

Annual Review of English Construction Law Developments

An international perspective

August 2021

Contents

3	Introduction
4	Indirect and consequential loss exclusions: an update
8	On demand bonds: emerging differences between English law and the URDG
16	Advance payment bonds and “step-down” provisions
22	Supply contracts and interface design liability
26	Design life obligations and non-standard maintenance requirements
32	Treaty claims for cancelled and modified infrastructure projects
36	Acceptance testing and deferring termination rights
40	Assignment of subcontracts on termination
46	The use of experts in international construction disputes: conflicts of interest and multiple instructions
50	Mediation and the Singapore Convention - Two Years On
54	International English Law Construction Contacts



I simply consider this to be ‘mandatory literature’ for anyone interested in construction law.

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Introduction

Welcome to the 2021 edition of our internationally focused *Annual Review of English Construction Law Developments*, covering developments in 2020 from across the globe of relevance to international projects governed by English law.

Many of the topics in this year’s edition reflect issues which have become topical during the economic turbulence brought about by the pandemic. Two articles have been included on developments in relation to on-demand bonds – reflecting a number of cases on the subject in 2020. These cases give important guidance as to the URDG and the making of demands under advance payment bonds.

Three articles are included in relation to termination scenarios and cancelled projects. These consider the important issues of deferring termination rights, the assignment of subcontracts upon termination, and treaty claims for projects which are no longer viable.

In the 2017 edition of this Annual Review we surmised that English law in relation to indirect and consequential loss exclusions could be on the brink of change. 2020 saw the first direct challenge made to the existing law on this topic and the English court’s decision in that case is likely to encourage others.

Design liability continues to be an area of development for English law in the wake of the UK Supreme Court’s decision in *MJ Hojgaard*. Two articles feature on this topic dealing with interface design liability and design life obligations.

2020 also saw a number of developments in international dispute resolution of relevance to the construction industry. The two we have included relate to conflict of interests in the appointment of experts for international construction disputes and the coming into force of the Singapore Convention on International Mediation.

As always, we hope you find this publication of use and welcome any comments or feedback you may have. Should you wish to receive more frequent updates throughout the coming year, or for briefer summaries of developments earlier this year, please sign up for our Law-Now service at www.law-now.com and select “Construction” as your chosen area of law.

We sincerely hope that you and your staff are emerging from the pandemic with strength and vitality. We look forward to assisting you in any way possible over the coming year.



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Indirect and consequential loss exclusions: an update

Exclusions or limitations of liability for 'indirect' or 'consequential' loss are commonplace in international construction and engineering contracts. Such exclusions appear in many of the commonly used standard forms, including the FIDIC suite¹, the LOGIC General Conditions of Contract for Construction², and the NEC³. English law has given a specific meaning to such exclusions, limiting their application to losses falling within the second limb of the rule in *Hadley v Baxendale*.⁴

The narrowness of this approach has been subject to growing criticism of late and prompted a direct attack on the rule considered in an English Technology and Construction Court decision last year. Although upholding the traditional interpretation in the circumstances of the case before it, the decision appears to accept the need to give such clauses their natural and ordinary interpretation in the context of the agreement as a whole and any relevant factual matrix. The case follows recent judicial commentary criticising the traditional approach and may suggest a more case-by-case approach to the interpretation of such exclusions (whether or not the same outcome is reached).



Introduction

Several decisions of the English Court of Appeal have established that contractual exclusions for "consequential and indirect losses" will be limited to losses which fall within what is known as the "second limb" of *Hadley v Baxendale*. *Hadley v Baxendale* is an old and well-known decision in English law establishing a fundamental division between two types of recoverable losses for breach of contract:

- Damages that may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from a breach of contract. For example, if the breach involved the destruction of a factory, both the cost of rebuilding and the loss of production suffered during rebuilding would fall within this first category. These are "direct losses".
- Any other damages which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. This category depends upon additional facts being known to both parties. In the example of the factory just given, it may be that loss of production during the period of rebuilding caused the loss of a particularly lucrative long-term contract. The loss of such a contract would not be recoverable unless both parties knew that the contract might be lost in the event of such a breach. These are "indirect losses" or "consequential losses" (the terms "indirect" and "consequential" loss are used interchangeably).

The traditional approach of English law has been that exclusions for "consequential" or "indirect" losses will usually exclude only those losses falling within the second category described above. In the case of the factory, therefore, such an exclusion would not affect any claim for ordinary loss of production suffered during the period the factory was unavailable. Such an interpretation has been criticised as one which the average businessman would not expect. However, the rule is very well established and in *British Sugar plc v NEI Power Projects*, the Court of Appeal commented that reasonable businessmen using such language must be taken to be aware of the distinction.

In more recent years judicial criticism of the traditional approach has appeared. In 2002, one member of the House of Lords stated that he wished to reserve the question as to whether the traditional approach was correct (*Caledonia North Sea Limited v BT plc*). In 2015, a judge of the Commercial Court who has since been appointed to the Supreme Court, indicated that the traditional approach was to be "deprecated" (*Scottish Power UK Plc v BP Exploration Operating Company Ltd*). In 2016, the Court of Appeal thought it was "questionable" whether the cases underpinning the

traditional approach would be decided in the same way today (*Transocean Drilling UK Ltd v Providence Resources Plc*). Later that year, the traditional approach was departed from in *Star Polaris LLC v HHIC-Phil Inc*, albeit by reference to specific wording of the clause in question which suggested a different interpretation (see the 2017 edition of this *Annual Review* for more detail on this case).

In this most recent case, a more direct assault has been made on the traditional approach by reference to the above criticism.



1 Clause 1.15 of the Yellow and Red 2nd Edition contracts, and clause 1.14 of the Silver, exclude 'any indirect or consequential loss or damage' among other things. Similar provisions are at clause 17.8 of the Gold Book and clause 17.6 of the other First Edition contracts.
2 Clause 25(i) of the Logic Conditions of Contract, Construction, Edition 2, excludes 'consequential or indirect loss under English Law.'
3 Optional clause X18.2 of the NEC4 Engineering and Construction Contract limits liability for 'the Client's indirect or consequential loss'.
4 (1854) 9 Exch. 341.

2 Entertain Video Ltd v Sony DADC Europe Ltd

2 Entertain Video Ltd (“2E”) sued Sony for, among other things, loss of profit arising from a fire at Sony’s warehouse in Enfield. 2E published, marketed and sold various home entertainment media such as Blu-ray discs, DVDs and CDs. Approximately £40 million worth of stock owned by 2E was being held at Sony’s warehouse at the time of the fire, which was caused by civil disorder arising from a controversial policy shooting in 2011.

One issue which arose in the proceedings was whether 2E’s claim for loss of profit was precluded by an indirect and consequential loss exclusion in the following terms:

“Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business.”

Sony argued that the loss of profits and business interruption losses claimed by 2E were consequential on the loss of the stock and therefore excluded by the words of this clause. Sony also pointed to a separate clause in the contract which limited its liability for “any loss of or damage to Client’s Materials or Client’s Goods” to “their manufacturing replacement cost.” Sony argued that these two clauses should be read together so that the intention of the indirect and consequential loss exclusion was to provide a broad exclusion for liabilities beyond the replacement cost of the stock.

After the considering the recent judicial criticism of the traditional approach noted above, O’Farrell J in the Technology and Construction Court accepted the submission “that any general understanding of the meaning of ‘indirect or consequential loss’ must not override the true construction of that clause when read in context against the other provisions in the Logistics Contract and the factual matrix”. However, in evaluating the natural and ordinary meaning of the clause, the judge reached the same conclusion as the traditional approach:

“The exclusion is “for any indirect or consequential loss or damage”. The direct and natural result of the fire was the destruction of the goods and the warehouse, causing lost profits and business interruption losses to the claimants. Therefore, the claims in this case do not appear to fall within the scope of the exclusion.”

Conclusion

This case appears to be the first occasion on which a direct attempt to overcome the traditional approach has been made by reference to the recent judicial criticism of it (*Star Polaris* being a case where the rule was distinguished by reference to specific drafting). It is of note, therefore, that the court applied the traditional approach whilst accepting the need to give the words “indirect” and “consequential” their natural and ordinary meaning, in the context of the agreement as a whole and the relevant factual matrix.

It is unfortunate that the court’s reasoning in this regard is not spelt out in more detail. The central thrust of Sony’s argument was that 2E’s lost profits were a consequence of the destruction of the media held at the warehouse and were therefore “consequential” losses. The judge appears to have disagreed with this argument on the basis that the lost profits were nevertheless caused as a direct and natural result of the fire. However, there is no explanation for why the losses are said not to be “consequential”.

This judgment is likely to add to the growing debate over the proper interpretation of indirect and consequential loss exclusions under English law. In the meantime, parties negotiating contracts with such exclusions should be aware of the arguments being made for a broadening of the traditional approach. The arguments made by Sony in this case would have dramatically expanded the reach of the clause in comparison to the traditional approach.

For a more detailed analysis of the traditional approach and the arguments for change please see the article by CMS lawyers Adrian Bell and Aidan Steensma in the International Construction Law Review cited below.

References:

Hadley v Baxendale (1854) 9 Ex 341; *British Sugar PLC v NEI Power Products Ltd* [1997] CLC 622; *Caledonia North Sea Limited v British Telecommunications plc* [2002] BLR 139; *Scottish Power UK Plc v BP Exploration Operating Company Ltd* [2015] EWHC 2658 (Comm); *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372; *Star Polaris LLC v HHIC-Phil Inc* [2016] EWHC 2941 (Comm); Exclusions for indirect and consequential loss: English law on the brink of change? ICLR, 2017, 34(3), pages 210-225; *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* [2020] EWHC 972.



On demand bonds: emerging differences between English law and the URDG

The ICC's Uniform Rules for Demand Guarantees ("**URDG**") are widely incorporated into on-demand performance securities issued in connection with international construction projects. The latest edition of the URDG (known as URDG 758) was published in 2010 and superseded the initial set of rules published by the ICC in 1992. The rules represent an attempt to standardise and codify demand guarantee practices. The rules mark a departure from the English common law position in a number of respects, but have not been subject to much in the way of judicial scrutiny until recently. Two cases in 2020, one from the English Technology and Construction Court, and another from the Qatari International Court, have considered key parts of the rules concerning non-documentary conditions, notices of rejection and the doctrine of strict performance. These decisions are considered below and contrasted with the position under English common law in the absence of the URDG.



Non-documentary conditions

Article 7 of the URDG provides that:

"A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee."

Under English law, non-documentary conditions are often interpreted as carrying with them an implied documentation condition. For example, in *Esal (Commodities) Ltd v Oriental Credit Ltd* a bond which required payment "on your written demand in the event that the supplier fails to execute the contract in perfect performance" was held to impliedly require a demand to state expressly that the supplier had failed to execute the contract. Likewise, in *IE Contractors v Lloyds* a bond which obliged the bondsman to pay "unconditionally, the said amount on demand, being your claim for damages brought about by the above named principal" impliedly required a demand to state that it was a claim for damages brought about by the contractors.

A more recent example is *Lukoil Mid-East Ltd v Barclays Bank Plc*. The guarantee in that case required Barclays, the bank, to pay upon Lukoil's "first written request submitted to [Barclays] before the expiry date if [the contractor] fails to fulfil the Contract provisions, on the condition that no amendment has been made to the Contract concluded between [Lukoil] and [the contractor] impacting the timely performance of the Works under the Contract". Barclays contended that the condition stated in the guarantee as to amendments impliedly required a statement to be made in the demand that no relevant amendment had been made to the Contract. Although the court accepted that such conditional wording could have this effect, other parts of the bond suggested that the demand need not address itself to the existence of amendments.

Técnicas Reunidas v Korean Development Bank

The relationship between this English law principle and Article 7 of the URDG was considered recently in *Técnicas Reunidas v Korean Development Bank*. Técnicas Reunidas ("**TR**") had entered into a subcontract agreement with Sungchang & Abdullah Al-Shaikh

Contracting Co Ltd ("**Sungchang**") for the performance of electro-mechanical works as part of the construction of a gas project in Saudi Arabia. The subcontract required TR to provide an advance payment to Sungchang which was secured by an on-demand guarantee (the "**Guarantee**") given by the Korean Development Bank ("**KDB**") on behalf of Sungchang. BNP Paribas SA acted as advising bank from its branch in Spain. The Guarantee was governed by English law and subject to the URDG.



TR terminated the subcontract and called the Guarantee alleging various breaches by Sungchang, including that Sungchang had abandoned the site and the subcontract works. KDB rejected TR's demand, relying on a condition in the Guarantee (termed the "**HSBC condition**") that the advance payment had to be paid into a numbered account held with HSBC Bank: "it is a condition for any claim and payment under this Guarantee to be made that the funds paid as advance payment subject to the terms of the subcontract must have been received by the subcontractor on its account no.[...] held with HSBC Bank".

KDB argued that TR was not entitled to call the Guarantee as TR had paid the advance payment to an account (with the correct account number) held by the Saudi British Bank ("**SABB**"), at the relevant time a 40% subsidiary of HSBC bank, and therefore it had not fulfilled the HSBC condition, which required it to make payment to an account held with HSBC bank.



The court found in favour of TR principally on the basis that the proper interpretation of the HSBC condition was that the account intended was the account held by the SABB to which the funds had been paid. However, the court also found that the HSBC Condition was a non-documentary condition which fell to be disregarded in accordance with Article 7 of the URDG.

KDB relied on what was said to be inconsistency between Article 7 and the HSBC Condition in the bond itself. KDB argued that the general rule that specifically agreed terms take precedence over general terms and conditions should apply. It also referred to Article 12 of the URDG which states that the guarantor is liable “only in accordance with, first the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.”

In considering this argument, the court highlighted the special importance the URDG have within the international banking community:

“The URDG is not a set of arbitrary or random standard terms that one party or other may habitually attach to its contracts regardless of where they came from or how they were drafted. The URDG is an internationally recognised set of rules which are contributed to and revised from time to time by a group of international users, including banks, so as to provide clarity and certainty to the creation and the performance of demand guarantees. I say that because, in my judgment, it is quite wrong to reduce these rules to a set of standard conditions and to apply [ordinary] the principles of interpretation ... They are far more important than that.”

The court also noted that the inconsistency relied upon by KDB was inherent in Article 7 itself and that Article 7 could never apply if KDB were correct. As the court noted, Article 7 “assumes that parties might, very specifically, put into the contract a clause which is referring to a factual condition but not one which is a documentary condition.” Article 7 creates a deliberate override in such circumstances “which is designed to protect the issuing bank and therefore one cannot get rid of Article 7 simply by saying that there is a conflict and the way to deal with the conflict effectively is to read out Article 7 altogether.”

Leonardo S.p.A v Doha Bank Assurance Company LLC

A similar conclusion was reached by the Appellate Division of the Civil and Commercial Court of the Qatar Financial Centre in *Leonardo S.p.A v Doha Bank Assurance Company LLC*. Leonardo entered into a contract with the Qatar Armed Forces (“QAF”) for the provision of a low-level radar system in July 2015. Leonardo then subcontracted certain engineering, procurement and construction activities to PAT Engineering Enterprises Co WLL (“PAT”) in March 2016. The subcontract required the provision by PAT of performance and advance payment bonds (the “Guarantees”), which PAT procured from the Doha Bank Assurance Company LLC (“DBAC”). The Guarantees were subject to the URDG.

