

## Construction & Engineering London Legal Update

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## In this issue

Welcome to issue 64.

Time to think about holidays again? How about Africa this year? Kwadwo Sarkodie and his colleagues have been looking at the legal regimes in Tanzania, Ghana, Nigeria and Angola and the bid by Mauritius to be an African seat of arbitration for the 21st century. An arbitration and a holiday on the same trip perhaps? And don't forget to ask Kwadwo for a copy of the updated Quick Reference Guide to International Arbitration in Sub-Saharan Africa.

On another continent there's an insight into the legal system in Kazakhstan and a report by Raid Abu-Manneh and Chetna Gulati-Kapoor on the Indian Supreme Court ruling that foreign arbitration and awards are a protected species. Closer to home there are some important reminders from the cases, including why an insurance proposal form needs to be checked very carefully and how to keep a bond alive, and an update on the contracts and regulations front, not forgetting, of course, PF2.

We hope you enjoy the contents.



## 2012 – a year of sport, Mauritius and arbitration

So another year sprints over the finishing line and we wonder, as usual, just where it went. Much of it, perhaps, in following sport, but if we rewind 2012 what do we see round the world on the construction law front? No holy grail, yet, of a magic construction contract that always delivers a dispute-free construction project on time and on budget, to the required quality, with profits for all the project team. And no dramatic discovery, either, of an antidote to disputes, but we have visited a number of legal systems over the year, so if we put them side by side, is there a 2012 message for international construction?

All have their different hurdles for foreign contractors or consultants to clear, from the Angola Private Investment Law to the Tanzania Public Procurement Act. But perhaps one common thread does emerge, the promotion of effective arbitration.

Making a legally binding contract is not just to clarify who does what, how and when but to sign up for the insurance and reassurance of a Plan B, so that if one party fails to perform, a tribunal will be able to order compensation or some other remedy. For contracts on home turf the tribunal may be the local courts, but for international projects the obvious choice is arbitration, so as to avoid any risk of delay, or lack of expertise or impartiality in local courts. And arbitration needs to be effective as well; awards must be easily enforceable. Effective arbitration arrangements, Plan B, thus become a significant element of the commercial deal. And if arbitration is a potential problem, it may even deter potential tenderers from bidding for the project.

Our common thread springs from a concern to be able to offer effective arbitration as Plan B. Take, for example, Saudi Arabia. Not only does it have, since July, a new Arbitration Law but it has been recently reported that it is also considering bringing its high value dispute resolution to London. A London-based arbitration centre, and contracts applying English law are said to be in the plan, which is intended to reassure foreign investors.

Nigeria has the new Lagos Court of Arbitration, not to mention its 2009 Arbitration Law, Ghana has its 2010 Alternative Dispute Resolution Act that comprehensively revised its domestic and international arbitration law and in May Rwanda launched the Kigali International Arbitration Centre. 2012 also saw the dramatic ruling by the Indian Supreme Court in the Bharat Aluminium case, that the Indian courts do not have power to interfere in foreign arbitrations or awards (though only under arbitration agreements made after the ruling).

And now there's Mauritius, keen to be seen and used as an "*An African Seat (of arbitration) for the 21<sup>st</sup> Century*" in view of the ever-growing flow of trade and investment into Africa, particularly from India and China, whose investment in Africa in 2011 is said to have been more than \$10 billion. Capitalising on its strategic location between, and strong historic and trade ties with, Africa and Asia, Mauritius has worked hard to develop a world-class platform for international arbitration.

The groundwork laid by a new Mauritian International Arbitration Act in 2008 has been built on by a host-country agreement with the Permanent Court of Arbitration in The Hague and the creation of a centre for international arbitration in association with the London Court of International Arbitration. This was formally inaugurated with a conference in early December 2012, hosted in Mauritius and attended by leading practitioners in international commercial and investment arbitration from across the globe.

All of which seems to confirm that arbitration that works is the must-have option for the thriving or up-and-coming economy. Wherever you contract, make sure you have an effective Plan B. In future it may not be just the Factor 30 you need for Mauritius.

**Raid Abu-Manneh**

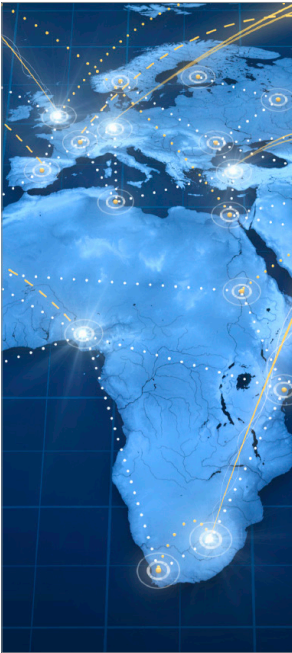
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This article first appeared in a slightly different form in Building.



## Focus on Africa

### TANZANIA – BIRTH OF A GAS GIANT?

Tanzania has lots of energy. While a stable government, substantial mineral resources, tourism and agriculture have all played a part in making Tanzania one of Africa's fastest-growing economies, with current annual GDP growth in the region of 7%, it is the energy sector that is expected to grab the headlines.

Newly discovered natural gas reserves off the southern coast of Tanzania (with further reserves in the west) are set to make the country a major natural gas producer. With exploration still in its early stages, confirmed gas reserves already stand at upwards of 20 trillion ft<sup>3</sup>. Plans are afoot to develop facilities for the liquefaction and export of liquefied natural gas, and financing has been agreed for a 532km gas pipeline. Natural gas is therefore acting as a stimulus to Tanzania's construction and engineering industry even before the revenues from exports, and the expected benefits of improved power supplies, start to make themselves felt.

None of this has been lost on international investors, with many major international energy and engineering companies already active in Tanzania. What, therefore, are the key considerations for those looking to do business in East Africa's most populous country?

### Investment legislation

The United Republic of Tanzania includes both the Tanzanian mainland and the semi-autonomous Zanzibar archipelago. Investment on the mainland is governed by the Tanzanian Investment Act No. 26 of 1997. For foreign investors making a capital investment of US\$300,000 or more, the Tanzania Investment Centre can assist with obtaining the permits, authorisations and documentation required to set up and operate in Tanzania.

Investment in Zanzibar is governed by the Investment Promotion Act of 1986, with the Zanzibar Investment Promotion Agency undertaking a similar role to the Tanzania Investment Centre.

### Permits, licences and tax

To conduct business in Tanzania, a foreign company must first register with the Business Registration and Licensing Agency. The Contractor's Registration Act 1997 sets out further requirements as to the registration (with the Contractor's Registration Board) of contractors and construction projects. The registration process can be bureaucratic and potentially lengthy.

All companies must register with the Commissioner of Domestic Revenue and receive a taxpayer identification number, to be used in all tax and business activities. The tax regime features incentives aimed at promoting national economic development, such as relief from VAT and import duties in respect of plant and machinery for certain infrastructure and utilities projects.

### Doing business

Business in Tanzania tends to be built around strong personal relationships and trust, making one-to-one meetings between senior decision-makers a key priority.

As with many emerging markets, corruption can be an issue, as highlighted in May 2012 when corruption allegations triggered a reshuffle in which a number of senior government ministers lost their jobs. Tanzania ranked 100<sup>th</sup> out of 182 in the 2011 Corruption Perceptions Index by Transparency International.

