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Construction & Engineering London Legal Update

CONSTRUCTION & ENGINEERING GROUP

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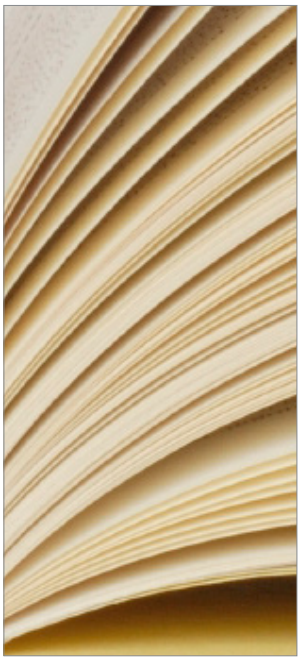

In this issue

Welcome to issue 66.

In which we continue our tour of emerging markets. Nate Galer and Juan Pablo Moreno take us to South America, where they introduce us to Colombia and Mexico and Kwadwo Sarkodie and Fabiana Blasiis report on Brazil. In Asia, Kevin Owen is our guide to Indonesia and, in Africa, Kwadwo Sarkodie reports on Ethiopia and, following his visit to Johannesburg, tells us about South Africa's arbitration law.

Joanna Horsnail and Rachel Smith highlight key issues in bidding or contracting for US governmental projects, while, closer to home, Maurits Kalff, Sander Maarschalkerweerd and Bas van Zelst of Van Doorne in Amsterdam provide the answers to our questions about the modernisation of Dutch arbitration law.

Mark King and Tom Duncan look at recovery of the cost of management time spent in dealing with a breach of contract and there are the usual case notes and news items.

We hope you enjoy the contents.

Viva Mexico?

Much has been made of the potential of the "MINT" countries, Mexico, Indonesia, Nigeria and Turkey, to contribute to the world's economy in upcoming years. Some see Mexico developing into the world's 5th largest economy, ahead of the UK, by 2050. Mexico's energetic new president, Enrique Peña Nieto, has already introduced a variety of reforms to attract international investment, including last December's groundbreaking energy reform, which offers foreign investors new opportunities in one of the largest unexplored natural energy reserves of the world. So what opportunities does Mexico offer for UK construction?

CHALLENGES AND OPPORTUNITIES

With a GDP of US$1.177 trillion, Mexico is the world's 14th largest economy, the second largest in Latin America behind Brazil. It has vast natural resources, a large manufacturing industry, with some of the lowest manufacturing costs among emerging economies, and a consumer base of approximately 120 million inhabitants. Despite this, Mexico still suffers from a variety of challenges, primarily the low infrastructure quality in many industries. In the World Economic Forum's 2013 Global Competitiveness Report, Mexico ranked 65th out of 144 countries in infrastructure quality. It needs infrastructure investment to realize its potential and it is this challenge that, coupled with last year's reforms, creates significant opportunities.

The Mexican government plans to increase spending by 8.8% (compared to 2013 levels). Of this, a large portion will go to infrastructure and construction projects, notably in transportation infrastructure. The government recently allocated to the Transport and Communications Ministry Mx.118 billion (US$9.12 billion) for infrastructure spending, approximately 40% more than in 2013. These funds will allow the agency to initiate public tenders for some of its flagship projects, including the expansion of Mexico City's airport and metro, the construction of the new passenger train routes from Mexico City, the expansion of the Veracruz Port, and construction and maintenance of key federal highways.

The energy infrastructure sector is expected to follow a similar path and the new energy reform is expected to result in the participation of the private sector in the development of new oil and gas pipelines, gas processing and petrochemical facilities and oil refineries and of Mexico's huge deepwater and shale gas reserves. This, in turn, could lead to a new era of energy investment and construction in Mexico.

Elsewhere other planned projects include the construction of five million social homes.

FREE TRADE, ARBITRATION, AND FOREIGN INVESTMENT

Mexico has a solid legal framework for international investors, with rules promoting free trade, a stable arbitral environment and encouragement of foreign investment. Mexico has entered into a variety of foreign trade agreements with more than 40 countries, including the North American Free Trade Agreement (NAFTA) with the U.S. and Canada (1990) and the Free Trade Agreement with the European Union (2000). In addition, Mexico was among the earliest to sign and ratify the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Mexico's 1993 Foreign Investment Law (*Ley de Inversión Extranjera*) governs foreign investment in Mexico and provides for non-discriminatory treatment of foreign investors. It also allows foreign investors to own up to 100% of equity in local companies, acquire fixed assets, engage in new economic activities, manufacture products and open and operate establishments.

LOOKING AHEAD

An ambitious new President, a raft of radical reforms and a need for infrastructure add up to significant and exciting opportunities. Not for nothing is Mexico the "M" in "MINT".

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Indonesia - how about the 'i' in potential?

As the "I" in the "MINT" countries, Indonesia was seen as a rising star. Until, that is, concerns about the emerging markets hit its star billing. But Indonesia is the world's third largest democracy, it has a population of almost 250 million with demographics similar to the BRIC countries. It has an affluent and aspirational middle class said to exceed 35 million, it has been outperforming its neighbours in growth rate, it is rich in natural resources and the FCO says that it is likely to remain one of the world's fastest growing emerging markets. Which adds up to huge potential – and opportunities for UK construction.

Despite the current market concerns, Indonesia needs to invest in infrastructure to exploit its natural resources, to maintain growth and to meet the demands of its youthful (60% under 30) population. Which translates into a lengthy infrastructure shopping list that includes power generation, rail projects, new and modernised ports, roads, public transport to alleviate congestion, new and expanded airports for a country of 17,000 islands and water and sanitation projects. And Indonesia is also keen on renewable energy sources and technology.

To speed up transport projects it has put in place a long-awaited regulation on land acquisition and it sees Public Private Partnerships as a key to financing Indonesia's economic development. Inevitably, however, there are challenges.

DOING BUSINESS

To obtain substantial work, a local office or partner is a necessity but there is a limited number of major Indonesian contractors. There is high inflation in the construction sector, continuing electricity shortages and this election year brought political uncertainty. Another economic concern is the recent mineral export ban that has produced a mining crisis.

And doing business is not easy. The World Bank Group 2013 Ease of Doing Business rankings placed Indonesia overall at 120th out of 189. Bureaucracy is a problem, perhaps reflected in the rankings of 175th for starting a business and 147th for enforcing contracts and, despite the commitment by President Susil Bambang Yudhoyono to deal with corruption, Indonesia ranked 114th out of 175 in the Transparency International 2013 Corruption Perceptions Index.

There is also a new problem with contracts in Indonesia – language. All contracts with an Indonesian national or entity have to be written in Indonesian and, in July 2013, the District Court of West Jakarta ruled (contrary to Ministry of Law and Human Rights advice) that a loan agreement drafted in English was void on the grounds of illegal cause. Until the decision is overturned, determinative Indonesian versions of such contracts now appear to be essential.

DISPUTE RESOLUTION

Indonesia is a civil law jurisdiction, with no system of binding precedent, with Dutch law as the underlying basis, to which have been added a number of new laws since independence in 1945.

International arbitration, with its usual advantages of expertise and speed over local courts, is the obvious choice for dispute resolution. Indonesia has ratified the New York Convention but will only apply it to arbitral awards made in other contracting states in respect of commercial disputes. It has also ratified the ICSID Convention and has entered into bilateral treaties with a number of countries, including the UK.

Indonesia's arbitration law is largely to be found in Law No.30 of 1999. International arbitration awards (unless Indonesia is a party) are enforced by obtaining a writ of execution from the Central Jakarta District Court. In addition to the reciprocity and commercial reservations, the award must not conflict with "*public order*". Many foreign investors in Indonesia insist on specifying Singapore as a neutral seat for arbitration and use of the arbitration rules developed by the Singapore International Arbitration Centre.

THE CHALLENGE

Indonesia is therefore potentially a very big market. There are risks to assess and obstacles to overcome but, ultimately, it's the same old story - if you don't go after the business, someone else will or, in the case of the Japanese, Korean and Chinese contractors, already has.

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Colombia – Latin America's newcomer

Often referred to as the oldest democracy in Latin America, Colombia has benefited from relative political stability, economic stability and growth. It is one of the few Latin American countries that has not suffered a lasting dictator or a *coup d'état*. It benefits from an investment grade rating by all major rating agencies. It has only had one year of negative growth since the 1930s.

Despite this impressive record, Colombia's advancement has been held in check for much of the past century due in part to cumbersome policies on foreign investment and a long-running internal war with drug cartels and guerillas. Recent legal reforms and security initiatives to overcome these obstacles have started to pay off, however, and Colombia looks to finally be living up to its full potential. With this potential come enormous opportunities for the infrastructure and construction sectors.

INFRASTRUCTURE OPPORTUNITIES

As with many Latin American countries, Colombia's infrastructure lags behind other developed countries. In the World Economic Forum's Global Competitiveness Report, Colombia consistently ranks as one of the countries with the lowest transport infrastructure quality in the world (ranked 111th out of 144 countries in 2013). To meet this challenge, Colombia has focused on aggressive legal reforms and policy initiatives.

Colombia has recently passed legal reforms aimed at attracting international investment in infrastructure and construction. Of particular note is Law 1508 of 2012, which created an innovative legal framework for public private partnerships (PPP) to further boost construction and development in the country.

To back up these legal reforms, the Colombian government has put forward an aggressive US$55 billion 10-year plan to improve the country's low infrastructure quality. The plan aims to upgrade more than 8,000 kilometres of roads and attain more than 3,500 kilometres of four-lane highways before the end of the decade. As part of this plan, the government is planning on investing nearly US$12 billion in infrastructure and related construction projects in 2014 alone.