Leonardo terminated the subcontract in May 2018 and called the advance payment bond. DBAC rejected the demand. In August 2018 Leonardo issued further

demands on both Guarantees and, again, DBAC rejected the demands. One issue arising between the parties was whether Leonardo’s claim satisfied the documentary requirements of the Guarantees. DBAC, in rejecting Leonardo’s demand on the Guarantees argued that, on the terms of the Guarantees, Leonardo needed to have made a written claim to PAT prior to calling the Guarantees. This was based on a provision in the Guarantees stating that the Guarantee covered any sums up to the guaranteed limit that “Leonardo might have to claim in writing from PAT”. However, the Guarantees did not expressly state that confirmation or a copy of such a claim was to be included within a demand. DBAC argued that such a requirement was to be implied, relying on the *Esal* and *IE Contractors* cases noted above.

Leonardo commenced proceedings against DBAC in the Civil and Commercial Court of the Qatar Financial Centre. The case was initially heard by a panel of three judges comprising a former judge of the English Technology and Construction Court, a former Lord President of the Scottish Court of Session and a former judge of the New Zealand Court of Appeal. Leonardo succeeded at first instance and the case was appealed to the Appellate Division and heard by a separate panel of judges comprising a former Lord Chief Justice of England and Wales and two senior barristers from England and Singapore. Overall, therefore, Leonardo’s claims were considered by a range of senior judges and barristers from across the common law world.

The Appellate Division rejected DBAC’s arguments finding that the requirement for a claim in writing was a non-documentary condition under Article 7. In the court’s view:

“It is clear from reading the Guarantees that the reference to claims in writing on the PAT does not give rise to a documentary requirement, as it is not expressed as such in the Guarantees. We consider the words are there to refer to the underlying contractual relationship between Leonardo and PAT and restrict the guarantees to such claims as are in writing. However, the Guarantees do not purport to set out a documentary requirement and cannot be construed as such. ... It would have been simple to have set out a documentary requirement, if one had been intended. This was not done. We therefore conclude that the words can be disregarded, as Article 7 contemplates, in considering what was required when a demand was made.”

The Appellate Division’s reasoning does not extend beyond these simple observations. Unfortunately, there is no discussion of the inconsistency arguments raised in the *Técnicas Reunidas* decision.

Where to from here for non-documentary conditions?

The above two decisions, whilst clear in their outcome, leave a number of questions unresolved:

- Neither decision makes clear what role non-documentary conditions are intended to have within the URDG framework. Both courts accepted that the non-documentary conditions were intended to operate and restrict the scope of the guarantee, yet the guarantor is required to disregard the condition when considering a demand. The question arises whether there is any other way in which a

guarantor may seek to enforce a non-documentary condition. For example, might separate proceedings be brought by the guarantor as to non-compliance with the condition? Or might non-compliance form the basis of an allegation that a demand has been made fraudulently?

- The difficulty with these alternative routes to enforcing a non-documentary condition is their inconsistency with the fundamental nature of an on-demand instrument. For example, whether or not a demand is fraudulent depends on whether the maker of the demand had an honest belief in the demand itself – not whether some other condition in the bond, not addressed in the demand, has been fulfilled.
- Reliance on the non-documentary condition in this way would also appear to be at odds with the wording of Article 7, which requires the guarantor to “deem such condition as not stated” and to “disregard it”. These requirements are not limited to the consideration of a demand only, but are stated in general terms. The opening words of the Article also make clear that a guarantee “should not contain” such conditions and the intention of the Article is evidently to make such conditions ineffective.
- If non-documentary conditions are to be rendered entirely ineffective by this route, then fundamental questions arise as to the interpretation of such instruments. If it is sufficiently clear from the wording of the guarantee that a non-documentary condition was intended to be effective, it is difficult to understand how the incorporation of the URDG can override such an intention, particularly when Article 12 makes the rules subject to the wording of the guarantee. While the URDG are, in the terms used in *Técnicas Reunidas*, far more important than the ordinary terms and conditions of a particular party, they do not have any independent force of law. They can operate only to the extent parties choose to incorporate them.

Rejection formalities and Article 24 of the URDG

Article 24(d)-(f) of the URDG provides as follows:

“d. When the guarantor rejects a demand it shall give a single notice to that effect to the presenter of the demand. The notice to that effect shall state:

- i. that the guarantor is rejecting the demand, and
- ii. each discrepancy for which the guarantor rejects the demand.

e. The notice required by paragraph (d) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.

f. A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand.”

The restriction provided for in this article is not implied under English law generally and therefore provides a valuable right for beneficiaries. The significance of this right is highlighted by the *Técnicas Reunidas* and *Leonardo* cases noted above.

In *Técnicas Reunidas*, TR presented its demand in person but, when KDB rejected TR’s demand, it did so initially by way of a SWIFT message sent to BNP (the advising bank). The rejection was notified to TR the following day, outside the five business day period allowed by Article 24.

The court held that, on the basis of Article 24, KDB’s rejection of TR’s call for the Guarantee should have been sent to TR as it was the “presenter”. The rejection was therefore out of time and KDB would have been precluded from claiming the demand was non-compliant.

In *Leonardo* it was also argued that, irrespective of the merits of the Article 7 issue, DBAC had failed to raise the “claims in writing” condition in its notice of rejection of Leonardo’s demand under Article 24 of the URDG. DBAC had served a notice of rejection within time but this did not extend to the “claims in writing” condition. DBAC argued that, provided a notice was initially given within time, it could be amplified at a later date to include further objections. The Appellate Division rejected this suggestion, noting that the commercial rationale of Article 24 was to provide the beneficiary with clarity as to the grounds of rejection and to avoid unfair practices whereby grounds of rejection are notified “in a piecemeal fashion over an extended period in order to leave as little time as possible to cure the discrepancies before expiry” (quoting *Affaki and Goode*).

DBAC had cited the limited 5 day period in support of its argument that amplification should be allowed, but the Appellate Division held that the period was not unreasonably short and was consistent with the commercial intent of such instruments and “the fact that the applicable principles are set out in a clear code [i.e. the URDG] which can be readily understood without reference to case law.”



Strict compliance

Another potential difference between English law and the URDG is the doctrine of strict performance. It is a long standing rule of English law that a presentation made under a letter of credit must comply strictly with any requirements stipulated by the letter of credit. As noted by the English House of Lords as early as 1927 (in *Trust Co of New York v Dawson Partners Ltd*):

“There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank’s branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.”

Accordingly, in *JH Rayner & Co Ltd v Hambros Bank Ltd*, a letter of credit was payable against an invoice and bills of lading for “Coromandel groundnuts”. However, the plaintiffs presented bills of lading for “machine-shelled groundnut kernels” accompanied by an invoice for “Coromandel groundnuts”. Although evidence was initially accepted by the court that “machine-shelled groundnut kernels” were universally understood in the trade to be identical with “Coromandel groundnuts”, the case was rejected on appeal. The bank was not required to investigate whether the two terms were synonymous and was entitled to decline payment “on the ground that the documents tendered ... did not comply precisely with the terms of the letter of credit which they had issued.”

This approach is also said to encourage the provision of documentary credits by banks. It is said to enable

“banks to issue letters of credit for a modest charge in the knowledge that they will not have to take decisions of substance as to whether the documents presented are sufficient.” (*IE Contractors Ltd v Lloyds Bank Plc*)

It is unclear to what extent the doctrine also applies to performance bonds or on-demand guarantees i.e. documentary credits which secure the performance of obligations rather than payment. In *IE Contractors* the English Court of Appeal commented that:

“... there is less need for a doctrine of strict compliance in the case of performance bonds, since I imagine that they are used less frequently than letters of credit, and attract attention at a higher level in banks. They are not so much part of the day-to-day mechanism of ordinary trade. And...the kind of documents which they require is usually different from the kind required under a letter of credit.”

The court therefore concluded that: “the degree of compliance required by a performance bond may be strict, or not so strict. It is a question of construction of the bond.”

IE Contractors was decided in 1990 and more recently the existence of a distinction between performance bonds and Letters of Credit has been challenged. In *Sea-Cargo Skips AS v State Bank of India*, a case decided in 2013, a judge of the English Commercial Court noted that:

“The distinction suggested [in *IE Contractors*] between letters of credit and performance bonds has not met with universal approval ... For my part I would respectfully doubt that there is less need for a doctrine of strict compliance in the field of performance bonds than in letters of credit. In the field of performance

bonds, as in the field of letters of credit, the banks who provide the bonds deal with documents. Banks must honour their obligation to pay if documents which conform with the requirements of the bond are tendered. Thus the banks must determine, on the basis of the presentation alone, whether it appears on its face to be a complying presentation; see articles 6 and 19(a) of the ICC's Uniform Rules for Demand Guarantees 2010 Revision which are good evidence of banking practice."

Going the other way is a 2016 decision of the English Commercial Court, in *MUR Joint Ventures BV v Compagnie Monegasque de Banque*. MUR entered into a joint operations agreement with Seatrade for the chartering and operation of a bulk carrier. Seatrade's obligations under the agreement were secured by an on-demand guarantee issued by a Montenegrin bank. MUR alleged that Seatrade had failed to make payments due under the agreement and made a demand under the guarantee.

The guarantee was expressed to guarantee a maximum amount of \$500,000, "provided that the Bank's obligation under this Guarantee to make a Guaranteed Payment shall arise forthwith upon written demand sent to the bank by way of registered mail to the above mentioned bank's address". The guarantee also required certain authorisation and authentication requirements to be complied with.

Seatrade objected to the demand on the grounds that the authorisation and authentication requirements had not been complied with and that the demand had not been sent by registered mail. The bank refused to pay and MUR commenced proceedings against the Bank.

The Commercial Court upheld MUR's demand, finding that the authorisation and authentication requirements had been complied with and that the failure to send by registered mail did not invalidate the demand. There was no question that the demand had been received by the Bank. The requirement for registered mail was "directory, not mandatory ... because the guiding principle is one of effective presentation of a demand".

In reaching its conclusion, the court considered the correct approach to the interpretation of on-demand guarantees and noted that "[t]he principle of strict compliance does not necessarily apply to demand guarantees". The court relied in this regard on *IE Contractors* and the proposition that the degree of compliance required by a performance bond may be strict or not so strict depending on the construction of the bond.

The position under English law is therefore uncertain. By contrast, the Appellate Division judges in the *Leonardo* case considered the doctrine of strict performance

central to the URDG. The court identified three core principles underpinning the rules, the first being autonomy, the second being a documents only approach and the third being the principle of strict performance. The court described the principle of strict compliance as being:

"concerned with the requirement that the documents presented must strictly conform to the requirements of the guarantee. This means that if the documents do not comply their presentation will be a non-complying even if the discrepancy has no practical effect."

The application of this doctrine also featured in the court's findings. DBAC relied in defence of the demand under the bond on an invoice PAT had submitted which (prior to termination) Leonardo had accepted as due. However, the bond required DBAC to be presented with an invoice "approved, certified and signed" by Leonardo's project representative. The Appellate Division applied this requirement strictly: "It was not sufficient that it could be shown that as between Leonardo and PAT that the amount had been agreed. There had to be a presentation of the document specified to the DBAC, as what mattered ... was not what had transpired between the parties to the subcontract, but what was specified as the condition for a reduction."

Conclusion

As noted in the introduction, the URDG are widely incorporated into on-demand bonds and guarantees used on international construction projects. The developments noted above suggest overall that this is in the interests of beneficiaries under English law bonds. The ineffectiveness of non-documentary conditions and the strict requirements as to rejections are powerful tools for beneficiaries looking to enforce, although balanced against this is the likelihood that strict performance will be required under the URDG and that arguments may still persist as to the extent to which Article 7 can overcome very clear non-documentary conditions.

* CMS acted for the successful party in the *Técnicas Reunidas* case.

References:

Trust Co of New York v Dawson Partners Ltd [1927] 27 Lloyd's Rep 49; *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37; *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546; *IE Contractors Ltd v Lloyds Bank Plc* [1990] 2 Lloyd's L R 496; *Sea-Cargo Skips AS v State Bank of India* [2013] 2 Lloyd's Rep 477; *MUR Joint Ventures BV v Compagnie Monegasque De Banque* [2016] EWHC 3107 (Comm); *Lukoil Mid-East Ltd v Barclays Bank Plc* [2016] EWHC 166 (TCC); *Leonardo S.p.A v Doha Bank Assurance Company LLC* [2019] QIC (F) 6; *Técnicas Reunidas v Korean Development Bank* [2020] EWHC 968 (TCC); *Leonardo S.p.A v Doha Bank Assurance Company LLC* [2020] QIC (A) 1.



Advance payment bonds and “step-down” provisions

Advance payments are a common feature of international construction projects. They are ordinarily recovered through deductions to payments otherwise due to the contractor throughout all or part of the project. Recovery of the payment in this manner will typically be secured by an on-demand bond or guarantee allowing the full amount of the advance payment to be recovered in circumstances such as termination, where the Employer will be unable to recover the advance through ongoing deductions.

When the need to call on an advance payment bond arises, partial recovery of the advance payment will usually have occurred through payment deductions. This potentially leaves the contractor and its bank exposed to a full call on the bond despite the amounts already recovered through deductions. To protect against such a scenario, provisions may be included to “step down” the value of the bond in accordance with recoveries made by the Employer through payment deductions. Two cases before the Civil and Commercial Court of the Qatar Financial Centre in 2020 have explored the interpretation of such provisions and highlighted their limitations.



Leonardo S.p.A v Doha Bank Assurance Company LLC

Leonardo entered into a contract with the Qatar Armed Forces (“QAF”) for the provision of a low-level radar system in July 2015. Leonardo then subcontracted certain engineering, procurement and construction activities to PAT Engineering Enterprises Co WLL (“PAT”) in March 2016. The subcontract required the provision by PAT of an advance payment bond (the “APB”), which PAT procured from the Doha Bank Assurance Company LLC (“DBAC”). The APB was expressed to secure the reimbursement of a €12.2 million advance payment to be paid by Leonardo to PAT. The APB was to be stepped-down in value as follows:

“This guarantee will be automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants for the LLRS Systems Installation upon presentation by PAT to [DBAC] of copies of the above mentioned project’s relevant documents (Progress Invoice) approved, certified and signed by [a Leonardo] project representative.”

The parties fell into dispute over various issues and Leonardo purported to terminate the subcontract in May 2018. It then made a demand for the full amount of the APB. DBAC rejected the demand and in August 2018 Leonardo made a further demand for a slightly reduced sum (£10.5 million). Leonardo’s second demand noted that the reduction was on account of an invoice issued by PAT in December 2017, which if accepted by Leonardo would have resulted in a proportionate stepping down of the APB in accordance with the provision quoted above.

DBAC rejected the demand on various grounds, including that the demand was greater than the maximum amount of the APB and that the demand was fraudulent or unconscionable. At the heart of these complaints was a submission that, in light of the broader dispute between the parties, the amount demanded by Leonardo was far greater than it could plausibly believe was due to it.