All public procurement is by tender, governed by the Public Procurement Act 2004 and the 2005 Procurement Regulations. Those contracting with government departments and state-owned enterprises must pay careful attention to the terms and conditions for tendering because even minor non-compliance may invalidate the tender.

A new procurement act, the Public Procurement Act 2011, has been approved by parliament and is expected to come into force shortly. Building on the provisions of the 2004 Act, the new Act includes measures to enhance transparency further and is expected to provide, for the first time, for e-procurement, with the aim of simplifying and speeding up the tendering process.

### Contract enforcement

Tanzania's legal system has at times been viewed as slow-moving and difficult to predict. However, recent strategies, spearheaded by the judiciary, have seen the Commercial Court streamlined, yielding a substantial reduction in the average time taken for business disputes to be heard.

Arbitration in Tanzania is governed by the Arbitration Act (Chapter 15), which was introduced in 1971 and so pre-dates the UNCITRAL Model Law. The National Construction Council publishes a set of arbitration rules (last revised in 2001) which are commonly used in relation to domestic construction contracts. Tanzania has been party to the New York Convention since 1965 and acceded to the ICSID Convention in 1992.

### Opportunities

Tanzania therefore holds many promising opportunities for investors in the construction and engineering sector with an appreciation of what is involved in doing business there. If, as expected, natural gas fires the Tanzanian economy to even greater rates of growth, the opportunities will only increase in the coming years.

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This article first appeared in *Building*.

## GHANA – A VERY MODERN LEGAL OUTLOOK

The force is with Ghana. The positive trends seen in much of Africa over the past decade have been particularly evident in Ghana. Ghana has experienced a long period of political stability, with six successive free and fully-contested elections over the past 20 years, resulting on two occasions in a peaceful change of government.

This stability has encouraged international agencies and investors to make substantial investments in the Ghanaian economy, boosted by oil revenues now that the substantial “*Jubilee*” oilfield off Ghana’s coast has come on-stream. These investments, coupled with contributions from the important agriculture and mining sectors, and an increasingly vibrant consumer and services sector, resulted in the highest GDP growth rate in the world for 2011 – 12 to 13%. Growth rates consistently in excess of 7% are predicted over the coming years despite the effects of the global recession, and the development of housing and infrastructure are urgent government priorities. Together with the development of the nascent oil and gas industry, the construction sector is expected to continue to generate extensive opportunities for overseas contractors, consultants and suppliers.

For those in the construction industry doing business in Ghana, a good understanding of the local legal regime is crucial. So what are some of its key features?

### Procurement

Procurement by Ghanaian government agencies is governed by the Public Procurement Act 2003, although there are exceptions for the petroleum and mining sectors. “*Local content*” legislation, which stipulates minimum levels of local participation in all projects in the oil and gas industry, is expected shortly; the legal requirements, influenced by the framework applied in Trinidad and Tobago, are currently making their way through Ghana’s legislature.

### Corruption and ease of doing business

Ghana has signed and ratified the UN Convention Against Corruption. It currently ranks 63<sup>rd</sup> out of 183 for “*ease of doing business*” (IFC “*Doing Business*” Report 2012) and scores 3.9 out of 10 with regard to corruption (Transparency International Corruption Perceptions Index 2011). This shows that, while there is still more to do in these areas, Ghana compares very favourably with neighbouring countries and with the major emerging economies. On both counts, Ghana scores significantly better than Brazil, China, India and Russia.

### The courts

Ghana has a common law legal system based on the English model, with which it retains many close parallels. English legal authorities can be cited with persuasive weight in the Ghanaian courts, except where they conflict with the Ghanaian constitution, legislation or case law. The court hierarchy in Ghana consists of the High Court of Justice, the Court of Appeal and the Supreme Court of Ghana. Commercial disputes are dealt with by the Commercial Division of the High Court. This specialist court, which applies rules and procedures aimed at encouraging the swift resolution of disputes, was set up in January 2005 to deal more effectively with commercial disputes.

### Arbitration and ADR

The Ghanaian government has been active in its encouragement of alternatives to the courts for dispute resolution, with the aim of easing the burden imposed on the courts by a frequently excessive case-load. This is reflected in the passing of the Alternative Dispute Resolution Act 2010, which came into force in May 2010 and comprehensively revised the law governing domestic and international arbitration in Ghana. Ghana consequently has a modern legal framework governing arbitration which reflects current international standards and practices. The Act also includes provisions governing and encouraging mediation, and both the courts and arbitrators can recommend or refer disputes for settlement by mediation.

Ghana has signed up to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Alternative Dispute Resolution Act expressly provides for the High Court to enforce foreign awards made under the Convention that are not subject to an appeal. Enforcement can only be refused in a narrow set of circumstances.

Bilateral investment treaties are in force between Ghana and seven other states, including the United Kingdom. The treaty with the UK provides for reference of investment disputes between an investor and the Ghanaian government to determination by the International Centre for the Settlement of Investment Disputes.

While it remains to be seen if the land once known as the Gold Coast is on the threshold of a golden era, a fast-growing economy, political stability and a modern legal outlook offer an attractive combination for those looking to do business in Ghana.

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This article first appeared in *Building*.



## NIGERIA – TOO BIG TO IGNORE?

With a population of 160 million, an expanding middle class, an active and increasingly sophisticated banking sector and consistent GDP growth of more than 6%, the Nigerian economy is expected to replace South Africa as Africa's largest economy by the end of the decade. Nigeria's construction industry is reported to be growing faster than that of India and has been identified as a "*global hotspot from now until 2020*". Although the Nigerian market may attract positive and negative publicity in equal measure, its size and business potential are undeniable. Just how business-friendly is it?

### Doing business

Nigeria is the largest African recipient of foreign direct investment, encouraged by an investor-friendly legislative framework. A 100% foreign-owned company may carry on business in Nigeria on the same basis as a Nigerian-owned company, and the repatriation of dividends and capital is unrestricted. However, there are still hurdles to be cleared by foreign investors.

A foreign investor generally has to invest through a limited liability company incorporated in accordance with the Companies and Allied Matters Act 2004 (although the Act does have some exemptions, which include engineering consultants or technical experts working on specialist projects under contracts with state/federal government). After incorporation, the local company must be registered and a "*Certificate of Registration of Company with Foreign Participation*" obtained. A business permit is also required.

Nigeria's Minister of Trade and Investment recognised the need for more encouragement of foreign investment in an address – "*Reforming Nigeria's Investment Climate*". This announced a reform programme directed at easing the regulatory burden and improving competitiveness. Target areas include business registration, construction permits and the enforcement of contracts.

Bribery and corruption are significant issues in the Nigerian market, with Nigeria currently ranked 143<sup>rd</sup> out of 183 in the Transparency International Corruption Perceptions Index 2011. This has been identified by the government as a priority, and significant steps to address corruption are under way. US Secretary of State Hillary Clinton recently said that Nigeria's future is "*limitless*" if the country's anti-corruption reform efforts continue.

### Procurement

Public contract awards are governed by the Public Procurement Act 2007 and associated rules, administered by the Bureau of Public Procurement. The Oil and Gas Industry Content Development Act 2010, which applies to all operations in the Nigerian oil and gas industry, including exploration and production/service companies, seeks to increase indigenous participation in the industry, setting minimum thresholds for use of local goods and services.

