changes due to tenant requirements, changes in technology, and unavailability of components all frequently occur. Further, the need for multiple systems to work in harmony can mean that one variation can have a knock-on impact.

- ***Disruption claims.*** We see a lot of disruption claims particularly among M&E subcontractors, who may have a significant amount of the work but are dealing with challenging supply chains and may be working around issues caused by preceding trades. There may be workfronts available but out of sequence, leading to disruption but not necessarily critical delay. Many tenants also request to begin their fit out works at an early stage, and so there can be a situation where the M&E subcontractor is working around tenant fit-out works.

Quality

- Data centres contain large amounts of specialised technical equipment from different suppliers. Issues may be difficult to pinpoint, determine responsibility and address. That is exacerbated by interface issues and risk. Data centres are also sensitive environments and equipment, which does not always mix well with a live construction site (and even more so when rectifying defects post-completion, during operation).

- On that subject, resolving defects when the data centre is operational can be a nightmare. Access can be greatly restricted; the environment is carefully controlled. Downtime risk is huge and any issue that may threaten the operation of the data centre is very difficult to resolve.

- Further specific issues that can arise include the risk of OFCI (owner furnished contractor installed) / CFCI (contractor furnished contractor installed) equipment, and tenant requirements. Who takes the risk of any issues?

Other risks to consider

- ***Complex contractual situation.*** There are often many parties involved in the construction and operation of a data centre, with different roles. The matrix of contracts is very complex, and terms and scope are very often not back-to-back. As noted earlier, there may be huge damages payable for downtime which may not be flowed down to the supply chain (it may not be possible to do so). The supply chain is very international, and the risk of costly cross-border litigation is higher. Companies should take particular care that they have clear, signed and effective contracts in place, with effective risk management. Terms like limitations of liability, governing law and dispute resolution, defect liability, and standards of care are particularly important.

- ***Power supply.*** One of the buzzwords of the industry over the past few years, the issue of effective power supply to data centres (and the risks associated with grid connections and downtime) is something to keep in mind and manage (Is there enough power? How long will connection take?). Water cooling can also be an issue.

- ***Procurement.*** I previously mentioned that a large proportion of data centre projects use a construction management model. Others may involve a M&E contractor taking on the role of a main contractor, because their package of work is by far the biggest. However, M&E contractors are often not experienced performing the role of a main contractor and so that can pose issues, e.g. in effective management of other trades and in contract administration. Different models have advantages and disadvantages. There can also be scope gaps where packages are broken down too much, causing disputes.

Conclusions and mitigation tips

So, what are some 'top tips' to mitigate risks in data centre projects? We started off with AI's Mitigation Tips, which are pretty good.

I have some further suggestions and lessons learned:

- Early engagement and work with the supply chain, including careful attention to the programme and in particular the commissioning programme, will pay dividends.

- Draft contracts carefully, consider the risks you may be exposed to, include effective and robust limitations of liability, and ensure terms are back-to-back where possible.

- The usual tips for any project – records and contract administration. Make sure to keep good, thorough contemporaneous records including progress records, programmes and correspondence. Newer technological solutions, including video diary site walkarounds, can be particularly useful to record progress. And ensure to submit notices, claims, etc. on time.

- Keep 'on top' of progress, pay attention to programme updates, check they are an accurate reflection of progress, and work closely with the M&E contractor, key subcontractors, and consultants, to issue-spot and problem solve effectively before problems spiral out of control.

Data centre construction shows no sign of a slowdown in the near future. It's a potentially huge opportunity for many in the industry. Just stay on the right side of some of these issues (and, if in doubt, ask a construction lawyer!). ■

Contracting for building safety

In the 2023/2024 *Annual Review,*[1] we explored some initial themes coming out of the Building Safety Act 2022, identifying some of the potential challenges and how these can be managed. In this article, **Ben Smith** and **Caitlin Binns** consider how these themes have developed over the last twelve months and how you can address them in your construction contracts.

Applications and the Regulator

In the past year, we have seen how the Building Safety Regulator (the "Regulator") has developed in its role as approver of building control applications for higher-risk buildings ("HRBs").

Delay

Where a project involves the construction of a new HRB, or works to an existing HRB, that work will need to be approved by the Regulator before works can start on site, in a process known as Gateway 2 approval. On receipt of a valid application, the Regulator is required to approve that application within 12 weeks of receipt.[2] Approval from the Regulator is, in practice, taking much longer than anticipated by statute (approximately 50 weeks). This has led to reform of the Regulator to unlock these delays and to meet the government's commitment to deliver 1.5 million safe, high-quality homes during this Parliament.[3]

Which party bears the risk for delays incurred by the Regulator in the approvals process is often a point for discussion. While clause 2.26.14 of JCT Design and Build Contract 2024 ("JCT DB 2024") allows for an extension of time for delay in receipt of any necessary approval from a statutory body, owing to the JCT's light-touch approach to building safety drafting within the JCT DB 2024, an express extension of time for delay caused by the Regulator is not included. Bespoke amendments passing this risk on to the contractor are therefore common.

Invalidity

According to figures released by the Regulator, around 44% of all applications received during the period between October 2023 and March 2025 were rejected on the grounds of invalidity. An application will be invalid where it does not include all the required documentation. In response to this, the Construction Leadership Council (the "CLC") has released guidance, in conjunction with the Regulator, clarifying what it expects to see within a valid building control application.[4]

For many project teams, the recommendations from the CLC may serve as a checklist ahead of application submission, however, the pro forma documents included within this guidance may prove useful for complex projects, or those less familiar with the application

1. https://www.fenwickelliott.com/research-insight/annual-review/2023/higher-risk-building-regulations
2. Building (Higher-Risk Buildings Procedures) (England) Regulations 2023, Regulations 3-7 (for work on new HRB) and Regulations 11-15 (for work to an existing HRB).
3. https://www.gov.uk/government/news/reforms-to-building-safety-regulator-to-accelerate-housebuilding
4. https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2025/07/CLC-Guidance-Suite-Building-Control-Approval-Application-for-a-New-Higher-Risk-Building-Gateway-2.pdf
5. Building Regulations etc (Amendment) England Regulations 2023, Regulation 11G (1)(b)
6. Building Regulations etc (Amendment) England Regulations 2023, Regulation 11G (2)
7. Building Regulations etc (Amendment) England Regulations 2023, Regulation 11G (3)
8. https://www.gov.uk/guidance/design-and-building-work-meeting-building-requirements#designers-duties
9. RIBA Practice Note: Principal Designer Role (November 2024)

process. Those involved in multi-building developments or staged applications should note that early engagement with the Regulator is now recommended. A document providing a summary of the overarching approach to the building control applications proposed for the project, along with timelines (referred to as the Application Strategy within the guidance), may be required in these early stages to ensure approval.

Dutyholders and Design and Build

Enquiries relating to the dutyholder regime for all building works created by the Building Regulations etc. (Amendment) (England) Regulations 2023 (the "Dutyholder Regulations") have shifted away from clarifying what the new roles are, to establishing who is best placed and able to take on the duties. This has been particularly so for the role of building regulations principal designer (the "BRPD") on design and build projects.

Where the design team has been novated to the main contractor, who has overall responsibility for the design of a project, the main contractor is likely to be best placed to carry out the role of BRPD, as it has overall control of the design of the works. However, to take on this role, the contractor must also have the relevant competencies required by the Dutyholder Regulations.

Further, where the BRPD is not an individual, it must have the organisational capability to fulfil the duties of BRPD under the Dutyholder Regulations.[5] The organisation taking on this role must also designate an individual from within the organisation who has the task of managing the organisation's functions as the BRPD.[6] That individual is required to have the skills, knowledge, experience and behaviours necessary to manage the organisation so that it can fulfil its duties as BRPD under the Dutyholder Regulations.[7]

Main contractors considering appointing a sub-consultant to carry out the duties of the BRPD on their behalf should be aware that the Regulator has published guidance confirming that the designated individual must come from within the BRPD organisation itself and the legal responsibilities for the role of BRPD will remain with the organisation.[8] Therefore, while it is not possible to subcontract the statutory dutyholder obligations, it is possible to appoint a sub-consultant to advise and assist with the role of BRPD, and there is support from industry bodies for architects to take on this advisory role where their professional indemnity coverage allows for it.[9]

Allocating risk – other amendments in construction contracts

We continue to review bespoke amendments to standard form contracts that allocate the risk of the new regulatory regime in relation to building safety between the parties. Initially, BSA-specific drafting within contracts was prescriptive and not always project-specific, or even relevant – for example, deferring the risk for delay caused by building control approval onto the contractor where works were to a non-HRB. However, as understanding of the regulatory regime has developed, so too has the drafting around it.

Common themes include limitation and insurance periods. Contractual limitation is often amended to match the extended limitation periods under the Defective Premises Act 1972 and the Building Act 1984. Alongside this, the period of insurance is invariably amended to mirror the limitation period in the contract. While this is ultimately a commercial point to be agreed, parties need to consider whether they want or need to extend the contractual limitation period, when a separate statutory limitation period is available, and what period of insurance they can accept, given the yearly premiums.

Drafting may also be inserted to cover the client's obligations under the regulatory regime for building safety. Often, clients will require a warranty from the contractor or designer that they possess the competency required by the regulations to carry out their role as a dutyholder, whether that be designer, contractor, principal designer or principal contractor. This often aligns with the liability that the contractor or designer takes on under statute. Therefore, it may be uncontroversial provided that the warranty is backed by the appropriate professional indemnity insurance policy.

Amendments driven by professional indemnity insurance policy requirements are also common. Insurers, who are now facing a significant number of potential claims relating to fire safety and cladding defects, often exclude such claims from their coverage. Accordingly, amendments may be requested to clauses setting out a contractor's or consultant's professional indemnity insurance obligation to clarify that fire safety and cladding defects claims are excluded from their coverage. This is often accompanied by an outright exclusion of the contractor's or the consultant's liability for fire safety and cladding claims.

Transitional arrangements – cancellation

We touched on what criteria needs to be met for the transitional arrangements to apply in our 2023/2024 *Annual Review*, one of which is the requirement for an initial notice to have been given and accepted by a local authority. But what happens where this notice is cancelled part way through the project as has happened previously with the insolvency of AIS, and the very recent demise of Assent?

The transitional arrangement set out within the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 are clear cut when it comes to projects where the criteria are met – they fall under the previous regime. However, where the initial notice is cancelled and the project no longer falls within the transitional arrangements, the new regulatory regime applies subject to the amendments set out under the appropriate provisions of Schedule 3. This means that the project must transfer to the Regulator as the building control authority for higher-risk building projects.

Conclusion

Given that those in the industry are still getting to grips with the Building Safety Act 2022, the resulting challenges continue to develop – and so do construction contracts. Clearly, bespoke drafting can serve as a useful tool to reflect the commercial positions agreed on building safety issues, but it is always important to bear in mind the commercial relevance and risks before agreeing to bespoke amendments. ■

Existing structure risk: a cautionary tale

The difficulties in drafting suitable provisions to deal with ground conditions and existing structures are nothing new. As **Katherine Butler** explains, the inherent *"unknown"* aspects of what may be found once construction is underway will always cause issues when it comes to contractual risk allocation. In the modern construction industry, issues surrounding these *"unknowns"* are becoming much more prevalent as construction spreads over brownfield sites and as *"cut-and-carve"* projects become more popular.

Construction contracts need to address these issues. By way of context, it is established law that, where a contract is silent on the point, the Contractor will be taken to have assumed the risks surrounding the site and its conditions.[1]

It is therefore timely that His Honour Judge Stephen Davies was able to revisit the topic in *John Sisk and Son Ltd v Capital & Centric (Rose) Ltd* [2025] EWHC 594 (TCC) earlier this year.

The facts

Sisk and C&C, using a heavily amended JCT Design and Build Contract, contracted for the construction of two new residential buildings, together with the repair and refurbishment of two listed mills in Stockport. Unexpected issues were encountered with the existing structures, which impacted on the works. Sisk claimed extensions of time and additional loss and expense as a result.

C&C rejected these claims on the basis that Sisk had assumed the risks regarding the existing structures under the contract.

The main body of the contract included bespoke provisions (clauses 2.42.1 to 2.42.4) whereby Sisk was contractually responsible for all risks in relation to the existing site, including existing structures and the risk of any information provided by C&C being wrong. These clauses were, however, noted to be *"subject to ... the Clarifications"* (clause 2.42.4).

This is where matters get a little bit complicated. There was both an electronic and a hard copy of the contract. The electronic version had two clarifications documents: one called *"Contract Clarifications"* and another called *"Tender Submission Clarifications"*. However, the physical version of the contract only included an initialled copy of the *"Contract Clarifications"*.

The Contract Clarifications detailed that the risks regarding the existing structures, including their ability to support and facilitate the proposed works, sat with the Employer, C&C. Conversely, the Tender Submission Clarifications included details of C&C not agreeing to this risk allocation.

The issue as to which party had, as a matter of fact, assumed the risks regarding the existing structures was referred to adjudication.

1. *Thorn v London County Council* (1876) 1 App. Cas. 120
2. Paragraph 6 of the judgment.
3. Paragraph 36 of the judgment, which also notes in a footnotes that "PCSA" is *"usually an abbreviation for Pre-Construction Services Agreement and, in this context, is plainly a reference to the period of time preceding the entry into the design and build contract in which Sisk was – in at least C&C's opinion – in a position to investigate and satisfy itself as to such matters"*.
4. Paragraph 47 of the judgment.

The adjudicator rendered a declaration in the following terms:

> *"On a proper interpretation of the Contract, and in particular clause 2.42 of the Contract and items 1 and 2 of the Contracts Clarifications schedule, the responsibility for ground conditions, including the identification of the basements, structures, voids, compressed structural elements and obstructions under the existing West Mill, was solely Sisk's risk."*[2]

Thereafter, Sisk brought Part 8 proceedings, seeking a declaration that the adjudicator's decision was wrong and that C&C was responsible for the state of the existing structures and their ability to support the proposed works.

The arguments

In its defence, C&C argued that the Tender Submission Clarifications evidenced that the risk allocation in the main body of the contract (i.e. Sisk's risk) was the true position. More specifically, C&C's comments within the Tender Submission Clarifications stated that the existing structures risk was *"[n]ot accepted. The PCSA period has been for Sisk to satisfy themselves on exactly these issues. We will categorically not accept a blanket exclusion on existing structures".*[3]

To counter this, Sisk contended that the Tender Submission Clarifications *"merely record the initial qualification and some history of negotiations"*, whereas the Contract Clarifications *"record the final contractual position".* Further and/or alternatively, Sisk argued that *"insofar as there is a conflict between the Clarifications and the Tender Clarifications, the former is to be preferred because it was included on the face of the executed contract".*[4]

The decision

The judge first dispensed with C&C's argument that evidence of pre-contractual negotiations should be admissible as an aid to interpreting the relevant provisions. HHJ Davies did not agree and determined that the facts of this case did not warrant a departure from the established authorities. To that end, the parties' arguments would stand or fall on the objective meanings of the words used in the contract.

The judge held that the Tender Submission Clarifications, whilst forming part of the Contract, did not fall within the definition of *"Clarifications"*, which were carved out of the risk allocation clause. Therefore, when determining Sisk's assumed risks, only the Contract Clarifications document was relevant. This document clearly stated that the existing structures were an Employer Risk.

On this point, HHJ Davies noted that it was extremely unlikely that C&C could have mistakenly agreed to include the concluding words *"Employer Risk"* against the existing structures in the Contract Clarifications when it had been advised by two separate consultancies and external lawyers.

The judge did, however, make it clear that the risk allocation carve-out in the Contract Clarifications was to be interpreted narrowly. This meant that C&C has assumed responsibility for the existing structures only and that Sisk's broader responsibilities regarding the site conditions (i.e. the subsoil, utilities, services, etc.) remained in place.

Takeaways

This is a case where the parties had evidently turned their minds to the issue of site conditions and who would be responsible for what. The fact that the matter still ended in dispute highlights the inherent difficulties in setting out these contractual lines of risk allocation with sufficient clarity and certainty.

This decision emphasises the care that needs to be taken when drafting multi-tiered contract documents and in ensuring that they do not contain contradictory provisions. Focus needs to be given to the priority of documents and to ensuring that the main contract reflects the agreement reached.

It should also be noted that parties will not be allowed to latterly try to rely on pre-contract negotiations to demonstrate that a contract means anything other than what it objectively says. The English Courts remain vigilant to ensure that the admissibility of such discussions is permitted only in very limited circumstances. ■

PFI: preventing the spread of handback maladies

The next decade will see a steady increase in the frequency of PFI contract expiries, with the number generally increasing each year to a peak of 69 in 2036. By that time, over 450 PFI contracts will have reached expiry, with the assets handed back to public bodies such as NHS Trusts, local authorities and government departments. Leading up to expiry, the aggregated amounts payable under these contracts totals some £49 billion, and the capital value of the underlying assets is estimated to be worth over £25 billion.[1] As **Ted Lowery** and **Rich Burton** discuss, the approach of PFI contract expiry frequently generates significant friction between public bodies and project companies.

With so much at stake, it is no wonder that the government has been turning its attention to ensuring that public bodies achieve value for money on their PFI contracts. One difficulty, however, is that public bodies may not be able to assess value for money until the assets have actually been handed back, particularly where the contract imposes obligations in relation to the condition of the assets which only crystallise upon expiry (for example, obligations relating to residual life of the assets).

In May 2020, the National Audit Office (the "NAO") identified that "*the public sector does not take a strategic or consistent approach to managing PFI contracts as they end and risks failing to secure value for money during the expiry negotiations with the private sector*".[2] Since then, a raft of guidance has been issued by various well-meaning institutions, particularly the Infrastructure and Projects Authority (the "IPA"),[3] whose publications have included 'Preparing for PFI contract expiry' (28 February 2022), A Guide to PFI Expiry Health Checks (20 July 2023), and PFI Asset Condition Playbook (10 March 2025).

One of the central tenets of the guidance is that public bodies are advised that *"expiry and transition planning should commence at least seven years before the expiry date"*.[4] Despite this, on 19 March 2025, the NAO reported that public bodies were *"continuing to show a lack of preparedness for contract expiry, particularly for long-term contracts"*.[5]

To some extent, a lack of preparedness is unsurprising given the complexities of many PFI contracts. Indeed, in a recent report of the Committee of Public Accounts, dated 11 July 2025,[6] it was recognised that "*as it stands, it is a large amount of data for authorities to digest*" and that *"many lack skilled contract managers"*. Part of the issue is that PFI contracts were designed to be off-balance sheet, with all responsibility for monitoring and reporting compliance against the performance framework falling on the project company. Consequently, many public bodies trimmed back their contract management teams, particularly during the austerity years when they came under pressure to find significant savings.

Be that as it may, the fact remains that in almost all instances the PFI assets will be handed back to the public sector and so, as project expiry approaches, public bodies' interests in the maintenance and lifecycle replacement of assets should become ever more acute. This is just at the time, however, when the cash flows in the project are petering out, meaning that the project company's ability/willingness to fund any significant repairs or replacement is likely to be substantially impeded and may well hinge on the level of funds held in any reserve accounts. Unfortunately, the contractual position as to the funding of maintenance or sinking fund reserves can vary significantly between projects, which is likely to be one of the reasons why the IPA has encouraged public bodies to begin planning for expiry at least seven years in advance.

Another part of the challenge is that the handback provisions are frequently imprecisely worded, meaning that expiry condition requirements and lifecycle replacement criteria for building elements or parts of the mechanical, electrical, or plumbing systems are open to interpretation: it is not unusual for PFI contracts to prescribe Delphic criteria along the lines that the assets must be *"fully functional"*, *"operational"* and *"available when required"*. One obvious difficulty with such nebulous language is that it is not always clear when an item needs to be replaced, particularly where it is possible to extend the life of the item through a cost-effective repair. There may also be uncertainty as to how performance standards apply across an estate that could include both new and retained buildings, or where certain assets are required to achieve a minimum residual life following expiry.

Historically, it may be that the public body was prepared to accept the project company's *laissez-faire* performance of its maintenance and lifecycle obligations, but in the face of project expiry, and often with the assistance/encouragement of rapacious advisers, the public body may change tack and seek to instigate a retrospective review of project delivery. This, in turn, may lead to the emergence of significant and high value disputes at the tail end of the project concerning events that occurred some 10-20

1. https://public.tableau.com/app/profile/ipa.ppp/viz/PFIDashboard2023-24/Guidance
2. https://www.nao.org.uk/wp-content/uploads/2020/06/Managing-PFI-assets-and-services-as-contracts-end.pdf
3. N.B. As of April 2015 the IPA has been subsumed within the National Infrastructure and Service Transformation Authority ("NISTA").
4. https://assets.publishing.service.gov.uk/media/621c877de90e0710bdc09a96/IPA_Guidance_-_Preparing_for_PFI_Contract_Expiry.pdf
5. https://www.nao.org.uk/wp-content/uploads/2025/03/lessons-learned-private-finance-for-infrastructure.pdf
6. https://publications.parliament.uk/pa/cm5901/cmselect/cmpubacc/821/report.html

years earlier (many PFI agreements do not include an effective time-bar provision). Such disputes may then be leveraged by the public body to seek agreement to sharing the costs of an enhanced handback survey, say as a *quid pro quo* for a temporary waiver of any potential deductions from the unitary charge payments due to the project company.