The flagship projects planned by the government include the construction of Bogota's underground system, considered the 4th most important infrastructure project in Latin America, a variety of concessions on roads to facilitate access to the Pacific and Atlantic seaports, the expansion of Cartagena's seaport and the construction of the *Bicentenario* oil pipeline in the northeast of the country. In addition, Colombia is already planning on opening nine new tenders for road projects that will bring an estimated US$6 billion in private investment in 2015 alone.

LOOKING AHEAD

Colombia is a party to numerous free trade agreements, including with the United States and the European Union, and is a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards. Today, Colombia is ranked as the third most business-friendly and as the leading reforming country in Latin America

according to Doing Business 2013 of the World Bank. It is attractive for foreign investment and, according to fund flow tracker EPFR Global, enjoyed as of March 2014 the largest inflow of capital into any emerging-market country (the UK regularly ranks as one of the top sources of foreign direct investment). With its solid legal framework, coupled with infrastructure-specific initiatives such as the PPP programme and 10-year plan, Colombia's future is bright. Indeed, Colombia's Finance Minister estimates that the government's infrastructure efforts alone will allow the country to boost its annual GDP growth by one percent, which in turn will allow the country to grow at 7% annually on a sustained basis. This would be an unparalleled record when compared with peers in the region. Latin America's newcomer is charging full speed ahead and offers significant opportunities for UK construction firms.

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Ethiopia: It's not about the oil

With annual GDP growth averaging 10.9% for the last decade, Ethiopia has shown that it is not just the oil producers driving Africa's economic boom. Over the course of 20 politically stable years, governments have focused squarely on the country's economic advancement. Infrastructure development has taken a key role, together with ambitious plans to lead the continent in renewable energy.

Ethiopia's economy is centred on agriculture (coffee, honey products and flowers), mining (gold, silver, diamonds and sapphires) and, increasingly, manufacturing and services. Its status as a non-oil economy may change in future, with exploration ongoing and the Ogaden Basin alone estimated to hold some 4.7 trillion ft^3 of oil and gas.

Ethiopia spends the highest proportion (almost 10%) of GDP on infrastructure in Africa. The development of a planned 5,000km national rail network is underway, together with the expansion of the road network, including a highway linking Ethiopia to Kenya due for completion in 2017. Also due to complete in 2017 is the Grand Renaissance Dam, part of a US$12 billion series of hydro-electric megaprojects aimed at making Ethiopia Africa's largest energy exporter by 2035. Ethiopia also boasts one of the largest fibre optic networks in Africa, developed in tandem with technology parks and school network systems and designed to foster a national ICT industry.

The liberalisation of Ethiopia's markets is progressing, albeit slowly. Companies entering for the first time should proceed with care. Discussed below are some of the key considerations for those wishing to participate in the Ethiopian growth story.

BUSINESS ESTABLISHMENT

Business is by no means easy, with Ethiopia ranked 125th out of 189 countries in the World Bank's "*Ease of Doing Business Report 2014*", representing a slight decline from 124th in the previous year.

However, as part of Ethiopia's market development initiatives, the Ethiopian Investment Agency (EIA) provides foreign investors with a one-stop-shop for business facilitation, licensing and information regarding any applicable incentives. All importers and exporters establishing a local office must register with both the Ministry of Trade (in order to apply for project approval) and the Ethiopian Revenue and Customs Authority (in order to obtain a tax identification number). A business licence through the EIA may be obtained on the day of the application if all requirements are met.

Ethiopia, which has ratified the United Nations Anti-Corruption Convention in 2007, was ranked 111th out of 177 countries in Transparency International's 2013 Corruption Perceptions Index.

DOING BUSINESS

As with much of East Africa, business in Ethiopia is founded upon close personal relationships. Meetings in particular will be preceded by personal greetings and enquiries before any business matters are addressed. Whilst business will often take place in English, the local Amharic script may be used in documents. Further, Ethiopia has its own time recording system, based upon daylight hours, which will often be employed.

Public procurement takes place through a tender system, overseen by the Public Procurement and Property Administration Agency. Whilst priority to domestic suppliers is not official policy, political factors may impact the tender process.

As for security, terrorism presents a risk in parts of Ethiopia. The ongoing conflict along the Somali border has intensified in recent years, and sporadic attacks and kidnappings have been reported in other regions. In November 2013, Ethiopian authorities issued a statement that they had "*tangible and reliable evidence*" of extremist intent to conduct attacks in Addis Ababa and other parts of the country.

CONTRACT ENFORCEMENT

Contractual enforcement within Ethiopia is generally viewed as weak, with an overburdened court system often cited as the root cause. As a result, arbitration is often preferred, although governed by somewhat dated legislation (the 1960 Civil Code and 1965 Civil Procedure Code) which is not reflective of the UNCITRAL Model Law. There are two active arbitral institutions – the Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute and the Ethiopian Arbitration and Conciliation Centre. Ethiopia is not signatory to the New York Convention.

Ethiopia has bilateral investment treaties in force with some 21 countries (a treaty with the UK has been signed, but has not yet been ratified). Ethiopia has not ratified the ICSID Convention, despite being one of the initial signatories.

THE FUTURE

Given the Ethiopian government's investment priorities, set out in a series of five-year plans, construction, energy and infrastructure opportunities are expected to continue to abound. Therefore despite some undoubted challenges, this could be an opportune time to take a closer look at Sub-Saharan Africa's fifth largest economy.

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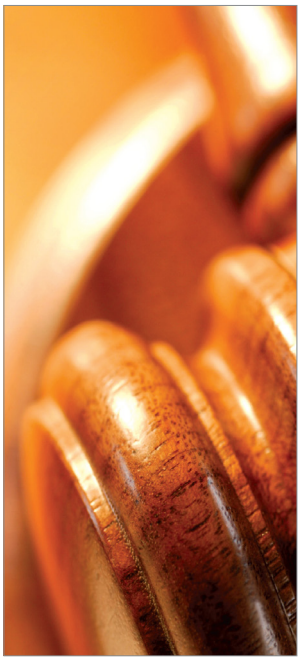

Dutch arbitration law gets an upgrade

The Netherlands, home of the International Court of Justice, the Permanent Court of Arbitration and the International Criminal Court, is looking to strengthen its position as a leading arbitration-friendly jurisdiction. The Dutch Parliament has recently approved a proposal to modernise Dutch arbitration law but providing arbitration support, legally and logistically, is fast becoming a very competitive business. In Africa, in Asia, new arbitration centres now give London and Paris a run for their money. To find out what might attract disputes to the Netherlands we spoke to Maurits Kalff, Sander Maarschalkerweerd and Bas van Zelst, members of the Arbitration Team at Amsterdam based firm Van Doorne N.V. This is what they told us.

Until now, how have commercial disputes in the Netherlands generally been resolved? In the Dutch courts? In arbitration? By agreement (perhaps through mediation)? Or in some other way?

As always, it depends. In larger commercial disputes (including post-acquisition disputes) and disputes requiring specific expertise from the adjudicator(s) (*i.e.* construction, ICT, energy disputes) parties have historically shown a preference for arbitration. However, more generally arbitration is on the rise as the preferred means of dispute resolution. Parties seem (amongst other things) to value the flexibility of the procedure as well as the option to keep disputes confidential. The rules of the Netherlands Arbitration Institute provide for confidentiality as a default.

We also see a trend towards an increase in so-called multi-tier dispute resolution clauses. Such clauses provide for different steps in the dispute resolution process, starting from alternative dispute resolution (ADR) techniques such as negotiation, expert assessments, mediation and conciliation and moving towards more litigious mechanisms such as arbitration and litigation. Although, under Dutch law, following the ADR steps in the process is voluntary (choosing to skip negotiation or mediation does not lead to unenforceability of the arbitration or choice of forum clause), parties increasingly show an interest in amicable dispute resolution methods.

What about international contracts involving Dutch companies, in particular construction and engineering contracts e.g. dredging. Until now, where might they go, and what law might they choose, for dispute resolution?

In the construction and engineering sectors arbitration has historically been the preferred dispute resolution mechanism. In these sectors in particular, technical expertise on the part of the arbitrator is key to an efficient and high quality dispute resolution process. The parties are free to choose the law applicable to the construction contract. This may be the (contract) law of the place of arbitration, the law of the place where the contract is performed (*i.e.* the location of the project) or any other law that the parties desire.

In summary, what are the key changes in the new law?

Although the new Dutch Arbitration Act (DAA) provides for a host of improvements, we feel the most relevant are the fact that the Court of Appeal is the competent Court to hear claims for setting aside an arbitral award. As a consequence, a decision in setting aside proceedings will only be subject to an appeal to the Supreme Court. This is expected to reduce the costs and number of post-arbitral proceedings.

Secondly, the DAA gives the court power, in setting aside proceedings, to remit the award to the arbitral tribunal. This is also likely to lead to more efficient conduct of post-arbitral proceedings. In this respect the DAA closely follows article 34 of the UNCITRAL Model Law of 1985 (with its 2006 amendments).

It is important to note that the new DAA will come into force on 1 January 2015 and applies to all arbitrations *commenced* on or after that date. This includes arbitrations brought under arbitration agreements that were concluded before the coming into force of the new act.

What aspects of the new law are designed to attract international arbitration disputes?

In addition to more efficient post-arbitral proceedings, the DAA provides that an agreement to arbitrate may either be valid under Dutch law or under the law applicable to it (either by virtue of a choice of the parties or by virtue of the arbitral tribunal applying a specific law). This ensures a wider scope of available laws and consequently a decreased possibility of an agreement to arbitrate proving unenforceable. The DAA also provides an efficient default mechanism as to the conduct of the arbitral proceedings.

Do you think they will succeed in doing that?