Leonardo commenced proceedings against DBAC in the Civil and Commercial Court of the Qatar Financial Centre. The case was heard by a panel of three judges comprising a former judge of the English Technology and Construction Court, a former Lord President of the Scottish Court of Session and a former judge of the New Zealand Court of Appeal.

The step-down provisions of the APG were interpreted strictly by the court. Whilst an invoice had been submitted by PAT, and there was a dispute over whether liability for the invoiced amount had been agreed, there

was no suggestion that an approved certified and signed invoice had been presented to DBAC. The contract also contained a pay-when-paid condition, which had not been satisfied, and so it was doubtful that PAT’s invoice could yet have fallen due. As the court noted:

“It matters not ... whether in some other way the claimant acknowledged that PAT had done work of value for which, subject always to the “pay when paid” clause, it had a right to receive payment from the claim. Unless the terms of the ... proportional reduction provision in the APG were satisfied, the amount covered by that guarantee remained unreduced and, in a question between the claimant and the defendant, the latter remained fully exposed under the guarantee in that unreduced amount.”



DBAC sought to overcome this difficulty by relying on a defence of unconscionability as developed in Singapore (and in some Australian jurisdictions). DBAC complained that Leonardo was seeking to benefit from its own wrong by making a demand under the APB which did not recognise the value of unpaid work carried out by PAT prior to termination (of which the invoiced amount was only a part). While the court did not consider unconscionability to be made out on the facts, given the clear wording of the APB, it expressed doubts as to whether the doctrine should be imported into the law of the Qatar Financial Centre in any event. The court noted that there had not been a wide acceptance internationally of the doctrine in relation to on-demand instruments. The court also found persuasive three policy reasons against adoption of the doctrine: (i) the vagueness and imprecision of the concept of unconscionability; (ii) the likelihood that it would result in more frequent judicial interference of on-demand instruments; and (iii) the likelihood that it would involve the courts in matters of dispute essentially relating to the underlying contract.

As the court noted:

“The whole commercial purpose of [on-demand] instruments, including advance payment guarantees, is to obviate the need for the parties to them to enter, at the stage of a demand under them, into disputes arising from the underlying contracts. Such disputes may require to be addressed and resolved later. But, the commercial purpose of the guarantee is that the beneficiary under it obtain immediate relief, although it may require to give an accounting subsequently. While fraud, where obvious, may operate as an extra-contractual bar to the operation of contractual rights, wider exceptions are not to be encouraged.”

DBAC had also alleged fraud, claiming that it was not plausible for Leonardo to have a genuine belief that the amounts demanded were due at the date of the demand. However, given the pay-when-paid provisions and the broader dispute which had followed termination of the contract, it was impossible to say that Leonardo did not have an honest belief that the sums demanded were due to it. In the court’s view, DBAC had *“failed to appreciate that a realistic inference to be drawn was that the claimant’s demands were genuine but that the underlying Contract was in dispute”*.

As noted in the preceding article, the court’s conclusions as to stepping down provision in the APG were upheld on appeal. The arguments as to unconscionability and fraud were not subject to appeal.

Obayashi Qatar LLC v Qatar First Bank LLC

Obayashi was a joint venture contractor employed to carry out works in relation to the Msheireb Downtown Doha Project in Doha, Qatar. It appointed Classical Palace Trading & Contracting SPC (“CP”) as subcontractor to carry out certain hotel finishes and fit-out works. The subcontract required CP to procure an advance payment guarantee to secure an advance of QAR 9.9 million to be made by Obayashi. An advance payment bond (the “APB”) was duly procured from the Qatar First Bank LLC (the “Bank”). The APB referred to the subcontract and contained the following step-down provision:

“The value of this Bond shall progressively be reduced by the amount deducted by [Obayashi] from [CP] as contained in the certificates and payments against the said Advance Payment.”

The advance payment equated to 5% of the subcontract price. Clause 14.2 of the subcontract provided for it to be repaid through a 10% deduction from the amount of each interim payment due under the subcontract. Initial Interim Payment Certificates (“IPCs”) issued under

the subcontract recorded the payment of the 5% advance payment (QAR 9.9 million) and made 10% deductions to effect its repayment.

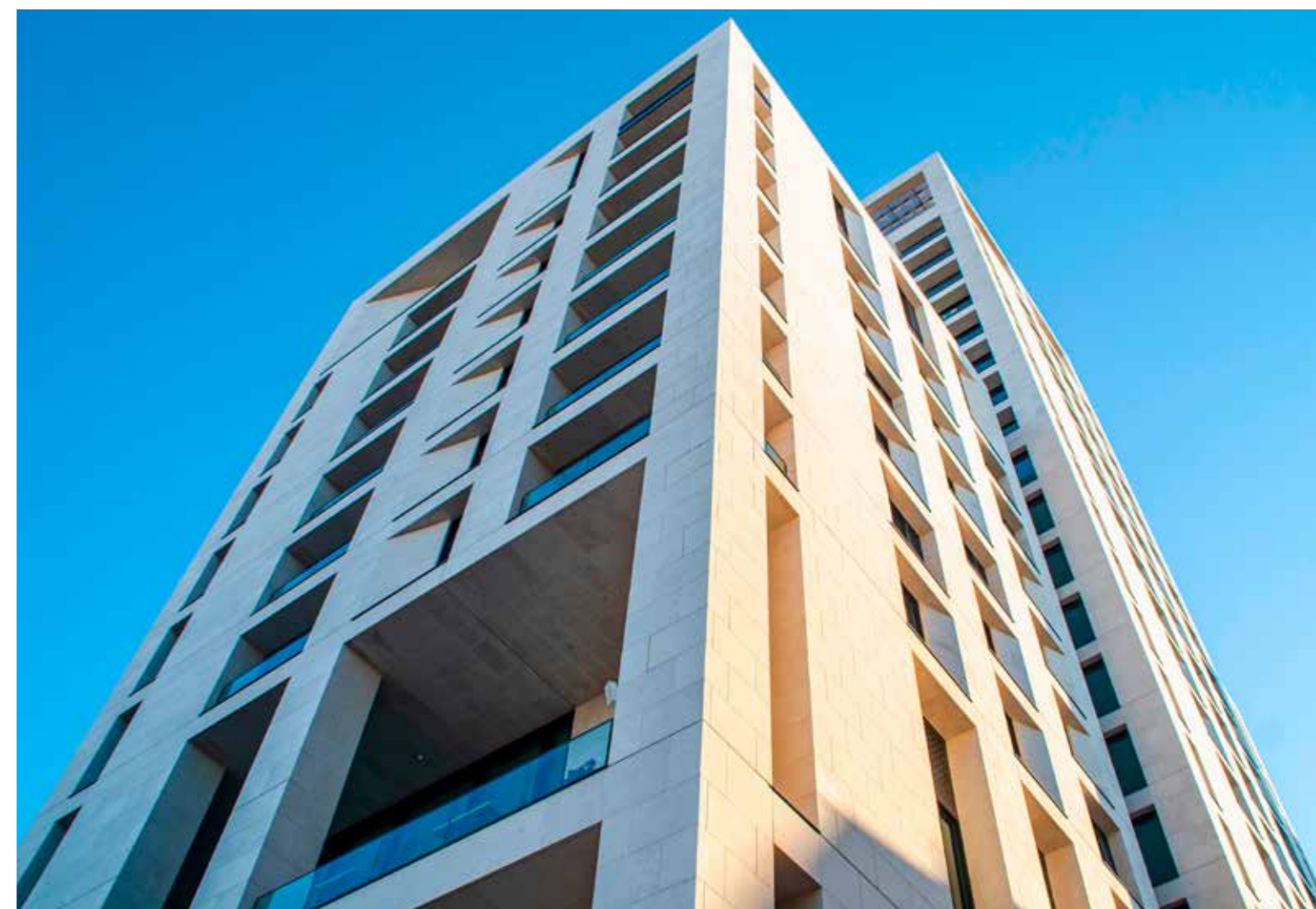
In April 2015, a further advance payment was made by Obayashi (without notice to the Bank) of QAR 4.95 million. From IPC 7 onward the total increased advanced payment was noted (QAR 14.85 million) but a single 10% deduction continued to be made on account of repayment. IPC 24 recorded a further increase in the total advance payments made to QAR 19.8 million, again without reference to the Bank. The 10% repayment deduction remained unchanged.

From IPC 26 onwards, the original advance payment was separated out from the later advances and the 10% repayment deduction was split equally between them. By IPC 35 (in July 2017) the total recovery stated against the original advance was certified as QAR 4.5 million. However, in IPC 36 (in August 2017) that figure was cancelled and a nil figure stated as having been recovered against the original advance. This nil figure remained stated up until the last IPC issued in August 2019 (IPC 48).

In November 2017, a supplemental agreement was entered into between Obayashi and CP which noted that Obayashi had provided total financial support to CP of just over QAR 50 million. The agreement noted that CP was unable to repay that amount, but that Obayashi would provide further support to assist CP in completing the works. In return, CP agreed to give Obayashi management control over certain of its subcontractors and agreed that Obayashi could recover its advances from various security instruments in its possession (including the APB) if repayment was not made within a certain time.

Matters did not improve much after the supplemental agreement and in February 2019, Obayashi made a demand for the full amount of the APB (as well demands under other securities). The Bank ultimately rejected the demand on two grounds. It firstly claimed the IPCs showed that the full amount of the APB had been recovered albeit that this amount had been allocated to other advance payments made by Obayashi. Secondly, it claimed that Obayashi had acted fraudulently in allocating and re-allocating the recovered sums shown on the IPCs without the Bank’s knowledge.

The Bank relied heavily on the terms of the subcontract with CP, which required repayment of the original advance payment through a 10% deduction from each IPC. As the APB was issued on the basis of these subcontract terms, Obayashi and CP were not at liberty to amend those terms without the consent of the Bank. Nor did Obayashi have a discretion as to whether to make a 10% deduction in any given IPC for repayment of the original advance.



Obayashi commenced proceedings against CP in the Civil and Commercial Court of the Qatar Financial Centre. The case was heard by a panel of three judges comprising a former Lord President of the Scottish Court of Session, a former judge of the Supreme Court of Appeal of South Africa and a senior English barrister.

The court rejected the Bank’s arguments relying heavily on the principle of autonomy. In the court’s opinion the repayment mechanism in the subcontract was not incorporated within the APB. The APB was to be interpreted strictly according to its own terms, which stipulated only that the APB would be reduced insofar as deductions on account of the original advance had been made in the IPCs. Accordingly, the court agreed that *“there was nothing to prevent [Obayashi] from agreeing with CP to reduce the recovery of the advance payment to 5% per month or not to recover anything at all during a particular month or during the whole contract period.”*

The court did not accept, however, that once repayments had been recorded on an IPC they could be

reversed or reallocated by agreement between Obayashi and CP. Once a repayment had been recorded on an IPC, the value of the APB had been reduced and could not be increased again without the agreement of the Bank. Accordingly, the APB fell to be reduced by the QAR 4.5 million recorded on IPC 35 as having been recovered against the original advance payment. Obayashi was therefore only entitled to QAR 5.4 million out of the total QAR 9.9 million it had demanded.

In light of the foregoing analysis the court had no hesitation in rejecting the Bank’s alternative argument based on fraud. In the court’s view:

“There was nothing dishonest in what [Obayashi] did. There was an issue about the nature and effect of the APG. [Obayashi] had a view of it. The fact that we have taken a different view does not involve any suggestion that the Claimants must have known that their demand was excessive and unlawful. Although we have rejected [Obayashi’s] arguments on the APG, they were of substance and made bona fide with a proper legal foundation.”

Conclusions

Both of these decisions provide helpful guidance as to the issues which can arise with step-down provisions under advance payment bonds. Given the composition of the courts in both cases, the reasoning adopted is likely to be persuasive in many common law jurisdictions.

Both courts can be seen to have taken a strict approach to step-down provisions, insisting on complete autonomy between the terms of the bond and the underlying contractual arrangements between the parties. In both cases this gave rise to complaints that the call under the bonds did not reflect financial reality, but the court was content for such issues to be raised within the narrow confines of the fraud exception or in subsequent proceedings between the parties to the underlying agreements after the demands had been honoured in accordance with the terms of the bonds.

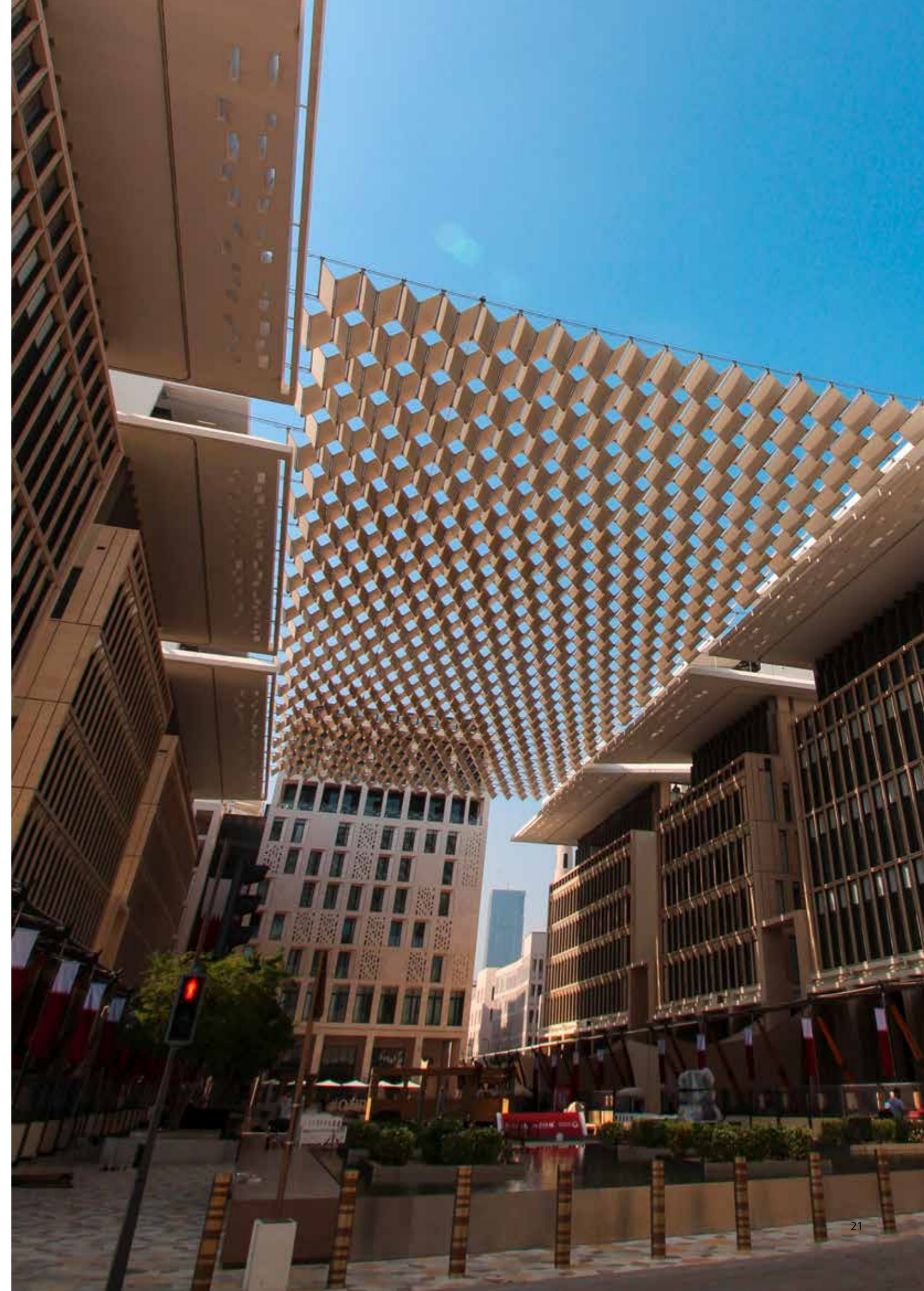
The attempt in the *Leonardo* case to soften the harshness of this approach by reference to a doctrine of unconscionability is notable. The reasons given for rejecting this attempt are convincing and echo reasons given by the English Commercial Court in rejecting an almost identical argument in *NIDCO v Banco Santander SA*.