## Law

Nigeria is a federation, with a federal court system in addition to the separate courts of each of Nigeria's 36 states. For commercial disputes, the Lagos State judicial system is the most important.

The Nigerian legal system follows the common law model. Many fundamental contract law principles are borrowed from English law and, in the absence of relevant Nigerian authorities, Commonwealth decisions have persuasive weight.

The Nigerian authorities are keen to promote ADR, particularly for commercial contracts. At federal level, the 1988 Arbitration and Conciliation Act is based on the UNCITRAL Model law. In Lagos State, the May 2009 Arbitration Law provides a modern arbitration framework and applies to all arbitrations with Lagos as the seat (unless expressly agreed otherwise). There are plans to harmonise the ACA with the Lagos Arbitration Law.

The Lagos Court of Arbitration, which is expected to begin functioning soon, aims to promote further the resolution of disputes in Lagos State by arbitration and other ADR mechanisms. It will provide administered arbitration proceedings, have the power to establish an arbitral tribunal and maintain a panel of arbitrators, mediators and other experts.

Nigeria ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1970, and the Nigerian courts have a long-established record of enforcement of awards under the Convention. Bilateral investment treaties are in force between Nigeria and ten other countries, and the treaty with the UK (in standard format) provides for the determination of investment disputes between investors and the Nigerian government by arbitration under the auspices of the International Centre for the Settlement of Investment Disputes.

## The verdict

Despite some negative publicity, Nigeria's construction and infrastructure sector is proving lucrative for an increasingly diverse range of foreign investors, and is simply too big to ignore. Could it be that those who most actively circulate the scare stories about Nigeria are actually happily operating there, but would like to keep this booming market to themselves?

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This article first appeared in *Building*.

## INVESTING IN ANGOLA – BETWEEN EXTREMES

Angola is a land of extremes. While many Angolans live in deepest poverty, the Angolan economy is the third largest in Sub-Saharan Africa, with annual GDP growth regularly topping 10% over recent years. In a country which spent nearly 30 years in a state of civil war, peace has now firmly taken hold. While Angola ranks 172<sup>nd</sup> out of 183 for ease of doing business (IFC “Doing Business” Report 2012), record foreign investment is flowing into the country.

At the heart of the story is Angola’s wealth of natural resources. Angola is the second largest oil producer in Sub-Saharan Africa, and holds substantial and varied mineral reserves, including diamonds, iron ore, phosphates and gold. Its agricultural and fishing potential are also considerable. Public and private investment are at record levels and show no sign of abating. Considerable investment is being directed towards infrastructure development, which, with housing, is an urgent priority following the devastation of the civil war.

Foreign construction companies wishing to do business in Angola must meet a series of legal and economic requirements. Angola’s position in the “ease of doing business” rankings warns us that clearing these hurdles is not straightforward and can be time-consuming and bureaucratic. However the significant business opportunities may well justify the time and effort involved.

### Private investment framework

Under the new 2011 Private Investment Law, foreign investors wishing to establish a company or branch office in Angola must have their venture approved as a “Private Investment Project” by the Angolan Private Investment Agency (*Agencia Nacional de Investimento Privado* (ANIP)). To qualify under the Private Investment Law, ventures must comply with the following legal and financial requirements:

- Foreign investment projects require a minimum investment of US\$1 million (in goods and/or cash).
- The company or branch registered in Angola must agree an investment contract with ANIP. This confers a right to repatriate profits (subject to the control of the Angolan central bank – the BNA).
- However an investor cannot simply repatriate profits as it wishes. Repatriation is instead governed by conditions negotiated with ANIP on a case-by-case basis and incorporated into the investment contract.
- The extent of repatriation permitted (and its timing) depends on a number of factors, including the amount and duration of the investment, the profits made and the impact of repatriation on national reserves. For example, a foreign entity investing US\$1 million in a project in the Luanda area would currently only be allowed to repatriate profits two years after full implementation of the project.

Once the investment is approved, ANIP issues a Private Investment Registry Certificate (*Certificado de Registo de Investimento Privado* (CRIP)), which is required before the investor can take further steps such as importing capital, establishing a local company/branch office or pursuing the necessary permits and licences.

### Permits and licences

Construction work in Angola is governed by the Ministry of Urbanism and Construction. If a company wishes to become directly involved in construction works, a General Construction Permit from the ministry is a vital pre-requisite. There are a number of categories, subcategories and classes of the General Construction Permit (as per Decree No. 09/1991). The particular (sub)category determines the type of construction activities the holder may engage in, and the particular class relates to the value of the construction works; the higher the class of permit, the greater the value of the construction works permitted.

The performance of private construction work in Angola also requires a licence (an authorisation for construction, known as an “*Alvará*”) issued by the governor of the province where the works are to be undertaken. An application must be made to the relevant provincial government in accordance with Decree No. 80/2006.

### And the reward?

Although the regulatory requirements governing investing and doing business in Angola are numerous and complex, and compliance in most cases is likely to be laborious, they do not appear to be deterring UK investment in Angola, which currently exceeds US\$3 billion per annum, second only to China. If and when the bilateral investment treaty between the UK and Angola (already agreed and signed) is brought into force, this is likely to provide further security to UK investors. In any event, with careful consideration and advice, and a measure of patience and persistence, meeting the regulatory requirements is certainly achievable. The reward is gaining access to one of the fastest-growing markets in Africa.

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This article first appeared in *Building*.

## INTERNATIONAL ARBITRATION IN SUB-SAHARAN AFRICA – THE QUICK REFERENCE GUIDE

Our International Arbitration group has updated the Quick Reference Guide to Key Facts on International Arbitration in Sub-Saharan Africa, which covers the following countries:

Angola	Benin	Botswana
Burkina Faso	Burundi	Cameroon
Cape Verde	Central African Republic	Chad
The Comoros	Democratic Republic of the Congo	Republic of the Congo
Côte d'Ivoire	Djibouti	Equatorial Guinea
Eritrea	Ethiopia	Gabon
The Gambia	Ghana	Guinea
Guinea-Bissau	Kenya	Lesotho
Liberia	Madagascar	Malawi
Mali	Mauritania	Mauritius
Mozambique	Namibia	Niger
Nigeria	Rwanda	São Tomé and Príncipe
Senegal	The Seychelles	Sierra Leone
Somalia	South Africa	South Sudan
Sudan	Swaziland	United Republic of Tanzania
Togo	Uganda	Zambia
Zimbabwe		

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## Extras

### CONTRACTS AND PROCUREMENT

#### JCT Tendering Practice Note 2012

The JCT's 2012 tendering guidance covers selective tendering, including single-stage, two-stage and competitive dialogue procedures, as well as pre-qualification. The guidance reflects current best practice and deals with the use of quality criteria in the tender assessment, the increased use of electronic tendering and the impact of EU public procurement rules. It also includes model forms, for the pre-selection and tender stages, for use in both public and private sectors, with any JCT main contract and, with adaptation, for sub-contract and framework tendering and with other construction contracts.

See: <http://www.jctltd.co.uk/product/tendering-practice-note>

#### RIBA books new appointments

Following an extensive industry-wide review led by the RIBA, 2012 revisions of the 2010 RIBA Agreements are now available and supersede the 2010 issue.