Business people - national or international - share a need for dispute resolution methods that are reliable and efficient while at the same time providing for satisfying results in terms of substance. The DAA caters to these needs by combining efficient default provisions with the option for the parties to deviate by agreement, either in the form of a choice of a set of arbitration rules or by means of tailor-made procedural arrangements.

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Brazilian flair

The 2014 World Cup preparations shone a spotlight on Brazil's efforts to expand and improve its infrastructure. Whilst predictions of disaster proved unfounded (for Brazil's infrastructure, if not its football team), significant challenges remain. In a country ranked 79th by the World Bank for overall infrastructure quality (behind Pakistan, Algeria and the Gambia), infrastructure development is central to medium and long-term government planning. This presents opportunities for UK contractors and consultants.

In 2012 Brazil's government launched the "*Logistics Investment Programme*" – a planned US$121 billion, 30-year investment in highways, ports, airports and rail (including a high-speed link between São Paulo and Rio de Janeiro). A rapid start has been made, with concessions for five of Brazil's most important airports being tendered in 2012 and 2013. Further tenders are expected following October's presidential elections, including a number of significant highway concessions, most likely in early to mid-2015. Perhaps reflecting a recognition of the benefits that overseas experience and expertise can bring, the participation of foreign companies in Brazilian public procurement is on the increase.

DOING BUSINESS

Operating in Brazil is not without its challenges. There is a legacy of restrictive rules and practices in relation to foreign investment dating back many years. Whilst serious efforts have been taken to address these, there is more to do.

Most foreign companies doing business in Brazil do so though a Brazilian limited liability company (a "*limitada*"). A company wishing to engage in infrastructure projects in Brazil will have to deal with several public organisations, some of which are more helpful than others. A local partner experienced in navigating local regulations, whilst not mandatory, can certainly be helpful.

Brazil ranked 72nd out of 175 in Transparency International's 2013 Corruption Perceptions Index. Federal Law 12,846/2013 has recently been introduced to bolster anti-corruption legislation, establishing civil and administrative sanctions for companies involved in corruption. It remains to be seen, however, how this law will be applied.

PROCUREMENT

Save for a very limited number of exceptions, public procurement in Brazil is by tender, generally governed by the provisions of Federal Law 8,666/1993. A simplified procurement law, Federal Law 12,462/2011, introduced a streamlined procedure in relation to construction for major sports events (e.g. the Confederations Cup, 2014 World Cup and 2016 Olympics) and the public education system. Careful attention must be paid to the terms and conditions for tendering, since even minor non-compliance may invalidate the tender.

Public-private partnerships (PPPs) are permitted in Brazil (for projects valued at 20 million Reals – approximately US$8.7 million – and over), and governed by Federal Law 11,079/2003.

ARBITRATION

Federal Law 9,307/1996 sets the governing framework for arbitration in Brazil. Following the enactment of this law an increasing number of government contracts have provided for arbitration. This is reflected in the airport concessions discussed above, which provide for arbitration under the ICC rules, in the Portuguese language and with a Brazilian arbitral seat.

Brazil ratified the New York Convention in 2002, and Brazil's courts have a good record of upholding arbitral awards. Local courts will enforce a foreign arbitral award as a matter of course, provided that it has first been validated by the Superior Court of Justice, Brazil's highest court for non-constitutional matters. Enforcement can only be refused in limited circumstances, and decisions over recent years confirm the readiness of the Superior Court of Justice to validate foreign arbitral awards.

CONCLUSION

Brazil has recognised the importance of infrastructure to its growth and development goals. This is reflected by the levels of investment being committed, and the legislative efforts to provide an effective governing framework, conducive to both domestic and overseas participation and investment. Large-scale infrastructure projects in Brazil have often proved very profitable for investors, and, given the scale of the task ahead (and with the 2016 Olympics just around the corner) opportunities abound. This perhaps explains why, despite the challenges, over recent years investors, contractors and consultants have joined the world's sports fans in heading to Brazil.

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This article first appeared in *Building*.

Land of opportunity – key points on bidding in the U.S.

In recent years, the market for public-private partnerships (PPP) and other sophisticated infrastructure projects in the US has increased steadily.

As the market continues to grow, foreign investors, developers and contractors are increasingly interested in participating in such projects.

The US provides a wealth of opportunity as a large country with many different governmental units increasingly authorising PPP projects.

Some projects attract the largest international investors and construction firms, and many moderately-sized state and local projects also attract parties of all sizes from overseas.

However, the web of local, state and federal government authorities in the US and the layers of applicable laws can be confusing for foreign parties to navigate.

In many cases, laws of multiple government authorities will apply to a single governmental project.

There are a number of issues that are important to consider when bidding or contracting for US governmental projects.

SOVEREIGN IMMUNITY ISSUES

Many governmental entities in the US have sovereign immunity and there may be restrictions on legal recourse against them. It is important to understand what recourse you would have against your counterparty when entering into a project in the US.

OPEN GOVERNMENT LAWS

While there are open government laws around the world, it is critical to understand how various open government laws would apply to documents you submit in response to a bid or include in a contract.

You should also be aware of the measures available to limit disclosure of any confidential information in your bid submission to avoid disclosing trade secrets, technological know-how and the like.

HIRING REQUIREMENTS

It is important to look carefully at requirements for hiring certain percentages of disadvantaged, minority, women and/or local contractors or local labour in government projects.

Sometimes these requirements are buried in the body of a draft agreement or in appendices, but these can have an influence on the cost and availability of labour for the project.

APPROPRIATION RISK

In many instances, payments made by a governmental entity over time may be subject to appropriation. This will usually be stated somewhere in bidding documents or in a draft agreement, and it is important to explore whether it is a risk you are able to take.

OBLIGATIONS DUE TO THE SOURCE OF FUNDING

Even a local or state project may be funded in part by federal funds, which may mean that a myriad of federal laws are applicable to the project.

Although these laws may not be spelled out in their entirety in bidding documents or a draft contract, they may significantly impact the cost of the project.

One example is the Buy America Act, which requires contractors on federally-funded projects to purchase certain products produced in the US.

FEDERAL LAWS

Other federal laws will apply regardless of whether there is federal funding on a project, including certain anti-terrorism laws and regulations enforced by the Office of Foreign Assets Control, which may be of particular concern to foreign investors.

UNION ISSUES

It will be important to determine promptly if union labour is required on a particular project. Even if not technically required, '*prevailing wage*' laws are likely to apply, which will need to be considered in bidding, along with availability of labour in the specific area of the project.

POLITICAL CHANGES

As with other parts of the world, support for a particular project or initiative may change with an election or a shift in political popularity.

Especially if you are participating in a large and/or controversial project, it is important to understand the politics at all levels (local, state and federal) supporting or opposing the project and the likelihood of politics interfering with the project moving forward.

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This article first appeared in *Construction News*.

Extras

CDM, payment, construction standards, planning and infrastructure

CDM AND ACOP REPLACEMENT REGULATIONS

The HSE has set out, and consulted on, its proposals to replace the 2007 CDM Regulations and the Approved Code of Practice. The aim, subject to ministerial and parliamentary scrutiny, is for the revised Regulations to come into force in April 2015. The draft proposes:

- significant structural simplification of the Regulations;
- replacement of the ACoP with targeted guidance;
- replacement of the CDM co-ordinator role with that of "*principal designer*";
- replacement of explicit competence requirements with a specific requirement for appropriate skills;
- addressing areas of the Temporary or Mobile Construction Sites Directive relating to domestic clients; and
- revising the threshold for appointment of CDM co-ordinators.

See: http://www.hse.gov.uk/consult/condocs/cd261.htm

NEW PAYMENT CHARTER LOOKS FOR COMMITMENT

The Construction Leadership Council has agreed a Construction Supply Chain Payment Charter. Included in its 11 "*fair payment commitments*" for all new construction contracts from 1 January 2015 are commitments to:

- reduce supply chain payment terms to 30 days from January 2018 (reaching this in stages - 60 days for new contracts and 45 days from June 2015);
- on central government contracts, make payment to Tier 1 within 14 days, to Tier 2 within 19 days and to Tier 3 within 23 days of the due date (7 days after the client's common assessment or valuation date in the Tier 1 contract);
- not withhold cash retention or ensure that supply chain retention arrangements are no more onerous than those of the client in the Tier 1 contract; the aim is to move to zero retentions by 2025;
- issue any payless notices at the earliest opportunity and no later than 7 days prior to the final date for payment;
- have processes in place to enable the effects of contract variations to be agreed promptly and fairly with payments for these variations to be included in the payment immediately following the completion of the varied works;
- make payments electronically (unless otherwise agreed); and
- use Project Bank Accounts on central government contracts unless there are compelling reasons not to do so and on other contracts where appropriate.

By signing the Charter, an organisation agrees to apply these commitments in its dealings with its supply chain, to be monitored for compliance by reporting against a set of agreed key performance indicators and to consider the performance of its supply chain against the agreed KPIs when awarding contracts.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306906/construction-supply-chain-payment-charter.pdf

PAS 1192-3

The BSI has launched PAS 1192-3, the Specification for information management for the operational phase of assets using BIM. Whilst partner document PAS 1192-2, published last year, is concerned with project delivery, PAS 1192-3 focuses on the operational phase of assets, irrespective of whether these were commissioned through direct capital works, acquired through transfer of ownership or already existed in an asset portfolio. Like PAS 1192-2, PAS 1192-3 applies to both building and infrastructure assets.