The findings in *Obayashi* may lead to closer attention given to step-down provisions within financial institutions. As the decision illustrates, the principle of autonomy allows parties to the underlying contracts considerable latitude in structuring their affairs to maximise the security provided under an advance payment bond. Had the bond in *Obayashi* not made specific reference to amounts recorded in interim certificates, it seems clear that the parties would have been able to reallocate sums previously allocated toward the repayment of the original advance payment. In circumstances where the contractor's solvency is in question, this is likely to incentivise parties to restructure their balances so as to permit the full value of an advance payment bond to be demanded.

Such practices may in some circumstances be subject to challenge via insolvency laws, but short of this, financial institutions will need to give careful thought as to the drafting of step-down provisions to protect against these practices whilst allowing demands to be assessed without undue complexity and investigation. One alternative approach to that adopted in the bonds considered in *Leonardo* and *Obayashi* is to require the demand itself to certify that the amount demanded gives credit for all recoveries made via payment deductions or other means. Attempts might also be made to prevent the types of changes and reallocations made in the *Leonardo* case by requiring the demand to certify that a certain proportion of each payment due under the construction contract has been applied to the repayment of the advance secured by the bond. Whether Employers would be willing to accept such requirements is a separate question.

References:

[National Infrastructure Development Co Ltd. v Banco Santander S.A](#) [2016] EWHC 2990 (Comm); [Leonardo S.p.A v Doha Bank Assurance Company LLC](#) [2019] QIC (F) 6; [Leonardo S.p.A v Doha Bank Assurance Company LLC](#) [2020] QIC (A) 1; [Obayashi Qatar LLC v Qatar First Bank LLC](#) [2020] QIC (F) 5.



Supply contracts and interface design liability

A decision of the English Technology and Construction Court in 2020 has considered the scope of design duties owed by a supplier of equipment for incorporation into construction works. The equipment in question had failed due to the design not being sufficiently robust for the system into which the equipment was to be incorporated. This is a common issue arising on international construction contracts, particularly those involving complicated engineering such as process plants or refineries. Put simply, it is a question of who bears responsibility for the interface between the equipment to be supplied and the rest of the works.



DBE Energy Limited v Biogas Products Limited

DBE was responsible for the design, construction and operation of a new anaerobic digestion facility (“**AD facility**”) in Surrey. In June and July 2017, DBE met and exchanged emails with Biogas, and it was understood that Biogas would provide detailed mechanical and process design of the AD facility. Biogas began carrying out this design work, including issuing drawings of the general site layout, tank connections, the hot water system process; however, there were no detailed written contractual arrangements in place in respect of these design works.

In October 2017, DBE entered a standalone contract with Biogas for the design and supply of four tank heaters and in January 2018 it entered another contract with Biogas for the design and supply of two pasteuriser tanks, based on quotations provided by Biogas. During testing and commissioning, defects were discovered in the tank heaters and pasteuriser tanks and they buckled and failed. DBE claimed the failures were caused by Biogas’ breach of contract and/or negligence in designing the equipment and sought to recover the loss and damage suffered.

The scope of design obligations

Biogas’ position was that, whilst it did have design obligations under the contracts, they were limited by reference to certain drawings referred to in its quotations and that it had no obligation to have regard to the design requirements of the overall system. It argued that the design obligations owed by a party will primarily be determined by the contractual documents and accompanying specifications. However, the court found that the contracts “cannot be seen in isolation from the other activities that Biogas was engaged in on site. Those activities provide important factual matrix evidence which cannot properly be ignored.”

Against this background, the court rejected Biogas’ submission that its design scope was limited and found that, to comply with its contractual duties to exercise reasonable care and skill in the design of the tank heaters and pasteuriser tanks, Biogas was required to check that the equipment design was consistent with other parts of the system and could be safely integrated. It was also of note that the drawings referred to in the quotations were not complete designs from which the items could immediately be fabricated; further design was required by Biogas to specify such things as material thicknesses and design pressure.

Notably, the court also found that even if Biogas had not been involved in wider aspects of the system design, a designer in Biogas’ position was obliged to have

regard to the system into which its components would be integrated in any event. In the court’s opinion, “a reasonably knowledgeable and skilled engineer engaged in the design of the Pasteuriser Tanks and Tank Heaters was obliged as part of those obligations to check what the likely operating pressure was to be, so as to ensure that he factored this information into his design.”

Fitness for purpose

The court also considered whether Biogas was in breach of an implied duty of fitness for purpose, which both parties accepted was to be implied under the Sale of Goods Act 1979 and/or the Sale of Goods and Services Act 1982. These two statutes also apply to international projects where parties provide for English law to apply.

Biogas relied on an earlier decision in *J Murphy & Sons Ltd v Johnston Precast Ltd* where the court had held piping was required to be fit for the purpose of carrying potable water, the intended use of the piping, but was not required to be fit for the purpose of use in conjunction with a foam concrete environment, the intended environment into which the piping would be installed. The court in that case did not accept that the surrounding conditions of the pipe equated to its purpose; and noted that this was not made known to the supplier nor was there evidence that the purchaser relied on the skill or judgement of the supplier.

The court distinguished *J Murphy* from the present case; it could not be said that the equipment was to be located in an environment not known to Biogas, but in fact the equipment was to be incorporated into a system that Biogas had designed. Further, DBE was relying on Biogas to ensure the equipment was compatible with the overall mechanical and process design. Therefore, the court found that the tank heaters and the pasteuriser tanks were not fit for purpose, which involved their operation as components in their own right but also their safe integration into the wider system:

“Biogas was involved in the mechanical and process design of the AD Facility, a design which necessarily involved the design of the hot water system and an understanding of the pressures operating in that system. Biogas was obliged to ensure that its design for the Tank Heaters and the Pasteuriser Tanks could be safely integrated into, and would be compatible with, the overall design, including with reference to the water pressure. This was not a situation in which the Tank Heaters and Pasteuriser Tanks were to be located in a particular environment the details of which were not made known to them; on the contrary, the Biogas components were to be integrated into a system whose details were known to Biogas because of its involvement in the design of that very system.”

Concurrent duties in tort

The court also considered whether Biogas had tortious liability for the defects. On international projects, a broadly worded choice of law clause will deal with both contractual and non-contractual (i.e. tortious) choices of law. Absent such a clause, the law governing tortious liability usually depends on the country in which the wrongful actions have occurred, which is often the location of the works. Tortious claims can sometimes provide a remedy where contractual claims do not, for example where contractual claims are time barred.

Addressing the question under English law, the court referred to the guidance given by the English Court of Appeal in *Robinson v PE Jones (Contractors)* as to the circumstances where a duty in tort will arise concurrently with contractual duties, requiring in particular an assumption of responsibility by the party in question. The court in that case had concluded that building contractors will generally not owe concurrent duties in tort under English law, but that construction professionals such as architects ordinarily would. This left a measure of uncertainty as to the position of design and build contractors.

In the present case, the court found that Biogas had assumed responsibility in tort for ensuring the compatibility of the tank heaters and pasteuriser tanks with the hot water system and that DBE had relied on Biogas' expertise in process and mechanical design. It noted that Biogas' position was "beyond that of a simple manufacturer of goods, or building contractor with no design obligations and is analogous with that of a design and build contractor who can owe a duty of care in tort which is coterminous with its contractual duties".

Conclusions

As noted in the introduction, this decision will be of particular relevance to the letting of subcontracts and supply contracts on complicated engineering projects. In overall terms, Biogas' liability for interface issues largely stemmed from its previous involvement in the project. For Contractors or Employers, therefore, the decision shows the advantages which can be gained, under English law, from more detailed pre-contractual involvement of a supplier or subcontractor. Conversely, suppliers or subcontractors should not be dismissive of the potential for interface liability to arise where their knowledge of the project is more than minimal; express exclusions should be deployed if such a risk is unacceptable.

A number of more general observations on this decision can also be made:

- The court's finding that even without such involvement Biogas would have been required to make enquiries of DBE to complete its design is notable. This again will depend on the circumstances and the nature of the items being supplied, but suppliers should take note that any ambiguity or incompleteness in the description or specification of the items may require enquiries to be made of the purchaser rather than allowing the supplier to complete the order based on its own judgment alone.
- The case makes an interesting contrast to the *J Murphy* decision and illustrates that the environment or systems into which goods are to be installed may form part of the supplier's fitness for purpose obligation. The findings in these two cases are understandable on their facts, but other cases are likely to emerge where the dividing line is difficult to discern.
- This appears to be the first English case after *Robinson v PE Jones (Contractors)* where a design and build type relationship has been held to give rise to concurrent duties of care in tort. This poses another "dividing line" question as to the extent of the design responsibility required before such concurrent duties will be implied, given most construction contracts without specific design work will still import a certain degree of design responsibility (i.e. selection of materials, methods of working etc).

References:

[J Murphy & Sons Ltd v Johnston Precast Ltd](#) [2008] EWHC 3024 (TCC);
[Robinson v P.E Jones \(Contractors\) Ltd](#) [2011] EWCA Civ 9; [DBE Energy Ltd v Biogas Products Ltd](#) [2020] EWHC 1232 (TCC).



Design life obligations and non-standard maintenance requirements

The 2018 edition of this Annual Review commented on the UK Supreme Court's decision in the *MT Højgaard* case. That case concerned the interpretation of a design life obligation contained in a technical schedule to a construction contract, in addition to more general obligations to exercise reasonable skill and care and to comply with international standards. A decision of the English Technology and Construction Court last year provides further guidance as to the interpretation of design life obligations how they apply to different components of a complex structure. The decision also considers the effect of provisions which prohibit designs requiring non-standard or unusually onerous maintenance regimes.



MT Højgaard: a recap

Contracts often include requirements that the works (or their components) achieve a certain design life. Quite what that means can be a vexed question and lead to disputes if one party alleges premature failure. Such a case was considered in 2017 by the Supreme Court in *E.ON vs MT Højgaard*.

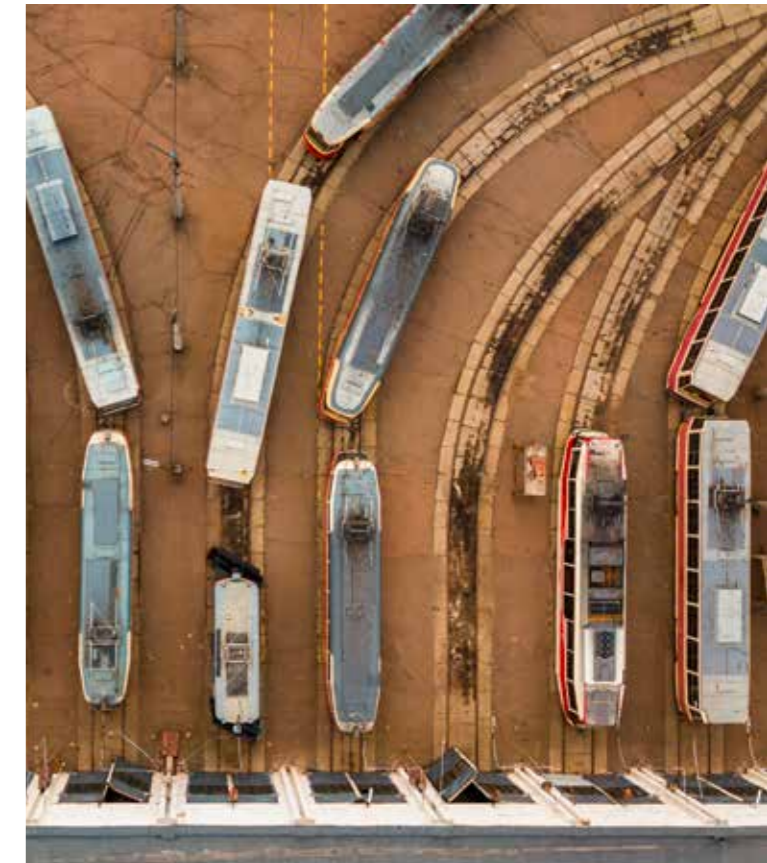
Contractor MT Højgaard ("**MTH**") had been employed by E.ON to design, fabricate and install 60 wind turbine foundations on the "Robin Rigg" project based on the international standard DNV-OS-J101 ("**J101**"). These particular turbines had a transition piece fitted over the top of the monopile, with the gap between the transition piece and the pile filled with grout, and the tower fitted onto the transition piece. In contrast, some other wind farms were built with so-called shear keys in the grouted connections. MTH installed the turbines between December 2007 and February 2009.

Shortly after completion, another offshore wind farm at Egmond aan Zee (Netherlands) was experiencing serious problems, as the transition pieces started to slip down the monopiles. Similar to Robin Rigg, the turbines on that project were built without shear keys and according to the same J101 standard. A flaw was subsequently discovered in the international standard which accounted for these failings. On Robin Rigg, the grouted connections started to fail in April 2010 and remedial works were commenced in 2014, after E.ON had developed a scheme of remedial works. E.ON brought High Court proceedings against MTH in England to recover the cost of the remedial works.

E.ON brought a claim against MTH for an alleged breach of the design life obligations in the design and build contract. The contract between the parties contained a mix of different design obligations situated in different parts of the contract. The primary issue in dispute between the parties was whether MTH had satisfied its design obligations by designing in accordance with J101 and its obligation of reasonable skill and care, or whether the contract required it to guarantee a service life of 20 years for the foundations.