In the 18th century, the English doctor Edward Jenner pioneered inoculation having realised that a small dose of cowpox could prevent the more drastic consequences of smallpox. In the same way, with PFI handback issues, addressing some early points of difference in the run-up to hand back, even if via dispute resolution procedures, should help reduce the risk of a wider conflagration with far more painful, extended and expensive consequences.

It follows that in line with IPA guidance, the best means of minimising the risk of handback becoming a melee of disputes and rancour is to encourage early dialogue between the interested parties – that is, the public body, the project company, and the project company's FM/services subcontractor. The better-drafted project agreements will include a long-term plan that ordinarily commences several years in advance of the project expiry date and provides for a series of surveys, submissions, counter-submissions, and negotiations within a structured framework. This will not of itself eliminate conflicts, but should ensure that the scope of any disputes is narrowed and allow for constructive determinations to be obtained on a timely basis. Both outcomes should have a positive influence on the overall differences between the parties. DBFO contracts for motorways are usually a good example of this, providing for the inspection and review process to start five years before the expiry date.

Other project agreements are less prescriptive and will require the parties to proactively engage to develop handback mechanisms and overcome what, in many cases, would be a natural inclination to stick their heads in the sand.

Given the inherent problems with handback noted above, and the toxicity often associated with PFI contracts (as highlighted by the White Fraiser Report issued in 2023), it is therefore not too surprising that the PFI industry is approaching the next decade with a sense of trepidation. However, lest this article begins to resemble a jeremiad, it should be noted that over the last few years, a number of PFI projects have been successfully handed back without any significant disputes and, in some cases, with no disputes at all. With some of these projects preparation for handback began up to eight years before the contract expiry date, tending to suggest, on the basis of anecdotal evidence at least, that the principle of early engagement should bear fruit.

It can also be noted that for other projects, the looming threat of a handback bunfight has driven the parties to take the opportunity of arranging an early exit on commercial terms so that any anticipated squabbling at contract expiry is thereby avoided: more analogous to amputation – possibly with a cash anaesthetic – than to Dr Jenner's curative inoculation. ■

> *With so much at stake, it is no wonder that the government has been turning its attention to ensuring that public bodies achieve value for money on their PFI contracts.*

Space law and dispute resolution in 2025: the UK's role in a crowded and contentious final frontier

The 21st century has witnessed a dramatic transformation in humanity's relationship with outer space. Once the exclusive domain of superpower governments, space is now a bustling arena of commercial, scientific, and military activity. The growing number of satellites and the increasing threat of space debris pose risks to operational satellites, such as those for GPS and climate monitoring, raise the possibility of collision cascades (the Kessler Syndrome[1]) that could render low-Earth orbit unusable for centuries. These challenges also threaten future space exploration and infrastructure development. This ever-increasing problem is driven by the expansion of large satellite constellations and the slow pace of debris mitigation, despite the existence of international guidelines. Then there is the spectre of militarisation which has made the governance of outer space more urgent and complex than ever before.

As the number of actors and activities in space grows, so too does the need for robust legal frameworks and effective dispute resolution mechanisms. **Simon Tolson**'s article explores the evolving landscape of space law, the growing need for effective dispute resolution, and the United Kingdom's emerging role as a leader in space governance and arbitration.

The Historical Development of Space Law

The early days: international cooperation and the Outer Space Treaty

Since the dawn of the space age on 4 October 1957, when the then-USSR's Sputnik became the first artificial satellite to orbit the Earth, outer space has been a place of international cooperation. Even before the first human set foot on the Moon, the United Nations recognised the need for rules governing space activities. The result was a suite of public international law treaties, the most important of which are the 1967 Outer Space Treaty ("OST")[2] and the 1972 Liability Convention ("LC")[3]. These treaties are often referred to as the *"constitution of space"*, providing the foundational principles for the exploration and use of outer space.

The OST, sometimes called the *"Magna Carta"* of outer space, enshrines several key principles. Article I states that the *"exploration and use of outer space… shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind"*. It further stipulates that space *"shall be free for exploration and use by all States without discrimination of any kind, on the basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies"*. Article II prohibits national appropriation of outer space, making clear that no part of space can be claimed as sovereign territory.

One of the still hotly debated topics in international law is the exact definition and delimitation of space. As there is no agreed-upon international definition. Instead, UK legislation, such as the Space Industry Act 2018, focuses on regulating space activities based on the capabilities and trajectories of spacecraft, using terms like *"sub-orbital"* and *"space object"* to determine regulatory scope.

Old Space vs. New Space

The legal framework for space was developed in an era when only a handful of nations could access space, and all activities were conducted by government space programs such as NASA and Roscosmos.[4] This *"Old Space"* era, spanning from the 1950s to the early

2000s, with national programs but not independently accessing space.

The landscape has since shifted dramatically. Today, private launch companies undertake a variety of independent commercial space activities, including providing launch services to both government and private actors. This *"New Space"* economy is worth an estimated US$613 billion as of mid-2025, with about 75% of this revenue generated by the satellite industry for goods and services produced in space for use on Earth. The potential for resource extraction in space is even more staggering – asteroids and the Moon contain vast reserves of precious metals – with some estimates running into the thousands of quadrillions of dollars.

The evolving space environment: the proliferation of space objects

The number of objects in orbit has increased exponentially, driven by both established and new launch providers. As of 2025, there are over 11,700 satellites in various orbits,[5] both active and inactive (c. 3,500 defunct), and tens of thousands of pieces of debris. The increase in launch capacity has led to bottlenecks and congestion in certain orbits, raising the risk of collisions (conjunctions) and interference. Conjunction risk refers to the probability that two objects in space will collide, which is particularly relevant for spacecraft and satellites in orbit.

Space debris: a growing threat

Space debris, as defined by the Inter-Agency Space Debris Coordination Committee ("IADC"), includes all human-made objects in Earth's orbit or re-entering the atmosphere that are non-functional. The challenge is compounded by the fact that while space is vast, areas of activity are highly concentrated and objects move at tremendous speeds. Low Earth Orbit ("LEO") satellites, like the International Space Station ("ISS"), move at approximately 28,000 km/h (17,500 mph), while geostationary satellites are much higher and move slower, around 11,000 km/h (7,000 mph). Tracking and predicting the future positions of these objects is feasible, but continuous observation is difficult.

Efforts to manage space debris fall into two categories: mitigation and removal – and what is called active space debris removal ("ADR"). Mitigation strategies include designing satellites to withstand impacts, adopting operational procedures to minimise debris creation, and ensuring proper end-of-life disposal. Active debris removal, though technologically challenging and expensive, is increasingly seen as essential to maintaining the long-term sustainability of space activities. At the time of writing, the ISS – all 109 metres and 420 tonnes of it – is scheduled to be taken out of service by the end of 2030, with a controlled deorbit planned for January 2031, something that will only just fit in Wembley Stadium.

Legal aspects of space debris

The 1972 Liability Convention creates two branches of liability: absolute liability for damage on Earth or to aircraft[6] and fault-based liability for on-orbit damage. However, there is no binding requirement for states to ensure mitigation or active debris removal, though states can enforce compliance through licensing. Regulators must consider debris mitigation when licensing new missions, especially for large constellations that increase collision risks. Technologies for space debris mitigation, such as passivation and deorbiting, are highlighted as essential measures. Passivation is the process of removing or disabling all potential sources of energy, like propellant or batteries, from a spacecraft to prevent explosions or fragmentation that could create dangerous space debris. Deorbiting is the process of lowering a spacecraft's orbit and causing it to re-enter Earth's atmosphere, where it burns up or lands safely, removing it from orbit entirely.

Legal frameworks for space activities: the pyramid of space governance

Space governance operates on a pyramid structure, with domestic regulations at the base, international treaty obligations in the middle, and non-binding mechanisms at the top. The OST remains central to international space law, emphasising free access to space, non-appropriation, and the responsibility of states for their activities. The LC further clarifies that states are absolutely liable for damage caused by their space objects on Earth and are fault-liable for damage in orbit.

Other important UN treaties include the Rescue Agreement (1968),[7] the Registration Convention (1975),[8] and the Moon Agreement (1984).[9] The latter expands on the OST, specifically regarding the Moon

and other celestial bodies, but it is the least successful treaty and has not been signed by any of the major spacefaring nations, including the United Kingdom, the United States, the Russian Federation or China.

The limitations of current treaties

Despite these foundational principles, the existing legal framework has notable gaps. The treaties were drafted in an era when only states could access space, and they do not adequately address the realities of private-sector involvement. For example, only states and intergovernmental organisations can access the dispute resolution mechanisms in the treaties, leaving private actors and third parties with limited recourse in the event of a dispute or damage.

Dispute resolution in space law: the rise of arbitration

As commercial activity in space accelerates, so does the potential for disputes – between private companies, between states, and between states and private actors. Arbitration has emerged as a preferred mechanism for resolving such disputes, offering flexibility, confidentiality, and enforceability. Parties can agree on the composition of the tribunal, the seat of arbitration, and the procedural rules, making it well-suited to the international and technical nature of space activities.

There is a negligible amount of publicly available data on the exact number of space law arbitration disputes in the UK. There are also very few reported space law arbitration disputes worldwide, with one study from 2024 finding 38 space-related cases,[10] a significant portion of which were commercial.

The Permanent Court of Arbitration ("PCA") in 2011 published its Optional Rules for Arbitration of Disputes Relating to Outer Space Activities[11] (the "PCA Space Rules") designed specifically to provide a voluntary and binding dispute resolution mechanism for the space sector. However, uptake of the PCA Space Rules has been limited, and there have been no reported arbitrations in accordance with these rules. Nevertheless, arbitration provides for an enforceable award pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Challenges for third parties

The commercial space industry, particularly in the satellite market, has been slow to mitigate potential third-party losses from possible satellite collisions. With over 9,000 satellites in orbit, incidents between parties with no contractual relationship are increasingly inevitable. Existing international space law is not equipped to deal with this effectively, as there is no dispute resolution mechanism and thus no realistic remedy for a damaged third party – either against a private party or a state responsible.

Currently, the dispute resolution mechanisms available for third-party space claims must be pursued through diplomatic channels, requiring a willing state to act on behalf of the damaged third party. The LC stipulates that a launching state *"shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight"*. Fault-based liability arises for proven damage caused by a space object of a launching state *"elsewhere than on the surface of the earth"* to a third-party space object, person(s), or property. The process for establishing a claims commission is complex and burdensome, and it has not been used often, demonstrating that it is no longer fit for purpose in the New Space economy.

The need for reform

The lack of an effective third-party dispute resolution mechanism could be remedied if the damaged party were able to access a pre-agreed, specific and independent dispute resolution process. One proposal is for states, through their internal launch licensing processes, to require applicants to adopt a pre-established arbitration protocol to deal with disputes. However, this could lead to inconsistencies in application and accessibility, with damaged third parties having no assurance of receiving uniform treatment. An agreed international convention would be more effective and likely to deliver consistent results, but given the current geopolitical climate, it is unlikely that a consensus on a binding treaty could be reached.

The UK's approach to space law and arbitration: the UK space law framework

The UK's international space obligations arise from the five principal UN treaties it has ratified, with the OST and LC being the most significant. At the national level,

the Space Industry Act 2018 ("SIA") created the high-level framework to enable launches from the UK. Prior to the SIA, space activities carried out in the UK or by UK entities overseas were governed by the Outer Space Act 1986 ("OSA"). Consistent with its international treaty obligations, the UK is responsible for the activities of its nationals and requires such entities to obtain a licence before they can procure a launch or operate a satellite. The applicable regulation now depends on whether the space activity is to be carried out from UK soil or not, with overseas activities governed by the OSA and domestic activities by the SIA.

The SIA sets out a high-level enabling framework for commercial spaceflight operations, regulating activities carried out in the UK, including launch and return, the procurement of a UK launch, the operation of a satellite in orbit, the operation of a spaceport, and the provision of range control services. The UK Space Agency plays a major role in delivering the government's National Space Strategy, and the UK's membership of the European Space Agency ("ESA") was not affected by Brexit, as the ESA is not an EU organisation.

In July 2021, the UK Civil Aviation Authority ("CAA") was given new powers as the UK's space regulator,[12] with responsibility for issuing UK space licences. The licensing process requires applicants to provide a detailed assessment of safety and security considerations, including a comprehensive safety case, an environmental assessment, financial resources, and security and cyber risk mitigation.

The role of arbitration in space law

As the space sector evolves from a state-dominated arena to a dynamic, commercially driven industry, the need for effective dispute resolution mechanisms has become increasingly urgent. Arbitration has emerged as a central tool in addressing the unique challenges of space law, filling critical gaps left by traditional treaty-based frameworks.

Professor Christopher Newman is a leading expert and professor in Space Law and Policy at Northumbria University, where he teaches and conducts research on space governance. He is involved in Northumbria's Space Law LLM course and explores topics like space law, ethics, long-duration spaceflight, and space situational awareness.

See too Joanne Wheeler MBE[13] and her links to the University of Leicester, which has put together an excellent professional training course covering the entire space mission lifecycle, including regulatory, spectrum, commercial and legal issues. The course is financially supported by the UK Space Agency.

Why arbitration is needed

The foundational treaties of space law, such as the OST and the LC, were crafted in an era when only states and intergovernmental organisations operated in space. These treaties provide for state-to-state dispute resolution but do not offer direct remedies for private parties or third parties affected by space activities. As private companies now launch, operate and manage satellites and other space assets, disputes increasingly arise between commercial actors or between private entities and states. The existing treaty mechanisms are ill-suited to resolve these modern, often highly technical and cross-border disputes efficiently.

> *The United Kingdom is well positioned as a forum for space arbitration, as are construction specialist arbitrators with space law experience. They bring expertise in managing complex, technical disputes and specialised procedures, which mirrors the challenges of space law.*

Advantages of arbitration in space law

Arbitration offers several advantages that make it particularly well suited for space law disputes:

- **Flexibility and Party Autonomy:** Parties can select arbitrators with relevant technical expertise, agree on procedural rules and choose the seat of arbitration. This flexibility is crucial for disputes involving complex technology and multinational interests.
- **Confidentiality:** Arbitration proceedings are generally private,

protecting sensitive commercial information and proprietary technology from public disclosure.

- **Enforceability:** Arbitral awards are recognised and enforceable in 172 countries under the New York Convention, providing a practical solution for international disputes.
- **Technical Suitability:** National courts may lack the expertise or neutrality required for space-related disputes, whereas arbitration allows for the appointment of specialists familiar with the sector's complexities.

Arbitration in practice

Many intergovernmental organisations in the space sector, such as the International Telecommunications Satellite Organisation and the European Telecommunications Satellite Organisation, have adopted arbitration as their preferred or mandatory dispute resolution mechanism. Commercial contracts between private parties, and between states and private investors, frequently include arbitration clauses. Investment treaty arbitration is also available to private investors with claims against states.

Like the PCA Space Rules, leading arbitral institutions such as the London Court of International Arbitration ("LCIA") are also equipped to handle space disputes, offering rules that address expedition, virtual hearings, consolidation, and data protection.

Gaps and challenges

Despite its advantages, arbitration in space law faces several challenges:

- **Third-Party Claims:** The current regime does not provide a direct remedy for third parties (such as those suffering damage from satellite collisions without a contractual link). These parties must rely on diplomatic channels, which are slow and uncertain. Proposals exist for states to require arbitration protocols in licensing, but this could lead to inconsistent application. A uniform international convention would be more effective, but it is unlikely in the current geopolitical climate.
- **Arbitrability and Remedies:** While most commercial disputes are arbitrable, tribunals may be limited in the remedies they can award. Some matters, such as those involving public policy or criminal issues, may not be suitable for arbitration. Nonetheless, emergency and interim relief are available, and confidentiality is generally respected.

The UK as a forum for space arbitration

The United Kingdom is well positioned as a forum for space arbitration, as are construction specialist arbitrators with space law experience. They bring expertise in managing complex, technical disputes and specialised procedures, which mirrors the challenges of space law. Their deep knowledge of engineering, modular construction, hold-point control, technical processes, and risk management (including safety cases) provides a critical advantage for space-related cases, where highly specialised technical expertise is essential for understanding issues like satellite operations and space debris.

The UK legal framework, anchored by the Arbitration Act 1996 (as amended by the 2025 Act), emphasises fairness, party autonomy and limited court intervention. The LCIA is a leading arbitral institution, and the UK's status as a signatory to the New York Convention ensures that awards are widely enforceable. The UK's regulatory regime for space activities (the Space Industry Act 2018 and the Outer Space Act 1986) and its established legal infrastructure make it an attractive seat for space-related arbitration.

Arbitration is increasingly recognised as the most suitable mechanism for resolving the diverse and complex disputes arising in the modern space sector. It offers flexibility, enforceability, confidentiality, and technical expertise, addressing the limitations of traditional treaty-based mechanisms. However, further work is needed to ensure uniform access to arbitration for third parties and to develop international consensus on binding dispute resolution protocols for space activities. As the space sector continues to grow, arbitration will play a vital role in supporting its legal and commercial stability.

Security, militarisation, and geopolitics: the increasing militarisation of space

The peaceful use of space is increasingly threatened by geopolitical tensions and the militarisation of orbits. In recent years, Washington and Moscow have traded increasingly sharp accusations of *"militarising"* outer space. After Russia shot down one of its own satellites in a 2021 test that created a massive debris field, Washington condemned the move as *"dangerous and irresponsible behaviour"*.[14] In early 2024, panic flared in the U.S. over reports that Moscow was preparing to deploy nuclear weapons in orbit – something Russia denied. The U.S. continues to warn that Russia is testing new military capabilities in orbit, and both Russia and China have tested anti-satellite weapons.

The UK, like many nations, is grappling with the dual challenge of defending its space assets and promoting responsible behaviour in orbit. The UK's 10-year industrial strategy, issued in June 2025,[15] identifies space as one of six *"frontier industries"* set to shape the future of manufacturing in the UK. The strategy's ambitious space-related goals include becoming a leading industrialised European exporter by 2030, increasing revenue generation, and enhancing supply chain resilience to support national security and defence. The sector plan acknowledges that regulatory reform will be key to enabling UK businesses to design, build, launch, and operate their satellites under one modern industrial regulatory environment.

The UK's military and industrial strategy

The UK is heavily reliant on the United States for the maintenance of its radar and missile defence systems. The UK government has promised to invest more in both space and missile defence and is taking steps to protect its satellites, including testing sensors to detect laser threats in space. Both China and Russia have developed lasers that could be used to dazzle and disrupt an adversary's satellites. The UK currently spends about 1% of its defence budget on space, compared with France's 3% and the US's 5%. Around £450 billion of the UK economy is dependent on space, which now forms the nervous system on which the UK's armed forces

increasingly depend – from navigation to precision strikes.

Conclusion

The rapid expansion of space activities has outpaced the legal frameworks designed to govern them. While the foundational treaties remain vital, they must be supplemented by modern, binding, and uniform mechanisms for dispute resolution – especially as private actors play an ever-larger role. Arbitration offers a promising path forward, but only if it is accessible to all parties and supported by robust national and international institutions.

The Society of Construction Arbitrators is currently forming a Space Law working group to create a small cluster of arbitrators with knowledge in the field, the writer being part of it.