The Specification can be downloaded free by registering at:

http://shop.bsigroup.com/forms/PASs/PAS-1192-3/?utm_source=PM-STAN-LAU-BUIL-PAS1192-3-REG-1403&utm_medium=et_mail&utm_content=3727386&utm_campaign=Construction%20e-shots%202014&utm_term=PAS%201192-3

GOVERNMENT ONE-STOP SHOP FOR HOUSING STANDARDS

The government plans to give housing standards a makeover. The current 100 standards will be cut to less than 10 and technical requirements will no longer be assessed by different organisations, but by building control bodies alone.

There will be "*optional*" building regulations, for instance, in respect of water efficiency and accessibility, with councils deciding where to apply them. The government will also be developing a national space standard and a security standard for new homes. Energy efficiency standards will in future be set through national building regulations.

See: https://www.gov.uk/government/news/stephen-williams-announces-plans-to-raise-housing-standards

PLANNING SYSTEM IN LINE FOR MORE CHANGES

The government has launched a consultation on proposals to make further planning system changes to:

- make it easier for residents and business to produce a neighbourhood plan;
- expand permitted development rights;
- improve the use of planning conditions and enable development to start more quickly on site after planning permission is granted;
- improve engagement with statutory consultees so they are consulted in a proportionate way on those developments where their input is most valuable;
- raise the environmental impact assessment screening thresholds for industrial estate and urban development projects located outside defined sensitive areas;

- make improvements to the nationally significant infrastructure planning regime; the government is seeking views on proposals to amend regulations for making changes to Development Consent Orders, and to expand the number of non planning consents which can be included within Development Consent Orders.

The consultation closes on 26 September 2014

see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339528/Technical_consultation_on_planning.pdf

AND S106 AFFORDABLE HOUSING CHARGES TO BE PRUNED

As part of its drive for more houses, the government is proposing to scrap s106 affordable housing charges for self-builders and homeowners, developers bringing disused buildings back into use and developers of small housing schemes of 10 homes or less.

The proposals were set out in a consultation, which also included proposals to ensure improvements in the speed of local authority decisions on planning applications for major development.

See: https://www.gov.uk/government/news/charges-adding-thousands-of-pounds-to-building-costs-to-be-axed

GOVERNMENT LATE PAYMENT PLANS

The government has outlined its plans on late payment.

It has decided not to introduce a maximum legal payment period at present, or to change, or add to, penalties for late payment but it is to bring forward legislation to streamline procurement and improve public sector payment practices. It is also to work with businesses and business organisations to develop a new, "*robust*", reporting framework (underpinned by legislation) on companies' payment practice and performance.

The government also intends to introduce legislation to tackle contractual barriers (such as bans on assignment) to the provision of finance.

See: https://www.gov.uk/government/news/transparency-at-the-heart-of-answer-to-late-payment

BREEAM UK NEW CONSTRUCTION 2014

The BREEAM (Building Research Establishment Environmental Assessment Method for buildings and large-scale developments) UK New Construction scheme has been updated with the aim of improving and evolving it technically and structurally.

See: http://www.breeam.org/page.jsp?id=369

NEW INFRASTRUCTURE BILL

The government's new Infrastructure Bill is on its way through Parliament. Key elements, designed to encourage investment in Britain's infrastructure, include:

- turning the Highways Agency into a government-owned company and providing for stable, long term funding for national strategic road infrastructure projects;
- providing more power to control invasive, non-native species that pose serious threats to biodiversity, the water environment and infrastructure;
- simplifying and speeding up measures to handle minor changes to existing planning permissions for major projects and simplifying the processes for more significant changes;
- allowing certain types of planning conditions to be regarded as discharged if a local planning authority has not notified the applicant of their decision within a prescribed time period;
- permitting land to be transferred directly from arms-length bodies to the Homes and Communities Agency (HCA);
- giving communities the right to buy a stake in their local renewable electricity scheme.

https://www.gov.uk/government/news/infrastructure-bill

BRE WORKING ON NEW SUSTAINABILITY STANDARD FOR HOUSING

BRE is developing a voluntary sustainability standard for new homes for UK and international markets. It has identified these issues as critical in future housing delivery:

- resilience to adverse and extreme weather;
- mental and physical health & wellbeing of occupants;
- resource efficiency;
- increased biodiversity;
- low energy, water and maintenance costs; and
- improved connectivity,

and has sought views in a consultation.

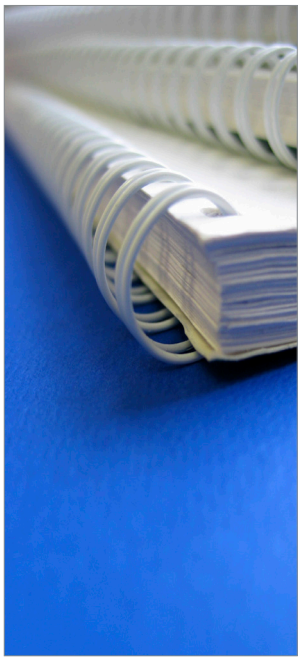
See: http://www.bre.co.uk/filelibrary/pdf/casestudies/66628---BREEAM-Homes-consultation.pdf

NAO TO REPORT ON GOVERNMENT PAYMENT PERFORMANCE

The National Audit Office is to investigate government department payment performance. The government's 2010 promise was that departments and their agencies would:

- aim to pay 80 per cent of undisputed invoices from suppliers within five days; and
- require their main contractors to pay subcontractors' invoices within 30 days.

The NAO report will examine how departments process invoices, calculate their prompt payment performance and ensure that main contractors comply with their obligations to subcontractors.



Contracts and procurement

NEC LAUNCHES FM SUITE OF CONTRACTS

In partnership with the British Institute of Facilities Management, the NEC has published "NEC for FM", a suite of contract documents and guides intended to support good practice in facilities management procurement in the public and private sector.

If the Term Service Contract and the Term Service Short Contract look familiar, that is because they have been published previously. They are now presented as an option for facilities management.

See: http://www.neccontract.com/Products/Contracts/NEC-for-FM-suite-of-contracts

EU 2014 PROCUREMENT DIRECTIVES - GOVERNMENT AIMS FOR QUICK IMPLEMENTATION

EU member states have two years from 17 April 2014 to implement the 2014 EU Procurement Directives in national legislation, but the UK government is aiming to do so quickly.

It is to launch a formal consultation on the draft implementing regulations.

See: https://www.gov.uk/transposing-eu-procurement-directives

GOVERNMENT NEW PROCUREMENT MODELS - FINAL GUIDANCE

Guidance for the government's new procurement models, cost led procurement, integrated project insurance and two stage open book, which first appeared in draft in January this year, has now been published in its final form.

See: https://www.gov.uk/government/publications/new-models-of-construction-procurement-introduction

The sleeping giant

The prospect of a new arbitration act to comprehensively overhaul and update international arbitration law in South Africa is undoubtedly significant. A modern framework for arbitration could do much to encourage and facilitate trade and investment. Further, South Africa could realise its latent potential as a seat and venue for arbitrations for the Southern African Development Community (SADC) and the wider African continent.

With Africa's best-developed infrastructure and most sophisticated (and second largest) economy, South Africa could become an African arbitration powerhouse. The coming years could see the country's commercial centres join, and even supersede, the established and emerging arbitration centres of the continent such as Cairo, Lagos, Nairobi, Kigali and Mauritius. Much depends on the outcome of the current reform process, influenced as it is by South Africa's unique history.

THE CURRENT LEGISLATION

The law currently governing arbitration in South Africa is set out in the Arbitration Act 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The 1965 act is based on the English Arbitration Acts of 1889 and 1950, pre-dating the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1985 UNCITRAL Model Law on International Commercial Arbitration.

While the 1977 act post-dates South Africa's ratification of the New York Convention in 1976, it is nonetheless considered incomplete and inconsistent in its application of the convention's terms.

The 1965 act similarly fails to accord with modern international standards. It allows the court a broad discretion with regard to upholding an arbitration agreement or enforcing an arbitral award. For example, section 6(2) of the act says the court "*may*" stay court proceedings where there is a valid arbitration agreement. This contrasts with the usual stipulation that the court "*shall*" stay proceedings in such circumstances (reflecting article II(3) of the New York Convention).

Section 3(2) of the 1965 act grants the court discretion to set aside an otherwise valid arbitration agreement if it considers there to be "*good cause*". Further, the 1965 act fails to address explicitly key issues such as the ruling of a tribunal on its own jurisdiction, the separability of the arbitral agreement or the power of the tribunal to grant interim measures.

Of course, it is always possible that such shortcomings may be mitigated by a pro-arbitration approach on the part of the courts. This indeed proved to be the case in the key judgments issued by the Supreme Court and the Constitutional Court of South Africa, respectively, in the 2006 case of *Telcordia Technologies Inc v Telkom SA Ltd* and the 2009 case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*.

These decisions robustly supported the right of parties to arbitrate and thereby to achieve a final, binding and enforceable decision.

However, a positive approach from the courts is not, on its own, sufficient. Clear and firm provision by way of legislation is necessary if certainty and confidence in South Africa as an arbitral seat is to be cemented. In this regard, it is worth noting that another recent judgment of the South African Supreme Court was less supportive of arbitration, and as such has attracted criticism. In its 2006 judgment in *NorthWest Provincial Government and Another v Tswaing Consulting CC and Others*, the court declined to apply the principle of separability to uphold an arbitration clause contained in a contract induced by fraud. This contrasted with the approach taken, at around the same time, by the English House of Lords in the 2007 judgment in *Fiona Trust Holding Corp & Ors v Privalov & Ors.*

REFORM PROPOSALS

The reform of South African arbitration law has been under discussion for some time. The South African Law Commission produced a report in July 1998 highlighting the shortcomings of the regime under the 1965 and 1977 acts, and concluding with the recommendation of a statute based on the Model Law. These recommendations were reflected in a draft bill, although not ultimately implemented.