See: <http://www.ribabookshops.com/riba-agreements-2010-2012-revision-print/>

#### NEC3 public sector Z clauses

NEC3 have four Z clauses on offer for UK government clients when using the NEC3 forms of contract, dealing with official secrets and confidentiality (Z1), security (Z2), project bank account (Z3) and fair payment (Z5).

Z3, the project bank account clause, is due to be re-launched as Y(UK)1. Z4, dealing with management information, is not yet available.

See: [http://www.neccontract.com/news/article.asp?NEWS\\_ID=825](http://www.neccontract.com/news/article.asp?NEWS_ID=825)

#### The future is PF2

In December 2012 the Chancellor announced the long expected arrival of PF2, PFI's successor. Key features of the government's new approach to public private partnerships include an eighteen month time limit for the competitive tendering phase, a public sector minority shareholding in projects, greater transparency, removal from projects of 'soft' services such as cleaning and catering and the launch of a comprehensive suite of new standard documentation. New draft mandatory PF2 guidance "Standardisation of PF2 Contracts" was issued in December and drafts of a new standard form services output template, pro forma payment mechanism and shareholder arrangements are to be published for consultation and will then be incorporated into the PF2 guidance.

See: [http://cdn.hm-treasury.gov.uk/infrastructure\\_new\\_approach\\_to\\_public\\_private\\_partnerships\\_051212.pdf](http://cdn.hm-treasury.gov.uk/infrastructure_new_approach_to_public_private_partnerships_051212.pdf)

and

[http://cdn.hm-treasury.gov.uk/infrastructure\\_standardisation\\_of\\_contracts\\_051212.pdf](http://cdn.hm-treasury.gov.uk/infrastructure_standardisation_of_contracts_051212.pdf).

## REGULATIONS AND STANDARDS

### New panel to beat building regulations and housing standards into shape

A new Independent Challenge Panel is to simplify the building regulations and housing standards, to make them easier to understand and follow. Housing standards included in the review are the Code for Sustainable Homes, Secured by Design, Lifetime Homes, Standards and Quality in Development and the Homes and Communities Agency's Housing Quality Indicators.

The review is part of the government's housing and growth strategy announced in September 2012 and coincides with the planning practice guidance review with which it is working closely. An action plan for consultation is to be produced by the spring.

See: <http://www.communities.gov.uk/news/housing/2247207>

### Government regulation two-for-one bonfire pledge

The government's 'One-in, One-out' initiative, which required the costs of every new regulation to be matched by equivalent savings, has been replaced by a 'One-in, Two-out' initiative.

The government announced that, from January 2013, every new regulation that imposes a new financial burden on firms must be offset by reductions in red tape that will save double those costs. The new initiative applies to every Whitehall department and to all domestic regulation affecting businesses and voluntary organisations.

<http://news.bis.gov.uk/>

[Press-Releases/-One-in-two-out-Government-to-go-further-and-faster-to-reduce-burdens-on-business-and-help-Britain-compete-in-the-global-race-6838c.aspx](http://news.bis.gov.uk/Press-Releases/-One-in-two-out-Government-to-go-further-and-faster-to-reduce-burdens-on-business-and-help-Britain-compete-in-the-global-race-6838c.aspx)

### New year launch for revamped Considerate Constructors Scheme

The Considerate Constructors Scheme has changed. From 1 January 2013, all registered sites and companies are being assessed on the new five-point Code of Considerate Practice, that takes the place of the 15 year old eight-point version.

Enhancing the appearance, respecting the community, protecting the environment, securing everyone's safety and caring for the workforce are the five sections of the revamped Code and each is accompanied by an aspirational statement, followed by four bullet points that list the areas the Scheme will consider within that section.

See: <http://www.ccscheme.org.uk/index.php/2013-code-and-checklist-changes>

### Government abandons plan for green 'conservatory tax'

Under proposed changes to Part L of the Building Regulations, homeowners wanting to carry out certain home improvement works (such as building an extension, converting a loft or garage, replacing a boiler or a number of windows) would have had to carry out 'consequential improvements' to the energy efficiency of the property.

Following a consultation, the government has decided not to go ahead now with the proposal, in particular because of the danger that the changes would discourage people from undertaking home improvements.

See: <https://www.gov.uk/government/speeches/minor-consequential-improvements>

### Building Regs upgrades

On 6 April 2013 changes to the Building Regulations come into force in England:

- new Approved Documents Parts K (Protection from falling, collision and impact) and P (Electrical safety - Dwellings);
- updated requirements for Approved Documents M (Access to and use of buildings) and B (Fire safety - Volumes 1 and 2); and
- withdrawal of Approved Document N (Glazing).

Approved Document 7 (Materials and workmanship) is due to come into effect on 1 July 2013. See: <http://www.thenbs.com/BuildingRegs/Default.aspx>





## Indian Supreme Court puts out the welcome mat

Probably at the end of the to-do list, in negotiations for an international construction project, is the important, but unexciting, “what if?” question. What if high level discussions or mediation don’t resolve a dispute? Where do we go next? Arbitration is an obvious answer for parties from different countries, avoiding any concerns about the speed, expertise or independence of local courts. And assuming the relevant countries have signed up to the New York Convention, enforcement of an arbitration award should, in principle, be fairly straightforward. Unless, of course, the legal system involved is not content to enforce an award without first carrying out a post-mortem. Which is what has been happening in India until a very recent and dramatic U-turn by India’s Supreme Court.

Despite the global recession and general commercial pessimism, India is still an attractive investment destination. According to a recent survey by the UN Conference on Trade and Development India is, after China, the second most important Foreign Direct Investment destination for 2010-2012 for transnational corporations and construction is one of the sectors attracting the highest inflows of that investment, with the UK among the leading investors. According to Ernst and Young, foreign direct investment in India increased in 2011 by 13% to \$50.8 billion. India is keen on greater foreign participation in its infrastructure but, until the Supreme Court’s decision in *Bharat Aluminium v Kaiser Aluminium Technical Services*, potential investors might have been forgiven for thinking twice about committing their money.

### The problem

The problem was that the Indian courts had been interfering in foreign arbitration awards, a failing compounded by the notorious delays in the court system. Part I of the 1996 Indian Arbitration Act was supposed to deal only with domestic arbitrations (as distinct from Part II of the Act which dealt with foreign arbitrations) but the courts applied it to foreign arbitrations. This meant that the Indian courts could pass interim orders for protection, i.e. effectively suspend enforcement of arbitration proceedings that were not subject to Indian law. It also allowed them to set aside foreign awards on various grounds, notably if the award was contrary to “*public policy*”, an elusive benchmark that was the basis for setting aside some perfectly valid foreign awards.

### And then there was the Bharat case...

But the judicial interference did not go unchallenged. A number of petitions challenged the Supreme Court’s previous decisions on the nature and extent of judicial interference by Indian courts in international arbitrations and, in January 2012, the Court put all the petitions, including a dispute on a contract for the supply of equipment and development of a Indian coal mine and disputes under two shipbuilding contracts, before a constitutional bench of the Court.