The United Kingdom's proactive approach to regulation and arbitration positions it as a leader in the new era of space governance. As the final frontier becomes ever more crowded and contested, the need for clear rules, effective enforcement, and international cooperation has never been greater. The future of space law will depend on our ability to adapt, innovate and work together to ensure that space remains a domain of opportunity, security and shared benefit for all. ■

1. Proposed by NASA's Donald Kessler in 1978, this syndrome describes a theoretical chain reaction in orbit where increasing space debris from collisions creates even more debris, ultimately resulting in a *"point of no return"* where the space environment becomes unusable.
2. Formally, the *"1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies"*.
3. Formally, the *"Convention on International Liability for Damage Caused by Space Objects"*.
4. The State Corporation for Space Activities, commonly known as *"Roscosmos"* is a state corporation of the Russian Federation, responsible for Russia's space program, including space flights, human spaceflight, and aerospace research.
5. The majority of active satellites belong to the United States and the Starlink mega-constellation.
6. Meaning that a launching state must compensate victims regardless of fault, such as when falling rocket debris damages property.
7. The Rescue Agreement (1968), formally the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, is an international treaty that establishes obligations for states to rescue astronauts in distress, return them to their launching state, and assist in the recovery of returned space objects.
8. The Registration Convention (1975), formally known as the Convention on Registration of Objects Launched into Outer Space, establishes a framework for the registration of space objects. It requires launching states to provide information about their space objects to the United Nations.
9. The Moon Agreement, officially known as the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, aims to provide a comprehensive legal framework for activities on the Moon and other celestial bodies.
10. 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12-14 October 2020 by Viva Dadwala and Madeleine Macdonald.
11. https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-space-related-disputes/
12. See https://www.legislation.gov.uk/ukdsi/2021/9780348223682/note.
13. Joanne Wheeler MBE is a leading expert in satellite law. With over 20 years of experience, including roles at ESA and Ofcom, she is recognized as a Top Tier lawyer for her work in satellite communications. Wheeler's significant contributions to the space industry earned her an MBE in 2017.
14. https://www.reuters.com/world/us/us-says-russia-carried-out-irresponsible-anti-satellite-test-2021-11-15/
15. https://www.gov.uk/government/collections/the-uks-modern-industrial-strategy-2025

> *"The UK is heavily reliant on the United States for the maintenance of its radar and missile defence systems. The UK government has promised to invest more in both space and missile defence and is taking steps to protect its satellites, including testing sensors to detect laser threats in space.*

Southern Africa's untapped potential: a turning point for infrastructure and investment

For the past four years, Fenwick Elliott has been pleased to be a part of the 10,000 Interns[1] programme Launched in 2020, the programme offers paid internship opportunities to Black students and graduates the initial mission was to create 10,000 internships across 25 sectors in the UK over 5 years. In 2025, they achieved exactly what they set out to do.

Munotida Maposa excelled during this year's six-week internship with the firm, on placement with our clients, and alongside leading barristers. We were able to offer her a full-time role with us after the internship came to an end – a testament both to her effort and the opportunities presented by this programme. And below we set out an extract based on her university dissertation. Fenwick Elliott has a long history working across Southern Africa, and Muno's observations offer an encouraging insight into the ways in which the infrastructure in the region is developing, including how it is able to support the global transition to green energy.

Sub-Saharan Africa holds nearly 30% of the world's reserves of minerals critical in the global transition towards low-carbon technologies, yet attracts less than 10% of global mining expenditure. Within this, the Southern African Development Community ("SADC") accounts for over a third of regional output. This signals major under-utilisation of the region's mineral potential. As Jörgen Sandström of the World Economic Forum notes, *"Southern Africa has the mineral reserves the global energy transition urgently needs, but finance flows are not keeping pace"*.

For decades, political instability, governance challenges and structural inequality have deterred investment. Corruption, inconsistent regulation, and infrastructure deficits have created operational uncertainty. For example, the effects of sanctions and economic isolation following the Zimbabwe Democracy and Economic Recovery Act (2001) are still visible. The Zimbabwean government's 2020 compensation agreement with former landowners aimed to rebuild diplomatic and financial ties, yet fiscal constraints have slowed progress. Nonetheless, recent signals of policy moderation, coupled with the country's ranking as the fifth largest holder of lithium reserves, suggest an exciting opportunity for the nation to reposition itself within the global mineral supply chain.

Similarly, South Africa is showing signs of change. Historically, onerous operating conditions and lengthy dispute processes have deterred private sector participation in construction across the region. However, recent government initiatives are attempting to shift that narrative. The Department of Public Works and Infrastructure and Infrastructure South Africa have launched a new project preparation bid window to promote infrastructure investment. By providing preparatory funding and technical support, the initiative seeks to reduce the risk profile of public projects and attract private capital. Research from the World Bank indicates that a 1% rise in infrastructure investment can stimulate GDP growth by up to 3%. Therefore, these reforms could have a significant impact on Southern Africa's investment flows and international growth.

Parallel to these internal reforms, cross-border infrastructure is beginning to reshape the regional investment landscape. The Lobito Corridor, a partnership backed by the European Union, the United States, Angola and the Development Bank of Southern Africa, is transforming trade connectivity by linking Zambia and the Democratic Republic of Congo's mineral heartlands to Angola's Atlantic port. This initiative not only reduces export bottlenecks but also signals an international appetite for strategic, multilateral engagement in African logistics. In April 2025, Namibia launched Africa's first industrial-scale Green Iron facility, powered entirely by renewable energy through solar, hydrogen and battery storage systems. Supported by the EU-Namibia Green Hydrogen Partnership, the project marks a pivotal step in decarbonising heavy industry on the continent. Meanwhile, Zambia's mining reforms are gradually restoring investor confidence, with projections to increase copper output from 700,000 tonnes to one million tonnes by 2026.

These developments suggest that the tide may finally be turning. Global demand for critical minerals, coupled with the energy transition and the modern market demands of artificial intelligence and electric vehicles, presents an opportunity for Southern Africa to reposition itself not only as a supplier of raw materials but as a strategic trade partner. When approaching cross-border infrastructure and mineral contracts, the focus should be on balancing investor protection with sustainable, non-exploitative local benefit. As Boitumelo Mosako, CEO of the Development Bank of Southern Africa, observed, *"Africa must be an active participant in shaping its own development path"*.

If Southern Africa can maintain its current reform trajectory, it could serve the dual purpose of stimulating regional development and supporting the global transition to clean energy. Southern Africa's reform momentum, supported by growing global demand for critical minerals, marks a critical juncture for the region. With sustained policy coherence, transparent governance, and strategic investment in infrastructure, the region can translate its resource endowment into inclusive economic growth and long-term competitiveness. ■

1. https://10000internsfoundation.com

Failures to comply with adjudication timetables and breaches of natural justice

Adjudication was introduced to enable parties in the construction industry to resolve their disputes in a quick and cost-effective manner. As **George Boddy** says, it stands in contrast to litigation or arbitration, where proceedings take far longer and are more costly.

Indeed, the speed of obtaining a decision is central to the concept and takes precedence over the *"correctness"* of the decision. Adjudicators' decisions are usually upheld by the courts even where the adjudicator has made an error. The threshold to prevent enforcement where there has been an adjudicator error is a high one. As Chadwick LJ stated in *Bouygues UK Ltd v Dahl-Jensen UK Ltd*,[1] *"the need to have the 'right' answer has been subordinated to the need to have an answer quickly"*. The original purpose of adjudication was, of course, to improve cash flow in the industry; it was not, according to Chadwick LJ, introduced to *"provide definitive answers to complex questions"*. In theory, this is mitigated by the temporarily binding nature of adjudicators' decisions. If a party feels really aggrieved, then it is open to them to commence litigation or arbitration to overturn the adjudicator's decision.

Given the need for speed, the adjudication process inherently involves tight timescales and short deadlines for serving submissions. Responding parties often have a maximum of 7 to 14 days to set out their case in full, and shorter timescales are common for any subsequent submissions, although in practice the statutory 28-day timetable is often extended by agreement between the parties. In any case, parties to adjudication are almost always required to prepare their cases with haste.

For referring parties, the opportunity to put an opponent under pressure by launching an unexpected adjudication is an important tactical device, particularly if it is suspected that the responding party is not well prepared or if its position appears poorly substantiated. In those circumstances, the referring party will want a tight timetable that affords the responding party as little time as possible to serve its submissions.

However, what happens if, after the timetable for the conduct of the adjudication is agreed or directed, the responding party fails to serve its submissions on time? What recourse does the referring party have if the responding party repeatedly breaches the timetable by serving its submissions hours or even days late, without warning or good reason? This would afford a responding party a significant advantage – more time – which it is not supposed to have; adjudication is meant to be quick.

In the context of litigation, if a party misses a deadline imposed by the court, that can carry serious consequences. The precise nature of those consequences will depend on the nature of the deadline that has been breached, but the party in default will likely have to apply to the court to seek relief and explain the reasons for its failure to comply.

The consequences of failing to serve a submission on time in an adjudication are potentially as severe. However, the severity of the consequences is likely to depend on the nature of the failure and the attitude of the adjudicator. Under paragraph 15 of the Scheme[2] rules, in the event that, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any written document or written statement requested by the adjudicator, or otherwise fails to comply with a requirement of the Scheme rules, the adjudicator has three options. They can:

1. Continue the adjudication in the absence of that party or of the document or written statement requested;
2. Draw such inferences from that failure to comply as the circumstances may justify; or
3. Make a decision on the basis of the information before them, attaching such weight as they think fit to the evidence submitted outside of the period directed.

In other words, if a responding party repeatedly breaches an agreed timetable, then under the Scheme rules, the adjudicator has wide discretion as to how to proceed. We would suggest that the option chosen by the adjudicator will depend on the factual circumstances, including their view of the breach, the position taken by the referring party, the nature of the failure and whether there is a good (or any) reason for it.

Other adjudication rules contain similar provisions in circumstances where a party does not comply. For example, the TECSA rules permit the adjudicator to establish the procedure and timetable for the adjudication and *"may proceed if one party does not*

1. [2000] EWCA Civ 507.
2. The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.
3. TECSA Adjudication Rules Version 3.2.3, 30 November 2023, paragraph 17.
4. The Construction Industry Council Model Adjudication Procedure, fifth edition, paragraph 17.
5. [2010] EWHC 283 (TCC)
6. [2015] EWHC 667 (TCC).
7. [2023] EWHC 1946 (TCC).

participate or cooperate".[3] The CIC Model Adjudication Procedure[4] gives the adjudicator complete discretion as to how to conduct the adjudication, to establish the procedure and timetable, and to proceed with the adjudication and reach a decision even if a party fails to comply with a request or direction of the adjudicator.

It seems that, by virtue of paragraph 15 of the Scheme, or the similar provisions in other adjudication rules, an adjudicator would be entitled to proceed to make their decision without considering a submission that one party has submitted out of time. However, in adopting such a course, the adjudicator would need to ensure that they are acting fairly between the parties and have taken into account the rules of natural justice. Whether such a course would amount to a breach of natural justice would depend on the surrounding circumstances. If, for example, a submission was only late by a matter of hours, then that is unlikely to cause the opposing party prejudice, assuming that the timetable can be altered or extended to accommodate any further submissions.

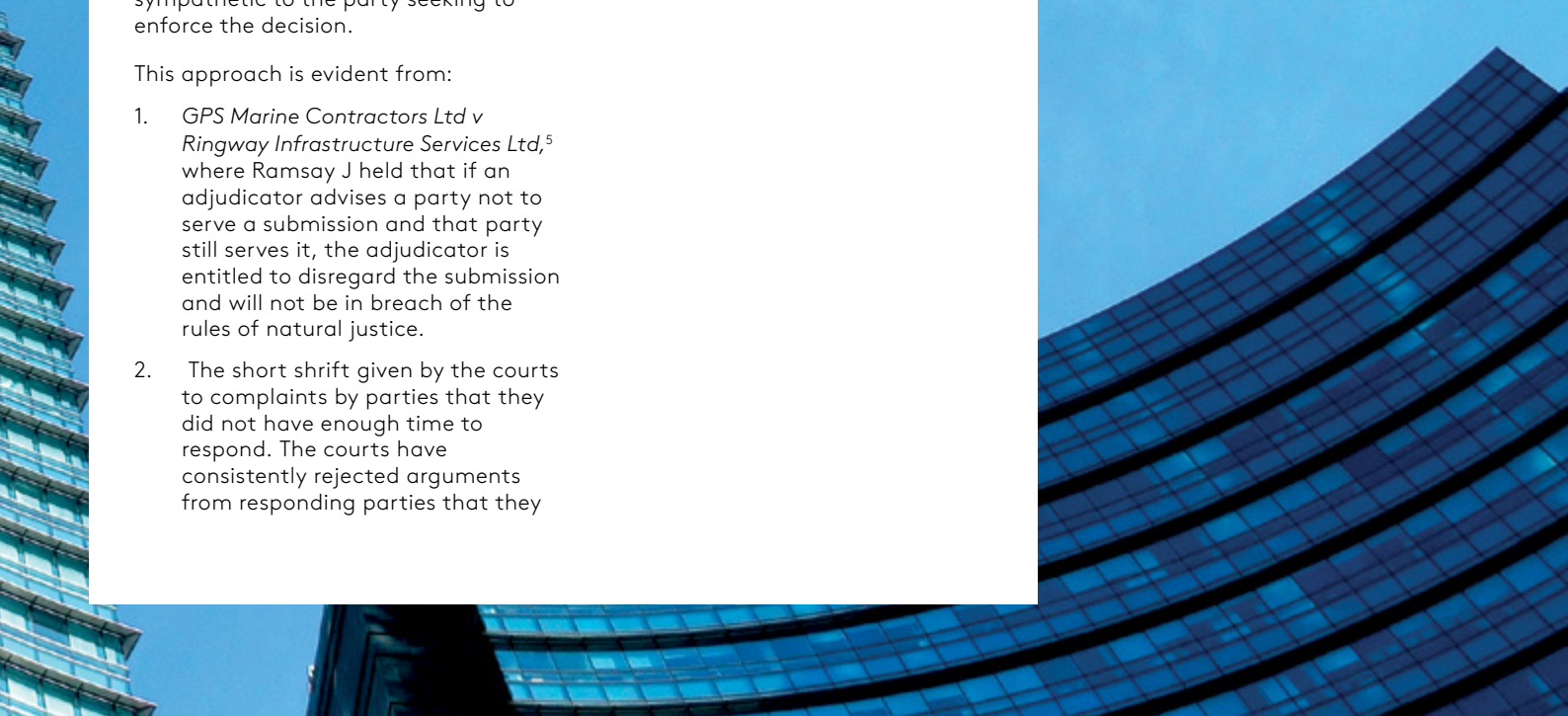
In circumstances where a submission is late by significantly longer – such as days or even a week – and there is no good reason for the delay, and the delay has caused considerable disruption to the timetable, then an adjudicator may well be entitled to proceed to make his or her decision without taking the late submission into account. Clearly, it will depend on the exact factual circumstances, but given the courts' willingness to enforce adjudicators' decisions and the high bar for claims of breaches of natural justice, we would expect a court to be sympathetic to the party seeking to enforce the decision.

This approach is evident from:

1. *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd,*[5] where Ramsay J held that if an adjudicator advises a party not to serve a submission and that party still serves it, the adjudicator is entitled to disregard the submission and will not be in breach of the rules of natural justice.
2. The short shrift given by the courts to complaints by parties that they did not have enough time to respond. The courts have consistently rejected arguments from responding parties that they did not have enough time to respond, in cases such as *CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd,*[6] where the court rejected the argument that a 28-day timetable was too quick.
3. The courts' general lack of sympathy with the argument that the referral notice is too large or too complicated to deal with in the time allowed. For example, in *Home Group Ltd v MPS Housing Ltd,*[7] Constable J rejected an argument by the responding party that dealing with a large referral consisting of 88 pages, five witness statements and over 2,300 other files in a period of 19 days amounted to a breach of natural justice.

In conclusion, if one party fails to comply with an adjudication timetable without good reason, there are options open to the other party and to the adjudicator. Given the trend in cases on breaches of natural justice, we would expect a court to be unsympathetic to a party that has failed to comply with an adjudication timetable without good reason. ■

In circumstances where a submission is late by significantly longer – such as days or even a week – and there is no good reason for the delay, and the delay has caused considerable disruption to the timetable, then an adjudicator may well be entitled to proceed to make his or her decision without taking the late submission into account.



Payment notices: clarity on substance and timing

As **Adele Parsons** explains, the judgment in *Placefirst Construction Ltd v CAR Construction (North East) Ltd [2025]* EWHC 100 (TCC), offers valuable guidance on the interpretation and timing of payment and pay less notices under the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act"), while serving as a reminder that the simplest of steps when administering contracts can prevent costly smash-and-grab adjudications.

One email, two notices

A payment dispute arose between Placefirst, the main contractor for a project to build rental properties in Durham, and its subcontractor, CAR, which was appointed under an amended form of the JCT Design and Build 2016 form of subcontract.

In summary, the subcontract payment mechanism required that:

- CAR issue an interim payment application no later than the 25th day of each month;
- the due date for payment be 16 days after the interim valuation date;
- Placefirst issue a payment notice five days after the due date stating the sum due and basis for its calculation, or CAR's application would become a payment notice in default; and
- Placefirst pay the amount specified in the payment notice (or "notified sum") by the final date for payment unless Placefirst had issued a pay less notice, which was to be issued no later than two days before the final date for payment.

On 24 July 2024, CAR submitted its interim payment application 30 to Placefirst in the sum of circa £867,000 plus VAT.

In response, Placefirst sent an email to CAR on 31 July 2024 with the subject line *"CAR Construction Pay Less Notice **and** Valuation 30"* [emphasis added]. The email advised:

> *"Please find the attached Pay Less Notice and Valuation 30 to support, in relation to your AFP 30 received on 24th July 2024. In consideration of the delays to the sub-contract works there is a balance due in the sum of (£22,812.15)."*

Attached to the email was: (i) an Excel workbook entitled *"Valuation 30.xlsm"* ("Valuation 30"), which contained several tabs, including one titled "subcontract payment certificate"; and (ii) a PDF entitled *"Valuation 30 – Pay Less Notice"* that referred to Valuation 30 which was said to be enclosed for CAR's information.

Smash-and-grab adjudication

The disparity in the parties' valuations led to an adjudication in which CAR argued, and the adjudicator agreed, that:

- Valuation 30 was not a valid payment notice but only supporting information for Placefirst's pay less notice;
- the pay less notice was nonetheless ineffective as it had been served prematurely – being issued before the date on which it could be validly served under either the Construction Act or the subcontract; and
- CAR was entitled to be paid the sum claimed in its application for payment.

The court proceedings

Placefirst refused to pay the sum determined by the adjudicator and instead commenced Part 8 proceedings seeking a final determination as to the validity of the payment and pay less notices in anticipation of CAR issuing enforcement proceedings, which it did only three days later. The court heard both proceedings together, having sufficient availability to do so.

The key questions for the court were:

- whether Placefirst's Valuation 30 was a valid payment notice under the Construction Act; and
- whether the pay less notice was valid given it had been served in advance of when one would normally expect it to be served under the Construction Act or the subcontract (it being served in response to the interim payment application and at the same time as Valuation 30 (or what Placefirst considered to be its payment notice)).

Validity of the payment notice: substance over style

The court found that Valuation 30 was a valid payment notice by reason of the following:

- Notices were to be interpreted objectively. The question was not how the recipient of a notice understood the notice but how a reasonable recipient would have understood the notice, considering the *"relevant objective contextual scene"*.
- This was not a case of being unduly legalistic. The court was clear that it would be *"unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis"*.
- Rather, it was a case of taking a practical, common-sense view of the notice to determine whether it complied with the relevant statutory and contractual requirements in *"substance and form"*, such that it set out the sum that was due and the basis on which that sum was calculated. Beyond this, a notice's validity was a *"question of fact and degree"*.
- There was certainly no requirement (as CAR argued) that the notice must be labelled as a payment notice to be valid or refer to a specific contractual clause. For example, the court was unimpressed with CAR's argument that Valuation 30 was not a valid payment notice because it was labelled as a *"subcontract payment certificate"*.

Timing of the pay less notice

CAR relied on section 111(5)(b) of the Construction Act to argue the pay less notice was invalid, as it had been issued before *"the notice by reference to which the notified sum is determined"*, which would typically be a valid payment notice or, in lieu of that notice, an application which had become a payment notice in default – which CAR claimed was not the case here.

The court, however, on considering the amended wording of the subcontract against the Construction Act, found that CAR's interim application served as a payment notice by which the notified sum was determined as:

- Section 110A(3) of the Construction Act requires that the notice must state the sum the payee considers *"is or to have been due"* at the due date, i.e. the actual, current amount.
- Clause 4.6 of the JCT (as unamended) only requires the payee to state the amount that *"will become due"*, i.e. a future amount.
- However, the subcontract's amended clause 4.6.2 complied with section 110A(3), as it required that CAR's interim payment applications included a statement of the sum owed (i.e. the actual or current amount), the date when the interim payment was to be calculated, and the basis on which it was calculated.

The above meant that Placefirst's pay less notice had not been issued prematurely as it had been issued in response to the application or what the court found was a notice in which the notified sum was determined.

In reaching this conclusion, the court noted there was *"no logical reason why a pay less notice should not be given before the time for giving a payment notice has elapsed"*, providing an interim application had been made. It was the issue of CAR's interim application, not when it took effect as a default payment notice, that mattered; the court finding that the application complied with the requirements of a default payment notice even though it would not have had the effect of a payment notice until Placefirst failed to give a valid payment notice (i.e. failed to provide a payment notice within 5 days after the due date).