This lack of legislative action may have reflected a dimming of enthusiasm for arbitration, founded on concerns such as those expressed in a 2005 report by Judge John Hlophe, president of the Western Cape Division of the High Court of South Africa. He suggested that arbitration is perceived by some as a means by which parties can circumvent a judiciary increasingly staffed by black judges, thereby undermining the judicial transformation of South Africa.

More recently, however, interest in reform has revived, with a new commission being convened. The draft legislation has been reviewed, amended and developed.

Interestingly, in addition to the Model Law, the commission considered the Organisation for the Harmonisation of Business Law in Africa (OHADA) Uniform Act on Arbitration – currently applicable in the 17 African countries comprising OHADA – as a possible model, though it was not ultimately selected. What has emerged is a revised text for a proposed international arbitration act with the Model Law as a basis. This provides for compatibility with a number of South Africa's neighbours and trading partners which have arbitration laws either based on, or influenced by, the Model Law.

INVESTOR-STATE ARBITRATION

All of this is against a background of significant changes in relation to investor-state arbitration. South Africa, which is not a signatory to the ICSID Convention, has recently terminated its bilateral investment treaties with a number of EU states. It is also consulting on a new Investment Promotion and Protection Bill, which would serve to limit recourse to investor-state arbitration, instead conferring the central role in investment protection upon the laws, courts and tribunals of South Africa itself.

Such measures have caused some consternation on the part of foreign investors and may again reflect the government's desire to protect its transformational agenda. In particular, elements within government have expressed concerns that efforts to empower previously-disadvantaged groups could be hindered by decisions taken in investor-state arbitration by international tribunals.

THE WAY FORWARD

It seems that a number of sometimes conflicting considerations are forming a backdrop to the proposed reforms. On the one hand, it is recognised that the effectiveness and credibility of modern arbitration depends on a sound legislative framework, upholding the arbitral agreement and the powers of the tribunal. On the other, the South African government is naturally concerned to protect the constitutionally enshrined commitment to economic reform and transformation.

Such considerations are being brought to a head with the consultation on the draft Investment Promotion and Protection Bill, and the imminent issue for comment of draft bills governing domestic and international arbitration.

Accordingly, while the availability of investor-state arbitration in relation to South African investments is being curtailed, international commercial arbitration is expected to receive significant support. With the drafting of an act specifically governing international commercial arbitration (and with domestic arbitration dealt with separately), the legislation is being framed to minimise the risk that international arbitration provisions become entangled with controversies over domestic judicial transformation.

Despite a long gestation, and the need to reckon with, and often reconcile, a wide range of issues and considerations, it would appear that a new international arbitration act is likely to be in force by the end of the year. Being based on the Model Law, it is expected to manifest the standards necessary to allow disputes concerning the most complex of cross-border transactions to be dealt with efficiently, cost-effectively and finally. International commercial arbitration in South Africa is set to join the 21st century.

Cases referenced

Telcordia Technologies Inc v Telkom SA Ltd (26/05) [2006] ZASCA 112

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6.

NorthWest Provincial Government and Another v Tswaing Consulting CC and Others (190/05) [2006] ZASCA 108

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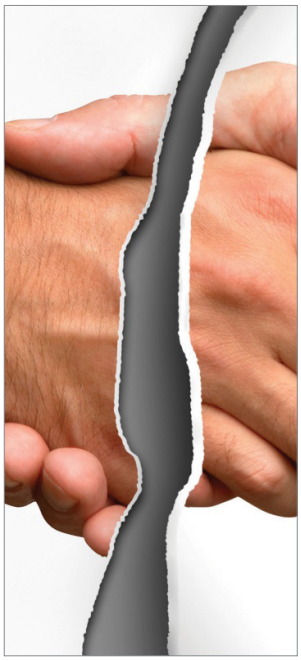
A similar version of this article first appeared in *Global Arbitration Review, 17 June*



Breach of contract? Don't forget the staff time.

How far can victims of broken contracts go in recovering the costs of lost time and productivity from the contract breaker?

Dealing with the fallout from a breach of contract can be difficult. For the victim, fixing the problem can be time consuming – and costly, particularly if it means taking staff off productive work to get things back on track. But to what extent can the victim recover these staff costs from the contract breaker?

The court was recently faced with this very question. A company called Azzurri bought 1,077 phones from SOS to meet an order from the AA for its UK call centres but a number of the phones turned out to be faulty. Some would cut off for no reason which, for a call centre, is not good news. Azzurri replaced all the AA phones with a new batch from a different supplier and then claimed the replacement costs from SOS. It also claimed "*internal business costs*", the costs of the staff time spent in investigating the problem and replacing the telephones.

NEED FOR GOOD RECORD KEEPING

Case law says that, to succeed in a claim of this type, a claimant must establish the fact and extent of the diversion of staff time and show that it caused significant disruption to the day to day running of the business.

Keeping good records is crucial. These should be kept at the time of dealing with the breach (not later) and generally require a higher level of detail than for a standard time-recording system. The records should show the exact time spent by a person in fixing the breach and have narratives for each time entry so that the activities carried out in fixing the problem are clearly identified and timed.

If diversion of staff time and significant disruption can be shown (and if the contract breaker cannot establish otherwise), it is usually reasonable for the court to infer from the disruption that, had the staff not been diverted, they would have applied their time to activities which would, directly or indirectly, have generated revenue for the business. The revenue would be at least equal to the *actual* cost of employing the relevant staff during that time.

PARTIALLY SUCCESSFUL CLAIM

With the court applying these principles, Azzurri's claim for staff costs only partially succeeded. The court rejected the claim for the time spent by the technical support team in investigating the problems because fault finding and correction was part of the support function that Azzurri's business was set up to handle. However, the claim for time spent arranging for the replacement phones did succeed.

Potential claims of this nature will inevitably arise in a construction context, for example, if materials have to be replaced or work redone. The important thing to remember where there is significant diversion of, or disruption to, staff time is to keep appropriate records at the time. The exercise may not be a popular addition to the daily task list of those involved in fixing a breach, but, as they say, no pain - no gain.

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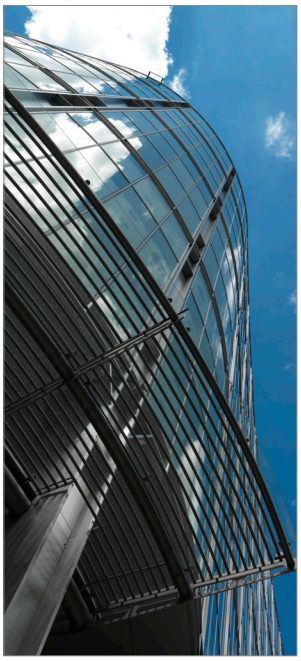
This article first appeared in *Construction News*.



What's been happening @ Mayer Brown?

- In May Chris Fellowes was a guest speaker on a Lexis webinar on the New Engineering Contract, looking at practical tips and pitfalls.
- In early June Tom Duncan was a panel member at the Beijing Arbitration Commission event in London discussing recent developments in dispute resolution in infrastructure projects.
- Kwadwo Sarkodie was involved in chairing proceedings at the ICC/FIDIC conference in Johannesburg, South Africa, on International Construction Contracts and the Resolution of Disputes.
- And later in June, Raid Abu-Manneh, Mark King and Wisam Sirhan spoke at the IBC Legal conference on Construction Law: Contracts and Dispute Management, on Risk Management and Dispute Resolution in the Middle East.

  Their presentation included consideration of the laws of the Middle East, Arab contract law and Shari'a, the interaction between standard contracts and local law and the increasing use of international arbitration for bilateral investment treaty disputes.
- Welcome to Mark McMahon and Charles Pacey on joining the Construction & Engineering Group as Associates.

Case notes

COURT FOILS CONSTRUCTION ACT ESCAPE ATTEMPT

A *"construction contract"* clause that says that the referring party has to pay all the costs of the adjudication is not a good idea. The courts will strike it down because it discourages a party from exercising its right to go to adjudication. But what if the contract says that any money award by the adjudicator must be paid into a joint account in the names of the parties' solicitors? Or that the referring party must pay all the adjudicator's fees? Though less extreme, will they also face the judicial axe?

Both provisions appeared in a contract to which the unamended Construction Act applied and the court said that both were contrary to the 1996 Construction Act and unlawful, and therefore ineffective, because they discouraged a claiming party from going to adjudication.

This was, however, a rare case where the court granted a stay of execution. There was a clear and unqualified admission by the claimant that it was technically insolvent, the claimant had misled the defendant, when entering into the subcontract, as to its financial state and the defendant had not caused, or substantially contributed to, the claimant's financial difficulties.

Pioneer Cladding Ltd v John Graham Construction Ltd [2013] EWHC 2954

SO WHAT DOES "DUE DILIGENCE" MEAN?

Despite its regular appearance in contract wording, interpreting the term *"due diligence"* is a challenge, but in ***Sabic v Punj Lloyd*** the court had to provide an answer. The parties agreed that the requirements of due diligence could not be expressed in the abstract and the court said that the cases tended to support the proposition that the obligation of diligence is linked to the parties' contractual obligations. The starting point in construing any commercial contract is, however, the relevant wording, read in the context of the contract as a whole, and applying the usual interpretation rules.

In ***Sabic*** the due diligence obligation involved (but was not limited to) an obligation to carry out and complete the works "*industriously, assiduously, efficiently and expeditiously*". What would satisfy that obligation depended on what was required to achieve the contractual objects and might include acceleration if delay threatened those contractual objects. The obligation would not become less onerous if it was, or became, impossible for a particular contractual object to be achieved.