The Court not only produced its decision remarkably quickly but it also, and more significantly, dramatically overruled its own previous decisions in two key cases, *Bhatia International v Bulk Trading & Anr.* and *Global Engineering v Satyam Computer Services Ltd.*

It ruled that Part I of the 1996 Act did not apply to foreign arbitrations and that domestic Indian courts had no power to make interim orders under the Act in a foreign arbitration, nor to set aside an award made in a foreign arbitration. The law of the seat of the arbitration, i.e. where the arbitration was based, should, it said, govern the conduct of the arbitration.

And to rule out any possible interference by other routes, the Court also went on to rule out any power for the Indian courts to make interim orders in foreign arbitrations under other legislation, including the Specific Relief Act and the Civil Procedure Code.

The only disappointment in this very welcome ruling is that it only applies prospectively, so that this new non-intervention policy only applies to arbitration agreements entered into after the date of the decision. It should, however, go a long way to boosting the confidence of those who might otherwise be deterred by the Indian legal system. Now that the Supreme Court has put out the welcome mat, the opportunities presented by India look a rather more attractive proposition.

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This article first appeared in *Building*.



## What's been happening @ Mayer Brown?

- In June the Mayer Brown mining team won the Infrastructure/ Energy Team of the Year at the Lawyer Awards 2012 for its pioneering work to develop a legal framework to encourage international investment in the mining industry in Afghanistan. The team, led by London partner Ian Coles who heads the firm's global Mining practice, is sponsored by the US Department of Defense's Task Force for Business and Stability Operations. In order for Afghanistan to realise the full potential from its mineral resources, the team is assisting in the development of a legislative and regulatory framework. The team is also designing and implementing a transparent tender process that relies upon internationally-recognised business practices on behalf of Afghanistan's Ministry of Mines.

Ian and his team have worked on mining projects in almost every single country where significant mining activity takes place across the globe, including the first producing mine in Eritrea, the Voshkod Chrome project in Kazakhstan, and the Kupol gold and silver mines in Russia. The team working on the project in Afghanistan included Chris Fellowes, Jonathan Olson-Welsh, Tamsin Travers, Sean Hummerstone, Peter Parten and Camilla West from the Construction & Engineering Group.

- Also in June, Jonathan Hosie chaired the Construction Law & Strategies 2012 conference in London.
- Raid Abu-Manneh and Kwadwo Sarkodie were the presenters in a seminar, followed by a webinar, in July on international arbitration in the Middle East and Sub-Saharan Africa.
- In November Raid was interviewed on Radio 4 and the BBC World Service about the reported possible move by Saudi Arabia to bring its high value dispute resolution to London.
- And in December Raid, Chris and Jonathan Hosie were all speakers at the FIDIC International Contract Users' Conference in London, on a panel considering key commercial project risks under the FIDIC Yellow and Silver Books plus the Multilateral Development Bank version of the FIDIC Red Book.
- Kwadwo also co-chaired the "*Arbitration – Getting the Basics Right*" session at the Symposium on International Commercial Arbitration and ADR in Lagos, Nigeria in February, hosted by the London Court of International Arbitration African Users' Council.
- Congratulations to Jonathan Olson-Welsh on promotion to partner in the Construction & Engineering Group.

Jonathan's work focuses on procurement and tendering advice and the drafting of national and international construction and engineering contracts. He has particular experience in the mining sector and has advised on large international projects including: the development of the mining industry in Afghanistan (see above); the expansion of the Panama Canal; petrochemical plants in Saudi Arabia and Qatar; mining projects in Kenya, Turkey and New Mexico; and power projects in Kuwait. He provides advice on the application of procurement rules to projects and has advised on a wide variety of procurement issues. Jonathan is a founder member of the Mayer Brown public procurement group.

- Congratulations also to Amber Chew, Ryan Fordham, Wisam Sirhan and Tamsin Travers on their promotion to Senior Associate.
- Welcome to Sean Hummerstone, Alison Barker, Bob Ashcroft, Sebastian Cunningham and Peter Parten, who have joined the Construction & Engineering Group as Associates, and to Jonathan Stone, who joined us in September as a Senior Associate.



## Kazakhstan – the regulations, the permits and the laws

The ninth largest country in the world, Kazakhstan stretches from Eastern Europe to Asia across an area the size of Western Europe. It is rich in natural resources, with huge economic potential. A series of economic reforms and privatisations have encouraged growth. The IMF's World Economic Outlook report forecasted GDP growth of 5.9% and 6% for 2012 and 2013 respectively, and negotiations on Kazakhstan's accession to the World Trade Organisation should be completed by the end of 2012. Unsurprisingly, Kazakhstan is attracting interest from international investors. So what are key issues for those wishing to do business there?

### Business culture

Essential for anyone wishing to do business in Kazakhstan is an understanding and recognition of the distinctive Kazakh business culture. It is strictly hierarchical, normally with just one key decision-maker, the most senior person in the company. Personal relationships are key, and whilst those in more subordinate positions can represent the business during meetings, they normally do not have the authority to make decisions unless stated in writing. The same will be assumed of company representatives negotiating with Kazakh entities – don't send someone junior to meet the CEO.

### Construction

Construction activities are heavily regulated in Kazakhstan and require a number of permits and approvals. The main legislation regulating construction is the 2001 Law on Construction. Most stages of construction are subject to approval, in particular by the Agency for Construction, Housing and Utilities.

Like many business and professional activities in Kazakhstan, most construction activities are subject to mandatory licensing. A 2007 law (Decree No. 555) lists the construction activities affected. Licences are obtained from the regional local executive bodies, which have a great deal of discretion in applying the regulations.

### Employment, local content and the environment

The Labour Code adopted in 2007 regulates the employment of both residents and non-residents in Kazakhstan. Employee rights established by the code generally cannot be reduced or restricted by the provisions of an employment contract.

Local content is a crucial consideration for any organisation wishing to do business in Kazakhstan. A local content regulation requires contractors and suppliers to purchase goods and services from local Kazakh entities, give employment preference to local labour and meet annual local content benchmarks.

The 2004 Law on Conservation, Reproduction and Use of Wildlife regulates environmental matters and the Ministry of Environmental Protection deals with the licences and permits required by contractors and suppliers.

### Tax and administration

Although corporate and individual income tax rates in Kazakhstan are low by international standards, the tax laws have changed frequently in recent years. Tax planning must therefore be both careful and robust, addressing the needs of business restructuring and the need to cope with changes in the tax law. Kazakhstan is very bureaucratic and keeping all documentation in good order is of paramount importance.

### Corruption

Kazakhstan is a signatory to the United Nations Convention against Corruption and its anti-corruption laws are relatively strong. The Criminal Code criminalises active and passive bribery, attempted corruption, extortion, money laundering, abuse of office, as well as bribe facilitation by third parties.

### Investment and dispute resolution

Kazakhstan's Law on Investments, adopted in early 2003, provides for the settlement of investment disputes through litigation and international arbitration, although in practice arbitration is rarely used. It should be noted that the law defines "*investment disputes*" narrowly, excluding disputes between private entities. Whilst the law contains various provisions aimed at protecting the contractual and property rights of investors in Kazakhstan, concerns have been raised that the law does not go far enough. For instance, while the law guarantees "*the stability of the conditions of contracts entered into between the investors and state bodies*", this is made subject to a number of exceptions.

Kazakhstan is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its arbitration law gives precedence to international arbitration agreements. It is also signatory to bilateral investment treaties with over 40 countries, including the UK.