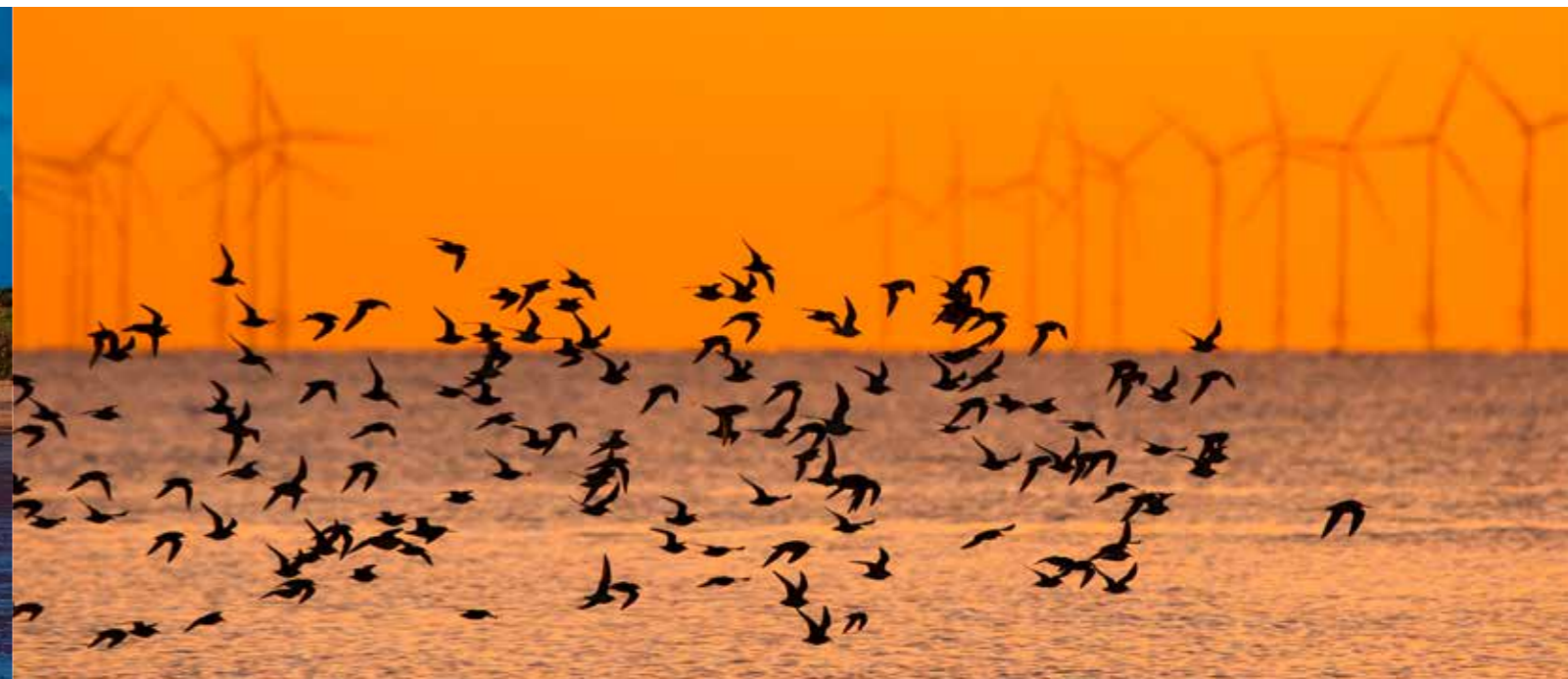
The Supreme Court held that complying with the relevant standards was only a minimum requirement and the obligation to provide a design that would allow for a 20-year life, while not necessarily an absolute warranty, was essentially a fitness for purpose obligation. This was despite the obligation being "tucked away" in the technical requirements. Given the technical schedule in question had been given contractual force by the parties, it was to be taken at face value.

In interpreting the concept of a design life, the Supreme Court drew a distinction between an absolute warranty of lifespan and a warranty that the works had been designed to last a certain period. As Lord Neuberger noted: "[T]here is a powerful case for saying that, rather than warranting that the foundations would have a lifetime of 20 years, para 3.2.2(ii) amounted to an agreement that the design of the foundations was such that they would have a lifetime of 20 years."



This distinction gives rise to a further question as to what is meant by the requirement to design for a specified lifetime. Lord Neuberger considered that this lesser obligation would permit an allowance for probabilistic failure, bearing in mind the forces of nature – particularly at sea – meant that a specific lifespan could never be absolutely guaranteed. In his view:

"The answer is to be found in J101 [which] requires the annual probability of failure to be in the range of one in 10,000 to one in 100,000, and specifically provides that, if a service life is not specified in a contract "20 years should be used", which ties in with the proposition, agreed between the parties, that an offshore wind farm is typically designed for a 20-year lifetime ...



[T]he simple point is that J101, while concerned with making recommendations and requirements linked to the intended life of a structure to which it applies, makes it clear that there is a risk, which it quantifies, of that life being shortened. That risk is, in my view, the risk which should be treated as incorporated in para 3.2.2.2(ii) - if it is indeed concerned with the designed life of the Works."

Blackpool Borough Council v Volkerfitzpatrick Limited

In this most recent case, Blackpool Borough Council entered into a design and build contract with Volkerfitzpatrick for the construction of a new tram depot. Construction was completed in 2011.

The contract was a modified NEC3 standard form design and build contract. The specification for the works (known as the "Works Information") provided that the works should have "a design life of 20 years" save where specified to the contrary in the Functional Procurement Specification ("FPS") (included in the Works Information). The FPS itself stated that the "design life of the building structure shall be a minimum of 50 years".

The depot is located on a coastline meaning it is exposed to the elements and in January 2015 a section of the roof detached during high winds. Upon inspection, the Council discovered that steel components in the roof space had lost galvanized coating and were significantly more corroded than would have been expected after 4 years of service life.

The Council brought TCC proceedings alleging significant parts of the depot did not meet their intended design life of 50 years and were unsuitable for a coastal environment. Volkerfitzpatrick contended that the design life was either 25 or 20 years and that the Council had failed to maintain the depot correctly.

Design life

Although the contract contained a "reasonable care" clause, it also provided that the works were to be provided in accordance with the Works Information, which included the design life requirements. In addition, a specific Z clause had been added to the contract pursuant to which the contractor "warranted and undertook" that the works, when completed, would "satisfy any performance specification or other requirement included or referred to in the contract". As a result, and relying on *Højgaard*, the court was satisfied that the clauses in the contract should have the same strict character as the Supreme Court had held the clauses in that case to have, namely that the design of the depot was such that it would last the specified period without replacement. In the court's view, what this meant in practice was that Volkerfitzpatrick would be at liberty to contend "that a particular element of the tram depot would not last its minimum design life notwithstanding any design which might feasibly have been adopted." As in *Højgaard*, it was unnecessary for the court to determine whether the contract went further and provided an absolute warranty that the depot would last that period without replacement (i.e. regardless of whether such a result was feasible as a matter of design).

The court then proceeded to consider the meaning of the term "design life", noting that there was no contractual definition of the phrase. Considering a number of relevant standards, the court held that the structure could not reasonably be expected to be "maintenance free" for the whole of its design life, but that it could be assumed that it "ought not to need major repairs over that period". The distinction was between anticipated maintenance and major repair.

As noted above, the Works Information provided for a design life of 20 years, save for the "building structure" where it was to be 50 years. The term "building structure" was undefined and Volkerfitzpatrick relied on a "technical design log tender development document" (the "RPS Log") which referred to a 50 year design life in relation to the "external shell". Volkerfitzpatrick argued that this could be used to interpret the term "building structure" as being limited to the external shell of the depot. The Council argued for a broader interpretation of "building structure" and relied on a contractual hierarchy clause to overcome the RPS Log. However, the court agreed with Volkerfitzpatrick that the RPS Log provided the clearest guidance as to what was intended to be included in the term "building structure". As a result, the two terms could be read together and there was no conflict or inconsistency to be resolved through the hierarchy clause.

Coatings

A separate issue arose as to how the design life obligation applied to coatings. The Council argued that the design life applied to the component in question as

a whole including the coatings, while Volkerfitzpatrick argued that the coatings were to provide protection for the steel structure below and may be consumed or "sacrificed". On Volkerfitzpatrick's interpretation, the criterion for breach of the design life obligation would be loss of the coating and sufficient loss of the steel substrate such that it could not perform its function.

The court reached different conclusions on this issue for different components. For double coated external facing components such as wall cladding panels and tram doors, due to the contractual requirements for external facings to withstand harsh environments, and the aesthetic qualities of the design, the coating should have the same design life as the underlying structure. For the cold formed components which were internal, the court held that there was no need to repair or replace these components unless and until they could not perform their structural function. The design life obligation would not be breached for those components merely because the coatings would not last the specified period, provided structural integrity was not compromised.

The maintenance proviso

In defending the Council's case on design life, Volkerfitzpatrick alleged that the Council should have maintained areas affected by corrosion more frequently than in a non-coastal environment. However, the Council relied on a contractual requirement precluding the design from incorporating any "... 'non-standard' or 'unusually onerous' operation and/or maintenance requirements in respect of the works having regard to normal

construction operations and maintenance requirements which are applicable for works of a similar character as the works” (the “maintenance proviso”).

The court held that if the design required non-standard or unduly onerous operation or maintenance requirements because of the location of the depot, it was Volkerfitzpatrick’s obligation to identify those requirements and to obtain the Council’s consent. In coming to this conclusion, the court considered that the words “normal” maintenance requirements and “similar character” indicated that the comparator was intended only to be structures of the same kind rather than structures of the same kind and in similar locations. Otherwise, in the court’s view, it was difficult to see that the proviso was intended to achieve: “since any maintenance requirements which were reasonably necessary for this particular tram depot at this particular location could never be said to be ‘non-standard’ or ‘unduly onerous’ in such a case”.

Conclusions

This decision provides important guidance as to the use of design life obligations in construction contracts. In particular:

- The court’s analysis of the meaning of the term “design life” provides a helpful rule of thumb distinguishing between routine maintenance and major repairs.
- The court’s elaboration of the *Højgaard* decision means that a contractor subject to a “design life” obligation will usually be able to argue (absent an absolute lifespan warranty) that the specified lifespan would not have been achieved despite any design which might “feasibly” have been adopted.

- The court’s findings as to how design life obligations apply to coatings may potentially apply to other consumable elements of a project and highlights the need for parties to specify how consumables are to be treated as part of any design life obligation, or to exclude them entirely. In the absence of specific wording, the court’s approach suggests that a design life obligation may or may not extend to consumable elements depending on the purpose of the element in question.

- The court’s analysis of the maintenance proviso is also of interest. The suggestion that a location specific interpretation of the proviso would render it meaningless would appear to overlook the fact that alternative designs may exist for a given building which balance the interests of cost or performance with a greater or lesser need for maintenance. It does not seem inconceivable that such a provision might have been intended to have a location specific meaning with a view to avoiding cheaper or unusual designs which require greater maintenance than other more standard designs. This is an important issue, as such provisos are commonplace and link directly to the extent to which a given design can be said to meet the required design life.

- The decision provides yet another example of an informal technical document “tucked away” in a schedule to a contract proving to be of decisive relevance in much the same way as in *Højgaard* and despite the inclusion of a contractual hierarchy clause.

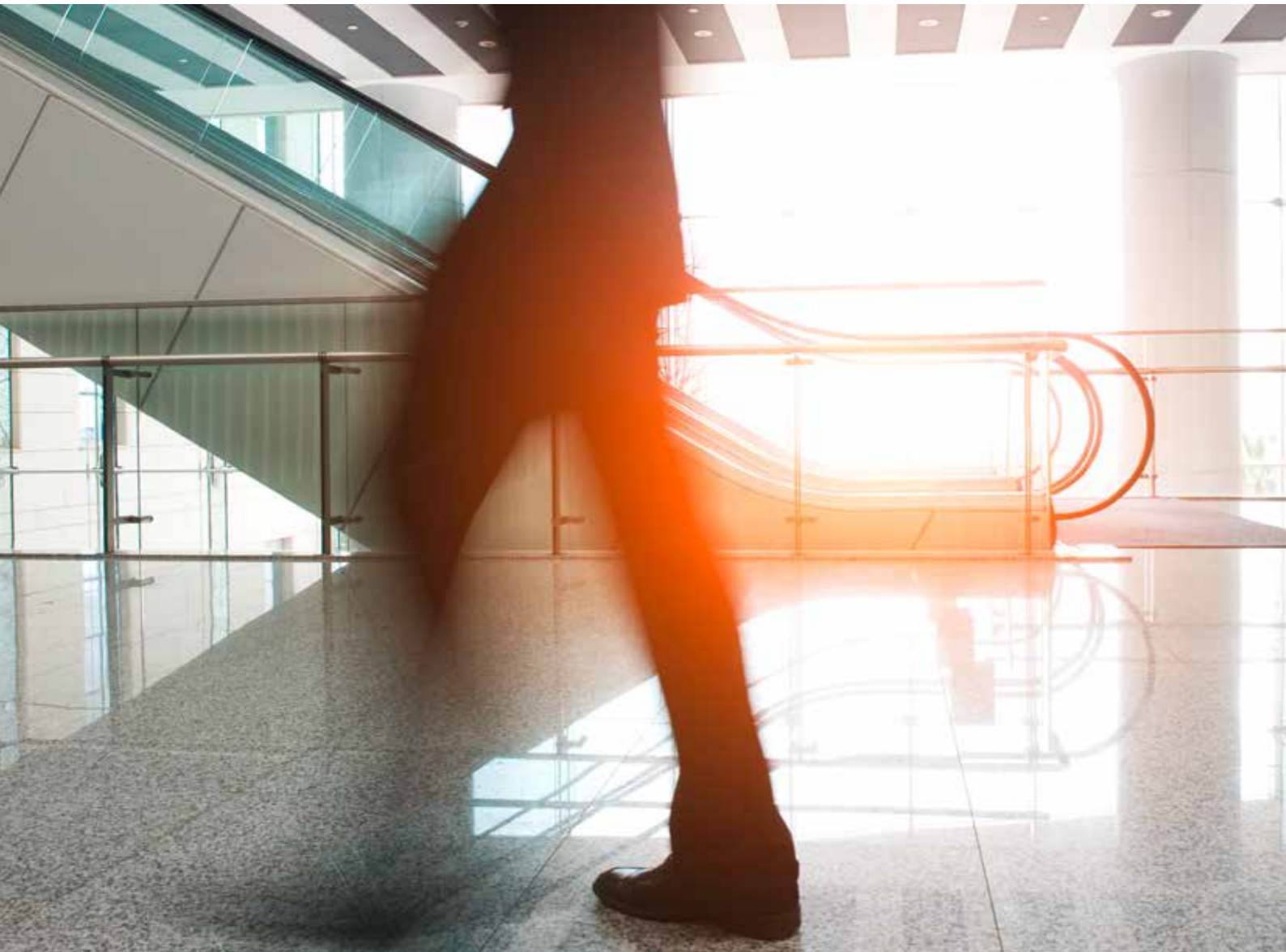
References:

[MT Højgaard v E.ON \[2017\]](#) UKSC 59; [Blackpool Borough Council v Volkerfitz Patrick Ltd \[2020\]](#) EWHC 1523 (TCC).



Treaty claims for cancelled and modified infrastructure projects

An ICSID tribunal decision in 2020 considered an investment treaty claim in relation to the downsizing of an airport development in Latvia. Although not itself related to the COVID-19 pandemic, the decision is very relevant to the economic upheaval wrought by the pandemic and the consequent reappraisal of many infrastructure projects across the globe. The tribunal in this case determined that the actions of the airport authority were not attributable to the Latvian State and that the changes made to the original development plans did not give rise to a treaty-breach, despite having a significant impact on the investor's ability to proceed with the works.