Key takeaways

While Placefirst ultimately obtained judgment in its favour, a lot of time and cost could have been avoided had it taken a clearer approach to its administration of the subcontract payment mechanism. Some important points arising from the decision include:

- Substance over form. A document can be a valid payment notice even if it is not labelled as one, so long as it states (i) the sum considered due and (ii) the basis of calculation. To avoid disputes, however, it is always best to title your notices and state the contract clause under which it is being issued.
- Payment notices and pay less notices can be served at the same time, but they must be kept as two distinct files. A single document cannot function as both notices, even if they contain the same content.
- Check the wording of your contract. While the court noted that pay less notices can be served after an application for payment but before a payment notice is issued, further arguments as to what is the *"Notified Sum"* can be avoided by following the order in the contract payment mechanism – i.e. application, payment notice and then pay less notice.
- Diarise the payment mechanism cycle every month, so you are clear on the application date, due date, the payment-notice window, final date for payment, and pay less deadline.
- Be wary of how time is calculated under the contract – deadlines falling on weekends, how notices must be served, whether notices have to be served on a particular person or address. Keep an audit trail to show what you have done.

When it comes to payment, prevention rather than cure should prevail. Do not rely on the court being lenient or hope that a technical loophole will save you. While the *Placefirst* decision shows a more flexible stance on what counts as valid notice, other rulings have been far more rigid. See *Placefirst* as a useful reference, not an excuse to cut corners. Make sure your notices are clear, delivered on time, and complete in their own right. ■

The Arbitration Act 2025: a new era for UK arbitration?

In the world of international contracting, when contracting parties enter into an arbitration agreement, they agree on a seat of the arbitration (or should).[1] The choice of seat requires careful thought, especially where the parties are from different jurisdictions. **Sam Thyne** and **Rhea Yactine** review the Arbitration Act 2025, which came into force on 1 August and modernises key aspects of the UK's arbitral framework.

The Arbitration Act 2025 (the "2025 Act") came into force on 1 August 2025 and amends the Arbitration Act 1996 (the "1996 Act") with the goal of strengthening the United Kingdom's position as an arbitral seat, by modernising aspects of the legal framework that applies to the popular dispute resolution method.[2]

Key considerations for choosing a seat include its reliability and how arbitration friendly the applicable law will be. Several of the changes made to the 2025 Act are aimed at clearing up areas of ambiguity that have arisen. It is hoped that the 2025 Act will make dispute resolution clearer, fairer, more efficient, effective and economical – and that these changes will attract parties to nominate London as their arbitral seat.

What has changed and what are the effects on arbitration in the UK?

Applicable Law

The 2025 Act clarifies that the law applicable to an arbitration agreement is the law the parties agreed upon or, where the parties have not agreed on a jurisdiction, the law of the seat of the arbitration.

This change has addressed an area of substantial ambiguity, as highlighted in *Enka v Chubb*[3] where the parties had not specified the law that governs their arbitration agreement. The Supreme Court ruled in this case that if parties have not specified the law that governs their arbitration agreement, then the governing law of the contract applies.

The 2025 Act now clarifies that the law governing the contract is not necessarily considered an agreement that this law also applies to the arbitration agreement. This change encourages parties to be diligent when drafting their agreements to limit the possibility of potential disputes and streamline the arbitral process.

The 2025 Act also introduces an express carve-out for investor-state arbitration agreements to ensure that they are governed by the relevant rules and regulations of international law, and to avoid the risk of conflicting with the investor-state's intention, where it may not wish English law to govern its disputes.

Arbitrators' Impartiality: Duty of Disclosure

The 2025 Act also aims to limit the circumstances in which an arbitrator's impartiality might be doubted, by imposing a duty of disclosure on arbitrators. This section codifies the Supreme Court's judgment in *Halliburton v Chubb*[4] (previously covered in *International Quarterly,* Issue 38) where the Supreme Court ruled that arbitrators have a duty of disclosure under English law.

Immunity of Arbitrators

Arbitrators who resign now benefit from immunity, except for situations where the resignation is considered *"unreasonable"*. The 2025 Act also grants arbitrators who have been removed by the court, immunity from incurring the costs of court proceedings except where it was proven the arbitrator acted in bad faith.

These amendments encourage arbitrators to act independently without apprehending any cost or liability consequences, thereby fostering fairness in the arbitral process.

Emergency Arbitrators

Emergency arbitrators have been given the authority to make peremptory orders and grant parties permission to apply to court for a section 44 order. Section 44 provides that an English court may make orders in support of arbitral proceedings against third parties. With emergency arbitrations becoming more widespread, this amendment was a welcome change to the 1996 Act, giving emergency arbitrators the same authority as other arbitrators and further promoting trust in the arbitral process.

Powers of Summary Disposal

The 2025 Act now allows the parties to apply for an expedited procedure to give the tribunal power to make an award on a summary basis, where the tribunal considers there is no real prospect of success in the claim, defence or the relevant issue. Although there is no specific procedure for deciding whether there is *"no real prospect of success"*, parties and the tribunal could look to the English Civil Procedure Rules and LCIA rules when deciding an award on a summary basis. Parties can choose to opt out of this in their Arbitration Agreement or by a later agreement. This amendment to the 1996 Act was

1. To see what complications arise when contracting parties do not agree on a seat of arbitration, see *"The Importance of Choosing an Arbitral Seat for the Parties"* and *"International arbitration: governing law"*.
2. https://www.gov.uk/government/news/boost-for-uk-economy-as-arbitration-act-receives-royal-assent
3. [2020] UKSC 38
4. [2020] UKSC 48.
5. https://iccwbo.org/news-publications/news/icc-dispute-resolution-statistics-2024/.

brought in an effort to promote efficiency in the arbitral process.

Jurisdictional Challenges

Under the 1996 Act, a party who objected on jurisdiction during the arbitration could challenge the award on jurisdictional grounds, which would often lead to new evidence being brought to the courts and a re-hearing of the same issues argued before the tribunal. The 2025 Act now forbids the parties from raising new grounds of objection, new evidence and arguing the same issues heard by the tribunal, unless they meet the requirements of a *"reasonable diligence test"*. The 2025 Act also gives the Civil Procedure Rule Committee authority to limit jurisdictional challenges from becoming full re-hearings by creating new rules. The aim of this amendment is to limit costs and boost effectiveness in arbitration by eliminating unnecessary delays and challenges.

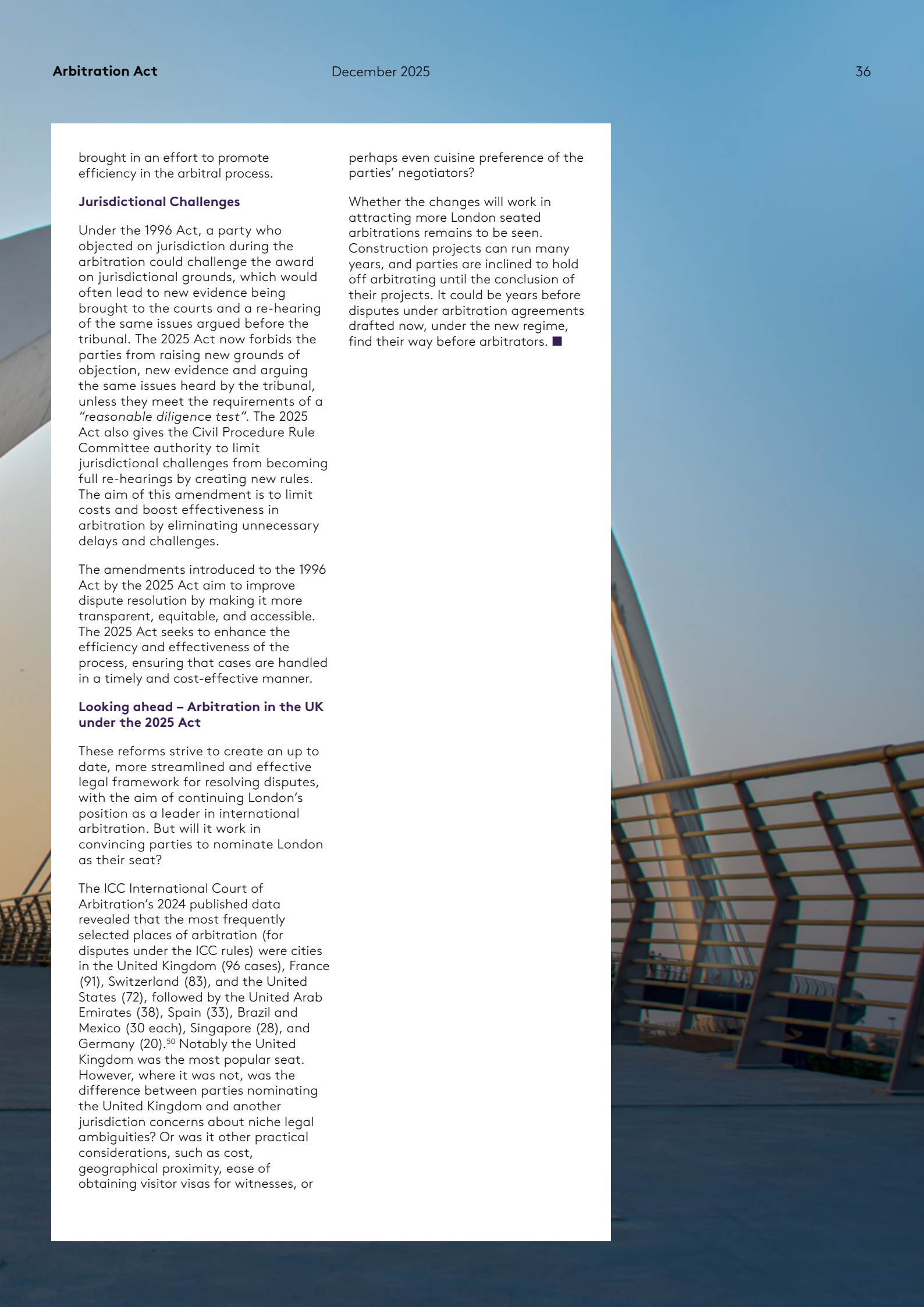
The amendments introduced to the 1996 Act by the 2025 Act aim to improve dispute resolution by making it more transparent, equitable, and accessible. The 2025 Act seeks to enhance the efficiency and effectiveness of the process, ensuring that cases are handled in a timely and cost-effective manner.

Looking ahead – Arbitration in the UK under the 2025 Act

These reforms strive to create an up to date, more streamlined and effective legal framework for resolving disputes, with the aim of continuing London's position as a leader in international arbitration. But will it work in convincing parties to nominate London as their seat?

The ICC International Court of Arbitration's 2024 published data revealed that the most frequently selected places of arbitration (for disputes under the ICC rules) were cities in the United Kingdom (96 cases), France (91), Switzerland (83), and the United States (72), followed by the United Arab Emirates (38), Spain (33), Brazil and Mexico (30 each), Singapore (28), and Germany (20).[50] Notably the United Kingdom was the most popular seat. However, where it was not, was the difference between parties nominating the United Kingdom and another jurisdiction concerns about niche legal ambiguities? Or was it other practical considerations, such as cost, geographical proximity, ease of obtaining visitor visas for witnesses, or perhaps even cuisine preference of the parties' negotiators?

Whether the changes will work in attracting more London seated arbitrations remains to be seen. Construction projects can run many years, and parties are inclined to hold off arbitrating until the conclusion of their projects. It could be years before disputes under arbitration agreements drafted now, under the new regime, find their way before arbitrators. ■



Recognition of *"without prejudice"* in the UAE

The Dubai local onshore courts recently recognised and upheld the *"without prejudice"* principle, a principle previously not recognised. As **Roma Patel** writes, this marks a significant development to the approach taken to confidential settlement discussions in the UAE.

Introduction

"Without prejudice" privilege is recognised in several common law jurisdictions. The *"without prejudice"* principle offers protection against certain communications made during the course of negotiations or discussions concerning settlement. It prevents these statements from being used as evidence in court or other legal proceedings, specifically against the party who made the *"without prejudice"* statement. The purpose of this principle is to encourage open, honest and unreserved discussions between parties in an attempt to resolve and settle disputes without the fear that communications will later be held against parties later on in the proceedings.

The traditional approach taken by the courts

The UAE local onshore courts have not previously recognised the *"without prejudice"* principle. In fact, the courts have admitted and considered documents marked *"without prejudice"* or statements used in the course of settlement discussions as evidence. Consequently, this approach has often hampered settlement discussions between parties.

Recent developments

A recent landmark decision on Case No. 31/2024, issued on 22 October 2024 by the Dubai Court of Cassation, significantly departed from the traditional approach taken by the local onshore courts. The judgment held that communications made in the course of settlement were inadmissible as evidence.

Background

The dispute arose out of an agreement to purchase cryptocurrency. The Claimant filed a claim seeking to recover funds plus interest from the Defendant. The Claimant claimed that it had transferred a specific amount of funds to the Defendant to purchase the equivalent amount of cryptocurrency. However, the Claimant alleged that the Defendant failed to transfer the equivalent amount of cryptocurrency which the Claimant claimed had been agreed between the parties. Following the analysis of a court-appointed expert committee, the Court of First Instance awarded a lower amount than claimed by the Claimant.

The Claimant appealed, arguing that the Court of First Instance had not analysed the evidence properly, including WhatsApp communications exchanged between the parties during settlement negotiations. In these negotiations, the Defendant allegedly admitted to owing a higher amount than what was awarded by the Court of First Instance.

On 3 April 2024, the Court of Appeal issued its judgment in Case No. 31/2024. The Court of Appeal upheld the Court of First Instance's judgment. In its consideration of the evidence, the Court of Appeal applied the *"without prejudice"* principle. It held that settlement communications were inadmissible as evidence. Whilst it is unclear and unlikely that the WhatsApp communications were marked as *"without prejudice"*, it was clear the communications were intended to facilitate settlement between the parties. The Claimant filed a further appeal to the Court of Cassation.

On 22 October 2024, in Case No. 486/2024, the Court of Cassation upheld the Court of Appeal's judgment. In its analysis, it made clear that statements made during the course of failed amicable settlement discussions were not to be taken as evidence or admission against the individual who made them, on the basis that these statements are made *"without prejudice"* to their rights. The Court stated that such statements enjoyed the right to immunity. The Court made clear that, even if the settlement discussion were unsuccessful, communications during settlement discussions were still not to be considered as evidence in proceedings.

Implications and future approaches

The judgment displays a significant departure from the previous approach taken by the local onshore courts. Whilst the UAE courts do not have a system of binding judicial precedent, meaning that the UAE courts are not bound to abide by the Court of Cassation's findings in this matter, the judgment provides scope for the *"without prejudice"* principle to be applied by the UAE courts in the future. The judgment parties the opportunity to refer to the Court of Cassation's judgment when trying to convince the relevant courts to exclude settlement communications from evidence. Time will tell whether the opportunity for *"without prejudice"* protections will be formalised in legislation.

Further, it can be inferred from this judgment that the courts do not necessarily require communications to be marked *"without prejudice"* during the course of negotiations. If the communications were exchanged with the intent of settlement efforts, this may be enough to apply the *"without prejudice"* principle. However, until the principle is routinely applied in the UAE and/or codified by law, parties should continue to mark settlement communications clearly as *"without prejudice"* to avoid any uncertainty as to the intent behind the communications. Indeed, to avoid any uncertainty around the status of such communications, it would be best practice to ensure they are marked *"without prejudice"*.

To conclude, the judgment has brought UAE local onshore courts one step closer to the approach adopted by common law jurisdictions with respect to settlement discussions. This positive change may invite parties in the UAE to engage in more settlement discussions without the fear that their statements may later be used against them in evidence. ■

Industry update: regulating contractor activities in Dubai

In recent decades, Dubai has transformed into a dynamic city with substantial investment in real estate and infrastructure shaped by the contracting and construction industry. As **Nicole Leahy** writes, construction output has been steadily rising in the region, and major projects have highlighted the need for a unified system to regulate activities in the industry.

In July of this year, Dubai issued *Law No. 7 of 2025 Regulating Contractors' Activities in the Emirate of Dubai* (the "CA Law"),[1] marking a major development in the regulation of activities in the construction sector. The CA Law casts its net wide: subject to certain exceptions, it applies to all contractors working in Dubai, including those operating in freezones (including the Dubai International Financial Centre); and covers a variety of activities, including engineering, electrical, architectural, building, construction and demolition.[2]

The law will take effect in January 2026 and provides a one-year grace period for compliance.[3]

Purpose and scope of the CA Law

The CA Law seeks to enhance contractor contributions to Dubai's urban and economic development by aligning activities with international standards. It will introduce clear contractor categorisation, detailing experience, financial, technical, and administrative capabilities, alongside defined steps to ensure compliance with Dubai's building and planning standards.[4]

Notably, certain activities are exempt from the provisions of the CA Law, including those related to airport infrastructure and facilities, and other activities that may be exempt by way of a decision of the Executive Council.[5]

Highlights from the CA Law

The Register

The Dubai Municipality will maintain a unified register of all contractors operating in Dubai, which shall be linked to the *"Invest in Dubai"* platform (as established pursuant to Decree No. (13) of 2024). The Register will record data including details of the activities each contractor is permitted to undertake, details of technical staff, classification category and any other data deemed necessary.[6] Contractors will be required to renew their registration each year.[7]

Classification of Contractors

The CA Law will establish contractor classification, in a manner consistent with the experience and financial, technical and administrative abilities of the contractor. As part of registration, contractors will be classified into a

1. *Dubai Government Official Gazette*, Gazette No. 726.
2. Contractor Activities are defined as follows: *"Any activity undertaken by a contractor from among the activities approved by the Committee, and is related to any of the various engineering fields: civil, architectural, electrical, mechanical, industrial, environmental, agricultural, coastal, or others, and includes, without limitation, construction, building, demolition, roads, bridges, tunnels, railways, irrigation, rainwater drainage, sewage, electricity networks, water networks, cooling networks, and extension of service lines."*
3. Pursuant to Article 29 of the Law it *"shall be published in the Official Gazette and shall enter into force six (6) months following the date of its publication."*
4. The CA Law, Article 3.
5. The CA Law, Article 4.
6. The CA Law, see definition of Register.
7. The CA Law, Article 12.
8. The CA Law, Articles 3 and 5.
9. The CA Law, Articles 14 and 20.
10. The CA Law, Article 15.
11. The CA Law, Article 18.
12. The CA Law, Article 17.
13. The CA Law, Article 15.
14. The CA Law, Article 19.
15. The CA Law, Article 22.

category and will not be permitted to engage in any activities or operate outside of their approved classification.[8]

Furthermore, contractors must maintain technical staff to carry out certain activities, and those technical staff must hold a professional competency certificate as imposed by the CA Law.[9]

Adherence to a Code of Ethics

A Code of Ethics and Conduct is to be prepared and adopted, and must be adhered to by all contractors.[10]

Consortiums and subcontracting

Consortiums (such as joint ventures) have historically been popular in Dubai for large-scale construction projects, forming temporary alliances between companies to undertake complex infrastructure projects which require diverse expertise. The CA Law allows consortiums for singular projects where necessitated, subject to prior approval. In such instances, all members must be registered, and the classification and activities of each member must be commensurate with the nature of the project.[11]

Further, subcontracting is also permitted, provided a number of conditions have been satisfied, including prior approval.[12]

Document Retention

The CA Law provides that contractors must retain records, data and documents for 10 years from the date of the completion certificate.[13]

Turnkey Projects

A *"turnkey project"* (being fully completed and ready for immediate use upon handover) is popular in Dubai. The CA Law states that the authorities will decide which projects qualify as *"turnkey projects"*, and specific regulations governing such contracts will be issued.[14]

Violations and Penalties

The CA Law provides for fines from AED 1,000 to AED 100,000 in the event of violations. Fines shall also be doubled (up to a maximum of AED 200,000) in the event of repeat infractions of the CA Law within one year.

In addition to a fine, contractors may also face suspension from engaging in contractor activities for up to one year; the downgrading of their classification category into a lower category; the cancellation of a contractor's listing on the Register; the temporary suspension of technical staff from engaging in contractor activities; and/or the revocation of professional competency certificates and subsequent deregistration.[15]

Final thoughts

The CA Law represents a major step in unifying and strengthening regulation within Dubai's industry, promoting higher quality standards in a rapidly evolving sector.

Contractors should consider several practical steps moving forward, such as:

- reviewing current licensing and classification;
- identifying steps needed to meet the CA Law requirements for specific activities they intend to undertake;
- ensuring technical staff compliance with the CA Law;
- ensuring best practice in respect of document management so that documents are appropriately retained; and
- staying updated on developments, including new regulations or guidance from the Dubai Municipality and related authorities. ■

Dubai Court of Cassation reaffirms the independence of arbitral tribunals

The Dubai Court of Cassation recently confirmed that arbitral tribunals seated in Dubai have the authority under Article 21 of the UAE Arbitration Law to issue interim or precautionary measures, and that such measures fall under the exclusive power of those tribunals to vacate or amend them. As **Roma Patel** explains, this case reaffirms the independence of the arbitral tribunal in managing its own procedures.