### The verdict

Like other former Soviet Republics, Kazakhstan is still developing a transparent and effective business environment and those in authority recognise the need for further economic reforms to continue to attract foreign investment. It is, however, a promising place to do business and the time and effort spent in developing personal relationships and in understanding, and being sensitive to, local customs could be rewarded with lasting business relationships.

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This article first appeared in *Building*.





## Case notes

### CONTRACT MACHINERY - IS IT BROKEN OR JUST BEING DIFFICULT?

In the changed world of construction contracts, pay when certified clauses are a rarer breed. But, where they survive, what if the certifying machinery up the line doesn't produce the certificate on which payment down the line depends? Does refusal to issue a certificate mean the machinery has broken down so that the subcontractor is entitled to immediate payment?

No, said the court in *R and C Electrical Engineers Ltd v Shaylor Construction Ltd*. There is a difference between circumstances which prevent the contractual machinery being operated, and circumstances in which one party refuses to operate it, although able to do so. Where there is a refusal, the problem can be cured, as it was in the case in question, by a letter certifying completion. Whether or not the main contract machinery has broken down in some way is essentially a question of fact, requiring evidence from the main contract parties.

*R and C Electrical Engineers Ltd v Shaylor Construction Ltd* [2012] EWHC 1254

### BATTLE OF THE FORMS - BUT I LIKE YOURS BETTER

Battles of the forms, where contracting parties each claim that their own standard terms apply, are a familiar feature of contract disputes. Not so common are cases where each party claims that the other party's terms apply. A ductwork supplier went to adjudication to claim monies said to be due from a subcontractor but there was a catch; the Construction Act did not appear to apply to the ductwork supply and only the subcontractor's terms, but not the supplier's, provided for adjudication of disputes. The supplier said that the subcontractor's terms, and therefore the adjudication clause, applied. The subcontractor, unsurprisingly, argued that the supplier's adjudication-free terms applied. So who was right?

The courts' approach to deciding if there is a contract and, if so, its terms, is objective. Neither party had proceeded on the basis that the subcontractor's terms applied, which meant that the adjudication clause in those terms did not apply and, as the subcontractor had clearly challenged the adjudicator's jurisdiction and reserved its right to challenge the legality of any award, there was no valid adjudication or award.

*Specialist Insulation Ltd v. Pro-Duct (Fife) Ltd*: <http://www.scotcourts.gov.uk/opinions/2012CSOH79.html>

### SETTLEMENT AGREEMENTS – COURT DISCOVERS A WIDTH RESTRICTION

A claim arising out of the financing of the commercial exploitation of certain innovative technologies ended in a settlement. The agreement said that it was in full and final settlement of “...all and any claims, actions, liabilities, costs or demands that the Claimants have or may have ....whether past, present or future and whether or not known or contemplated at the date of this Settlement Agreement arising under or in any way connected with (the court proceedings) or with any dealings between the parties concerning loans to or investments in the Defendants (and others) or by any person whosoever...”

A third party who had provided funds for the same project but was not involved in the original proceedings then assigned its rights to the original claimant, who brought similar, fresh, proceedings against the defendant. But did the wide settlement agreement wording doom the new claim? Not according to the Court of Appeal. Settlement agreements are to be construed in the same way as other contracts, which means interpreting the contract wording as it would be understood by reasonable persons aware of the factual background known to both parties. The settlement agreement, in the Court’s largely intuitive view, did not extend to rights acquired in the future from third parties.

*Kazeminy v Siddiqi & Ors* [2012] EWCA Civ 416

### COURT TAKES HANDS-OFF APPROACH TO COMPANY PUPPETEERS

A company is a separate legal entity that can make contracts, just like a human. But sometimes a court can look behind the “*veil of incorporation*”, the corporate facade, and give remedies against those who control the company. A bank lent money to a Russian company that defaulted on the loan. The bank claimed it was induced to enter into the loan agreement by misrepresentations made pursuant to a conspiracy involving three parties who controlled the borrower company. It said the court should pierce the corporate veil to show that the other parties were also liable under the loan agreement. But does “*veil piercing*” extend that far?

No, said the Court of Appeal. In exceptional cases the court may “*pierce the corporate veil*”, identify the company with those who control it and grant additional remedies against the company or its controllers, the “*puppeteers*”. But the principle is limited to providing a practical solution in particular factual circumstances. The cases still treat the puppet company as a legal person separate from the puppeteer and they do not support the proposition that the puppeteer should be regarded as a party to a contract to which they plainly were not.

*VTB Capital Plc v Nutritek International Corp & Ors* [2012] EWCA Civ 808



## REPUDIATION – IT COULD BE A GAME OF PATIENCE

After the credit crunch hit sales of residential units in a four block development, the developers put work on two of the blocks on hold, because of funding difficulties. Work did not resume for eighteen months but the developer had entered into an agreement to construct and let commercial units in the development. Under the agreement it had to procure that the works were carried out with “*due diligence*” and to use reasonable endeavours to procure completion by the target date or as soon as reasonably possible after that. Was the standstill on the two blocks a repudiation of the commercial lettings agreement?

The two contract terms did not say if they were conditions or warranties; they were innominate terms and so the answer depended on the seriousness of the breach. Even though the innocent party has the benefit of part of the contract, if the breach goes “*to the root*” or substantially deprives the innocent party of the benefit of a significant part or stage, it constitutes a repudiatory breach. The contract envisaged a single project of four blocks, with three of them framing a piazza, and the court said it would therefore “*frustrate*” the commercial purpose if, for a substantial period, the innocent party received only two blocks, while the rest of the development remained a building site. A continuing breach that, at the start, is not a repudiation may, after a time, become one and breaches of both obligations had, in time, become sufficiently substantial to be repudiatory.

*Ampurius NU Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch)

## COURT SETS OUT CLAIM BLAME GAME RULES

In a 138 page judgment, in a case with combined legal costs approaching £10 million, Mr Justice Akenhead set out the rules on some key issues in time and money claims under JCT-style eot and loss and expense clauses including:

- **concurrent delays** – where delay is caused by two or more effective causes, one of which is a Relevant Event, the contractor is entitled to a full extension of time. The English approach, rather than the Scottish apportionment approach, wins the day in England;
- **loss and expense information** – how much must a contractor give the architect or QS to enable an ascertainment to be made? The information need not be such as to provide absolute certainty as to the loss claimed, but it should be sufficient for the architect or QS to be satisfied that all or some of the loss has been, or is likely to be, incurred. It is also relevant to take into account what information the architect already has, e.g. from attending project meetings and applications for eots;
- **global claims** - delay or disruption-related loss and expense claims must be proved as a matter of fact; the contractor must demonstrate on a balance of probabilities that events entitling it to loss and expense occurred and caused delay and/or disruption which caused it to incur loss and/or expense but there is no set way for contractors to prove these elements. A global cost claim will not necessarily fail just because one or more elements may be attributable to the contractor’s own default but in many cases there are evidential difficulties in pursuing such a claim;

- **Hudson/Emden formulae etc.**, - to recover head office overheads and profit on a delay loss and expense claim, the contractor must prove on a balance of probabilities that, but for the delay, it would have secured work producing a profit and/or a contribution to head office overheads. Using a formula, such as Emden or Hudson, is legitimate and helpful in ascertaining, on a balance of probabilities, what that return is.