Staur Eiendom AS v Latvia

The Claimants in this case were all limited liability companies who held an interest in (SIA) Rixport ("Rixport"), a company incorporated for the purpose of bidding for a contract for the development of a parcel of land adjacent to Riga International Airport in Latvia. Following a tender process in 2006, the Latvian state-owned company SJSC Airport Riga ("SJSC"), which operates Riga International Airport, awarded four land lease agreements to Rixport in respect of this land (the "Land Leases"). Under a business proposal which was annexed to the Land Leases, Rixport undertook to use the land for the construction of hotels, conference and exhibition facilities, a business park and greenery and recreational areas.

Following the award of the Land Leases to Rixport, the Claimants argued that the development plans for Riga Airport were continually reviewed and revised to take into account elements such as projected flight numbers, passenger numbers, cargo volumes, and required infrastructure capacity. During 2006, SJSC was anticipating (in the context of the economic conditions at the time) a need to develop the capacity of Riga Airport to accommodate increased use and a growing volume of passengers (which was anticipated to increase from 2.5m passengers to up to 7.5m passengers). There is a dispute as to whether the development plan was a product of SJSC's internal deliberations or whether it was dictated or otherwise influenced by the Latvian Ministry of Transport (the "MoT") (being the sole shareholder of SJSC).

Following an extended period whereby no construction was carried out by Rixport and unsuccessful settlement discussions between the Parties, SJSC cancelled the Land Leases on the basis of Rixport's failure to make rent payments. The Claimants commenced ICSID arbitration against Latvia alleging that Rixport's construction and development efforts were thwarted by "constant changes to the SJSC Airport's development plans".

State attribution

To succeed in their treaty claim, the Claimants were required to show that SJSC's changes to its development plans were attributable to the Latvian Government. The Claimants relied on a number of grounds to support attribution, including:

- the MoT having a role in SJSC's decision making and operations;
- SJSC's board was not independent from the MoT and was made up of politically appointed directors who referred to themselves as "state officials";



- SJSC's financial dependence on the State which was evidenced by the alleged need for SJSC to obtain MoT authorisation for any major expenditure;
- SJSC's development plans for Riga Airport were submitted to the MoT and the Latvian Cabinet of Ministers for review;
- more generally that the management of strategic state assets such as an international airport could not possibly take place without the exercise of governmental authority.

These grounds were contested by SJSC witnesses and the tribunal found that attribution had not been proved:

"there is no evidence that the changes of SJSC Airport's business plans, including the postponement of SJSC Airport's terminal expansion plans, were instructed, directed or otherwise attributable to any decisions of the State".

In doing so, the tribunal accepted the State's submissions that there must be a presumption of autonomy for State Owned Enterprises unless there is compelling evidence to the contrary. The tribunal accepted the State's witness evidence that "SJSC Airport develops internal business development plans 'like most businesses.' These plans are not binding upon anyone and are not required to be approved by the State. Even if they are prepared with the objectives of the State for the Airport in mind, it does not follow that they are themselves acts of governmental authority". In this case, the appointment of board members and having oversight in relation to SJSC decisions or conduct was not sufficient to demonstrate a lack of autonomy for the SJSC. Such conduct "was not unlike that ordinarily played by the shareholder of any private company" and was not sufficient for SJSC's separate legal personality to be disregarded.

Fair and equal treatment

Despite finding against the Claimants in relation to attribution, the tribunal nonetheless considered the Claimant's case that Latvia had violated its obligation to afford fair and equitable treatment to Rixport. The tribunal rejected the suggestion that Rixport could have had a reasonable expectation for a consistent policy with regards to the development of the airport as (despite various representations being made by SJSC and other Government representatives) *"the leases did not provide for the expansion of the Airport terminal in accordance with any particular technical plan or timeline. Nor did they contain any representations concerning Airport passenger forecasts"*. The tribunal did not accept that the State and/or SJSC had created a legitimate expectation that the development was "shovel-ready" or that Rixport could commence construction soon after the land leases had been awarded. Instead, the tribunal held that it was *"normal and indeed necessary, for an airport to continuously assess the need of the market and to consider possible changes, including extensions or expansions"*.

Implications for COVID-19 affected projects

Whilst this decision arose from a very specific set of facts, it potentially has wider implications for the airport infrastructure sector and global infrastructure projects generally in light of the current economic upheaval caused by the COVID-19 pandemic. The development interruptions experienced by the Claimants in this case (e.g. "repeated and significant changes to the number of passengers the airport facilities were expected to cater for") are exactly the type of interruptions that many airport infrastructure projects may be experiencing in the current climate of economic uncertainty.

The decision in this case demonstrates that developers and EPC Contractors on projects which end up being reduced in scope, shelved or cancelled as a result of changing economic conditions, will need to satisfy a high evidentiary threshold in order to establish treaty breaches in respect of these impacted projects. Parties should be cognisant that:

- A high threshold exists for seeking to attribute actions by a state-owned entity to the state itself. This case is a further example of an ICSID tribunal taking a narrow approach towards the assessment of attribution and requiring the claimants to submit compelling evidence to demonstrate that the presumption of autonomy for state-owned enterprises should be displaced. Whilst the Claimants had relied on express representations by various State officials expressing support for the

development prior to the Land Leases, it was unable to prove that subsequent changes in plans for the airport were directed or instructed by the State.

- Where the development or project in question relates to ancillary facilities such as those considered in this case (i.e. hotels, conference facilities and other key supporting infrastructure to the airport), it should be ensured that the contract documents expressly specify that the development of those ancillary facilities is predicated on certain developmental baselines for the primary infrastructure (e.g. in the case of an airport, a defined terminal size or location, an agreed baseline of estimated passenger volumes, and/or an agreed date for completion of construction/upgrade to the terminal itself etc). Accordingly, if any subsequent changes to the development of the ancillary facilities are required in order to meet changes to the planning for the primary infrastructure, there is a clear measure to assess the investor's legitimate expectations at the time of the investment. This should help to preserve the option to seek treaty-based relief (particularly potential claims for breaches of the fair and equitable treatment standard) without facing the same difficulties as beset the Claimants in this case.

There are other ICSID decisions where claimants have been successful in demonstrating that project cancellations (as opposed to simply suspensions or reductions in scope) are a breach of treaty-based obligations by the State. The present case suggests that claims based on the underlying parameters of a project being altered (as opposed to projects being cancelled entirely) are more difficult to demonstrate as treaty breaches.

References:

[Staur Eiendom AS, EBO Invest AS & Roxy Holding AS v Republic of Latvia](#), ICSID Case No. ARB/16/38; [Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) dated 18 March 1965 (the "ICSID Convention"); [Agreement between Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments](#), which was signed on 16 June 1992 and entered into force on 1 December 1992 (the "BIT").



Acceptance testing and deferring termination rights

An English Technology and Construction Court decision last year has considered the operation of an acceptance testing regime under an engineering and construction contract. Such testing procedures can be fertile ground for dispute if procedures are not adhered to or rights are not exercised promptly. The court in this case considered two attempts to imply terms into the testing procedure said to have been required to enable it to operate effectively in the circumstances in which the parties found themselves. The court upheld one of these terms and rejected the other. The court's findings in this regard are directly relevant to other engineering and construction contracts with acceptance testing procedures, including those found in the FIDIC suite of contracts.



Acceptance testing and practical dilemmas

Most engineering contracts will provide for acceptance testing to be carried out prior to Taking Over of the works. Many will have multiple stages of acceptance testing in the lead up to Taking Over. Sophisticated contracts will include provisions for re-testing, deemed acceptance and various notices along the way. Despite these provisions, parties can easily find themselves in un-chartered territory, if the contractual procedures have been departed from or if gaps become apparent. This can give rise to considerable uncertainty and, in serious cases, a dispute over whether or not Taking Over is deemed to have occurred.

Failed acceptance tests also present an Employer with a difficult choice. Most contracts will allow the Employer to terminate or reject the works in such circumstances, but that may be considered too drastic an option where further time and resource could allow the Contractor to rectify its failings. Termination or rejection is likely to plunge the Employer into a full-blown dispute which most will be keen to avoid. Commercial pressures often lead to a more cooperative approach, potentially with further time being given, a partial Taking Over agreed and/or a relaxation in technical requirements coupled with financial accommodations. In many cases, these commercial arrangements will be sufficient to allow the Works to be finally accepted by the Employer. In others, however, the situation proceeds from bad to worse and drastic remedies can no longer be put off.

Disputes can easily arise in such scenarios as to just what contractual rights remain for the Employer to exercise. The Contractor may argue that the Employer's contractual rights to terminate or reject are no longer operable, having been overtaken by subsequent agreements or simply waived by the passage of time. This was the argument made by the Contractor in the case reported below.

Essex County Council v UBB Waste (Essex) Ltd

Essex engaged UBB to carry out the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in the United Kingdom (the "MBT Facility"). Pursuant to the terms of the contract, the MBT Facility was required to pass certain Acceptance Tests on or before the extended Planned Services Commencement Date of 12 July 2015. However, the MBT Facility failed to pass the Acceptance Tests by that date and still had not passed them by the Acceptance Longstop Date of 12 January 2017, thereby giving Essex a right to terminate the contract.

The matter came before the English Technology and Construction Court in May 2019. At that time, the MBT Facility still had not passed the Acceptance Tests and Essex sought damages and a declaration that it was entitled to terminate the contract. UBB denied that Essex was entitled to terminate the contract. UBB claimed that it was entitled to an extension of time to complete the Acceptance Tests and sought damages in excess of £77 million as well as declaratory and injunctive relief on the basis of alleged breaches of contract by Essex.



The "terminate within a reasonable time" implied term

Essex claimed it was entitled to terminate the contract on grounds that failure to pass the Acceptance Tests by the Acceptance Longstop Date was a Contractor Default. In the event of a Contractor Default, the contract simply required Essex to serve a termination notice. No time limit was prescribed for the service of the notice. UBB argued for an implied term that any notice of termination must be served within a reasonable period and that it was now too late for Essex to give such a notice.

In considering whether to imply a term, the court applied the traditional principles set out in *BP Refinery v Shire of Hastings* and reaffirmed recently by the UK Supreme Court in *Marks & Spencer v BNP Paribas*, in particular the need for an implied term to be necessary to give the contract business efficacy. The Court took the view that there was no absolute rule of law that a reasonable time limit must be implied, concluding instead that previous cases merely illustrated occasions on which business efficacy required such a limitation. The court went on to consider the practical effects of the implied term sought by UBB and noted that it was neither “commercial, practical or obvious” to imply a term that could give rise to a situation in which Essex could not terminate, due to delay in exercising the right to do so, but the MBT Facility could not enter the Services Period, due to its inability to pass the Acceptance Tests, leaving the parties in a “contractual stalemate” for the 25 year life of the contract. The court also noted that the implied term would have the effect of discouraging Essex from allowing UBB an opportunity to rectify the issues with the design.

The “object within a reasonable time” implied term

A separate issue between the parties concerned whether it was an implied term of the contract that Essex was required to challenge the results of Composition Tests within a reasonable time. During the commissioning period these tests were carried out by UBB and provided a mechanism for adjustments to be made to allow the Acceptance Tests to be achieved. Looking in detail at the context in which the Composition Tests took place, the general timetable for

commissioning and the need for the Acceptance Tests to be passed by the prescribed date, the court took the view that a reasonable time limit was necessary for business efficacy. Clarity over the standing of the Composition Tests was needed to allow UBB to work toward the achievement of the Acceptance Tests.

Testing under the FIDIC form

The findings in this case are significant and readily applicable to many international construction contracts. Under the 2nd edition of the FIDIC form, the Employer in all books is given three options in the event that the Works or a Section fail to pass Tests on Completion (once the Contractor is given a chance to repeat the tests):

- A further repetition of the tests can be instructed under clause 9.4(a).
- The Works or the Section can be rejected under clause 9.4(b) and (c) respectively if the failure deprives the Employer of substantially the whole benefit of the Works or, in the case of a Section, it cannot be used for its intended purpose. The rejection of the Works leads to a termination of the Contract under clause 11.4(d), with the Employer being entitled to recover all sums paid for the Works, plus financing charges and the costs of dismantling, clearing the Site and returning Plant and Materials to the Contractor.
- The failure can be accepted and a Taking-Over Certificate issued under clause 9.4(d) with payment by the Contractor of Performance Damages or a reduction in the Contract Price as appropriate under clause 11.4(b).

Despite the testing process elsewhere in the FIDIC contracts being reasonably thorough and notice driven, no timeframe is specified for the exercise of these rights by the Employer. It is easy to see how similar types of delays to those which occurred in the *UBB* case could happen in a FIDIC context. Even if the testing process had been followed to the letter, with all relevant notices given on time, few Employers would not wish to pause before considering which of the three options afforded by clause 9.4 to adopt.

Conclusion

The decision in the *UBB* case suggests that more time can be given without rights to terminate or reject being lost. Many of the commercial considerations which led the court to this conclusion will apply to other cases involving Acceptance Tests or Tests on Completion, although a great deal will depend on the circumstances surrounding the giving of additional time and the terms of the contract in question.

By way of contrast, a different approach was taken in a recent Scottish case: *David Macbrayne Limited v Atos IT Services (UK) Limited*. There, a contract for IT services allowed a right of termination where certain critical milestones were missed. Both parties accepted, and the court also agreed, that a reasonable time limitation should be implied based on the principles in *Marks & Spencer*. However, in determining that the right had been exercised within a reasonable period, the court took account of the fact that the parties had mutually agreed to suspend performance and to seek to resolve their differences through direct discussions and then by mediation. A notice of termination a few months after the unsuccessful mediation was still within time. This

therefore suggests that even if an implied term exists, an employer may still be able to preserve its right to terminate whilst seeking to resolve any acceptance testing issues with the Contractor.

The best solution, as always, is for the Employer to record clearly on what basis additional time is being given to the Contractor and to reserve the ability to exercise any rights available to it at any time in the future. Of course, any rights to terminate or reject will evaporate if the Contractor passes the relevant tests in the meantime.

References:

BP Refinery (Westenport) Pty Ltd v. Shire of Hastings (1977) 180 CLR 266 (PC); *Marks & Spencer plc v. BNP Paribas Securities Services Trust Co. (Jersey) Ltd* [2015] UKSC 72; *David Macbrayne Limited v Atos IT Services (UK) Limited* [2018] CSOH 32; *Essex County Council v UBB Waste (Essex) Ltd (Rev 1)* [2020] EWHC 1581 (TCC).



Assignment of subcontracts on termination

Construction contracts commonly provide for a Contractor to assign the benefit of subcontracts to the Employer in the event the contract is terminated for default. There has to date been very little guidance from the English courts as to the effect of these provisions on a Contractor's rights of recourse against its subcontractors. A decision of the English Technology and Construction Court last year has considered this issue directly and shows that considerable risks arise for Contractors in agreeing to such provisions without qualification.



Assignments on termination: an introduction

Construction contracts commonly provide for the assignment of subcontracts to an Employer upon termination for Contractor default. All of the major standard forms include such rights. For example, the LOGIC General Conditions of Contract for Construction, 3rd Edition, provide in clause 29.3 that in the event of termination by the Employer the Contractor shall:

"assign to the [Employer], or its nominee, to the extent desired by the [Employer] all or the relevant parts of the rights, titles, liabilities and SUBCONTRACTS relating to the WORK which the CONTRACTOR may have acquired or entered into".