Introduction

Interim or provisional measures are temporary measures granted by arbitral tribunals or courts to prevent harm, preserve the status quo, or stop a party dispensing of moving its assets before a final award is issued. The measures aid in preserving, safeguarding and maintaining the integrity of the arbitral or court process. This interim relief is an *"indispensable tool"*[1] in the arbitration process, as it prevents a party from acting in a manner that could compromise the enforcement of the final award or judgment.

Recent developments

Court of Appeal

On 28 April 2025, the Dubai Court of Appeal (in Case No. 8 of 2025) issued a decision to annul an interim award granted by an International Chamber of Commerce arbitral tribunal (the "ICC Tribunal") seated in Dubai.

During the course of the arbitral proceedings, the ICC Tribunal issued an anti-suit injunction preventing a party from filing proceedings in the UAE Courts in respect of matters governed by the arbitration agreement. Following its issuance, the party applied to the court challenging the award, submitting that the anti-suit injunction was not a valid interim or precautionary measure under Article 21 of Federal Law No. 6 of 2018 (the "UAE Arbitration Law").

The Court of Appeal annulled the ICC Tribunal's award, holding that arbitration proceedings cannot prohibit a party's right to access the courts unless expressly permitted by law. Accordingly, such an anti-suit injunction was not a valid interim measure under the UAE Arbitration Law.

Court of Cassation

On 3 July 2025, the Dubai Court of Cassation issued a decision by way of Case No. 657 of 2025, reversing the judgment of the Court of Appeal. In considering whether an arbitral tribunal seated in the UAE has the power under the UAE Arbitration Law to issue an anti-suit injunction; and whether the courts may annul such an interim order while an arbitration is ongoing. The Court of Cassation held that under Article 21 of the UAE Arbitration Law arbitral tribunals are empowered to issue interim or precautionary measures during the course of an arbitration, and have the exclusive authority to vacate or amend those interim measures. Accordingly, the Court of Cassation determined that the Court of Appeal had erred in exercising jurisdiction to annul the ICC Tribunal's anti-suit injunction.

Impact and practical implications of the judgment

This decision is significant in reaffirming the independence of the arbitral tribunal in respect of managing its own procedures, including clarifying that arbitral tribunals seated in the UAE have authority under Article 21 of the UAE Arbitration Law to issue interim measures – an authority which is exclusive to the arbitral tribunal.

Finally, it can be inferred from the judgment that parties seeking to prevent parallel court proceedings may now have greater support to apply for anti-suit injunctions where necessary, or other interim measures such as making an application to prevent a party from moving or disposing of its assets prior to the issuance of a final arbitral award.

Conclusion

The Dubai Court of Cassation's decision in Case No. 657 of 2025 marks a landmark ruling in UAE arbitration law. It confirms that arbitral tribunals seated in Dubai have the power under Article 21 of the UAE Arbitration Law to issue anti-suit injunctions as interim or precautionary measures, and that such measures fall under the exclusive authority of those tribunals to vacate or amend them.

For businesses, legal counsel and arbitration practitioners, this provides greater certainty that interim orders issued during the course of arbitral proceedings will generally enjoy protection from judicial interference. It enhances the UAE's appeal as a venue for arbitration and continues the trend of greater prominence being given to arbitration in the UAE dispute resolution landscape. ■

1. Gary B Born, 'Provisional Relief in International Arbitration' in *International Commercial Arbitration* (3rd edition, Kluwer Law International, 2020, updated Dec. 2023) ch. 17, s.17.01.

FIDIC Carbon Emissions Management Guidance

One of the most interesting projects **Jeremy Glover** has been involved with over the past few months is FIDIC Net Zero Task Group 23, where the team has been drafting guidance on the use of carbon emissions on projects. As he explains below, he has learnt a great deal from his talented colleagues,[1] and as the Guidance for use with the Red Book is due to be published at the end of 2025, he is able to share some of the details of what is being proposed.

What do we mean by *"green"* construction and sustainability?

There are many answers to this question. Essentially, it is the application of processes that are environmentally responsible and resource-efficient throughout a building's lifecycle – from planning to design, construction, operation, maintenance, renovation and demolition.

There are almost as many definitions of net zero. The United Nations Net Zero Coalition says:

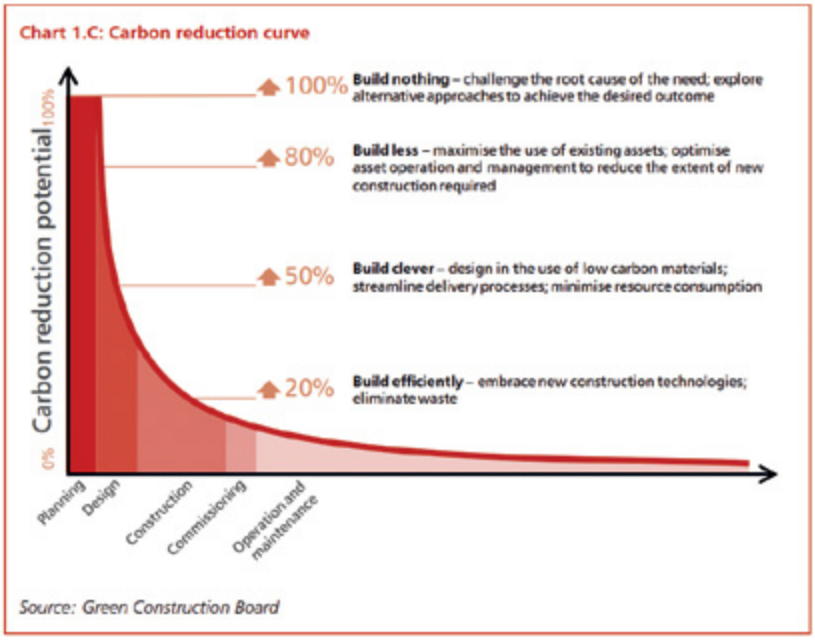
> *"Put simply, net zero means cutting carbon emissions to a small amount of residual emissions that can be absorbed and durably stored by nature and other carbon dioxide removal measures, leaving zero in the atmosphere."*

As for sustainable development, in essence, it means designing and constructing buildings to make as little impact on the environment as possible. The FAC-1 Contract defines sustainability as:

> *"Sustainability - measures intended to reduce carbon emissions, to reduce use of energy and or natural and manmade resources, to improve waste management, to improve employment and training opportunities, and otherwise to protect or improve the condition of the Environment or the well-being of people".*

Sustainability is all about the reduction of energy use, carbon emissions, and pollution and waste, as well as the conservation of our finite resources.

Recycling too, must always be a consideration. One of my favourite diagrams comes from the Infrastructure Carbon Review of HM Treasury in 2013 – *"Build nothing, build less, build clever, build efficiently":*



1. Hugo Fonseca, ADEPT, Portugal (Task Group Chair); Adriana Spassova, EQE Control OOD, Bulgaria (FIDIC Contracts committee; Rami Ismail, Morganti Saudi Arabia, Jordan; Bipin Bahri, Ramboll Denmark, India; Edith Bustamante, ACCIONA, Spain; Idriss Kathrada, Inoal, France.

What about other contracts?

NEC4 uses a secondary option X29. The aim is to support the reduction of the climate change impact with built assets. The clause allows for the parties to agree certain minimum Climate Change Requirements ("CCRs"). A failure to comply with these constitutes a defect. Alternatively, a performance table ("PT"), which is not mandatory, can be used by the client to set out specific climate change targets in addition to the CCRs. Here, a failure to achieve targets is not a Defect. The parties are free to agree financial incentives to achieve these targets, or use the PT as a tool to measure and record the performance achieved. In addition, the contractor can propose changes that may lessen the climate change impact of the Works. If the contractor does so, there is a duty on the project manager to address any such proposal.

The JCT Design and Build 2024 adopts a similar approach. Under new clause 2.1.5, contractors are "*encouraged*" to suggest amendments to the project which "*may*" result in improvements in environmental performance or sustainability. Contractors are further required by clause 2.2.2 to provide any information reasonably requested by employers in respect of the environmental impact of the supply and use of goods and materials. Strictly these clauses are not new. The JCT has simply moved the supplemental sustainability provisions of the JCT D&B 2016 into the main contract.

So, what about FIDIC?

The existing FIDIC Contracts do, of course, include many sustainability aspects, not least in GCC 4.18 [Protection of the Environment], which provides that:

> *"The Contractor shall take all necessary measures to:*
>
> *(a) protect the environment (both on and off the Site);*
>
> *(b) comply with the environmental impact statement for the Works (if any); and*
>
> *(c) limit damage and nuisance to people and property resulting from pollution, noise and other results of the Contractor's operations and/or activities.*
>
> *The Contractor shall ensure that emissions, surface and subsurface discharges, effluent and any other pollutants from the Contractor's activities shall exceed neither the values indicated in the Employer's Requirements nor those prescribed by applicable Laws."*

The existing FIDIC contract covers environmental protection, resource efficiency and waste management, which provide a sound foundation for introducing enhanced provisions for carbon management. The new Guidance applies to the management of carbon emissions.

The new carbon management guidance adopts a whole lifecycle approach. Every project is different, with its own strengths, challenges, and objectives. BS EN 15978:2011 Sustainability of construction works categorises the whole lifecycle approach as follows:

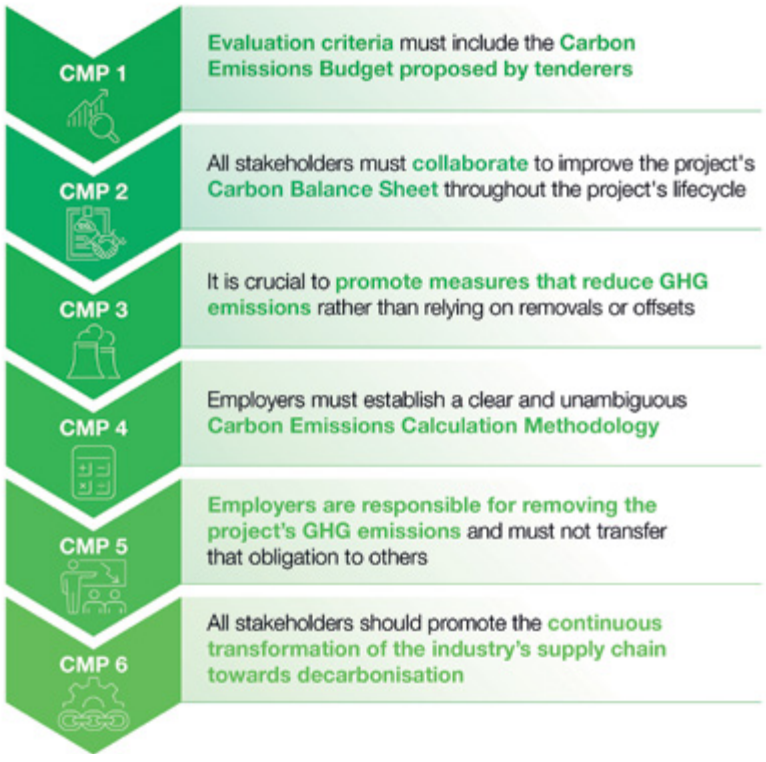
- Design, feasibility, planning;
- Building and construction: construction products and procedures;
- Building operation: operational energy, maintenance, repair, refurbishment, and waste use;
  - Soft hand-over from construction to operation;
  - Extended hand-over period;
  - Biodiversity;
- End of life: demolition, recycling, waste, and disposal;
- Beyond the lifecycle: carbon savings from material and re-use.

FIDIC have also noted the adoption by the World Bank and other development banks of rated criteria. In September 2023, Enzo de Laurentiis said this:

> *"A key objective of procurement in bank operations is to help borrowers achieve sustainable development objectives through value-based principles and transparent procurement strategies... Rated criteria help to better manage environmental, social, supply chain and cyber-security risks as well as leverage new opportunities such as promoting green procurement."*

This is reflected in the first of six Carbon Management Principles ("CMPs") adopted by FIDIC as part of the new Carbon Emissions Management ("CEM") Guidance, which requires that the Carbon Emissions Budget ("CE Budget") forms a part of the evaluation criteria.

The six CMPs are as follows:



It is FIDIC's intention that, by integrating the CEM principles into practical contractual mechanisms, the CEM Guidance enables the construction industry to move beyond aspirational sustainability goals towards measurable, accountable performance. The provisions maintain FIDIC's commitment to balanced risk allocation whilst enabling all parties to contribute meaningfully to the global sustainability transformation that the construction industry must achieve.

The nature of the Guidance will depend on the form of contract. The question of who carries out the design is particularly significant. Under the FIDIC Red Book, where the contractor executes the employer's design, that design has a significant impact on the possible reduction of GHG emissions. In contrast, the contractor can only reduce emissions resulting from its activities in the execution of the works.

As a result, the Guidance explains that it is the employer who retains responsibility for the whole-life Carbon Balance Sheet of the asset and for implementing Carbon Removal Measures to address the project's GHG emissions, while the Contractor can contribute to the reduction of GHG emissions through optimising construction methods, material choices and execution processes within the scope of the employer's design requirements.

The Task Group felt that, rather than add a significant number of amendments to the existing sub-clauses, the cleanest and most transparent approach would be to introduce a comprehensive solution through a new CEM Clause and Schedule of Carbon Emissions, which could integrate with the existing contractual framework. Multiple amendments across multiple sub-clauses can lead to errors and inconsistencies.

The new CEM clause still reflects the fundamental principle that underlies all FIDIC contracts, namely balanced risk allocation between the parties to the contract. The clause also introduces the concept of GHG emissions, whose efficient management is essential to achieving the sustainability objectives of the project. Under the new CEM clause:

- GHG emissions are treated as a critical resource requiring efficient management alongside financial resources, with quantified objectives. This should create clear, centralised obligations for Carbon Emissions Management;
- The CE Budget, which is proposed by the tenderer and not imposed by the employer, establishes the contractor's commitment to specific emission targets, with clear mechanisms for adjustment when circumstances beyond the contractor's control affect these targets;
- A balanced incentive structure provides both Carbon Emissions Incentives ("CE Incentives"), when the contractor achieves savings under the CE Budget, and Carbon Emissions Damages ("CE Damages") when the contractor is responsible for the Actual Carbon Emissions ("Actual CE") exceeding the CE Budget;
- The Schedule of Carbon Emissions provides adaptability to accommodate different project types, sizes, and specific GHG emissions management requirements, whilst maintaining consistency with the FIDIC CEM principles.

Employers need to appreciate the importance of care when preparing the tender documents, as they are absolutely fundamental to achieving meaningful Carbon Management and to the tenderers' ability to propose a realistic CE Budget.

A key document is the new Schedule of Carbon Emissions. The idea behind the Schedule is that it serves as an adaptable component that allows the CEM Special Provisions to accommodate the specific requirements of each project. It can therefore address a variety of aspects, including Carbon Emissions Objectives, Milestones, Calculation Methodology, Risk Management requirements, reporting procedures, supply chain obligations and taking-over procedures. The Schedule, which is in effect a single contractual document, can therefore provide a comprehensive and adaptable framework for carbon emissions management.

It is important to note that the Guidance does not simply discuss the new CEM clause. It also includes guidance and examples for the preparation of any CEM Contract Data or CEM Special Provisions required for the new CEM mechanism, as well as additional optional CEM provisions, the Schedule of Carbon Emissions, and any CEM inputs needed for the Specification.

As for the new CEM clause, it comes in seven parts:

1. Definitions: As with anything new, it is particularly important that everyone understands what the terms mean and that everyone uses the same terminology.
2. Objectives: Here, the clause encourages the parties to collaborate to achieve any carbon emissions objectives.
3. Obligations: The aim is that the contractor completes the works and comes in on or under the CE Budget.
4. Reporting: The reporting obligation is separate from the regular Progress Reports.
5. Meetings: These are to be organised by the engineer.
6. Budget changes: The system here mirrors the traditional FIDIC approach.
7. Incentives/damages: As noted above the new clause adopts a balanced incentive approach.

As I have said, the new Guidance is scheduled to be launched in December 2025. It will be interesting to see the industry's reaction. The Guidance will sit alongside the *Carbon Collaboration Initiative* (of which Fenwick Elliott are founder members), which FIDIC have said aims to develop a: *"common, replicable and standardised process of calculation and disclosure of embodied and operational CO_2e (carbon dioxide equivalent) emissions related to infrastructure projects"*. This new initiative recognises the different levels of understanding and technology around the globe, when it comes to issues relating to sustainability, including carbon emissions. As part of the initiative, a new Carbon Management Framework is being developed, which can be used by anyone to help build up their knowledge around carbon management at a project level. The aim is for this to receive wide adoption across the industry.

The Guidance is therefore just one part of FIDIC's commitment to helping engineer solutions to the global challenges of climate change and biodiversity loss. ■

Adjudication: cases from *Dispatch*

Our usual case round-up comes from two different sources. As always, we highlight here some of the more important cases which may not be covered in detail elsewhere in the *Review*. First, 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 *https://www.fenwickelliott.com/research-insight/newsletters/dispatch*. If you would like to receive a copy every month, please contact **Jeremy Glover** or sign-up online at *https://www.fenwickelliott.com/subscribe*.

We begin by setting out some of the most important adjudication cases as taken from *Dispatch*. Second, there is the *Construction Industry Law Letter (CILL)*, edited by Fenwick Elliott's **Karen Gidwani**. *CILL* is published by Informa Professional. For information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0)20 3377 3976.

Was the defence to the adjudication enforcement proceedings: *"entirely without merit"*?

ATG Services (Scotland) LTD against Ogilvie Construction LTD

[2024] CSOH 94

Ogilvie refused to pay an adjudicator's decision of £1 million claiming that there had been breaches of natural justice. ATG had been appointed a subcontractor for a groundworks package at a project for the construction of a housing and care facility. The dispute arose in connection with an interim payment application made by ATG. The adjudicator decided that ATG had made a valid application for payment, that there was no valid payment notice and that no valid pay less notice had been issued by Ogilvie, and that the final date for payment had passed without full and proper payment of the notified sum.

Ogilvie said that the subcontract required notices served under it to be sent by first class recorded delivery post to a stipulated address or to such further address as might be notified in writing from time to time, or else by fax. It was further agreed at a pre-contract meeting that any applications for payment had to be submitted to two specified email addresses. The application in question took the form of an attachment to an email sent to a different email address, albeit one that was associated with Ogilvie.

Ogilvie did not seek to argue that it had not duly received the email. Rather, it maintained that the use of a method of service other than that stipulated in the contract rendered what was sent invalid as an application for payment of a notified sum. ATG said that the parties had adopted a course of conduct which treated applications served other than in accordance with the provisions of the contract as nonetheless valid.

Lord Sandison held that Ogilvie's defence was *"entirely without merit"*, noting that:

> *"To describe an adjudicator as having gone off on a frolic of his own is to maintain that his decision depends to some material extent on a ground which was not suggested to him by the parties and on which he gave them no sufficient opportunity to comment. It is that lack of opportunity to state one's case which permits the categorisation of such a frolic as a breach of the requirements of natural justice."*

Here, both parties accepted that a live question in the adjudication was whether the Ogilvie's behaviour in having accepted and dealt with earlier payment applications from ATG which had not been made by the means prescribed by the contract meant that it was no longer entitled to insist on the contract requirements. The legal principle being asserted by ATG was entirely clear. It was open to Ogilvie to submit whatever it chose in response. Instead, Lord Sandison said that Ogilvie: *"contented itself with the somewhat delphic pronouncement that ATG had failed to evidence any principle of Scots law upon which it is seeking to rely in relation to its submissions on course of conduct"*, adding later that ATG had *"failed to provide a Scots law principle or any authority for their assertions"*.

The judge said that the adjudicator was perfectly entitled to prefer ATG's submissions, and even if the adjudicator was wrong in their determination of the law, that would represent no more than an error of law, about which Ogilvie could have no relevant complaint in the context of an adjudication enforcement.

Lord Sandison reminded Ogilvie that:

> *"It may be tempting to forget from time to time that it is no part of the function of this court to act as a general appeal tribunal in respect of the adjudicator's decision, but it must not be lost sight of that the criticism of the adjudicator in this connection is that he breached the requirements of natural justice by going off on a frolic of his own"*. The suggestion here was: *"nothing less than an inversion of reality. No opportunity for injustice to be done was afforded"*.

Lord Sandison concluded that the legislative policy of *"pay now, argue later"* that lay behind the relevant sections of the HGCRA judicial policy ought to be to discourage, as far as properly possible, frivolous defences such as those advanced here. This *"unreasonable behaviour"* justified an award of expenses on *"the agent and client, client paying scale"*, which is effectively the Scottish equivalent of indemnity costs.

Was the dispute referred to adjudication about one or more contracts?