Delay did not by itself provide conclusive proof of lack of due diligence but it might suggest and evidence a lack of due diligence and might require an explanation. The standard then to be applied is not determined by what can realistically be achieved by the individual contractor. Due diligence is a contractual requirement that the contractor must meet and is to be assessed in the light of the contractor's other contractual obligations.

Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916

TORT CLAIM AGAINST GLUE MANFACTURER COMES UNSTUCK

A manufacturer of high quality exhibition stands, Finesse, used liquid adhesive to fix colour panels to the structure of its stands. It was claimed that a number of panels began to delaminate from the stands and displayed a "*bubbling or bulging effect*" and had to be refixed. Finesse sued the adhesive supplier in contract and the adhesive manufacturer, Bostik, but on an application by Finesse to amend its case, the court had to decide if it had any cause of action in tort against Bostik.

If there is no close relationship (e.g. a contract) between the parties or no particular assumption of responsibility towards the claimant, any duty of care in tort will usually require there to be physical damage or injury, other than to the structure or article, the *"thing"* being constructed. On the facts pleaded the judge did not think it was arguable that there is or was any damage in the case at all. He also doubted that the glue could be said to be anything other than part of the one structure or *"thing"* and that the alleged delamination was therefore, in itself, not damage to anything other than the *"thing"* itself.

One also had to bear in mind a public policy *"floodgates"* argument in relation to goods such as glue or even machine components. If, for example, carelessly prepared glue used in making a shoe caused the sole or heel to drop off, the suggestion that the shoe owner could sue the glue manufacturer (in the absence of injury or damage to other property) was *"fanciful"*.

Finesse Group Ltd v Bryson Products (A Firm) [2013] EWHC 3273

COURT BLOCKS ON DEMAND GUARANTEE CALLS

An on demand bond is supposed to do what it says on the tin. So long as the bond's conditions have been met, it should pay out. Only fraud can get in the way. But what if an employer wrongly fails to issue taking-over certificates, which would have triggered expiry of the guarantee, and then makes a call on the guarantee?

In ***Doosan Babcock v MABE*** the court concluded that the contractor, Doosan Babcock, had a strong case that failure by its employer, MABE, to issue taking-over certificates was a breach of contract and that MABE was trying to take advantage of its own breach to derive a benefit, namely the continuing existence of two on demand guarantees. In those circumstances the court continued an interim injunction to restrain a call on the guarantees until arbitrators had determined whether MABE's refusal to issue the taking-over certificates was a breach of contract. The court relied on a 2011 case that said that, if the underlying contract clearly prevents a beneficiary from calling a bond, the court can restrain the call. In ***Doosan*** the court said it could also reach the same result by a different route, by relying on the legal principle that a party cannot take advantage of their own wrong.

Doosan Babcock Ltd & Anor v Comercializadora De Equipos Y Materiales Mabe Limitada [2013] EWHC 3201

WOT – NO ADJUDICATION JURISDICTION? SPEAK NOW OR FOREVER...

A development company challenged the jurisdiction of an adjudicator – but over 14 days after its solicitors had served a Response in the adjudication, without any reservation as to jurisdiction, and a week before the adjudicator's decision was due. Was the challenge too late?

It was, said the court. Failure to make a jurisdictional objection open to a party, before the adjudicator's decision, can be taken as a waiver of the objection. In continuing to take part and to incur costs and management time in the adjudication, the other party is entitled to rely on the objecting party's active and unqualified participation in the adjudication, as if the adjudicator had jurisdiction.

Even if the jurisdictional challenge is made relatively late in the adjudication but before the decision, there can still be an effective waiver by the challenging party if it failed to take the jurisdictional point at an earlier stage, if, and to the extent that, the other party continued positively to participate and spend time, cost and resources in the adjudication. What is needed, however, is some activity (e.g. service of an unqualified Response) by the party which later challenges jurisdiction, which amounts objectively to an assertion or representation that it is participating without reservation.

Brims Construction Ltd v A2M Development Ltd [2013] EWHC 3262

NET CONTRIBUTION CLAUSES – WHO'S IN YOUR LIST OF CONTRIBUTORS?

The problem with net contribution clauses is usually whether the parties can agree to include one in an appointment or warranty. But if they do, just as important is identifying, in the clause, the other project team members whose liability is to be taken into account by the court in working out what proportion of liability to impose on the party entitled to the benefit of the clause.

In ***Royal Bank of Scotland plc v Halcrow Waterman Limited*** the net contribution clause in a warranty given by structural engineers to a tenant referred to '*all Other Consultants*' but not to the design and build contractor or its subcontractors. That, according to the Scottish court, made all the difference and any liability of the contractor could not be taken into account in assessing the engineers' liability. In principle they could, of course, seek contribution from the contractor but in fact that was of little use to them, as the contractor was insolvent.

http://www.scotcourts.gov.uk/opinions/2013CSOH173.html

INSURERS' SUBROGATION RIGHTS: NOT CLAIMING BUT WAIVING?

Until integrated project insurance brings a golden age of alliancing, no-fault, construction projects, sorting out liability for negligently caused fires and other disasters can be a challenge for the courts. Insurance should cover the situation but can the insurers who pay out stand in the shoes of an insured and claim the money back from the negligent party, even if they are a co-insured?

In ***Rathbone v Novae*** in the Commercial Court it was common ground, in the light of case law, that the right of subrogation, the right of insurers to sue the negligent

party, in the insured's name, to recover money paid out, can be excluded between co-insureds by reference to the policy itself ("*policy waiver*") or the underlying contract between the co-insureds (if any) ("*contract waiver*"). An example of policy waiver would be if the co-insured against whom subrogation is sought is insured in respect of the same loss. Contract waiver depends on the facts of the individual case, and the construction of the underlying contract, as to whether the parties can be said to have apportioned the risks and benefits.

Rathbone Brothers Plc & Anor v Novae Corporate Underwriting & Ors [2013] EWHC 3457

STOPPING A STATUTORY DEMAND - ARE YOU SERIOUS?

A statutory demand, the prelude to a winding up-petition, can be a very effective way to get paid. But what if the debt is disputed?

In ***Foxholes v Accora***, a nursing home company disputed the sum claimed in a statutory demand served on it by a furniture supplier and asked the court to restrain the presentation of a winding up petition. The court said it is a Companies Court rule of practice that it will refuse to entertain a petition founded on a disputed debt, but only if the dispute is genuine and substantial and relates to the whole of the sum claimed. The court's policy is not to allow petitions to be used to pressure debtors, unfairly, into paying a sum disputed on substantial grounds rather than run the risk that the existence of the petition, once widely known, may damage its credit and ultimately destroy its business. The court will also restrain a winding up petition if there is a "*serious and genuine*" counterclaim (unless there are special circumstances).

Since there was a genuine and substantial dispute between the parties relating to the whole of the sum claimed and the purpose of the statutory demand appeared to be to pressure the nursing home into paying, the court restrained the presentation of a winding up petition.

Foxholes Nursing Home Limited v Accora Limited [2013] EWHC 3712 (Ch) (Link not available)

MEDIATION INVITATION? SILENCE COULD BE COSTLY

Mediation may not be compulsory but ignoring an invitation to mediate could be expensive. A landlord brought a claim for dilapidations in the courts and invited the former tenant, OMFS, to participate in mediation. OMFS failed to respond but the proceedings were settled when the landlord accepted OMFS's Part 36 offer. Did OMFS's silence on the mediation offer affect its usual entitlement to costs on acceptance of the Part 36 offer?

Yes, said the Court of Appeal. Silence when invited to participate in ADR is generally unreasonable, regardless of whether a refusal might have been justified by identifying reasonable grounds. OMFS was consequently deprived of its Part 36 entitlement to costs. The Court of Appeal acknowledged that it also had power to order OMFS to pay the landlord's costs for the relevant period but said that a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR.

PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288

NO BOND AND NO WARRANTIES – HOW ABOUT SPECIFIC PERFORMANCE?

A contracting company's obligation to provide a performance bond and subcontract warranties survived termination of its contract but it failed to provide them. Because the employer had, however, asked for the wrong company to enter into the main contract, that company had no assets and the chances of a judgment for damages (for its failure to provide the documents) being satisfied was "*questionable*". Was there an alternative?

The court said damages were not an adequate remedy and it would have ordered specific performance of the obligations to provide the bond and warranties. There was evidence that the company had access to third party funds, it had been involved as a contracting party in substantial works carried out under some arrangement with another company and supervision of specific performance by the court would not be excessive. The court held back, however, from ordering specific performance, in case it proved to be impossible to provide the bond and warranties. Instead, it ordered the company first to use its best endeavours to obtain the bond and warranties, so that the position on the alleged impossibility could be properly considered at another hearing.

Liberty Mercian Ltd v Cuddy Civil Engineering Ltd & Anor [2013] EWHC 4110 (TCC)

ADJUDICATION: WHAT, PRECISELY, ARE WE ARGUING ABOUT?

Adjudication awards may be produced at speed and only be temporarily binding but they can have serious financial consequences. The courts discourage losing parties in adjudications from "*scrabbling around to find some argument, however tenuous*" and will even enforce wrong decisions. This makes any issues about jurisdiction and enforceability potentially very significant.

In ***Wales And West v PPS*** the court had to decide what, exactly, had been referred to adjudication. The cases showed that, to determine the scope of a dispute, the court must analyse the parties' relevant exchanges and then construe the Notice of Adjudication to determine how much of the crystallised dispute is being referred to adjudication. The defending party can run any factual or legal defence to the claim but none of the adjudication documentation produced after the Notice alters the scope of the dispute referred, unless there is agreement, waiver or estoppel.

The jurisdiction challenge failed because the adjudicator had decided the dispute referred to him but, even if it had succeeded, by paying the adjudicator's fees and the full amount awarded, without reservation, the losing party had lost its right to challenge the award.