*Walter Lilly & Company Ltd v Mackay & Anor* [2012] EWHC 1773

### PROJECT MANAGERS WHO FAILED TO PUT BUILDING CONTRACT IN PLACE HIT BY DAMAGES

A contract for school accommodation was not executed until long after delayed completion. During the works, while contract negotiations continued, the project managers arranged for their client to issue letters of intent, eight in total, ultimately to cover the full value of the works. The works finished late but the letters of intent gave no entitlement to liquidated damages for delay. At mediation, the client and contractor settled their respective claims and the building contract was then executed, but without any entitlement to delay damages. Had the project managers, who provided contract management services, been negligent in failing to do enough to get the building contract, with liquidated damages machinery, in place?

Yes, said the court. The project managers' conduct in addressing every difficulty by issuing "*just one more*" letter of intent was clearly below the standard reasonably required. If they had not failed in their duty, their client would have taken sufficient steps to procure a contract. There would have been a real and substantial chance of the contractor executing a contract with liquidated damages machinery, which would have been a material benefit to the client in its dispute with the contractor over delayed completion. They would probably then have negotiated a reasonable settlement. The court awarded the client two thirds of the assessed value of the settlement (reflecting the chance of the contractor executing the contract) as damages.

The project managers' appointment capped liability at the lesser of their fees (less than £200,000) or £1million, but the judge said the cap was unreasonable under the Unfair Contract Terms Act, in particular because they had also agreed to take out PI insurance of £10 million. The client had to pay for that cover (within the fees) but it would be largely illusory if the cap was valid.

*Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd* [2012] EWHC 2137

### AFTER THE ADJUDICATOR'S DECISION – WHEN CAN YOU SET-OFF?

For the party on the wrong end of an adjudication award, the idea of setting-off other claims (such as liquidated damages), against the award is rather attractive. But generally, it can't legally be done, because it's contrary to the Housing Grants Act and to the underlying purpose of construction adjudication.

There are, however, a couple of exceptions. The contract may allow set-off against the award, but such cases will be “*relatively rare*” and clear contract wording will usually be needed to do this. The other exception comes out of the adjudicator's decision. If it simply says X must pay Y a specified amount, it is hard to see any room for a withholding notice or set-off. If, however, the decision is in the nature of a declaration as to the proper operation of the contractual payment machinery, and identifies a sum that should be the subject of that machinery then, if a withholding notice can legitimately be served in accordance with the contractual payment provisions, the set-off *may* give rise to an arguable defence.

*Squibb Group Ltd v Vertase FLI Ltd* [2012] EWHC 1958

### NO-DISPUTE FALSE START SEES ADJUDICATION CLAIM ELIMINATED

A party to a Housing Grants Act construction contract can refer a dispute to adjudication “*at any time*”, but before starting an adjudication it is vital to check that there really is a dispute. A main contractor had claims against a flooring subcontractor and late on the Thursday afternoon before the Easter bank holiday weekend, it sent the subcontractor an additional claim for liquidated damages. On the Tuesday immediately after Easter it then issued a notice of adjudication in respect of its claims, but with a significantly different claim for liquidated damages. Had a dispute on this damages claim crystallised, that it could refer to adjudication with its other claims?

Not yet. Whilst a gap of five days after a claim will often, in normal circumstances, be enough to infer a dispute, particularly if the dispute has previous history, the holiday weekend was not. And, in any event, the damages claim in the notice of adjudication was materially different from the claim notified just before Easter but, as the claims had separate arguments and evidence, the damages part of the award could be severed, leaving the valid part of the award to be enforced.

*Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808

### WHEN A PROMISE DEFEATS THE CONTRACT WORDING

Signed written contracts, perhaps with an entire agreement clause, are supposed to be, literally, the last word on the parties' rights and obligations. But what if the written terms are in conflict with what was promised in the contract negotiations? Do the written terms win?

Mr and Mrs Armstrong, who had built up a successful financial services business, were recruited to join another firm as self-employed advisers. They were paid compensation for bringing their client base and for future commissions, in effect the goodwill of their business, and they were assured, in pre-contract discussions, that the only condition attached to the compensation was that they should stay with the new firm for three years. The two agreements they were given to sign, at different times, entitled the new firm, however, to repayment of the compensation if the agreements were terminated by it on notice without cause, which is what happened. But did the written terms override the assurance given to the Armstrongs?

No, said the Court of Appeal. The assurance given to the Armstrongs, the "collateral warranty", could, and in this case did, take precedence over the inconsistent wording of even a signed contract.

*Thinc Group Ltd v Armstrong & Anor* [2012] EWCA Civ 1227

### ARE YOU KEEPING SOMETHING EXCEPTIONALLY DANGEROUS OR MISCHIEVOUS ON YOUR LAND?

In the days when negligence law was being invented, the overflowing of Mr Rylands' reservoir into Mr Fletcher's colliery produced a case that imposed strict liability for escapes of exceptionally dangerous or mischievous things kept or brought on to a landowner's property. The rule in *Rylands v Fletcher* has rarely been successfully deployed, but was the owner of a tyre fitting business liable under the rule when the tyres in his building caught fire and the fire destroyed his neighbour's premises?

The Court of Appeal said that the *Rylands v Fletcher* rule can apply to damage caused by an escape of fire but such cases are likely to be very difficult to bring within the rule (and therefore very rare) because:

- it is the "thing" brought onto the land which must escape, not the fire started or increased by the "thing";
- while fire may be a dangerous thing, the occasions when it is brought onto the land may be limited to cases where the fire is deliberately or negligently started by the occupier or someone for whom they are responsible; and
- in any event, starting a fire on your own land may be an ordinary use of the land.

The tyre fitting business was not liable as it was the tyres that were the "thing" brought onto the land, they were not exceptionally dangerous or mischievous and it was the fire, not the tyres, that had escaped. The moral of the story is to ensure fire insurance is in place.

*Stannard (t/a Wyvern Tyres) v Gore* [2012] EWCA Civ 1248

### ADJUDICATOR: THERE'S NO GETTING PAID FOR AN AWARD THAT DOESN'T WORK

An adjudicator wrongly fails to deal with a main contractor's defence, without hearing what the parties had to say on the point. The award was consequently in breach of the rules of natural justice, but was the adjudicator still entitled to his fees? Mr Justice Akenhead said that he was, as there had been partial performance. Did the Court of Appeal agree?

In the Court of Appeal's view, what the adjudicator had agreed to produce was an enforceable decision. Nothing in his contract with the parties indicated that they would pay for an unenforceable decision or for services which were preparatory to making an unenforceable decision and nothing in the Scheme changed that conclusion. The purpose of the appointment was to produce an enforceable decision which, for the time being, would resolve the dispute. An unenforceable decision was of no value to the parties and the adjudicator was not entitled to be paid for it.

*PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA Civ 1371

### THE ADJUDICATOR WHO CHANGED HIS MIND

Vertase and Squibb fought out two adjudications. In the first, the adjudicator apparently decided that Vertase, the main contractor, could not deduct liquidated damages from whatever he decided was due to Squibb, the subcontractor. In the second, however, he said he was sufficiently persuaded by Vertase's arguments on the legal position to change his mind on his decision in adjudication no 1. But could he do that?