George Beattie & Sons Ltd v Gareloch Support Services (Plant) Ltd

DBN-A107-20

Beattie was engaged to assist in the removal of the Glen Mallan jetty. The contract was made up of a number of documents, including four quotations and correspondence accepting those quotations. Having issued four invoices which were paid without objection, Beattie issued a fifth for £60,000. Gareloch issued a pay less notice in the sum of £30,000, which Beattie did not accept. Gareloch then refused to pay. An adjudicator decided that the pay less notice was invalid.

Gareloch said that the adjudicator had exceeded their jurisdiction by considering multiple contracts, rather than a single contract, when determining the dispute. The sheriff held that the four separate quotations and acceptances amounted to a single contract and that only one contract had been referred to the adjudicator. Further, Gareloch had failed to make a valid challenge to the adjudicator's jurisdiction.

On appeal, Appeal Sheriff O'Carroll noted that the court should consider what the parties meant by the language used in the contract. The correct approach was to consider what a reasonable person would have understood the parties to have meant – that reasonable person possessing all the background knowledge reasonably available to the parties at the time of the contract. This was what the sheriff had done. She considered in detail the evidence and arguments for and against the one contract argument. There were a number of arguments in favour of the one contract position, including the use of *"phases"* by the parties to describe the works and the request by Gareloch that a single invoice number be used by for all invoices, a request which was followed.

The sheriff also considered the factors said to point towards a series of separate contracts. However, taken singly or together, these were not enough to demonstrate that there was more than one contract. All the work carried out by Beattie was done under a single contract and that was what was referred to the adjudicator who had jurisdiction to determine the dispute arising from that contract.

Appeal Sheriff O'Carroll considered that the appeal rested on the proposition that taking account of all the factors, the sheriff ought to have reached the opposite conclusion. In other words, Gareloch was seeking to reargue their earlier submissions. However, it was the sheriff's task to determine the facts, analyse and weigh them appropriately, reach conclusions, and determine the legal issue.

Appeal Sheriff O'Carroll noted that it was common ground that the dispute concerned a single invoice number 4138, which Gareloch refused to pay because Beattie refused to agree a set off of £30,000. It was also common ground that the invoice was for work referable to two or more of the quotations.

Importantly, it was also common ground that the invoice did not ascribe separate charges to work attributable to different quotations, no breakdown was given. It would not be possible for either of the parties to separate the charges in that way on that invoice. Adjudication was intended to eliminate or reduce payment delays and simplify dispute resolution. But, if Gareloch's arguments were correct, it would have been impossible for Beattie to have referred the dispute to adjudication at all. It was only necessary to state the argument to see the manifest impracticality of such an approach. The reality, as determined by the sheriff, reflected in the composite nature of invoice 4138, was that the parties entered into a single contract for all the work involved and only a single adjudication on that invoice was required.

This conclusion meant that the second issue fell away. However, Appeal Sheriff O'Carroll noted that, unless the respondent to a referral challenges jurisdiction properly, it will be bound by the adjudication and cannot resist subsequent enforcement proceedings on the basis of lack of jurisdiction. The judge referred to the Inner House decision in *Hochtief Solutions AG v Maspero Elevatori S.p.A* (2021 SLT 528) who held that in deciding whether a challenge to jurisdiction had been properly made:

> *"the critical question is whether it made its challenge 'appropriately and clearly'... Such a threshold test is required, because the adjudicator and the referring party must be given an opportunity to assess whether the challenge is a good one. No purpose is served by continuing with a flawed adjudication."*

Here, there was no express challenge and the test set out there was not satisfied.

Should the adjudicator have gone back to the parties, when they decided to use a new *"fair and reasonable"* rate for valuing certain items? Did they fail to provide adequate reasons for their decision?

Clegg Food Projects Ltd v Prestige Car Direct Properties Ltd

[2025] EWHC 2173 (TCC)

Following practical completion, a dispute arose regarding the valuation of Clegg's application for payment 37. The disputed issues included the valuation of eight variations and Clegg's entitlement to extensions of time and prolongation costs. Following an adjudication, the two key issues before HHJ Kelly were:

1. Was the adjudicator in breach of natural justice by failing to go back to the parties and ask for further submissions when they decided to use a new *"fair and reasonable"* rate and a single new measurement in respect of the valuation of certain individual items when asked to provide a gross valuation of Application 37.
2. Did the adjudicator fail to provide adequate reasons for their decision including to explain the decision made on *"fair and reasonable"* rates?

By way of a reminder, the judge confirmed that not only must there have been a breach of the principles of natural justice, but any breach must also be material. HHJ Kelly also confirmed that:

> *"If issues have been fairly canvassed before an adjudicator, or if the adjudicator has simply adopted an intermediate position, fairness does not require the parties to be given an opportunity to make further submissions. An adjudicator is obliged to make a decision and come to conclusions based on the evidence of each party, his analysis of it and of the submissions put to him. He is not under an obligation to invite*

comments on his conclusions reached after that process."

Prestige said that there was a breach of natural justice because the adjudicator used their own rates and remeasured the work (using the documentation provided in respect of one of the variations) without informing the parties that they intended to do so and without giving them the opportunity to comment on the suitability of that approach. This breach was material because it was founded on a novel analysis of the materials. As such, if consulted, Prestige may have had a reasonable prospect of successfully objecting to the new approach. By choosing new rates, the adjudicator *"made good"* Clegg's case.

The adjudicator had ample opportunity seek submissions on the new rates and measurement. The fact that additional workings were provided by the adjudicator after the decision underlined that further explanation was required to enable the parties to understand the decision. Simply providing a list of numbers with an explanation that the adjudicator had decided upon a *"new rate"* was not sufficient to enable the parties to understand how those rates had been arrived at.

Clegg argued that the adjudicator was absolutely entitled to rely on their own knowledge and experience. The complaints about the new rates were *"excessively granular"* and were, in effect, a smokescreen intended to distract from the key facts. The adjudicator had been asked to provide a gross valuation of Application 37, which included the eight variations, each containing multiple items and sub-items.

One difficulty with Prestige's approach was that, without exception, the rates the adjudicator used to arrive at overall valuations for the variations were within the range established by the parties' contentions. Furthermore, in all but two cases, the use of the new rates was more advantageous to Prestige than at least one of the rates the adjudicator could have adopted without consultation – namely being Clegg's rate, Prestige's rate, or a crude *"split the difference"* rate.

The two exceptions resulted in an increase in the valuation of less than £2,600 or under 0.2% of the Relevant Changes. Those increases were vastly outweighed by more than £202,000 resulting from the adjudicator's use of the rates which were more favourable to Prestige than the rates the adjudicator could have adopted without further consultation. The use of new rates therefore had the overall effect of substantially reducing the amounts payable to Clegg.

The judge did not accept that there had been a breach of natural justice. Both parties had specifically invited the adjudicator to award either the amount each of them submitted for the gross valuation or *"such other sums as the adjudicator shall see fit"*. The adjudicator was not tasked with making declarations on the individual rates to be used when valuing any sub-items. The decision they were asked to make was broader: the overall valuation of Application 37.

The adjudicator was not filling a gap in the evidence. Both parties had made submissions on rates, and the adjudicator did not rely on material that the parties instructed them not to consider. In addition, it was significant that each *"fair and reasonable"* value adopted by the adjudicator was either an intermediate position between those contended for by the parties or was more favourable to Prestige. Prestige had accepted that if the adjudicator had simply adopted either party's position on value or applied a crude *"split the difference"* rate, it could have no legitimate complaint.

The parties chose to instruct a Chartered Quantity Surveyor to assess their submissions. They provided the adjudicator with the materials needed to reach a valuation and the adjudicator provided a valuation within the range contended for by the parties, or which was more favourable to Prestige. It was not necessary for the adjudicator to set out the details of the methodology used to come to a decision.

Further, Prestige had not established that any breach, if proved, was material. Prestige accepted that the adjudicator could simply have adopted the rate proposed by them. Whilst, in respect of some sub-issues, the adjudicator's decision meant that the *"fair and reasonable"* rate was more favourable to Clegg than Prestige, that was not always the position. As Counsel for Clegg observed, Prestige could not: *"properly complain that it lost an opportunity to persuade the adjudicator to order it to pay more than it was in fact ordered to pay"*.

Following a request by Prestige, the adjudicator provided additional workings. The judge commented that the fact the adjudicator later provided workings and answered questions about their reasoning, when asked directly, did not mean that the initial decision amounted to a failure to provide adequate reasons.

Further, there was sufficient detail in the 88-page decision to enable the parties to understand how the decision had been reached. The judge accepted that the reasons provided were broadbrush, with references to submissions and documents in footnotes. Fuller reasons could have been given, but that did not mean the reasons given were inadequate: *"Detailed reasons, workings and explanations do not have to be given in respect of each individual sub item when the dispute put to the adjudicator is one concerning a global valuation"*.

Was there one contract or a series of contracts? Did the adjudicator have jurisdiction to consider the dispute?

Lapp Industries Ltd v 1st Formations Ltd [2025] EWHC 943 (TCC)

Lapp sought summary enforcement of an adjudicator's decision. Lapp had sent an application for interim payment in the sum of £120k. No payment or payless notice was served. During the adjudication, Formations raised a jurisdictional challenge, saying that there were numerous contracts between the parties and not a single contract as alleged. The adjudicator rejected this, saying that there was only one contract.

The contract issue had arisen because Lapp provided individual quotations for specific items of work. Lapp said this was because Formation never *"definitively finalised"* the specification. For example, Lapp submitted an initial quotation for works to the roof, decking and reception. This was accepted in writing.

Deputy Judge Williamson KC considered that these *"undisputed facts"* clearly gave rise to a construction contract. The parties were of the same mind as to scope, price and location, with the time for completion impliedly agreed to be a reasonable time. Thereafter, Lapp submitted further quotations, which were accepted. They then carried out the

agreed further works, raised invoices, and were paid.

The judge further thought the following: *"it seems to me clear that the parties agreed, on an ad hoc basis, to expand the scope of the construction contract formed in June 2022, through a series of further accepted quotations. There was, therefore, a single contract (and a single dispute), albeit that this contract grew considerably in scope when compared to June 2022 engagement".*

In addition, all the work was performed at a single site, i.e. the premises, and both parties referred to the works as a *"project"*. Their contractual dealings were consistent with *"an overarching contractual arrangement"* for the project as a whole, rather than a series of one-off engagements.

There were some fourteen quotations issued by Lapp. It would be surprising if there were at least fourteen separate contracts at a single site. Finally, *"The scenario here – an initial limited engagement, gradually expanded ad hoc – is not unfamiliar in the construction industry and makes far more commercial sense than the suggestion of many separate contracts".*

The judge also noted that:

> *"Any other analysis is contrived and unrealistic. These business people were not concerned with some artificial carving up of what was, for them, a single, ongoing engagement. The 'more than one contract' point would not have occurred to them, and has arisen solely in the context of a very technical argument on jurisdiction, of the kind familiar to lawyers but not, generally, to those involved in commercial negotiations."*

Adjudication: residential occupiers and pay less notices

RBH Building Contractors Ltd v James & Anor

[2025] EWHC 2005 (TCC)

RBH sought the summary enforcement of a *"smash and grab"* adjudicator's decision in their favour of £665k. Mr and Mrs James said that the contract in question was a construction contract with a residential occupier, so the adjudicator lacked jurisdiction to determine the dispute. They also sought a Part 8 declaration that their pay less notice was valid.

During the adjudication, the Jameses objected to the adjudicator's jurisdiction on the basis that they were residential occupiers. RBH said that the Jameses were property developers, and that they had never occupied it and they never intended to occupy it.

Section 106 of the HGCRA provides as follows:

> *"(1) This Part does not apply:*
>
> *a) to a construction contract with a residential occupier (see below)*
> *...*
>
> *(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence ..."*

Deputy Judge Moody KC said that there were two separate and disjunctive grounds where the exception may arise: (i) where a party occupies the property as their residence; or (ii) where they intend to occupy it. Here, Mr and Mrs James had never occupied the house. Indeed, the house was now up for sale, and they accepted that they now had no intention of occupying it. However, their case was that, at the time of the contract and until around November 2022, it had been their intention to occupy it. They stated that their intention changed because their finances were such that they were compelled to put the property up for sale. For the judge, the factual issue which arose on the residential occupier point was: what was their intention, objectively determined, at the time of the contract?

RBH's position was that they had never been informed that Mr and Mrs James intended to occupy the property. This was a development property.

The judge noted that there was evidence, (registering with a local GP, and going on the electoral roll, as well as screenshots of messages with friends) which supported the Jameses' case on their intention at the time of the contract. That evidence, if accepted would be determinative. However, this was an application for summary judgment, and there was conflicting evidence which meant that this issue had to be determined on the basis of oral evidence and could not be resolved summarily. As the judge considered that Mr and Mrs James had a real prospect of establishing that the residential occupier exception in section 106 applied, the application for summary judgment was dismissed.

As for the pay less notice, this was in the form of a letter with 11 bullet points. The letter of 27 November 2024 disputed items with a total value of £1,245,140.55. RBH had claimed a balance due of £663,016.16. The November letter took issue with specified, quantified claims which were in bullet points 1-5, 7 and 9. In the remaining bullet points, the letter rejected certain heads of claim wholesale without referring to figures. The quantified and unquantified heads exceeded £663,000, and so the notice concluded that the sum owing was £0.

The judge considered how the bullet points in the letter which related to the payment application would have been understood by any reasonably objective reader who had knowledge of the contract works. In his view, on that basis, the bullet points set an adequate agenda for an adjudication by identifying specifically which elements of the payment application were not accepted and, briefly, why they were not accepted. The judge did not accept that the letter had to set out an arithmetical calculation in order to amount to a valid pay less notice. That would be to read into the HGCRA an additional requirement that did not appear and would be to take an overly prescriptive approach to the contents of a notice.

The judge referred with approval to the following comment about pay less notices from Sir Peter Coulson at paragraph 3.36 of his book on *Construction Adjudication (4th edition)*:

> *"The Courts will take a commonsense, practical view of the contents of a pay less notice and will not adopt an unnecessarily restrictive interpretation of such a notice ... It is thought that, provided that the notice makes tolerably clear what is being held and why, the Court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective."*

Had the referring party "*deliberately or recklessly made a false statement*" in applying for the nomination of an adjudicator?

RNJM Ltd v Purpose Social Homes Ltd

[2025] EWHC 2224 (TCC)

RNJM sought summary enforcement of an adjudicator's decision in the sum of £132k. Relying on the principle in the case of *Eurocom v Siemens* (*Dispatch*, Issue 174), Purpose said that RNJM had *"deliberately or recklessly made a false statement"* in applying to the RICS for the nomination of an adjudicator, which meant that the application was invalid, and the adjudicator did not have jurisdiction.

HHJ Kelly summarised a number of relevant principles including:

- if a false representation is made, in respect of an asserted conflict of interest when applying to an adjudicator nominating body, the resulting adjudication is invalid, and any decision is a nullity due to lack of jurisdiction of the adjudicator;
- it is irrelevant whether the adjudicator nominating body is deceived by the false representation or not;
- it is only if a potential adjudicator has a clear conflict of interest that the nominating body should be warned;
- the test for apparent bias is whether a fair-minded and informed observer, having considered all of the circumstances of the assertion that the adjudicator is biased, would conclude that there was a real possibility that the adjudicator is biased; and
- the failure of a party to pay the costs of previous adjudications as directed by an adjudicator is an example of unreasonable and oppressive behaviour. An adjudicator's decision on allocation of their fees is final even if the decision on the dispute is subsequently overturned.

This was the fifth adjudication between the parties. The same adjudicator had been appointed in the second, third and fourth adjudications. That adjudicator found against RNJM in the third and fourth adjudications and ordered RNJM to pay their fees. RNJM did not comply, and the adjudicator wrote to both parties threatening legal proceedings as the parties were jointly and severally liable for their fees. Purpose paid those fees and wrote to RNJM asking why they had not done so themselves.

When RNJM started a fifth adjudication, they stated on the RICS nomination form that there was a conflict of interest between them and the previous adjudicator. The RICS has issued guidance on the point, which includes:

"Conflict of interest: An involvement between the dispute resolver and one of the parties, one of the parties and representatives or the subject matter of the dispute, or any other circumstances that raises justifiable doubts of bias or apparent bias."

Purpose's solicitors emailed the RICS stating that there was no conflict or dispute concerning the fees. The position was simply that RNJM had chosen not to discharge its liability to pay those fees when directed to do so by the adjudicator.

RNJM did not respond but a different adjudicator was appointed who found in favour of RNJM. The issue before HHJ Kelly was whether Purpose had a real prospect of successfully arguing that RNJM had deliberately or recklessly made a false statement when applying to the RICS for the appointment of an adjudicator for the fifth adjudication.

RJNM said, for the first time as part of the enforcement process, that they had a genuine belief that the payment dispute over the fees on the previous adjudications was a potential conflict. It was also reasonable that a fair-minded observer would conclude that the adjudicator would be biased.

Purpose highlighted that RJNM had never provided an adequate explanation for claiming that a dispute existed. There was no evidence or assertion that RJNM had disputed the fees with the adjudicator or challenged the underlying entitlements to them. RJNM simply did not pay them. Further, the adjudicator pursued both parties for payment of the fees. In fact, the only possible dispute over the fees was between RNJM and Purpose, since Purpose had already paid them.

In considering whether the information provided by Purpose was false, the judge examined the adequacy of the evidence given by RNJM. No one from RNJM explained why it was said that they were in dispute with the adjudicator. There was nothing beyond a bare assertion that there was such a dispute. RNJM never responded to requests from Purpose to identify the dispute.

Once the adjudicator's fees had been paid, the adjudicator had no fee dispute with either party. The judge said that it could not have mattered who paid the fees and, for all the adjudicator knew, there may have been an agreement in the background about the payment that was made.

As for apparent bias, RNJM said that there was a concern that the steps taken by the adjudicator to pursue payment of their fees *"constituted a risk"* that there would be a perception of apparent bias against them. It was therefore reasonable to set out those concerns in the nomination form.

The judge considered it relevant that there was no evidence of RNJM's advisors warning RNJM of the consequences of wrongly asserting that there was a conflict. Further, it was *"surprising"* that the potential conflict was described in such minimum detail on the form without any further explanation.

HHJ Kelly concluded that the evidence provided by RNJM was wholly inadequate to establish the nature or basis for asserting that there was an alleged dispute. The numerous questions raised by Purpose were legitimate. The fact that RNJM chose not to answer those questions or provide any evidence about the nature of the dispute was *"telling"* and those questions remained unresolved. As a consequence, the judge refused RNJM's application for summary judgment. Purpose had a realistic prospect of successfully arguing that the adjudicator lacked jurisdiction on the basis that RNJM had made a false statement about a conflict of interest on the adjudication referral form. ■

Other cases: *Construction Industry Law Letter*

Enforcement – Natural justice – Bias – Pre-determination – Waiver of right to object by payment of adjudicator's fees

Essential Living (Greenwich) Ltd v Conneely Facades Ltd

[2024] EWHC 2629 (TCC)

In the Technology and Construction Court;
Before Mr Adrian Williamson KC sitting as a Deputy High Court Judge;
Judgment delivered 17 September 2024

The facts

By a trade contract dated 14 June 2017, Essential Living (Greenwich) Ltd ("Essential") engaged Conneely Facades Ltd ("Conneelyl") to carry out the design, construction, coordination and commissioning of rainscreen cladding, curtain walling, glass doors and glass screen works at a development at Greenwich Creekside.

Disputes arose between the parties and on 2 February 2024, Essential commenced adjudication against Conneely requesting declarations to the effect that the Corium brick slip cladding system, designed and installed by Conneely, was defective. Essential claimed the costs of the defects in the sum of approximately £1 million.

On 9 February 2024, Essential served its Referral. On 16 February 2024, Conneely's solicitors sought disclosure of an adjudication decision of Dr Mastrandrea dated 22 July 2019 and the associated expert reports in that adjudication, which had taken place between Essential and another trade contractor (the "Mastrandrea materials").

The basis of the application for disclosure was that the Mastrandrea materials supported Conneely's case that the defects complained of in the present adjudication were occasioned by breaches of contract by other parties and were not due to workmanship failures on the part of Conneely. It was also said that the Mastrandrea materials would support Coneely's case that Essential was seeking double recovery.

On 20 February 2024, the adjudicator rejected the disclosure application. Conneely invited the adjudicator to

resign and reserved its position on natural justice.

On 19 April 2024, the adjudicator issued his decision, in Essential's favour. Conneely failed to pay the amount awarded and challenged the enforcement of the decision on the basis that, at the time of making the determination of the disclosure application, the adjudicator made a determination as to the strength of Conneely's case that would lead a fair-minded and informed observer to conclude that there was a real possibility that he had predetermined the case and was therefore biased.

Essential disputed that there had been any breach of natural justice.