Similarly, the NEC4 Engineering and Construction Contract states at clause 92.2, P2:

"The [Employer] may instruct the Contractor to leave the Site, remove any Equipment, Plant and Materials from the Site and assign the benefit of any subcontract or other contract related to performance of the contract to the [Employer]".

The position under the FIDIC forms is similar, although rather than conferring an absolute right to instruct assignments, the Contractor need only comply with *"reasonable instructions ... given by the Employer ... for the assignment of any subcontract"* (see, for example, Clause 15.2.3 of the Yellow Book, 2017 Edition).

Despite the ubiquity of such provisions, their scope and operation has rarely been tested. A particular point of ambiguity concerns how the contractor's legal relationship with its subcontractors is affected by such assignments. Having terminated for default, the Employer will typically make large claims against the Contractor for the cost of completing the works, delay and other termination losses. A Contractor would usually seek to pass such claims onto its supply chain where possible, but what of the assignments made to the Employer? May the Contractor still pass on liabilities under subcontracts which have been assigned to the Employer?

If the Contractor is unable to pass on such liabilities, its exposure to Employer claims may be much greater than expected. That was the position which befell a contractor in the recent case discussed below.



Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd

In 2015 Energy Works (Hull) Ltd ("EWHL") appointed MW High Tech Projects UK Ltd ("MW") as its main contractor for the design, procurement, construction, commissioning and testing of a waste to energy plant in the north of England. In turn, MW subcontracted certain elements of the project to Outotec (USA) Inc ("Outotec").

The project ran into difficulty, suffering significant delays, and EWHL purported to terminate MW's contract for a "contractor default" being that the delays to completion of the works (including works to remedy defects) were such that the delay damages exceeded the contractual cap on delay damages for which MW could be liable.

MW argued that it was entitled to additional time for completion and that EWHL was not entitled to terminate for breach, and that the termination took effect as one for convenience. However, a consequence of the termination was that MW was required to assign its subcontract with Outotec, which it duly did by way of notice.

MW sought to pass on to Outotec any liability it might be found to have to EWHL. Outotec objected on the basis that its contract with MW had been assigned to EWHL. In response, MW argued that (i) the assignment of the subcontract was an assignment of future rights only (and not past or accrued rights) or (ii) alternatively that if past and accrued rights were assigned, MW could claim a contribution from Outotec under the Civil Liability (Contribution) Act 1978 (the "Contribution Act").



Assignment

In considering whether both accrued and future rights had been assigned, the TCC emphasised the use of the expression “*assign the subcontract*” and followed previous caselaw which had taken that term to mean the assignment of accrued and future rights. The court noted that whilst it would be possible to limit an assignment to future rights only, clear words would be required in order to do so.

As to MW’s argument that it would be an “*implausible and uncommercial interpretation*” to find that the contractual intention was for MW to lose its right to sue Outotec, the TCC disagreed and remarked that this was simply the assumption of a commercial risk by MW, and an extension to the risk that it might lose or limit its right to sue Outotec for other reasons, such as Outotec’s insolvency or as a result of a contractual limit of liability.

This conclusion followed from the fact that the commercial purpose of the assignment provision was to protect the Employer from the consequences of the termination:

“the commercial purpose of assignment of the accrued and future rights under the Sub-contract is not to enable EWHL to take over the sub-contract works; it already has an express right to complete the works using others. The commercial purpose of assignment of the Sub-Contract is to allow EWHL to enforce those sub-contract rights against Outotec to mitigate its losses by seeking rectification of the works, specific performance of particular obligations or compensation.”

Contribution

Having divested itself of any direct rights to claim against Outotec, MW sought contribution from Outotec in respect of its liability to EWHL. In England, claims for contribution may be made under the Contribution Act where two parties are liable for the “same damage” suffered by a third party. The third party is able to claim in full against either of the wrongdoers, who will then be entitled to “contribution” from the other on a just and equitable basis having regard to the extent of each party’s responsibility for the damage. Contribution claims are often brought in construction disputes between designers and contractors in relation to allegations of defective work caused both by design and workmanship issues.

- The Contribution Act does not apply outside of the United Kingdom, but similar claims can arise in an international context in the following ways:
- Where an Employer is in contact with more than one Contractor on a Project an interface agreement is sometimes entered into whereby each Contractor agrees to be liable to the other in respect of Employer claims to the extent that it bears responsibility for the loss claimed by the Employer. This is, in effect, a contractual version of the Contribution Act.
- A “Net Contribution Clause” may be agreed whereby liability to the Employer is limited to the amount which ought reasonably to be paid having regard to the Contractor’s or Consultant’s responsibility for the loss or damages suffered by the

Employer and on the assumption that all other Contractors and Consultants appointed by the Employer have also paid such proportion of that loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility. Such clauses are much more common in Consultant appointments, and one is included in the FIDIC White Book, but can also be included in construction contracts.

- Local law applicable to the project may also provide rights similar to those given by the Contribution Act.

In the present case, Outotec resisted MW’s claim for contribution on the basis that any damage caused by breaches of its subcontract were suffered at the subcontract level and were distinct from the damage suffered by EWHL under the main contract. MW claimed that defects in Outotec’s work under the Subcontract were the cause of delay under the main contract for which EWHL had terminated and were accordingly for the “same damage” as that suffered under the main contract.

The court came to different conclusions on this issue for different heads of claim:

- In relation to delay damages claimed by EWHL, the court found the answer depended on the extent to which the periods of delay overlapped under the main contract and subcontract. Overlapping periods of delay would be for the “same damage” whereas distinct periods would not – they would concern “*the same type of harm but not the same harm*”.

- The termination losses claimed by EWHL (i.e. additional costs of completion) were held not to be the “same damage” as any liability Outotec may have under the subcontract. Outotec had no obligation to satisfy MW’s time obligations under the main contract and there was therefore no route by which EWHL as assignee of the subcontract could claim the additional costs of completion from Outotec.
- EWHL’s claim for defects against MW was held to represent the “same damage” as the parallel claim it had as assignee under the subcontract. Although the claims arose at different contractual tiers, they related to the same damage or harm i.e. a defective plant.

Conclusions

This case illustrates the broad exposure that can arise where a Contractor is required to assign subcontracts on termination. The Contractor in this case (MW) was able to preserve some recourse against the subcontractor under the Contribution Act, but in an international context similar rights may well not exist leaving the Contractor without any recourse at all.

As noted above, provisions requiring the assignment of subcontracts on termination for default are common within the industry and it is difficult to distinguish the wording used in the LOGIC and NEC forms from that considered by the court in this case. The decision may be less easily applied to the FIDIC form, given the presence of a reasonableness requirement: it might be argued, for example, that the distinction advanced by MW in the present case between the assignment of

future rights of performance and accrued rights represents a reasonable balance between the interests of the employer in securing future performance of subcontractors post-termination and the interests of the main contractor in preserving rights against its supply chain in respect of the employer's termination.

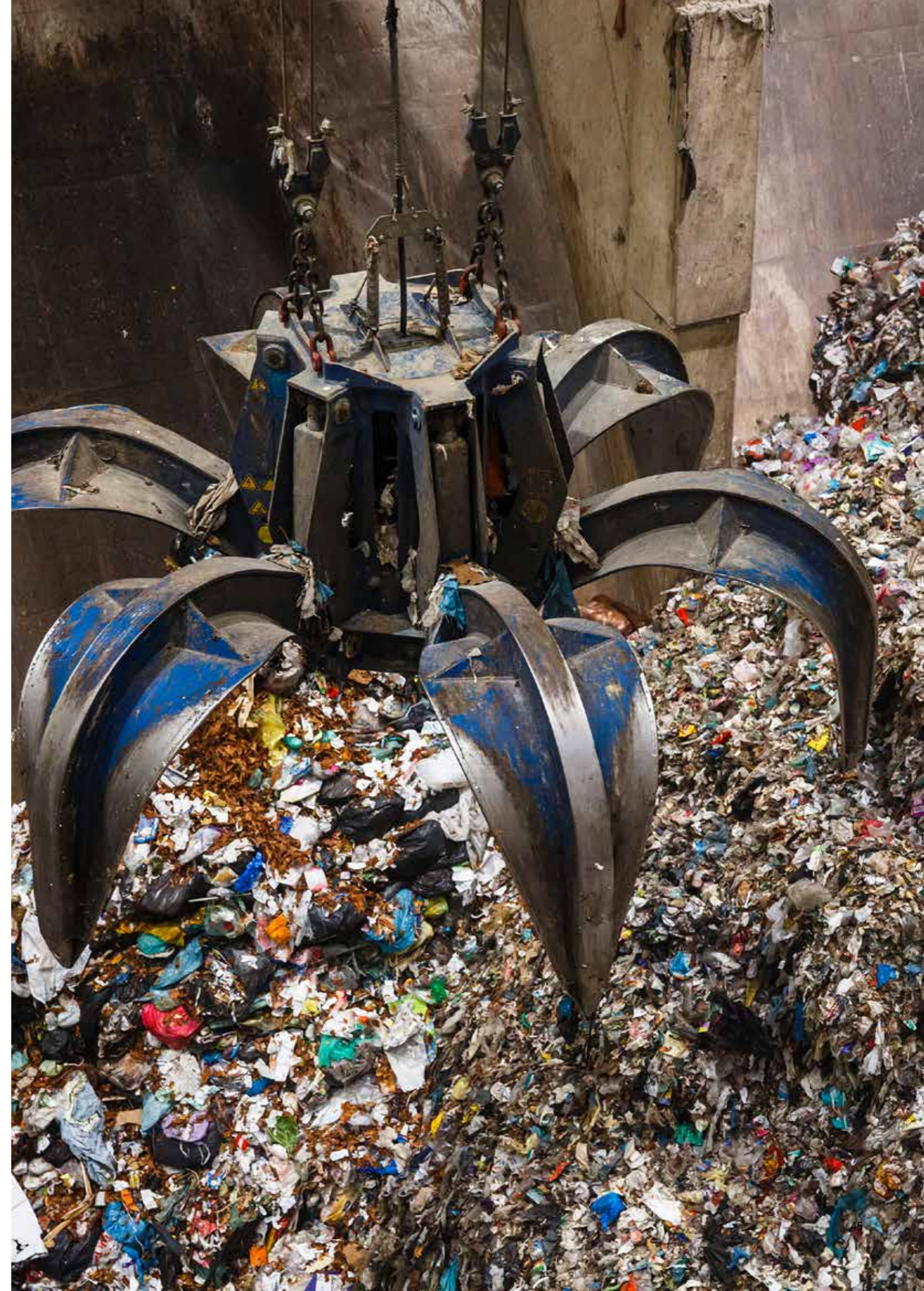
The court's findings as to contribution are complex and pose a number of issues for consideration in future cases. For example, the importance given to overlapping of periods of delay under the main contract and subcontract is not articulated in any detail by the court. There is also little analysis of the Employer's position and whether its claims under the main contract and subcontract could be cumulative in certain circumstances. For example, at least part of the delay claims under both contracts in this case were liquidated. MW's assignment to EWHL of this claim under the subcontract appears to be a simple assignment of a debt, which might be thought to be recoverable by EWHL in addition to the liquidated damages payable by MW under the main contract. Such a conclusion, however, is difficult to reconcile with the court's analysis of MW's rights under the Contribution Act.

What is clear from the decision is that assignment provisions such as those considered in this case represent a significant exposure to Contractors in the event of a termination for default. Such parties may wish to consider amendments allowing for the assignment of future rights only, or to adopt the FIDIC position of allowing the employer to instruct only such assignments as are reasonable.

The decision may also lead to an increase in non-assignment clauses being included in subcontracts. Such provisions effectively put the assignment of the subcontract out of the Contractor's reach and may avoid the position which the Contractor faced in the present case. Whether Contractors will be at liberty to propose such restrictions themselves will depend on the terms of the applicable main contract, as some will require the Contractor to ensure the assignability of subcontracts where possible.

References:

[Energy Works \(Hull\) Ltd v MW High Tech Projects UK Ltd](#) [2020] EWHC 2537 (TCC).



The use of experts in international construction disputes: conflicts of interest and multiple instructions

An English Court of Appeal decision in 2020 has upheld an injunction preventing an international expert services firm from acting for more than one party to an international construction dispute, despite involving separate experts in different locations contracting via separate legal entities. Given the rise of globalisation in the expert services industry, and for professional services more generally, this decision is likely to have considerable ramifications for the marketing of such services and the basis on which they are procured. The decision also provides guidance as to the drafting of expert witness appointments in relation to conflicts of interest and is likely to prompt many firms to amend their standard terms and conditions.



Secretariat Consulting PTE Ltd v A Company

A Consultant was appointed by an Employer to provide engineering, procurement and construction management (“EPCM”) services in relation to the construction of a petrochemical plant in the Middle East. The Employer also engaged a Contractor for the construction of certain aspects of the project. The Contractor claimed against the Employer in respect of additional costs incurred due to delays arising from the late release of certain designs. These were designs which the EPCM Consultant was required to produce under its appointment. The Employer’s position was that it would seek to pass on to the EPCM Consultant any liability it might have to the Contractor.

The Contractor commenced an ICC arbitration against the developer in relation to its claim (the “Contractor Arbitration”). The Employer engaged a delay expert from Secretariat, an international expert services practice, to advise and act in connection with the arbitration. Some months later the EPCM Consultant commenced its own arbitration against the Employer for non-payment of fees (the “EPCM Arbitration”). The Employer counterclaimed against the EPCM Consultant in respect of delay and disruption to the project, including any liability it had to the Contractor in the Contractor Arbitration.

Solicitors acting for the EPCM Consultant subsequently notified the Employer’s solicitors that they were proposing to retain an expert from Secretariat to assist the EPCM consultant in the EPCM Arbitration. The developer objected on the basis that Secretariat had already been appointed by it in the Contractor Arbitration to consider many of the same issues which would arise on its counterclaim in the EPCM Arbitration.

The EPCM Consultant and Secretariat sought to justify the acceptance of both retainers on four grounds:

- Each of the experts had a duty to act independently and to assist the tribunal.
- The appointed experts were natural persons distinct from their corporate employers.
- The experts were appointed in different disciplines, based in different geographic regions and engaged through different companies within the Firm.
- Information barriers were to be maintained to avoid any transfer of confidential information.

The Employer rejected these justifications and sought an injunction from the English courts restraining Secretariat from providing expert services to the EPCM Consultant in connection with the EPCM Arbitration.

The Technology and Construction Court

The issue first came before the Technology and Construction Court. The principal issue before the court at this stage was whether Secretariat’s appointment by the EPCM Consultant was in breach of any fiduciary duty of loyalty owed to the Employer through its original appointment in the Contractor Arbitration. By the time of the hearing, the Employer no longer relied on any risk to confidential information and the extent of physical and informational separation between the two experts became largely irrelevant. The crucial issue was whether Secretariat’s appointment in the Contractor Arbitration carried with it a fiduciary duty of loyalty.