No, said the court. Since his finding in adjudication no 1, whether right or wrong, was final and binding on the parties until finally determined by litigation or arbitration, he could not change it. As the case law confirmed, once a dispute has been determined by adjudication, there cannot be another adjudication about the same dispute.

*Vertase FLI Ltd v Squibb Group Ltd* [2012] EWHC 3194

### JUST HOW HARD IS IT TO EXCLUDE LIABILITY FOR NEGLIGENCE?

Attempting to exclude liability for negligence may not be the best way to start a contractual relationship and it is certainly not the easiest. It is, according to the court, "*inherently improbable*" that a contracting party should want to excuse the other party from liability for negligence. If you want to do so, you need to make your intention "*perfectly clear*".

60 years ago, a Privy Council case, *Canada Steamship Lines Ltd v The King*, set out the approach to be taken in interpreting a clause that attempts to exclude negligence. The Court of Appeal has, however, provided a reminder that it all comes down, in each case, to interpreting the particular wording used against the relevant background. The *Canada Steamship* principles should not, it says, be applied mechanistically; they are no more than guidelines which do not provide an automatic solution. The court's task is always to interpret the particular contract in the context in which it was made.

*Mir Steel UK Ltd v Morris & Ors* [2012] EWCA Civ 1397

### NAMING THE WRONG BUILDER PUTS PAID TO INSURANCE COVER

A housing association contracted with a builder who was to provide some affordable housing. The association also took out decennial insurance which included cover for the builder's insolvency. The builder became insolvent but the insurers said the policy was void because, in particular, the association had mistakenly named the wrong builder in the proposal form.

The cases say that if the insured signs a document, usually the proposal, as the basis of the insurance contract which confirms, to the best of their knowledge or belief (or absolutely) that the contents of the document are true, the insurance contract will be void or unenforceable if the contents are untrue. And if a corporate organisation is making a declaration, it does not have to have been dishonest but, if it actually knows that something that the declaration says is true is wrong, then it is making a statement which is not true to the best of its knowledge or belief.

Since the Association had signed a proposal form which confirmed that, to the best of its knowledge and belief, the information it had given was "*correct and complete in every detail*" but knew that the builder was not the company named in the proposal, its claim under the policy failed.

*Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* [2012] EWHC 3105

### WHEN SILENCE MAY NOT BE GOLDEN

Written contracts should usually set out what each party has promised to do for the other but there may, of course, also be unwritten, implied, terms to be discovered by a legal tribunal. There might even be other associated unwritten obligations in tort, owed to third parties, perhaps the tricky topic of a duty (or not) to warn.

In *Cleightonhills v Bembridge Marine Ltd*, a personal injuries claim involving an inadequately designed gantry platform, Mr Justice Akenhead had to consider when a duty of care to warn might arise in tort. There can be little doubt, he said, that, subject to the circumstances, a failure to warn of potential danger to human beings might give rise to a breach of any duty of care owed to a third party by a party who knows of the danger. Where the parties are in contract, the duty to warn may extend to dangers of which the party in question should have been aware by reason of its involvement as, for instance, a contractually appointed surveyor. In tort alone, however, any duty to warn may not in fact extend to warning the class of people who might be affected by the danger; it may be limited to warning the other party to the contract or the local authority.

*Cleightonhills v Bembridge Marine Ltd & Ors* [2012] EWHC 3449

## BOND SURVIVES COURT OF APPEAL ATTACK

Bonds need to be ready for any call. But what if the employer and contractor have agreed some new deal on time and money, in the hope it will improve progress on site, without seeking the consent of the bond provider, the surety?

In *Aviva Insurance Ltd v Hackney Empire Ltd* the Court of Appeal summarised the principles to be applied to find the answer. If employer and contractor have varied the terms of the original contract without the surety's consent, the surety is released from liability. Advance payments of the contract price may also have that effect. The surety will not, however, be released from liability if they have specifically consented to what has been done or the bond has an 'indulgence' clause which covers what was done. Additional payments will also not release the surety if made outside the terms of the original contract (e.g. as a gift or loan). As the sums in question had been paid to the contractor outside the original construction contract and for extraneous reasons, the surety was not released from liability.

*Aviva Insurance Ltd v Hackney Empire Ltd* [2012] EWCA Civ 1716

## WHAT'S NOT IN THE CONTRACT COULD MAKE A DIFFERENCE

Sometimes, written contracts may not tell the whole story. A housing organisation accepted a contractor's tender for repair and maintenance work but subsequently agreed a set of rates for work not covered by the tender. The contractor carried out thousands of items of work, and was paid at the agreed rates for some 5-6 months, but the housing body then deducted £300,000, claiming that the contract entered into after the rates were agreed, which said it was the parties' "entire agreement", did not permit payment at those rates. But was it bound by the rates it had agreed?

The court considered, in particular, estoppel by convention, the rule that where parties to a transaction proceed on an underlying assumption, of fact or law, neither is allowed to go back on the assumption if that would be unfair and unjust. The court said that it was reasonably arguable that this estoppel might apply, if the relevant facts were proved, and it rejected the housing body's application for summary judgment and to strike out the contractor's claim in respect of the £300,000.

*Mears Ltd v Shoreline Housing Partnership Ltd* [2013] EWHC 27

## ADJUDICATION AWARDS – MISTAKES DON'T COUNT

Adjudication may be a less than perfect way to resolve a dispute but the courts will enforce an award of an adjudicator acting within their jurisdiction, even if it's wrong, as a recent Scottish case reminds us. In *SW Global Resourcing Limited v Morris & Spottiswood Limited* a main contractor challenged an adjudication award in favour of a subcontractor on a number of grounds. One challenge was that the award had internal contradictions and that the adjudicator had acted irrationally.

The court rejected the challenges. For the court to review an adjudication award because it was unreasonable, a mistake must have "the hallmarks of irrationality", i.e., as an English judge had explained, the decision must be so outrageous in defying logic or accepted moral standards that no sensible person applying their mind to the decision could have made it. An adjudicator's decision is only an interim decision.

The court is not concerned whether the adjudicator has made errors of fact or law but only with the question whether the adjudicator has acted unfairly or acted ultra vires, without jurisdiction, and it is hostile to technical arguments to postpone the enforcement of the decision.

*<http://www.scotcourts.gov.uk/opinions/2012CSOH200.html>*

#### FARMER GUBBINS GETS DESIGN DELAY DAMAGES

A farmer appointed a consulting engineer to design a road and site drainage for a housing development, and to obtain local authority approval. The engineer failed to carry out the work by the agreed date and the development was delayed by 15 months. The farmer's claim against the engineer included a claim for a diminution in value of the development, but was the loss too remote?

No, said the Court of Appeal. In contract law, governed by what the parties agreed, if no express term deals with the types of loss for which a party in breach accepts potential liability, the law effectively implies a term to provide the answer. Normally a term is implied, accepting responsibility for the types of losses which, at the time of the contract, are reasonably foreseeable as not unlikely to result from breach. But if, in a particular case, the circumstances make that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability.

In the present case the engineer knew that the property market could go up or down and there was no evidence to displace the standard implied term. The engineer was therefore liable for the diminution in value of the development.

*John Grimes Partnership Ltd v Gubbins [2013] EWCA Civ 37*



## About Mayer Brown

Mayer Brown is a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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