Additionally, Essential argued that, as Conneely had paid the adjudicator's fees on 14 May 2024 with no further reservation of position, Conneely had waived its right to object to the enforcement of the decision.

Issues and findings

Had the adjudicator in determining the disclosure application pre-determined the dispute such that he was biased?

No. The adjudicator had made a fair determination and allowed Conneely every opportunity to put its case forward on the matters raised.

Had Conneely waived its right to object in any event?

Yes, by paying the adjudicator's fees after the issue of the decision with no reservation, Conneely had waived its right to object to the enforcement of the adjudicator's decision on the basis of natural justice.

Commentary

On the facts of this case, the judge robustly rejected the contention that the adjudicator had shown bias and in fact awarded indemnity costs against Conneely on the basis, among other things, that the Conneely had chosen to make an attack on the way in which the adjudicator had gone about his duties, which to the judge deemed wholly inappropriate.

A further point to note in this case is that even if Conneely had been correct to argue that there had been a breach of natural justice, they had lost he right to make such an argument by paying the adjudicator's fees without any reservation, even though they had raised natural justice on this point in the adjudication itself.

The judge's reasoning in this regard was based on the existing case law, and parties should be astute to the fact that reservations need to be maintained to ensure that they are not subsequently waived.

Interpretation of contract – Responsibility for completion of Stage 4 design

Workman Properties Ltd v ADI Building and Refurbishment Ltd

[2024] EWHC 2627 (TCC)

In the Technology and Construction Court;
Before HHJ Stephen Davies (sitting as a High Court Judge);
Judgment delivered 21 October 2024

The facts

On 6 January 2022, Workman Properties Ltd ("WPL") engaged ADI Building and Refurbishment Ltd ("ADI") to design and construct works under a contract in the JCT Design and Build Standard Form, 2016 edition with bespoke amendments.

All of the information provided by WPL or its representatives pre-contract was consistent with the design either having been completed to RIBA Stage 4/BSRIA Stage 4(i) ("Stage 4/4(i)") or to be completed to that stage by the time of the contract being entered into.

However, as matters transpired, the Stage 4/4(i) design was not complete and a dispute arose between the parties as to whether WPL or ADI was contractually responsible for completing the design of the works to Stage 4/4(i).

WPL relied, amongst other things, on the recitals to the contract, as amended, Article 1 of the contract and clause 2.17, which had been amended from the standard form and under which ADI was *"fully responsible in all respects for the design of the Works including all design work proposed by or on behalf of the Employer on or before the dates of this Contract forming part of the Employer's Requirements"*. WPL also argued that ADI was under an obligation to review the design and satisfy itself as to the sufficiency of that design.

ADI relied on the Employer's Requirements and the statement at paragraph 1.4 that significant design had been developed to date which had been taken to the end of RIBA Stage 4, with some parts of the contractor specialist design elements together with Services design to Stage 4(i).

Issues and findings

Was it the responsibility of WPL or ADI to complete the Stage 4/4(i) design?

Yes. Reading the contract as a whole, it was ADI's contractual responsibility to satisfy itself that what was in the existing design was sufficient in all respects to the sufficiency of the design. In such circumstances, the responsibility to complete the Stage 4/4(i) design fell on ADI.

ADI had argued that the provisions of the Employer's Requirements were contrary to this reading of the contract. The judge accepted that the second part of paragraph 1.4 was not consistent with the remainder of the contract provisions, but this was not enough to change the overarching meaning of the contract.

Commentary

Responsibility for the completion of the design under design and build contracts is often a contested issue and parties should aim to be as clear as possible in the provisions they draft in this regard.

Here, the judge concluded that the contract was clear in placing responsibility for the whole of the design on ADI. In particular, ADI was under an obligation to satisfy itself as to the sufficiency of the design. In such circumstances, the responsibility to complete the Stage 4/4(i) design fell on ADI.

ADI had argued that the provisions of the Employer's Requirements were contrary to this reading of the contract. The judge accepted that the second part of paragraph 1.4 was not consistent with the remainder of the contract provisions, but this was not enough to change the overarching meaning of the contract.

Enforcement – Building safety – Claims under Defective Premises Act 1972 adjudicable – Natural justice

BDW Trading Ltd v Ardmore Construction Ltd

[2024] EWHC 3235 (TCC)

In the Technology and Construction Court;
Before Mrs Justice Joanna Smith DBE;
Judgment delivered 16 December 2024

The facts

By a contract dated 30 October 2002 (the "Building Contract"), Basingstoke Property Company Ltd ("BPCL") engaged Ardmore Construction Ltd ("Ardmore") for the design, erection and completion of the shell and core, primary services and partial fitting out of apartments at Crown Heights, Basingstoke, Hampshire (the "Development").

On 3 November 2004, the full benefit of the Building Contract was assigned to BDW Trading Ltd ("BDW").

Practical completion occurred between December 2003 and June 2004. By virtue of section 135 of the Building Safety Act 2022 (the "BSA 2022"), the limitation period for claims under the Defective Premises Act 1972 (the "DPA 1972") was increased from six to 30 years. The legislative change prompted BDW to write a pre-action protocol letter of claim to Ardmore on 14 July 2022 (the *"Letter of Claim"*) identifying fire safety defects at the Development.

Further correspondence ensued between the parties and on 21 March 2024, BDW issued a Notice of Adjudication asserting that a dispute had arisen as to Ardmore's liability to BDW in respect of fire safety defects in the Development arising by reason of Ardmore's breaches of the Building Contract and/or its duties pursuant to section 1(1) of the DPA 1972. BDW sought damages in the sum of approximately £15 million.

On 25 March 2024, the adjudicator was nominated by the RICS. BDW issued its Referral on 27 March 2024 and put its claim in two ways. First, that there had been a breach of the Building Contract and such action was not timebarred for limitation purposes as there had been deliberate concealment of Ardmore's alleged breaches of duty, including a duty to install fire barriers. Secondly, a claim under section 1(1) of the DPA 1972.

Following an extended procedure for the adjudication, on 17 September 2024, the adjudicator issued his decision finding that Ardmore had breached its duties under the Building Contract in respect of fire safety aspects in the Development and that it was also liable under the DPA 1972 in respect of the same fire safety defects. BDW subsequently issued enforcement proceedings.

Ardmore resisted enforcement on four grounds.

First, Ardmore argued that the dispute referred to in the decision had not crystallised ("Ground 1"). Secondly, Ardmore argued that the adjudicator had no jurisdiction to determine a tortious claim for breach of the DPA 1972 ("Ground 2"). Thirdly, Ardmore argued that the adjudication was inherently unfair owing to the inequality of arms in terms of documentation ("Ground 3"). Finally, Ardmore argued that the adjudicator intentionally failed to consider a material defence relevant to the allegation of deliberate concealment against Ardmore ("Ground 4"). It was accepted that Ardmore required a real prospect of success on both Grounds 2 and 4 in order to be able to rely upon them to resist enforcement.

This report focuses on Grounds 2 and 3.

Issues and findings

Did the adjudicator have jurisdiction to consider a claim brought under the Defective Premise Act 1972?

Yes.

Had there been a breach of justice on the basis of inequality of arms in terms of documentation?

No.

Commentary

This is a lengthy judgment which should be read in full, although we have highlighted here two important issues addressed by the judge.

In the first instance, the court has confirmed, relying on the Fiona Trust principles, that a claim under the DPA 1972 should be considered a matter arising under the contract such that it can be referred to adjudication. In coming to this conclusion, the judge confirmed that she saw no reason why the Fiona Trust principles could not apply to adjudication clauses as well as arbitration clauses. There has been significant debate on this topic and the court has now made its view clear. Given the proliferation of building safety claims in the wake of the increased limitation period arising from the BSA 2022, it is likely that this judgment will now result in more adjudication on such claims.

The second point of importance is directly related to this. A feature of building safety claims that would otherwise have been time-barred due to limitation is that records are often a scarcity. In this case, Ardmore argued that there was a breach of natural justice given its inability to access the appropriate records. This in turn, Ardmore argued, forced it to rely on records provided only by BDW.

In this particular case, the judge rejected the argument that there had been a breach of natural justice, relying on Ardmore's own actions in relation to inspection and record-keeping. The matter ultimately appears to be fact dependent but given the general approach to the rough and ready nature of adjudication, it appears likely that it will be difficult to successfully argue that the inability to access records gives rise to a breach of natural justice.

Court order to mediate

DKH Retail Limited and others v City Football Group Limited

[2024] EWHC 3231 (Ch)

In the Business and Property Courts, Intellectual Property List (ChD);
Before Mr Justice Miles;
Judgment delivered 21 November 2024, postscript after 13 January 2025.

The facts

A trademark dispute arose between the claimants and the defendant and court proceedings were issued. The matter proceeded under the Shorter Trials Scheme.

At the pre-trial review, the claimants applied for an order for compulsory

mediation, which was resisted by the defendant.

On 1 October 2024, the Civil Procedure Rules were amended to include the express power by the court to order parties to use and facilitate the use of ADR, including mediation. The defendant did not dispute the power of the court to order mediation but argued that the court should only do so where there was a realistic prospect of success and submitted that this was not the case for the proceedings at hand. The defendant also relied on the proximity to trial, arguing that it was too late to mediate.

Issues and findings

Should the parties be ordered to mediate?

Yes.

Commentary

As of 1 October 2024, the court has the power under the Civil Procedure Rules to order mediation. In this case, whilst considering the objections of the defendant, the judge concluded that mediation would be beneficial and made the order. In particular, the judge noted that the mediation could be *"short and sharp"* and take place with the minimum of disruption to trial preparation. It is notable that the postscript to the judgment, added some weeks later, notes that the parties did settle their dispute.

Without prejudice privilege

Mornington 2000 LLP (t/a Sterilab Services) and Another v The Secretary of State for Health and Social Care

[2025] EWHC 540 (TCC)

In the Technology and Construction Court;
Before Mrs Justice Joanna Smith DBE;
Judgment delivered 11 March 2025

The facts

On 24 May 2021, the Secretary of State for Health and Social Care ("Secretary of State" or "DHSC") entered into a dynamic purchasing agreement (the "DPS Agreement") pursuant to which Mornington 2000 LLP (t/a Sterilab) ("Sterilab") and Sante Global LLP ("Sante") agreed to supply lateral flow testing devices ("Tests" or "LFTs") for Covid-19. Numerous disputes have arisen between the parties, resulting in three sets of legal proceedings.

In July 2021, Sterilab and Sante participated in a calloff competition under the DPS Agreement and were the successful second-highest-ranked bidder. The parties entered into a call-off contract dated 6 September 2021 pursuant to which Sterilab and Sante were to supply the Tests to the Secretary of Statement on receipt of committed orders, based on allocated volumes divided between the top three ranked bidders.

Sante engaged MP Biomedicals Germany GmbH ("MP Bio") as its subcontractor and the legal manufacturer of the Tests. MP Bio engaged Xiamen Boson Biotech ("Boson") in China as its sub-contractor and the physical manufacturer of the Tests.

On 30 September 2021, the Secretary of State placed a committed order for 68.4 million Tests from Sterilab and Sante. The Tests were manufactured by Boson which had its manufacturing facility in China between 11 October 2021 and 7 November 2021.

On 7 October 2021, the Secretary of State informed Sterilab and Sante that he had commissioned a standard Amfori Business Social Compliance Initiative ("BSCI") audit of the Boson facility by a company called QIMA Ltd ("QIMA"), which would assess working conditions in the supply chain.

The QIMA Audit Report was issued on 26 October 2021 and Boson was awarded an overall rating of "D", which the Secretary of State informed Sterilab and Sante amounted to a "failure". A follow-up report in the form of a Corrective Action Plan Acknowledgement Report ("CAPAR") was put in place. In the meantime, Sterilab and Sante objected to the findings in the QIMA Audit Report.

Within a short time of receipt of the QIMA Audit Report, the parties began to discuss on an open basis the ways in which issues identified in the audit could be addressed. One route identified was to carry out a further, interim, audit and report on the progress made against the CAPAR plan. With a view to undertaking such an interim audit, Sterilab and Sante withdrew their objections to the findings of the QIMA Audit Report and confirmed that they were continuing to work with Boson on a corrective action plan.

The interim audit was commissioned by Sterilab and Sante and carried out by V-Trust. On 8 November 2021, the V-Trust Audit Report was sent to the Secretary of State recording that there had been significant progress since the previous audit. The Secretary of State did not accept the finding of the V-Trust Audit Report. Instead, by a Rejection Notice dated 12 November 2021, the Secretary of State rejected the Tests that had already been delivered and further Tests to be delivered pursuant to the committed order. Sterilab and Sante disputed the Rejection Notice.

Notwithstanding the Rejection Notice, the parties continued to explore the potential to resolve the issues between them by way of, amongst other things, a further audit. The parties covered this in open correspondence.

Additionally, Sterilab and Sante procured another Amfori BSCI audit of the Boson facility from an independent company, TUV Rhineland ("TUV"). TUV gave the Boson facility an overall rating of "C". Again, the Secretary of State refused to accept the findings of the audit.

By late 2021, the parties were exploring the use of mediation to resolve the issues between them. A mediation took place on 19 January 2022, followed by a further without prejudice meeting on 25 January 2022. At the meeting, in light of the Secretary of State's refusal to accept the outcome of either the V-Trust Audit Report or the TUV Audit Report, the parties discussed undertaking a further audit. There followed a series of emails marked "*Without Prejudice*" in which the parties discussed the scope and purpose of the proposed audit and the date on which it should take place.

At an internal meeting of the DHSC held on 23 February 2022, reference was made to the new audit to be undertaken by a company called Intertek. No reference was made to the audit being undertaken on a without prejudice basis.

On 28 February 2022 and 1 March 2022, Intertek undertook the audit at the Boson facility. The Intertek Audit Report was issued to the Secretary of State on 4 March 2022.

There then followed a further series of *"Without Prejudice"* emails where Sterilab and Sante chased the Secretary of State for disclosure of the Intertek Audit Report.

By a letter dated 31 March 2022, the Secretary of State's legal representatives, the Government Legal Department ("GLD"), wrote to Sterilab and Sante's legal representatives (Lewis Silken) saying that the audit was procured as part of a confidential and without prejudice process and was therefore subject to without prejudice privilege.

On 1 April 2022, Lewis Silken responded stating that Sterilab and Sante did not agree given that the parties ultimately did not agree on the scope of the audit, and this was instead determined by the DHSC. Lewis Silken said that Sterilab and Sante could not therefore accept that the without prejudice negotiations were for the sole purpose of the review and audit and that the documents created in connection with Intertek's instruction and the review and audit were covered by without prejudice privilege. Notwithstanding, Lewis Silken indicated that for the purpose of the ongoing settlement discussions, Sterilab and Sante were prepared to receive the Intertek Audit report on a without prejudice basis, reserving the position on the ultimate question of privilege. Eventually, the Intertek report was provided to Sterilab and Sante on 25 April 2022 under cover of a letter marked as *"confidential and without prejudice"*.

On 15 February 2022, Sterilab and Sante issued proceedings against the Secretary of State alleging a breach of the relevant procurement regulations. A second claim was issued on 30 August 2022 and it was subsequently directed that the two claims be managed together.

Disclosure for the claims was given on 26 July 2024, with the trial listed for June 2026. The Secretary of State did not include in his disclosure the Intertek Audit Report or any associated documents.

On 11 November 2024, Sterilab and Sante applied to the court for a declaration that the Intertek Audit Report and associated documents did not benefit from without prejudice privilege.

Issues and findings

Were the Intertek Audit Report and associated documents the subject of without prejudice privilege?

No.

Commentary

In this case, the judge considered whether a report obtained by the Secretary of State following without prejudice discussions could be considered to be subject to without prejudice privilege. The judgment is helpful in illustrating the boundaries of what might or might not be covered by without prejudice privilege following a mediation or a without prejudice meeting.

In respect of public policy, the judge considered, on analysis of the relevant case law, that the public policy justification for without prejudice privilege was narrow and could not be extended to cover actions that the parties take further to discussions at a without prejudice meeting.

Turning to whether there had been any agreement between the parties that the report would be covered by without prejudice privilege (whether express or implied), the judge concluded that, on the facts, there had been no such agreement. Accordingly, it was held that the report should be disclosed.

Interpretation of Arbitration Award – Final dispositive section

Nigeria LNG Ltd v Taleveras Petroleum Trading DMCC

[2025] EWCA Civ 457

In the Court of Appeal;
Before Lord Justice Phillips, Lord Justice Warby and Lord Justice Zacaroli;
Judgment delivered 16 April 2025

The facts

By a final UNCITRAL arbitration award dated 30 January 2023 ("the Award"), following a London Arbitration in the London Court of International Arbitration ("LCIA"), Nigeria LNG Ltd ("NLNG") was held liable for failing to supply 19 FOB cargoes of liquefied natural gas to Taleveras Petroleum Trading Co DMCC ("Taleveras").

NLNG was ordered to pay damages to Taleveras for its loss of profits on the 19 cargoes in the sum of US$24 million and to indemnify Taleveras in respect of any amounts it was found liable to pay in separate arbitrations with Vitol SA ("Vitol" and the "Vitol Arbitration") and Glencore Energy UK Ltd ("Glencore" and "the Glencore Arbitration") relating to on-sale arrangements ("the Indemnity").

On 1 December 2023, the tribunal in the Vitol Arbitration published its final award, awarding Vitol damages against Taleveras in the principal sum of approximately US$233 million together with interest and costs ("the Vitol Award").

On 5 December 2023, Taleveras sent a copy of the Vitol Award to NLNG and demanded payment of the sums awarded pursuant to the Indemnity.

On 8 January 2024, NLNG commenced proceedings in the Commercial Court in London ("the NLNG Claim"), disputing liability to indemnify Taleveras on the ground that it was a condition precedent of the Indemnity that the tribunal in the Vitol Arbitration should have endorsed its award as to the application of the Indemnity to the sums awarded.

NLNG based this argument on what had been expressed in para 607 of the analysis section of the Award rather than anything in the dispositive section of the Award. NLNG claimed a declaration of non-liability and an injunction to prevent Taleveras from enforcing the Indemnity in respect of the Vitol Award.

Taleveras denied that there was any such condition on the Indemnity, relying on the fact that para 607 was not part of the final dispositive section of the Award. On 21 February 2024, Taleveras commenced an arbitration claim in the Commercial Court, seeking permission to enforce the Award.

On 1 March 2024, Taleveras filed an Amended Defence in the LNLG Claim pleading in the alternative that on 12 February 2024, the tribunal in the Vitol Arbitration had issued as an Addendum to the Award an endorsement that the sums awarded to Taleveras against NLNG fell within the scope of the Indemnity. NLNG pleaded in reply that the arbitrators in the Vitol Arbitration had no jurisdiction to add

the Addendum to its Award, being functus officio.

The claims were tried together on 2 July 2024. The judge at first instance determined that as a matter of the proper interpretation of the Award, the Indemnity was not contingent or subject to any declaration in the Vitol Arbitration or the Glencore Arbitration to the effect that the sums awarded fell within the scope of the Indemnity.

He further held, in case he was wrong on the issue of interpretation, that the Addendum was valid. By an order dated 31 July 2024, the judge therefore dismissed NLNG's claim and granted Taleveras permission to enforce the Indemnity in respect of the Vitol Award.

NLNG appealed.

Issues and findings

Should the parties take into account the non-dispositive paragraph in the Award when enforcing the Award?

No.

Commentary

In this case, the Court of Appeal unanimously rejected the NLNG's appeal in respect of the Award, finding the approach of the first instance judge to the interpretation of the Award to be unimpeachable.

In this regard, the judge at first instance had considered the form and content of the Award and whilst recognising that the whole of the Award needed to be considered and that the dispositive section read in the context of the written reasons, he had concluded that the dispositive section of the Award was likely to and had been intended by the tribunal to contain a comprehensive statement of what in English proceedings would appear in an order following a trial. Accordingly, the words contained in para 607 did not augment the dispositive section of the Award.

Remediation Contribution Orders – Costs incurred prior to Building Safety Act 2022 – Who may incur recoverable costs – Costs incurred in preventing risks form materialising or in reducing the severity of building safety incidents

Triathlon Homes LLP v (1) Stratford Village Development and Others [2025] EWCA Civ 846

In the Court of Appeal;
Before Lord Justice Newey, Lord Justice Nugee and Lord Justice Holgate;
Judgment delivered 8 July 2025

The facts

Stratford Village Development Partnership ("SVDP") was the developer of five residential buildings (the "Blocks") at Stratford East London to provide accommodation for athletes and officials for the London 2012 Olympic Games.

The Blocks are located in an area known as the East Village. Some of the units in the Blocks are owned by Triathlon Homes LLP ("Triathlon") and some of the units are owned through subsidiaries of Get Living plc ("Get Living"). Triathlon specialises in social and affordable housing and Get Living specialises in private rented housing.