The court concluded that such a duty did apply, emphasising that the developer had engaged the Firm to “provide extensive advice and support for the [developer] throughout the arbitration proceedings”. A previous case in which an expert was found not to owe a duty of loyalty was distinguished on the basis that the client in that case was aware that the expert would continue to provide the relevant services to others including the opposing party in question.

Secretariat argued that the finding of a duty of loyalty would conflict with the independent role of an expert and the duties owed to the court or tribunal in this regard. This argument was rejected by reference to the similar position in which solicitors and barrister stand:



“In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. ... [T]he terms of the expert’s appointment will encompass that paramount duty to the court.”

The court also rejected the suggestion that the duty of loyalty was to be confined to individual persons or companies within Secretariat. The court noted that there was a common financial interest in the companies involved, that the group of companies as a whole was managed and marketed as one global firm, and that there was a common approach to the identification and management of any conflicts of interests. In those circumstances, the duty of loyalty was owed by all of the corporate entities within the Firm.

Secretariat appealed.

The Court of Appeal

The Court of Appeal rejected Secretariat’s appeal and maintained the injunction. The Court found it unnecessary, however, to uphold the TCC’s finding as to fiduciary duties and expressed reservations as to the implications of such a finding. Instead, the Court based its decision on an express clause of the appointment in the Contractor Arbitration which prohibited conflicts of interests. The clause recorded that Secretariat had *“confirmed you have no conflict of interest in acting for [the developer] in this engagement”* and that it would *“maintain this position for the duration of your engagement”*.

Although the appointment was addressed to and signed by a specific company within the Secretariat group, the Court found that the conflict of interest clause was agreed on behalf of all companies within the group. One reason for this was that the conflict check said to be confirmed in the appointment had been carried out across all companies in the Secretariat group. Also of importance was the way in which the Secretariat business was managed and marketed:

“In considering what the parties would reasonably have understood, it is significant that companies within the group share the same name and are managed and marketed as a single global firm. They have a single website for the group as a whole, treating it as a single business in various jurisdictions, working as a team. It seems to me to be obvious that if an issue had arisen in the arbitration on which an employee in another company in the group had particular experience or expertise, both parties would naturally have expected that experience or expertise to be available to A Co as the client. ... In these circumstances the undertaking given by Secretariat Consulting not to accept instructions which would give rise to a conflict of interest can readily – and in my judgment must – be understood as having been given on behalf of the group as a whole.”

The Court agreed with the TCC that Secretariat had placed itself in a position of conflict by accepting an appointment for the consultant in the EPCM Arbitration. Whilst the Court acknowledged the question was a matter of degree, and that expert witnesses might readily act for and against the same company in disputes involving separate projects or transactions, it

considered this to be a clear case. The appointment in the EPCM Arbitration involved an overlap *“of parties, role, project, and subject matter”*. The interests of the consultant in the EPCM Arbitration were opposed to the developer’s interests such that the two Secretariat experts could easily find themselves supporting opposite positions on the same or similar issues.

Conclusions and implications

This decision is of particular significance in light of the relatively recent trend toward globalisation among expert services firms, particularly in the construction and engineering sphere. Expansion in this direction has often been the result of mergers between existing local practices, bringing with it the very real potential for instructions from multiple parties to an international dispute. As in the present case, such merged entities are typically marketed as a single firm with a unified management structure and a “global presence”.

The Court of Appeal’s reasoning poses a clear risk for such a business that undertakings to avoid conflicts of interests will be interpreted to apply globally across all of its companies. The Court acknowledged that appointments could be drafted to avoid this result, with such undertakings being limited to a specific company only. However, as the Court also noted: *“Whether, if it does so, it will secure the instruction, is another matter.”*

The Court’s reluctance to extend fiduciary obligations into expert witness appointments will be welcomed by many. The TCC’s reasoning on this point was potentially applicable across the board to expert appointments of a

general nature to assist a party in court or arbitration proceedings. Fiduciary obligations extend beyond mere duties of loyalty and, if upheld by the Court of Appeal, this is likely to have been an area of uncertainty productive of further disputes.

By contrast, the Court of Appeal’s decision is firmly rooted in the individual circumstances of the Secretariat appointment and the terms agreed with the developer. In substance, the Court of Appeal’s decision seems to be that when the express terms of the appointment were read against the factual matrix of Secretariat’s marketing the proper construction and interpretation of the appointment was (i) the conflicts undertaking was given in respect of the entire group and (ii) that the signatory was acting as agent for the entire group. Such circumstances may, of course, differ in future cases. The basis of the Court of Appeal’s decision means that it is open to international professional services firms to ensure that the express terms of their engagement avoid the conclusions reached in this case. In doing so there are two issues to address, first, whether any conflicts warranty or undertaking, is given in respect of the signatory or the entire group, and second, whether the signatory executes the terms of engagement for the entire group. Companies and firms wishing to avoid a similar result will need to deal with both of these issues, as the first might give rise to a liability for the signatory (even for conflicts generated by non-signatories) and the second a liability for non-signatories.

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[A v B](#) [2020] EWHC 809 (TCC).

Mediation and the Singapore Convention - Two Years On

It has now been over two years since the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “**Singapore Convention**”) was signed in Singapore on 7 August 2019, and a year since it entered into force on 12 September 2020. Since then, 54 countries have signed the Singapore Convention, and 6 have ratified or approved it.¹

The speed with which the Singapore Convention has been accepted by member states is encouraging. When it opened for signature on 7 August 2019, 46 countries signed it, including major economies such as the United States, China and India. If one were to compare these figures to the number of signatories on 10 June 1958 at the time the New York Convention² was opened for signature, it is clear that the international commercial community is ready for an alternative method of resolving disputes.

In this article, we look at how the focus and attention on mediation as a method of resolving disputes has increased and progressed since the Singapore Convention came into force. By exploring the greater interest in the use of mediation in Singapore and internationally, and the construction sector, we will also discuss what we can expect for the future of mediation



- a party to the settlement agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed, is not binding or is not final or has been subsequently modified;
- the obligations in the settlement agreement have been performed or are not clear or comprehensible;
- granting relief would be contrary to the terms of the settlement agreement;
- there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
- there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

The Singapore Convention Recapped

The Singapore Convention elevates the position of a mediated settlement agreement that has been concluded in writing by parties to resolve an international commercial dispute to that of a court judgment, or an arbitral award enforceable under the New York Convention. Mediated settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law are excluded from the scope of the Convention. Neither does the Convention apply to settlement agreements that had been approved by a court or were concluded in the course of proceedings before a court (and are thus enforceable as a judgment in the State of that court); nor to settlement agreements that have been recorded and are enforceable as an arbitral award.

In order to qualify as being “international”, at least two of the parties to the mediated settlement agreement must have their place of business in different States; or the State of the parties’ place of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State with which the subject matter is most closely connected.

A party seeking to rely on the mediated settlement agreement will have to provide the competent authority of the Convention State (i.e., a court) with a copy of the signed settlement agreement and evidence that the settlement agreement resulted from mediation. The court of a Convention State may refuse to grant relief if there is proof that:

It is worth highlighting at this stage that the last two grounds for refusal to grant relief under the Singapore Convention which relate to the mediator’s conduct and breach do not have an equivalent under the New York Convention. It is too early to say how the courts will interpret the “*standards applicable to the mediator or the mediation*” and what would constitute “*circumstances that raise justifiable doubts as to the mediator’s impartiality or independence*”. Unlike international arbitration that has had years to regulate its practice, there are no equivalent guidelines such as the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration that are used as extensively in mediation. However, institutions including SIMC have adopted best practices of requiring its mediators to sign code of ethics before the conduct of each mediation.

It is also noteworthy that the Singapore Convention does not operate on the basis of reciprocity, as does the New York Convention. Therefore, a mediated settlement agreement concluded in a state which is not a signatory of the Singapore Convention could be recognised and enforced in a contracting state. International commercial parties who do not belong to a Convention State will still be able to avail itself of the benefits of the Singapore Convention.

¹ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=en

² The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Mediation's Growing Popularity

There is no doubt that mediation has been gaining popularity as a method of resolving commercial disputes. In the UK, statistics published by the Centre for Effective Dispute Resolution³'s Ninth Mediation Audit⁴ in May 2021 show that there was a 38% increase in the annual number of cases mediated since its 2018 Audit.



This experience is echoed in Singapore. The Singapore International Mediation Centre ("SIMC"), established in 2014 as an independent not-for-profit organisation focussing on cross-border mediation services, witnessed an increase in its case filings year on year. In the first seven months of 2021, case filings at the SIMC have exceeded its entire caseload for 2020. In turn, the caseload for 2020 was nearly twice of that filed in 2019.

Matters of high value are being referred to mediation and this figure is increasing. The CEDR approximates that GBP 17.5 billion in value of cases are being mediated each year. This is out of an estimate of 16,500 cases per annum.⁵ The Singapore Mediation Centre ("SMC"), which launched in August 1997, reports that it has mediated more than 5,000 matters worth over SG\$10 billion. The SIMC, between its launch in November 2014 and July 2021, has had a caseload value of over SG\$6 billion for 180 cases. Parties from some 40 jurisdictions have mediated with SIMC, including China, India and the

United States of America. SIMC's settlement rate ranges from 70 to 80%. This demonstrates the high value and complex nature of cross border disputes that are being mediated in the SIMC successfully.

Infrastructure and construction cases also make up a significant portion of cases that are being mediated. It makes up a sizeable proportion of SIMC's caseload, while the SMC reports that construction disputes account for 40 per cent of the cases it resolves.⁶ This could well be a result of the well-trained Specialist Mediators in SIMC's panel with specialist knowledge in the infrastructure, construction & engineering practice and the increased efforts taken in Singapore to promote the use of mediation to resolve disputes as well as construction disputes.

— Starting with the introduction of the SIAC-SIMC Arb-Med-Arb Protocol in November 2014 by the Singapore International Arbitration Centre and SIMC, parties are given the option to attempt mediation during the course of arbitral proceedings. If the dispute is settled through mediation, the mediated settlement agreement may be recorded as a consent award, and is generally enforceable in over 160 countries under the New York Convention.

Whilst the Singapore Convention continues to gain traction, hybrid dispute resolutions processes are in the meantime a valuable and increasingly popular option, leveraging the benefits of mediation and the widespread enforceability of arbitral awards.

— In 2017, the Mediation Act 2017 was enacted in Singapore and has as a key feature, a provision which allows parties to apply to court to record their mediated settlement agreement as an order for court, allowing the agreement to be directly and immediately enforceable as an order of court.

— Soon after, in October 2018, the Singapore Infrastructure Dispute-Management Protocol ("SIDP") was launched, with a view to helping parties proactively manage differences and prevent them from escalating into disputes. Designed and recommended for construction or infrastructure projects of more than SG\$ 500 million in value, parties will convene a Dispute Board ("DB") from the start of the project to work collaboratively with the parties to enable early and efficient resolution of differences and disputes. Under the SIDP, the SIMC or the SMC may be designated as the "Authorised Appointing Body", to which the request for the appointment of a DB shall be made. A difference or dispute referred to the DB could be resolved in a number of ways including by way of mediation with the DB members acting as mediators. If mediation is adopted, and leads to a mediation settlement agreement, such agreement could then be recorded

as an order of court under the Singapore Mediation Act 2017 or other regimes.

— In October 2019, a MOU was signed between the Ministry of Communications and Information of Singapore and the Shenzhen Municipal People's Government, under the auspices of which the Shenzhen Court of International Arbitration ("SCIA") and SIMC collaborated to jointly provide a "mediation-arbitration" service. This enables settlement agreements obtained from SIMC mediations to be recorded as an arbitral award by the SCIA. The ability for parties to convert SIMC's mediated settlement agreements to SCIA arbitral awards gives parties the confidence that an SIMC mediated settlement agreement can be effectively enforced in China as an arbitral award, to obtain greater finality of outcomes.

— In May 2020, the SIMC launched the SIMC COVID-19 Protocol with the aim of providing "a swift and inexpensive route to resolve commercial disputes during the COVID-19 period". (We discussed this in our International Disputes Digest – Summer edition 2020 which can be downloaded [here](#)).

— There has been further international collaboration in the creation of joint COVID-19 protocols. The SIMC collaborated with partner institutions in Japan and India in launching the JIMC – SIMC Joint Covid-19 Protocol and the SIMC – CAMP Joint Covid-19 Protocol in September 2020 and July 2021 respectively. These protocols aim to provide seamless case management to international parties who will be able to appoint two mediators to co-mediate the case, in order to navigate and overcome any physical, cultural and jurisdictional barriers to settlement.

The signing and entry into force of the Singapore Convention has clearly contributed to this momentum. It has brought increased focus and attention to mediation as a means of resolving disputes while preserving commercial relationships, especially given the rigours of the Covid-19 pandemic.

There is also impetus in the international community to harmonise the laws and rules related to mediation. Alongside the Singapore Convention, the UN General Assembly also adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "Mediation Model Law"), which amended the UNCITRAL Model Law on International Commercial Conciliation (2002). The Mediation Model Law was designed to assist States in reforming and modernizing their laws on mediation procedure, provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.⁷

Further, UNCITRAL is also updating the UNCITRAL Conciliation Rules (1980) and is expected to publish the UNCITRAL Mediation Rules and the UNCITRAL Notes on Mediation at the end of 2021. These continuing efforts by UNCITRAL to enhance the use of mediation will result in the harmonisation of laws, rules and enforcement mechanisms for international commercial mediation, all of which will serve to promote the use of mediation.

Mediation No Longer an "Alternative" Method of Resolving Disputes

Mediation is no longer considered as an alternative to litigation and arbitration, or something that was more suited to family and neighbourhood disputes. There is growing recognition that it needs to form part of a holistic dispute resolution ecosystem. In March 2021, Sir Geoffrey Vos, Master of the Rolls and head of civil justice in England and Wales, in a speech at the re-launch of Hull University's Mediation Centre⁸ questioned the use of the word "alternative" when describing dispute resolution processes such as mediation, early neutral evaluation or judge led resolution. He was of the view dispute resolution should be an integrated whole with mediated interventions being part and parcel of the dispute resolution process – whether between businesses and consumers, amongst families or between the citizen and the state.

While there are clearly areas that need to be addressed before disputes are settled more frequently,⁹ there is undoubtedly momentum and appetite for mediation to be the primary method of avoiding, mitigating and resolving conflicts internationally. Parties are expecting faster and more creative solutions to the resolution of their disputes, and mediation seems to be filling this gap.

³ The Centre for Effective Dispute Resolution is an independent non-profit organisation and a registered charity based in the United Kingdom that specialises in mediation and alternative dispute resolution. <https://www.cedr.com/about-us/>

⁴ A survey of commercial mediator attitudes and experience in the United Kingdom.

⁵ <https://www.cedr.com/ninth-mediation-audit-2021/>

⁶ <https://www.mediation.com.sg/about-us/about-smc/>

⁷ https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

⁸ <https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-voss-master-of-the-rolls-speech-to-hull-university/>

⁹ Chew, Seraphina; Reed, Lucy; Thomas QC, J Christopher, "Report: Survey on Obstacles to Settlement of Investor-State Disputes" NUS Law Working Paper 2018/022, September 2018, www.law.nus.edu.sg/wps/.

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