Wales And West Utilities Ltd v PPS Pipeline Systems GmbH [2014] EWHC 54 (TCC)

DUTY TO MITIGATE – REJECTED OFFERS SPOIL CLAIMANT'S RECOVERY

A contractor arranged for contaminated spoil to be deposited on a site but subsequently discovered that it did not have permission for the operation. It made several offers to the site owner to remove the material and reinstate the site but the offers were not accepted and the owner brought proceedings in the Scottish courts for an order that the contractor remove the spoil, reinstate the land and provide a bond, alternatively claiming damages of £6.8million. Did the rejection of the offers make a difference?

The court said that a person must take "*all reasonable steps*" to mitigate loss consequent on breach, and cannot claim any part of the damage due to their failure

to do so. In a commercial contract, it is generally appropriate to accept an offer from the party in default (subject to the circumstances) and, if there is a failure to mitigate, damages should generally be assessed on the basis of what the claimant would have received, if they had been acting reasonably.

In failing to accept the contractor's reasonable offers, the site owner had failed to mitigate his loss and only recovered £19,600, the estimated cost of re-profiling the ground to address the difference in levels caused by the spoil.

See: ***Donal Alphonsus Nolan v Advance Construction (Scotland) Limited*** at http://www.scotcourts.gov.uk/opinions/2014CSOH4.html

ADJUDICATION AT ANY TIME – FOR ANY DISPUTE?

A construction contract dispute can be referred to adjudication under the Construction Act at any time, but does that cover *any* dispute? Does it include, for instance, a claim for damages for misrepresentation?

The House of Lords has ruled that an arbitration clause is presumed to cover any dispute arising out of the relevant contract relationship (unless the contract wording clearly says something different). And in ***Air Design (Kent) Ltd v Deerglen (Jersey) Ltd*** in 2008 Mr Justice Akenhead applied the House of Lords approach to an adjudication clause. In ***Hillcrest Homes Ltd v Beresford and Curbishley Ltd***, however, the JCT D&B contract adjudication clause was drafted more narrowly than the arbitration clause. A dispute could be referred to adjudication if it "*arises under the Contract"* and the court ruled that that did not cover a claim for misrepresentation. There was, said the court, *"considerable force"* in the submission by one party that the House of Lords' reasoning is inapplicable to adjudication clauses, which are present or implied by statute.

Hillcrest Homes Ltd v Beresford and Curbishley Ltd [2014] EWHC 280

A MISREPRESENTATION IS NOT JUST FOR...

A misrepresentation that has a continuing effect can upset a contract made some time later in reliance on it. But what if a company formed *after* the representation was made relied on it in entering into a contract?

The owner of a grouse moor provided a prospective tenant with an estimate of grouse numbers, based on unrepresentative counts. The prospective tenant formed a limited liability partnership to take the tenancy but, on discovering the shortfall in grouse numbers, the partnership brought proceedings for misrepresentation, even though it did not exist when the representation was made.

The Supreme Court said that, subject to the facts of the individual case, a misrepresentation can have a continuing effect until the contract is made. In concluding the contractual negotiations with the partnership, through the original prospective tenant as its agent, the owner implicitly asserted to the partnership the accuracy of its unwithdrawn representation, where it was foreseeable that the representation would induce the partnership to enter into a contract. They therefore assumed responsibility for its accuracy and owed an unfulfilled duty of care to the partnership.

Cramaso LLP v Ogilvie-Grant, Earl of Seafield & Ors (Scotland) [2014] UKSC 9 (12 February 2014)

WHEN AN ADJUDICATION AWARD IS NOT THE END OF THE ROAD...

A contractor succeeds with its payment claim in adjudication and is paid. The employer then pursues court proceedings to recover the money, claiming the award was wrong. An adjudicator's decision is binding until the dispute is finally determined by litigation or arbitration (or agreement) but who has to prove their case – employer or contractor?

The Scottish case of ***City Inn Ltd. v Shepherd Construction Ltd*** [2002] SLT 781 and the textbook *Coulson on Construction Adjudication* say that the burden of proof is unaffected and a contractor must prove their entitlement all over again in litigation or arbitration. In ***Walker Construction (UK) Ltd v Quayside Homes***, however, Lady Justice Gloster was not so sure. The Court of Appeal did not have to decide if ***City Inn*** was correct but the judge, without hearing detailed argument, had "*real difficulty*" with its analysis. The judge noted that, where an unsuccessful party has paid an adjudication award which it disputes, the successful party has no need to bring court proceedings to claim payment. And on the facts of ***City Inn*** why should the contractor not be entitled to contend that, until the contrary was proved to the court's satisfaction, the adjudicator's decision remained binding and the employer had to prove that no extension of time should be awarded and it was entitled to its money back?

Walker Construction (UK) Ltd v Quayside Homes Ltd & Anor [2014] EWCA Civ 93

CDM CO-ORDINATOR MUST TELL CLIENT TO PLUG THE GAPS

Included in pre-construction information distributed by a CDM co-ordinator were a consultant's recommendation that a Type 3 asbestos survey should be carried out and a warning about the possibility of asbestos. The principal contractor indicated it would carry out a more detailed asbestos survey but did not undertake a suitable assessment and, after work had started, asbestos was found. Should the CDM co-ordinator have advised the client to obtain and include a full asbestos survey in the pre-construction information?

Yes, said the court. Under the 2007 CDM regulations and the Approved Code of Practice, the CDM co-ordinator's duty to identify and collect relevant information not within the client's possession, but reasonably obtainable, requires the co-ordinator to advise the client if surveys are needed to fill significant gaps. The co-ordinator is a key project adviser to the client on construction health and safety risk management matters. Their role at pre-construction information stage is to identify specific gaps and not to leave it to the client to identify gaps from passages buried in substantial pre-construction information.

MWH UK Ltd v Wise (HM Inspector of Health & Safety) [2014] EWHC 427

LITIGATION PRIVILEGE AND MULTI-PURPOSE DOCUMENTS

In litigation, the parties do not have to disclose documents which are subject to litigation privilege. That applies to documents made with the "*dominant purpose*" of obtaining legal advice about actual or anticipated litigation. But what if a report is commissioned to find out the facts and whether there is then a basis for taking proceedings? Is that privileged?

In the litigation by Robert and Vincent Tchenguiz against the Serious Fraud Office, liquidators claimed litigation privilege for accountants' reports analysing relevant financial details. The Court of Appeal ruled, however, that the "*dominant purpose*" test had not been satisfied and confirmed that, to attract litigation privilege, where litigation has not been started, it must be "*reasonably in prospect*"; the prospect does not have to be greater than 50%, but it must be more than a mere possibility. Certain of the reports had more than one purpose and the dominant purpose test was not satisfied in respect of any of them. As also noted by the first instance judge, the provision of a report to the liquidators' legal advisers was not determinative. It is the purpose of the production, rather than use, of the document that is key.

Rawlinson And Hunter Trustees SA & Ors v Akers & Anor [2014] EWCA Civ 136

THE VICTORIAN DUTY TO CO-OPERATE

Some contracts need co-operation if they are to be performed - for instance, a shipbuilding contract where the builder's entitlement to a stage payment is dependent on the buyer's representative certifying that the relevant milestone has been reached. But is a duty to co-operate implied as a term of such a contract?

In ***Swallowfalls v Monaco Yachting***, the Court of Appeal confirmed that an implied term as to co-operation is an ordinary implication in any contract where co-operation is required for its performance, but this is not expressly spelled out in the contract. The principle was stated, in particular, by the House of Lords in the Victorian case of ***Mackay v Dick***, which involved the purchase of a steam digging machine, whose capabilities had to be demonstrated on the properly opened-up face of a railway cutting. The prospective purchaser failed to provide the required working face for the test and had to pay for the machine.

Swallowfalls Ltd v Monaco Yachting & Technologies S.A.M. & Anor [2014] EWCA Civ 186

REPUDIATION ISSUE SPLITS COURT OF APPEAL

One contract party says it will not comply with the contract payment terms, fails to make some monthly payments and offers to make reduced payments. The other party says that is a repudiation. But was it?

In ***Valilas v Januzaj*** one Court of Appeal judge noted the "*well established*" law that a party's declared intention to fulfil a contract "*but in a manner substantially inconsistent with his obligations and not in any other way*" is a repudiation. In their view the withholding of three monthly payments, understood in the light of contemporary statements of the payer's intentions, was consequently a repudiation.

The other two judges said that whether breach of the payment obligation (an innominate term) was a repudiation depended on the nature and consequences of the breach. Had the victim been deprived of substantially the whole of the benefit of the contract? That question was to be determined by evaluating all the relevant circumstances. It was not a question of discretion but fact-sensitive.

The parties' knowledge of the breach's likely effect was important evidence. The first instance judge had found that the receiving party knew that the likely result of the payer's actions was delayed payment, not a refusal to make payment. That did not therefore deprive him of substantially the whole of the benefit of the contract, and there was no repudiation.

Valilas v Januzaj [2014] EWCA Civ 436

HOW DO YOU STOP A SERIAL ADJUDICATION CLAIMANT?

A party to a "*construction contract*" can go to adjudication at any time but what about a serial adjudication claimant? Is there a point at which the court will stop any further adjudications because the legal process is being abused?