The repair and maintenance of the structure and common parts of the East Village is the responsibility of East Village Management Ltd ("EVML") which is a company jointly owned by Get Living and Triathlon.

Following the Grenfell Tower disaster, work was undertaken by EVML to determine fire risks in the construction of the East Village. By December 2017, it was established that the same highly combustible aluminium composite material ("ACM") employed in the cladding at Grenfell Tower had been used in certain of the plots in the East Village, but not where the Blocks were located.

Further investigations were commissioned in August 2019 to ascertain whether the non-ACM cladding material used in other buildings including the Blocks presented a risk of safety to residents.

In November 2020, it was ascertained that there were serious fire safety defects in the Blocks. In response to this, a waking watch was implemented in all Blocks until additional alarms and heat detection systems were installed in flats as temporary measures.

A programme of work to remedy the defects in the East Village has commenced and the Blocks should all be remediated by August 2025. The remediation works were being funded by grants made available to EVML from the Building Safety Fund ("BSF"). The total cost of the work exceeds £24.5 million.

On 19 December 2022, Triathlon made five applications (one for each of the Blocks) for remediation contribution orders ("RCOs") under the Building Safety Act 2022 ("BSA") requiring SVDP and Get Living to reimburse expenditure of £1.058 million already incurred by Triathlon through service changes paid to EVML in respect of interim fire safety measures and investigative and preparatory works.

Triathlon also requested a further £153,538 in respect of service charges previously demanded by EVML which Triathlon had not yet paid and £613,899 in respect of costs and anticipated costs which had not yet been the subject of service charge demands. Triathlon also sought an order that SVDP and Get Living reimburse £16.03 million incurred or to be incurred by EVML in remedying the defects, representing Triathlon's share of the total remediation costs.

SVDP raised a number of objections to Triathlon's application including:

- That an RCO could not be made in respect of costs incurred before the commencement of the 2022 Act (28 June 2022), alternatively that it would not be just and equitable to for a remediation contribution order to be made in respect of such costs.
- That an RCO did not extend to the costs of measures taken for the purposes of preventing a building safety risk from materialising or reducing the severity of any incident resulting for a budling safety risk which does materialise. SVDP argued that an RCO could only apply to costs incurred in remedying relevant defects.
- That it was not just and equitable for the orders sought to be made.

The First-tier Tribunal ("FTT") found that:

- An RCO could be made in respect of costs incurred before the commencement of the 2022 Act.
- An RCO could extend beyond the cost of remedying the relevant defects.
- That it was just and equitable to make the RCOs.

SVDP and Get Living appealed on two grounds. First, that the FTT had erred in concluding that it was just and equitable to make the RCOs and secondly, that the FTT had erred in concluding that an RCO can be made in respect of costs incurred before the relevant part of the 2022 Act came into force on 28 June 2022.

Issues and findings

Were the RCOs just and equitable?

Yes.

Could an RCO be made in respect of costs incurred before the commencement of the BSA?

Yes.

Commentary

In comprehensively dismissing the appeal made by SDVL and Get Living, the Court of Appeal affirmed the intention of parliament to protect leaseholders against the cost of remediation work to address building safety defects. In doing this, the Court of Appeal confirmed the general proposition that the policy of the BSA is that primary responsibility for remediation costs will fall on the original developer, this proposition having been endorsed by the Supreme Court in *URS Corporation Ltd v BDW Trading Ltd* [2025] BLR 33.

In his leading judgment, Lord Justice Nugee summarised the scheme of the remediation provisions against which Remediation Contribution Orders (and other remedies) will be made, noting that whoever ends up bearing the costs is given new rights against those ultimately responsible by way of, for example, the extended limitation period under the Defective Premises Act 1972 and by a new cause of action against those manufacturing or mis-selling cladding products.

Dust particles, odour and noise – public and private nuisance

Andrews and Others v Kronospan Ltd

[2025] EWHC 2429 (TCC)

In the Technology and Construction Court (Business and Property Courts of Manchester);
Before HHJ Stephen Davies sitting as a High Court Judge;
Judgment delivered 25 September 2025

The facts

This was a group action and the claimants were a group of lead claimants, who were residents of Chirk, a large village/small town near Wrexham. Kronospan Ltd ("Kronospan") is the UK arm of the Kronospan group of companies, which manufacture and distribute wood-based panels.

In the early 1970s, Kronospan built a factory in Chirk. In 2017, the claimants brought a claim against Kronospan in nuisance seeking damages and other relief in respect of the emission of dust particles, odour and noise from the factory. The claimants claimed that over a prolonged period, the factory had emitted dust, noise and odour to such an extent and with such a degree of regularity and unpleasant consequences that it constituted a legal nuisance. There was no claim that the dust particles, odour or noise were harmful to the human body.

Kronospan defended the claim on the basis that, while the operation of the factory was bound to have the occasional impact on those living nearby, its actual impact fell well below the level of intensity or continuity that amounts to a legal nuisance. In this regard, Kronospan argued that its factory operations: (a) formed part of an existing pattern of uses in Chirk; (b) had been tightly regulated and conducted responsibly in accordance with the best available techniques ("BAT") so as to mitigate any environmental impact; and (c) constituted an ordinary and reasonable user of its site. Kronospan also argued that the activities had been ongoing for a period of over 20 years and therefore the claims were subject to prescription.

The parties had agreed and the court had ordered that there be a two-stage trial process. The first stage was to determine the claimants' claims in damages, including quantum, in respect of the alleged nuisance from 18 July 2011 to 18 July 2017 ("the relevant claim period"), being the six-year period running back from the date of issue of the claim form (the 2011 date being the cutoff date for limitation). In order to determine the issue of damages, the court was required to consider whether Kronospan was liable in public or private nuisance to the claimants.

Issues and findings

Did Kronospan's use of its site over the relevant claim period cause a substantial interference with the ordinary use of each of the lead claimant's properties?

"*Substantial*" means that it exceeds a minimum level of seriousness, judged objectively, and where it is necessary to make a judgment about what an ordinary person would regard as acceptable, making an allowance for variations in normal human reactions. On the basis of the evidence given, the judge concluded that there had not been substantial interference.

(Obiter) if the claimants had been able to establish nuisance then would Kronospan have been able to avail itself of the defences of ordinary user or prescription?

No. The level of substantial interference was not the consequence of a slow, steady and incremental series of changes over an extended period; instead, there had been a marked increase of activities over a relatively short period from around the start of 1992 to around the end of 1999. Therefore, from the beginning of 2000, Kronospan's activities would have amounted to a nuisance. Kronospan would have had to have relied on the defence of prescription having accrued by 2011, but Kronospan could not establish that.

Commentary

This is a very long judgment (137 pages) and therefore only a small part can be extracted in this digest. Readers are directed to the full judgment and in particular the sections A, B and N.

In rejecting the claimants' claims for nuisance, the judge provided a helpful summary of the existing legal principles that apply. As noted by the judge, quoting *Carnwarth LJ in Barr and Others v Biffa Waste Services Ltd* [2012]

BLR 275, such cases conventionally turn on issues of fact, as was the case here.

In this regard, it is of interest to note the comments made by the judge in respect of factual evidence. In making his findings, the judge considered much of the factual evidence given by all the factual witnesses to be exaggerated and unreliable. This appears to have its foundation in the acrimonious relationship between the parties.

The judge also referred to recent commentary and cases relating to the current approach to fact-finding, particularly in Business and Property Court cases, and in particular in relation to the importance to be placed on the contemporaneous documents and the approach to the taken to the reliability of witness recollection.

The judge, however, concluded that the court is not relieved of making factual findings based on all the evidence and, in particular, if a sworn witness is to be disbelieved then a court must indicate why this is the case.

NHBC Insurance policy – Interpretation of contractor insolvency coverage clause – Limitation

National House Building Council v Peabody Trust

[2025] EWCA Civ 932; [2025] BLR 469; [2025] Lloyd's Rep IR 533

In the Court of Appeal;
Before Lord Justice Lewison, Lord Justice Moylan and Lord Justice Coulson;
Judgment delivered 21 July 2025

The facts

By a contract dated 20 November 2015 in the JCT Design and Build Standard Form, Catalyst Housing Ltd ("Catalyst") engaged Vantage Design and Build Ltd ("Vantage") to design and build 175 new dwellings at the former RAF Stanbridge site in Bedfordshire. The development included 88 social housing units. The 88 social housing units had the benefit of an NHBC insurance policy, which was dated 2 March 2016.

On or around 14 December 2015, Vantage commenced work. Vantage ceased work on 17 June 2016 and administrators were appointed on 29 June 2016. Pursuant to the NHBC policy, Vantage was insolvent as defined within the policy.

The NHBC policy contained various provisions that allowed for a claim to be made for the extra over costs of completing the works ("*paying more*") in the event of a contractor's insolvency.

On 7 December 2016, Catalyst informed the NHBC that it intended to claim via the insolvency cover for additional costs in relation to the 88 social housing units. Practical completion of the units took place on 19 January 2021 and the final cost of the 88 units was £11.3 million, as against the £10.3 million originally envisaged.

In June 2023, Catalyst merged with the Peabody Trust ("Peabody"), which took over management of the claim.

On 24 July 2013, Peabody commenced proceedings against the NHBC under the policy. It was alleged that the total additional cost of the 88 units was £913,555.36. On 1 January 2024, the NHBC applied to strike out the claim in the ground that it was statute-barred, alternatively it sought reverse summary judgment on the same ground. The NHBC argued that Peabody's claim had become statute-barred on 29 June 2022 pursuant to section 5 of the Limitation Act 1980 by virtue of more than six years having passed since Vantage went into administration on 29 June 2016.

Peabody denied that the claim was statute-barred, arguing that the claim did not accrue until Peabody incurred the extra costs of completing the units. The judge found in favour of Peabody, holding that the event insured against was not the insolvency of the contractor per se but the insured being required to pay more above the contract price to complete.

The requirement to pay more must have been caused by the insolvency, but the insolvency itself was not the risk that had been covered. The judge found that time did not start running on the insolvency of Vantage on 29 June 2016 but at a time (to be determined at trial) when Peabody "*[has] to pay more to complete the units, as a result of that insolvency*".

The NHBC appealed.

Issues and findings

Did the cause of action accrue at the date of insolvency for the purposes of making a claim for additional costs due to contractor insolvency under the NHBC policy?

No. It is trite law that the cause of action under an insurance policy accrues on the happening of the event insured against. In this case, the event insured against was the additional cost to complete and therefore the cause of action did not accrue at the date of the contractor insolvency.

Commentary

The Court of Appeal rejected the NHBC's appeal and found that, in accordance with well-established principles of insurance law, the cause of action could not accrue at the date of the contractor's insolvency.

What was not decided was when the cause of action did in fact accrue. One of the arguments made by the NHBC was that Peabody had "*won on a technicality*". The Court of Appeal rejected this argument pointing out that the trial judge had not decided that Peabody had discharged the burden of proving that the claim was not statute barred but that the matter had been left open to trial. ■

The Fenwick Elliott Blog:

URS Corporation Ltd v BDW Trading Ltd

The Fenwick Elliott Blog, edited by **Andrew Davies**, began in 2017. Its aim is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects, and to engage with you and share thoughts and ideas on these various matters through the comments facility.

In May 2025, **Ben Smith**, **Huw Wilkins** and **Paul Smylie** wrote about a UK Supreme Court case[1] which addressed several complex legal issues arising from a dispute over liability for building defects discovered in two high-rise residential developments.

Background

During its post-Grenfell investigations, in late 2019, BDW Trading Ltd ("BDW") discovered alleged design defects in two sets of multiple high-rise residential building developments (the "Developments") for which it had been the developer and for which the structural designs had been provided by URS Corporation Ltd ("URS").

The alleged design defects were said to constitute a breach of URS' appointment contracts as well as common law negligence.

No claim was made against BDW by the owners or occupiers of the Developments and any such claim would (at the time) have been time-barred. However, as BDW considered the defects to be dangerous from 2020 to 2021 BDW performed remedial works on the Developments. Even though by then it had no proprietary interest in the Developments.

In March 2020, BDW brought a claim against URS in the tort of negligence to recover the costs of the remedial works. It could not bring claims against URS in contract or under the Defective Premises Act 1972 ("DPA") because they were, before the coming into force of the Building Safety Act 2022 ("BSA"), time-barred.

After the introduction of the BSA, BDW applied for and was granted permission to amend its claim to claim against URS under:

- s.1 of the DPA (the BSA having extended the limitation period for such claims retrospectively; and
- the Civil Liability (Contribution) Act 1978 (the "Contribution Act").

URS appealed (unsuccessfully) to the Court of Appeal and then again to the Supreme Court on the basis of certain assumed facts.

The Appeal to the Supreme Court

Ground 1:[2] In relation to BDW's claim in the tort of negligence against URS, has BDW suffered actionable and recoverable damage or is the damage outside the scope of the duty of care and/or too remote because it was voluntarily incurred (disregarding the possible impact of s.135 BSA)? If the answer to that question is that the damage is outside the scope of the duty of care or is too remote, did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the Developments?

It was common ground that URS assumed responsibility to BDW under its contracts for professional services and breached the resulting duty of care by providing defective designs. In principle, therefore, BDW had a claim in the tort of negligence for its loss (i.e. the cost of the repairs).

However, URS argued that BDW was not entitled to any compensation because BDW carried out the repairs ***voluntarily***, in circumstances where: (i) it had no proprietary interest in the Developments; and/or (ii) it had no legal obligation to do so because all claims against it were time-barred. URS argued that English law recognised a principle of voluntariness which rendered BDW's loss outside the scope of URS's duty and/or too remote.

Principle of voluntariness

The Supreme Court was clear in deciding that there was no "*voluntariness principle*", although the extent to which repair costs had been voluntarily assumed may be relevant to legal causation and mitigation as being concerned with a claimant's unreasonable conduct. However, the Supreme Court said that the application of legal causation and mitigation are fact-specific and must go to trial. The Supreme Court also noted that its conclusion in this case was consistent with the underlying factors that might make the repairs reasonable. Namely, on the assumed facts:

- It was fair and reasonable for URS to be held liable to BDW for the repair costs BDW had incurred because they were the obvious consequence of URS failing to perform its services with the professional skill and care required.
- The commercial interest in avoiding reputational damage.
- Incentivising a claimant in BDW's position to carry out the repairs so as to ensure that any danger to homeowners is removed.

Pirelli[3]

Because of its finding to the first question in Ground 1, the Supreme Court did not need to consider –when BDW's tortious cause of action accrued.

Nevertheless, the Supreme Court commented on the correctness of the House of Lords decision in the *Pirelli* case. In the context of pure economic loss the Supreme Court said, *obiter*, "*there are strong arguments of principle for accepting that there can only be an actual loss once the pure economic loss has been discovered or could reasonably have been discovered*" and moving to the cause of action accruing at the date of discoverability in the context of defective buildings raises difficult issues. That the Supreme Court made any comment at all is a strong indication that *Pirelli* will be significantly limited in its application in the future.

Ground 2:[4] Does s.135 BSA apply in the present circumstances and, if so, what is its effect?

The Court considered the broad purpose and scheme of the BSA, including the retrospective extended limitation periods and new causes of action. The Supreme Court adopted the submissions of the Secretary of State for Housing, Communities and Local Government, which it said were particularly helpful in relation to the background, the policy and purpose underlying the BSA in general and section 135 in particular. It noted the submissions were strongly supportive of BDW's case.

Section 135 BSA

The general scheme of section 135 is to provide for a 15-year limitation period for rights of action under a "*relevant provision*", which includes section 1 of the DPA, which accrue on or after the commencement date

– 28 June 2022. In relation to rights of action under section 1 of the DPA which accrued before the commencement date, the applicable limitation period is 30 years rather than 15 years (section 4B(4)).

Section 135(3) provides that the amendment to the limitation period "*is to be treated as always having been in force*", save where that would involve a breach of a defendant's rights under the Convention, or in respect of claims settled or determined before 28 June 2022.

Application of Section 135 to other contingent claims

The parties agreed that s.135 BSA applies to a claim brought under s.1 DPA. The issue was whether the retrospectivity of s.135(3) BSA applies to other claims which are dependent on the time-bar applicable to claims under s.1 DPA. In this case the claims in negligence and for contribution made by BDW against URS.

The Court confirmed that s.135(3) of the BSA applies to claims which are dependent on the limitation period in s.1 DPA but are not actions brought under that section. The Supreme Court noted that the central purpose and policy of the BSA was to ensure that those responsible for historic building safety defects could be held to account; the "*polluter pays*" principle. The Court noted this purpose would be undermined if s.135(3) BSA were restricted to actions under s.1 DPA – while a homeowner would be able to bring a claim against a developer under the DPA, it would limit any 'onward' claims that the developer might make against the contractor directly responsible for the defect for contribution or in negligence.

Any contrary conclusion, the Supreme Court said would be legally incoherent and create two contradictory routes for claims depending on the identify if the defendant. It would also penalise responsible developers who are proactive in identifying and remedying building safety defects.

Ground 3:[5] Did URS owe a duty to BDW under s.1(1)(a) DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?

Unsurprisingly, the Supreme Court upheld the Court of Appeal's decision that a developer could both owe a duty and be owed a duty under the DPA.

The Supreme Court stated that the scheme of section 1(1) of the DPA means that:

1. Under section 1(1)(a) the duty is owed to a person to who has ordered the dwelling to be built. This most obviously includes a person who ordered a dwelling to be erected, converted or enlarged on their own land, which will cover developers who order relevant work and are the first owners. The Supreme Court found that the wording of the DPA is wide enough to cover circumstances where a person has no proprietary interest in the land and therefore no proprietary interest in the dwelling.
2. Under section 1(1)(b) the duty is also owed to all those who subsequently purchase (or acquire any other interest in) the dwelling which covers any subsequent purchaser of the dwelling.

The Supreme Court said that there was no reason why a person could not be both a provider and a person to whom a duty is owed, and rejected the suggestion that these were mutually exclusive categories. Further, the aim of the DPA (of improving the quality of construction of new housing) was better served if the duty under the DPA was imposed on anyone engaged in the provision of a new dwelling and owed to anyone to whom the dwelling is provided or who subsequently acquires an interest in the dwelling.

In respect of the recoverable losses, Lord Hamblen and Lord Burrows, said that as the wording of section 1(1)(a) of the DPA contemplates claims by developers against contractors, it follows that that the DPA also contemplates the losses incurred by a developer in remedying defects by its contractor's breach of duty. Lord Leggatt went further and said that the economic loss suffered as a result of a breach of the duty may arise from liability to the current owner of the dwelling and that there is no justification for regarding this type of loss as outside the scope of the DPA. This indicates a broad liability under the DPA which would also extend to consequential losses.

Ground 4:[6] Is BDW entitled to bring a claim against URS under section 1 of the Contribution Act when there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

The Supreme Court held that the right to recover contribution arises when (1) damage has been suffered by C for which D1 and D2 are each liable; and (2) D1 has paid or been ordered or agreed to pay compensation in respect of the damage to C. This was the point at which the two-year limitation period for a contribution claim to be brought arises, but it does not mean that an action could not be brought before that point.

Lord Leggatt, who gave the leading judgment on Ground 4, said that it first needs to be possible to identify an amount of money for which D1 is liable and of which D2 must be ordered to pay a proportion. Accordingly, D1 can recover a contribution when it has made or been ordered or agreed to make a payment in respect of which the contribution is sought. The Supreme Court confirmed that it was sufficient that BDW had made a "*payment in kind*" by performing remedial works in compensation for the damage suffered by the homeowners as it was capable of valuation in monetary terms.

Commentary

Ultimately, this important judgment reinforces the principle that costs should ultimately be borne by those responsible and is aligned with the overall policy of the BSA and its related secondary legislation.

This judgment has a number of practical effects:

- Developers can recover reasonable costs in negligence even if they have been incurred "*voluntarily*". This will encourage developers to undertake necessary remediation work without delay in line with the policy behind the BSA.
- For remedial work carried out after section 135 came into force (28 June 2022) developers can argue that the works were reasonable mitigation because the potential DPA liability to homeowners was no longer time-barred by the BSA. For work done before that date, however, the position is less clear cut and will turn on the facts.
- Developers have a direct statutory cause of action, which has a 30-year limitation period, against those responsible for defects rendering the dwelling unfit for habitation.
- Where a party carries out remedial works to address damage, they can claim contribution from another, liable, party for the cost of those works, even if no homeowner has brought a claim, obtained a judgment or agreed a settlement.
- The decision, however, gives members of the supply chain, including contractors and consultants, and their insurers more issues to consider and likely more claims to defend. ■

1. [2025] UKSC 21, https://caselaw.nationalarchives.gov.uk/uksc/2025/21
2. Paragraphs 27-77.
3. *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1
4. Paragraphs 27-125.
5. Paragraphs 126-161
6. Paragraphs 162-304.

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