In ***T Clarke (Scotland) Limited v Mmax Underfloor Heating Limited*** a sub-subcontractor had brought eight adjudications in nine months against a subcontractor. One was abandoned by the sub-subcontractor and in five the adjudicator resigned. The subcontractor asked the Scottish courts to stop the sub-subcontractor from initiating any further adjudications. Rejecting the subcontractor's application, the judge said that a court would only deprive a party of an express right conferred by Parliament in the most exceptional circumstances. He referred to the English cases of *Mentmore Towers Ltd & Ors v Packman Lucas Ltd [2010] EWHC 457 (TCC)* and *Twintec Ltd v Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC)*, which said that each case is fact specific, a party should not be prevented from referring a dispute to adjudication, save in the most exceptional circumstances, and it would have to be shown that the conduct was both unreasonable and oppressive.

http://www.scotcourts.gov.uk/opinions/2014CSOH62.html

NET CONTRIBUTION CLAUSES – UNFAIR AND UNREASONABLE?

A net contribution clause usually limits a party's liability to what it is reasonable for them to pay, taking into account the responsibility of others. Such a clause can also shift the risk of another contract breaker's insolvency to the employer. But what if the employer is a consumer? Could the clause be ineffective because it is unfair or unreasonable?

In ***West v Finlay***, where the main contractor was the subject of a winding up order, the Court of Appeal decided that a net contribution clause in an architect's appointment by homeowners was effective. It did not cause a "*significant imbalance*" in the parties' rights and obligations under the Unfair Terms in Consumer Contracts Regulations. This was because of the prevalence of its use in standard RIBA forms, because it was regarded as not unusual in a commercial contract and because the homeowners (one of whom was a banker) made the final choice of main contractor and were very likely to have been alive to the importance of the contractor's financial stability.

The clause was not contrary to good faith or unfair under the Regulations and it was also not unreasonable under the Unfair Contract Terms Act. The homeowners were in an equal bargaining position with the architect; they could have re-negotiated the clause, gone to another architect or even possibly protected themselves from the insolvency risk in some other way (e.g. insurance or a performance bond). They also ought reasonably to have known of the clause's existence, placed prominently on the third page of the appointment.

West & Anor v Ian Finlay & Associates (a firm) [2014] EWCA Civ 316

WORKS FAIL FITNESS FOR PURPOSE TEST DESPITE COMPLYING WITH SPECIFICATION

A contractor for the design, fabrication and installation of wind turbine foundations was required to design grouted connections in accordance with an international standard. It also warranted that the foundations would have a service life of 20 years. Its design complied with the international standard but that standard turned out to be fundamentally flawed and the grouted connections failed within 2-3 years. Was it liable under the warranty even though it had complied with the specified standard?

Yes, said the court. Canadian case law, reinforced by the textbook *Hudson's Building and Engineering Contracts*, said that a contractor's express fitness for purpose warranty could generally override an obligation to comply with the specification, even if the specification contains an error. The two obligations in question in the wind turbine contract were not inconsistent and the employer was entitled to rely on the warranty.

MT Højgaard A/s v E.ON Climate And Renewables & Ors [2014] EWHC 1088 (TCC)

PHYSICAL CONDITIONS - WHAT SHOULD AN EXPERIENCED CONTRACTOR FORESEE?

The Employer's Requirements for the design and construction of a road and tunnel under the runway at Gibraltar airport warned the contractor of the potential for contaminated land and unexploded ordinance. It was also told to allow for 10,000m^3 of contaminated material. In subsequent litigation, a key issue was whether the actual extent of contaminated materials in the ground to be excavated was reasonably foreseeable by an experienced contractor at the time of tender.

The court, in ruling that substantial quantities were foreseeable, said that an experienced contractor at tender stage would not limit itself to analysing the geotechnical information in the pre-contract site investigation report and sampling exercise. What was needed and expected from experienced contractors was intelligent assessment and analysis of why there was contamination there and, therefore, the prospects of encountering more than had been revealed by the pre-contract site investigation (even if difficult to quantify). The very obvious questions which any experienced contractor asks, and would have asked, in relation to, effectively, a brownfield site is: what was this site used for before? Tendering contractors must and should have known and appreciated that, historically, the site

had been influenced environmentally by its military use over hundreds of years, which could be a source of contamination from heavy metals and trace elements, and by its use as an airport area.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028

TERMINATION FOR BREACH OF CONTRACT - DOES IT NEED TO BE SERIOUS?

The ***Obrascon*** contract said it could be terminated for failure by the contractor to comply with a notice requiring it to remedy a failure to carry out *"any obligation"* under the contract. But what if an unremedied breach is trivial? Does the termination option still apply?

The court noted that *Hudson's Building and Engineering Contracts* (12th Edition) had correctly stated that determination clauses such as the one in question will generally be construed as permitting termination for significant or substantial breaches, as opposed to trivial, insignificant or insubstantial ones. That accorded with commercial common sense. The parties could not sensibly have thought (objectively) that a trivial contractual failure could lead to contractual termination. One day's culpable delay on a 730 day contract or $1m^3$ of defective paintwork out of $10,000m^3$ good paintwork would not, for reasonable and sensible commercial people, justify termination, even if the contractor did not comply with a notice to remedy. On the other hand, the breach did not have to be repudiatory. What is trivial and what is significant or serious will depend on the facts.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028

NUISANCE - WHAT DO THE COURTS REALLY MEAN BY "STRICT" LIABILITY?

While installing concrete piles for a redevelopment, concrete from a shaft escaped into a private sewer, not shown on current plans, and caused a partial blockage. The court found that the contractor had not been negligent, but was the contractor liable to the sewer owner in nuisance, where liability has traditionally been regarded as 'strict' because it does not require proof of negligence? No, said the Court of Appeal. The tort of nuisance involves interference by an occupier of land with somebody else's use or enjoyment of land, or of rights or interests in it. Two House of Lords decisions established that:

- if the defendant's use of their land is reasonable, they will not be liable in nuisance;
- unless the case falls within the ***Rylands v Fletcher*** rule, the defendant is not liable for damage caused by an isolated escape, i.e. one that is not intended or reasonably foreseeable; and

harm of the type suffered by the claimant must be foreseeable for the defendant to be liable in damages for nuisance.

In the court's view, urban redevelopment of land is normal and reasonable use (unless involving unusual methods of working) and case law says that, provided operations are carried out with reasonable skill and care so as to avoid as far as reasonably possible interfering with neighbours' use and enjoyment of their land, the noise and dust inevitably generated would not constitute a nuisance.

MT Northumbrian Water Ltd v McAlpine Ltd [2014] EWCA Civ 685

WORKING OUT THE BILL FOR UNREMEDIED DEFECTS

A contractor for substantial extension and refurbishment works to a large country house was not asked to remedy the defects alleged to have appeared in the rectification period. The employer instructed others to deal with the defects and the contract (JCT 2005 Intermediate) said that "*an appropriate deduction*" should be made. But how was that deduction to be calculated – by reference to the contract rates and prices, or something else?

The court said that the employer was entitled to damages for the defects, for which the contractor was contractually responsible, from practical completion, subject to a duty to mitigate. An "*appropriate deduction*", under clause 2.30 of the Intermediate Contract, means a deduction which is "*reasonable in all the circumstances*" and calculated, among other possible factors, by reference to one or more of:

- the contract rates/priced schedule of works/specification;
- the cost to the contractor of remedying the defect (including sums to be paid to their subcontractors);
- the reasonable cost to the employer of engaging another contractor to remedy the defect; and/or
- the particular factual circumstances and/or expert evidence relating to each defect and/or the proposed remedial works.

Mul v Hutton Construction Ltd [2014] EWHC 1797 (TCC)

2. NO TORT DUTY OF CARE FOR CAR PARK DESIGNERS

Sainsbury's brought proceedings for alleged defects in one of its car parks. Because the design and build contractor was in liquidation, probably without insurance cover, Sainsbury's also sued the contractor's managing director and shareholder, who was also the inventor and designer of the modular system used, in his personal capacity, and a company that had acquired the business, assets and share capital of a consultant said to have carried out design and inspection services for the contractor. But did either of these defendants owe Sainsbury's a duty of care in tort not to cause economic loss?

The case law said that a director of a contracting party may only be held to owe a duty of care not to cause economic loss where the evidence establishes that they assumed liability and there was the necessary reliance. It is not enough to establish a special relationship or assumption of responsibility if a director does no more than act in a way consistent with their position as director. There was no evidence to suggest that Sainsbury's relied on the managing director and system inventor in his personal capacity, rather than upon the contractor, with which it chose to contract.

And there is generally no assumption of responsibility by a sub-contractor or supplier, or for that matter, subcontracted design professional, direct to the building owner where the structure of the parties' relationship is inconsistent with such an assumption. Sainsbury's pleadings did not show a legal basis for finding that the consultant owed a duty of care and, even if it did, its liability could not be transferred to its owner. A personal liability in tort cannot generally be transferred to someone else. The claims against both defendants were consequently struck out.

Sainsbury's Supermarkets Ltd v Condek Holdings Ltd & Ors [2014] EWHC 2016

COURT DERAILS "DUTY TO WARN" CLAIM

A train collided with a tree that had fallen onto a railway line. A crack, a wound and decay in the tree had caused the fall but they would not have been seen without a close inspection. The tree owner's duty, acting as a reasonable and prudent landowner, extended no further than the carrying out of periodic informal or preliminary observations/inspections of the tree, and the tree owner was found not liable to the train company. But was a tree surgeon, who had only been employed to clear out the crown of the tree and to remove deadwood, so as to let more light in, under a duty to carry out a detailed inspection and warn of obvious defects?

No, said the court. All the cases where a court had found a duty to warn had arisen in the context of a contractual relationship, there were no reported cases where this kind of duty to warn was owed to a third party, in tort, and there was no reason to extend the duty in this case. And even if such a duty could be owed to a third party, all of the cases stressed that a duty to warn is only triggered by a clear defect or something that is "*obviously dangerous*".

Stagecoach South Western Trains Ltd v Hind & Anor [2014] EWHC 1891 (TCC)

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